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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF LICENSING	) **AFFIDAVIT OF MICHAEL C. ORR**
WATER RIGHT PERMIT NO. 01-7011	) **IN SUPPORT OF IDAHO**
IN THE NAME OF TWIN FALLS CANAL	) **WATER RESOURCE BOARD'S**
COMPANY AND NORTH SIDE CANAL	) **MOTION FOR SUMMARY**
COMPANY	) **JUDGMENT**

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

MICHAEL C. ORR, being first duly sworn upon his oath, deposes and states that:

1. I am a Deputy Attorney General in the Idaho Office of the Attorney General and one of the attorneys of record for the Idaho Water Resource Board in the above-entitled proceedings.

2. The following is based upon my own personal knowledge.

3. Attached hereto as **Exhibit 1** are true and correct copies of excerpted pages of the *Order On Petition For Judicial Review* entered on June 19, 2009 in *Clear*

Springs Foods, Inc. v. Idaho Ground Water Appropriators, Inc., Case. No. 2008-444 (Fifth Jud. Dist., Gooding County).

4. Attached hereto as **Exhibit 2** is a true and correct copy of the *Petition For Peremptory Writ Of Mandate*, filed on September 28, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

5. Attached hereto as **Exhibit 3** is a printout I caused to be made of the webpage of the Twin Falls Canal Company entitled "History of Milner Dam," at the following URL: http://www.tfcanal.com/milner.htm.

6. Attached hereto as **Exhibit 4** are true and correct copies of excerpted pages of *Before The Federal Energy Regulatory Commission - Application For Initial License: Project 2899-002* (Twin Falls Canal Company, North Side Canal Company) (July 1984) that I caused to be printed out from file entitled "Water Right Back File 1-7011," which can be accessed under the "Related Documents" for water right no. 01-7011 on the Department of Water Resources website, at the following URL: http://www.idwr.idaho.gov/apps/ExtSearch/SearchWRAJ.asp.

7. Attached hereto as **Exhibit 5** are true and correct copies of drawings of the Milner Dam and Milner hydropower project that I caused to be printed out from the file entitled "Water Right Back File 1-7011," which can be accessed under the "Related Documents" for water right no. 01-7011 on the Department of Water Resources website, at the following URL: http://www.idwr.idaho.gov/apps/ExtSearch/SearchWRAJ.asp.

8. Attached hereto as **Exhibit 6** are photographs of Milner Dam and nearby areas that I caused to be printed out from Google Earth®.

9. Attached hereto as **Exhibit 7** are true and correct copies of the 2009 annual reports of Twin Falls Canal Company and Milner Dam, Inc., that I caused to be printed out from the Idaho Secretary of State's website, at the following URL: http://www.accessidaho.org/public/sos/corp/search.html?ScriptForm.startstep=crit.

10. Attached hereto as **Exhibit 8** is a true and correct copy of the *Application For Alternative Writ Of Mandate* filed on September 28, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

11. Attached hereto as **Exhibit 9** is a true and correct copy of the *Order Denying Petition For Alternative Writ Of Mandate* entered on October 10, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

12. Attached hereto as **Exhibit 10** is a true and correct copy of the *Motion To Dismiss* filed on November 8, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

13. Attached hereto as **Exhibit 11** is a true and correct copy of the *Memorandum In Support Of Motion To Dismiss* filed on November 8, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

14. Attached hereto as **Exhibit 12** is a true and correct copy of the *Answer* filed on December 21, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

15. Attached hereto as **Exhibit 13** is a true and correct copy of the *Petitioners'*

Response To Respondents' Motion To Dismiss filed on December 14, 2007 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

16. Attached hereto as **Exhibit 14** is a true and correct copy of the *Order Granting Motion To Dismiss Petition For Writ Of Mandate* entered on January 25, 2008 in *North Side Canal Co. & Twin Falls Canal Co. v. Tuthill*, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County).

17. Attached hereto as **Exhibit 15** is a true and correct copy of the *Memorandum Decision And Order On Cross-Motions For Summary Judgment* entered on April 18, 2008 in SRBA Consolidated Subcase 00-92023.

18. Attached hereto as **Exhibit 16** is a true and correct copy of the State of Idaho's *Memorandum in Support of Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow* filed on October 16, 2009 in SRBA Subcase Nos. 00-92002GP, 02-00200, 02-00201, 02-00223, and 02-00224. This exhibit is referred to as the "SRBA Milner Brief" in the *Memorandum in Support of Idaho Water Resource Board's Motion for Summary Judgment* filed in this proceeding.

19. Attached hereto as **Exhibit 17** is a true and correct copy of the *Reporter's Transcript* of the November 19, 2009 SRBA hearing on the State of Idaho's Motion for Summary Judgment Re: Milner Zero Minimum Flow, SRBA Subcase Nos. Nos. 00-92002GP, 02-00200, 02-00201, 02-00223, and 02-00224.

20. Attached hereto as **Exhibit 18** are true and correct copies of excerpted pages of the *Canal Companies' Memorandum In Opposition To State Of Idaho's Motion For Partial Summary Judgment Re: Milner Zero Minimum Flow* filed on November 5,

2009 in SRBA Subcase Nos. 00-92002GP, 02-0200, 02-0201, 02-0223, and 02-0224.

21. Attached hereto as **Exhibit 19** are true and correct copies of letters from Idaho Attorney General Jim Jones to Governor John V. Evans and James Bruce of Idaho Power Company, dated August 16, 1984.

22. Attached hereto as **Exhibit 20** is a true and correct copy of the *Memorandum Decision* entered on May 16, 1980 in *Idaho Power Co. v. State*, Case No. 62237) (Fourth Jud. Dist., Ada County Dist. Ct.). This document was attached as exhibit 25 to the Fourth Affidavit of Michael C. Orr, filed in SRBA Consolidated Subcase No. 00-92023 on October 16, 2008.

23. Attached hereto as **Exhibit 21** is a true and correct copy of the *Plaintiff's Memorandum in Support of Motion to Re-Consider and Amend Summary Judgment* filed on February 19, 1980 in *Idaho Power Co. v. State*, Ada County Case No. 62237 (Fourth Jud. Dist., Ada County Dist. Ct.). This document was attached as exhibit 24 to the Fourth Affidavit of Michael C. Orr, filed in SRBA Consolidated Subcase No. 00-92023 on October 16, 2008.

24. Attached hereto as **Exhibit 22** is a true and correct copy of excerpted pages of a court reporter's transcript of a recording of a Department of Water Resources public information meeting in Twin Falls, Idaho, on May 23, 1985. This document was attached as exhibit 48 to the Fourth Affidavit of Michael C. Orr, filed in SRBA Consolidated Subcase No. 00-92023 on October 16, 2008.

25. Attached hereto as **Exhibit 23** are true and correct copies of excerpted pages of the 1985 Journal of the Idaho State Senate. These pages were attached as exhibit 28 to the Affidavit of Michael C. Orr in Support of State of Idaho's Motion for

Partial Summary Judgment, filed in SRBA Consolidated Subcase No. 00-92023 on January 11, 2008.

26. Attached hereto as **Exhibit 24** are true and correct copies of excerpted pages of the transcript of the Deposition of Patrick Jerome Kole, *In re SRBA* Case No. 39576 (Fifth Jud. Dist., Twin Falls County Dist. Ct.), dated November 14, 1990. These pages were attached as exhibit 13 to the Second Affidavit of Michael C. Orr, filed in SRBA Consolidated Subcase No. 00-92023 on February 7, 2008.

27. Attached hereto as **Exhibit 25** is a true and correct copy of the Minutes of the Senate Resources and Environment Committee for January 18, 1985, including attachments. This document was attached as exhibit 8 to the Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment, filed in SRBA Consolidated Subcase No. 00-92023 on January 11, 2008.

28. Attached hereto as **Exhibit 26** is a true and correct copy of the *Affidavit of Michael C. Orr*, including exhibits thereto, filed on October 19, 2009 in SRBA Subcase Nos. 00-92002GP, 02-0200, 02-0201, 02-0223, and 02-0224. This exhibit is referred to as the "SRBA Milner Aff." in the *Memorandum in Support of Idaho Water Resource Board's Motion for Summary Judgment* filed in this proceeding.

29. Attached hereto as **Exhibit 27** are true and correct copies of excerpted pages of "Palisades Dam and Reservoir Project In Idaho -- Letter from the Secretary of the Interior transmitting A Supplemental Report On The Allocation And Repayment Of Costs Of The Palisades Dam And Reservoir Projects In Idaho, Pursuant To Public Law 864, 81st Congress," dated Nov. 27, 1950 (House Document No. 720, 81st Congress, 2d Session).

30. Attached hereto as **Exhibit 28** is a true and correct copy of the *Order Granting Petition To Appear As Amicus Curiae, Order Setting Deadline For Comments and Special Master Report And Recommendation* entered on November 20, 2009 in SRBA Subcase Nos. 00-92002GP, 02-0200, 02-0201, 02-0223, and 02-0224.

31. Attached hereto as **Exhibit 29** is a true and correct copy of the Minutes of the Senate Resources and Environment Committee for January 21, 1985, including attachments. This document was attached as exhibit 9 to the Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment, filed in SRBA Consolidated Subcase No. 00-92023 on January 11, 2008.

32. Attached hereto as **Exhibit 30** is a true and correct copy of the Minutes of the Senate Resources and Environment Committee for January 25, 1985, including attachments. This document was attached as exhibit 10 to the Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment, filed in SRBA Consolidated Subcase No. 00-92023 on January 11, 2008.

Further your affiant sayeth naught.

DATED this 11th day of February 2010.

MICHAEL C. ORR

SUBSCRIBED AND SWORN to before me this 11th day of February 2010.

OLGA L. VALDIVIA NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at: Boise
My commission expires 2/8/2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of February 2010, I caused a true and correct copy of the foregoing **AFFIDAVIT OF MICHAEL C. ORR IN SUPPORT OF IDAHO WATER RESOURCE BOARD'S MOTION FOR SUMMARY JUDGMENT** to be filed with the Court and served on the following parties by the indicated methods:

John Rosholt Travis Thompson Barker Rosholt 113 Main Ave., W. Ste 303 Twin Falls, ID 83301-6167	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail (Affidavit only – no exhibits): jar@idahowaters.com tlt@idahowaters.com
John Simpson Barker Rosholt PO Box 2139 Boise, ID 83701-2139	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail (Affidavit only – no exhibits): jks@idahowaters.com
Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey, Chartered PO Box 1391 Pocatello, Idaho 83204-1391	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail (Affidavit only – no exhibits): rcb@racinelaw.net cmm@racinelaw.net
Robert L. Harris PO Box 50130 Idaho Falls, ID 83405	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail (Affidavit only – no exhibits): rharris@holdenlegal.com

Craig B. Evans, Chairman Bingham Group Water District PO Box 1268 Blackfoot, ID 83221	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail (Affidavit only – no exhibits): binghamgroundwtr@cableone.net
Lyle Swank IDWR 900 N. Skyline Dr. Idaho Falls, ID 83402-6105	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail (Affidavit only – no exhibits): lyle.swank@idwr.idaho.gov
Allen Merritt Cindy Yenter IDWR 1341 Fillmore St. Ste 200 Twin Falls, ID 83301-3033	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail ☐ Overnight Mail ☐ Facsimile: _____ ☒ E-mail (Affidavit only – no exhibits): allen.merritt@idwr.idaho.gov Cindy.yenter@idwr.idaho.gov

Michael C Orr

MICHAEL C. ORR
Deputy Attorney General

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 1

Excerpted pages of *Order On Petition For Judicial Review, Clear Springs Foods, Inc. v. Idaho Ground Water Appropriators, Inc.*, (Fifth Jud. Dist., Gooding County) (Case. No. 2008-444) (Jun. 19, 2009)

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DEPARTMENT OF
WATER RESOURCES

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

CLEAR SPRINGS FOODS, INC.,

Petitioner,

vs.

BLUE LAKES TROUT FARM, INC.,

Cross-Petitioner,

vs.

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT and MAGIC VALLEY GROUND WATER DISTRICT,

Cross-Petitioner,

vs.

IDAHO DAIRYMEN'S ASSOCIATION, INC.

Cross-Petitioner,

vs.

RANGEN, INC.

Cross-Petitioner,

Filed pursuant to I.R.C.P. 5(e)(1), on June 19, 2009, at 2:02 p.m.
John Melanson, District Judge

Case No. 2008-444

ORDER ON PETITION FOR JUDICIAL REVIEW

vs.

DAVID R. TUTHILL, JR., in his capacity as Director of the Idaho Department of Water Resources, and THE DEPARTMENT OF WATER RESOURCES,

Respondents.

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-0413A, 36-04013B, and 36-07148.

(Clear Springs Delivery Call)

IN THE MATTER OF DISTRIBUTIONOF WATER TO WATER RIGHTS NOS. 36-02356A, 36-07210, and 36-07427.

(Blue Lakes Delivery Call)

Ruling:

Remanded on issue of seasonal variation; Director abused discretion in ordering "replacement plan" and failure to provide timely hearings; affirmed in other respects.

Appearances:

John K. Simpson, Travis L. Thompson, Paul Arrington, of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for Clear Springs Foods, Inc.

Randall C. Budge, Candice M. McHugh, Thomas J. Budge, of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for Idaho Ground Water Appropriators, North Snake Ground Water District, and Magic Valley Ground Water District.

Daniel K. Steenson, Charles L. Honsinger, S. Bryce Ferris, of Rigert Law Chartered, Twin Falls, Idaho, attorneys for Blue Lakes Trout Farm, Inc.

Phillip J. Rassier, Chris M. Bromley, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for David R. Tuthill, in his capacity as Director of the Idaho Department of Water Resources.

Michael C. Creamer, Jeffrey C. Fereday, of Givens Pursley, LLP, Boise, Idaho, attorneys for the Idaho Dairymen's Association.

J. Justin May, of May Sudweeks & Browning, LLP, Boise, Idaho, attorney for Rangen, Inc.

I.
STATEMENT OF THE CASE

A. Nature of the case

This case is an appeal from an administrative decision of the Director of the Idaho Department of Water Resources ("Director," "IDWR" or "Department") issued in response to two separate delivery calls filed by petitioner Clear Springs Foods, Inc. ("Clear Springs") and cross-petitioner Blue Lakes Trout Farm, Inc. ("Blue Lakes") (collectively as "Spring Users"). The delivery calls were filed as a result of reductions in spring flows discharging from the Eastern Snake Plain Aquifer (ESPA) and which Spring Users hold water rights for fish propagation. Cross-petitioners, Idaho Ground Water Appropriators, Inc., North Snake Ground Water District and Magic Valley Ground Water District (collectively as "Ground Water Users") represent various ground water users holding ground water rights from the ESPA junior to those of the Spring Users and to which the delivery calls were directed. The *Final Order Regarding Blue Lakes and Clear Springs Delivery Calls* ("*Final Order*"), from which judicial review is sought was issued July 11, 2008, ordered curtailment of junior ground water rights or alternatively a phased-in replacement water plan in lieu of curtailment. Petitioners and cross-petitioners both contend the Department erred in response to the delivery calls and seek judicial review pursuant to the Idaho Administrative Procedures Act, Title 57, Chapter 52, Idaho Code.

3. **The Swan Falls Agreement and State Water Plan, while defining full economic development of the ESPA, are insufficient for administering rights on a smaller scale.**

The Ground Water Users argue that the scope of curtailment also violates the provisions of the State Water Plan and the Swan Falls Agreement. The Ground Water Users' argument is that to the extent curtailment of ground water rights to maintain spring flows results in flows exceeding the minimum flow requirements at the Murphy Gauge, the State Water Plan and Swan Falls Agreement are violated. The Hearing Officer concluded on summary judgment that that the Spring Users were not parties to the Swan Falls Agreement and rejected the argument. R. Vol. 14 at 3240. While the Spring Users were not parties to the Swan Falls Agreement, the State Water Plan and the Swan Falls Agreement establish at least on a macro scale what constitutes "full economic development" of the ESPA. The intent of the Swan Falls Agreement was to provide for full development of the ESPA below Milner Dam and satisfy Idaho Power's hydropower rights by meeting the minimum flow requirements at the Murphy Gauge.[12] *See* Exh. 437 at 5. For the reasons previously discussed, the rights of the Spring Users are subject to the full economic development provisions of the Ground Water Act and the CMR.

The Ground Water Users argue that management of the ESPA based on the minimum flows at the Murphy Gauge not only facilitates full economic development but also provides protection to both spring users and hydropower rights. This is only partially true. The State Water Plan and Swan Falls Agreement establish an overall cumulative minimum for spring flows as measured at Murphy Gauge. The Murphy Gauge is located on the main stem of the Snake River well below the Thousand Springs area. Neither the State Water Plan nor the Swan Falls Agreement establishes minimum flows for the particular sub-reaches or individual spring complexes at issue in this matter.

[12] In brief terms, the State Water Plan sets a "zero flow" at Milner Dam to allow for full development of the River above Milner. The source for the Snake River below Milner relies on tributary flows and gains from spring discharges from the ESPA. The State Water Plan also sets minimum flows at the Murphy Gauge located below the Swan Falls Dam on the Snake River. Development of the ground water on the ESPA affects the minimum flows. In resolution of a dispute over the status of Idaho Power's hydropower rights, the State and Idaho Power entered into the Swan Falls Agreement. Among other things, the Swan Falls Agreement provided for the amendment of the State Water Plan raising the minimum flows at Murphy and for the development of additional ground water "trust rights" on the ESPA. The intent being that Idaho Power would be guaranteed minimum flows and the ESPA would be fully developed once the minimum flows were reached. In 1992, a moratorium was placed on the issuance of new rights.

The Thousand Springs area is divided into six different sub-reaches and according to the Director's finding regarding the trim-line, pumping in one sub-reach may have no effect on the spring flows in a different sub-reach. Therefore, it is possible for ground water pumping to disproportionately deplete a particular sub-reach without affecting other sub-reaches and still satisfy the terms of the Swan Falls Agreement. It is also possible for ground water pumping immediately adjacent to a spring complex to impact the spring complex and still satisfy the terms of the State Water Plan and Swan Falls Agreement. In other words, it is possible to over-develop a particular sub-reach and still satisfy the Swan Falls Agreement.

Second, the Swan Falls Agreement only provides a minimum protection for spring flows if the Director administers ground water rights on a long range and on an anticipatory basis to meet the minimum flows at Murphy Gauge. At one point between 2000 and 2004 there was concern that the flows at Murphy Gauge would drop below the minimum flows. As a result of the delayed effect of curtailing ground water rights, Director Dreher was prepared to issue curtailment orders to *surface right holders* on the Snake River and then follow up later with the curtailment of ground water rights if necessary. TR. at 1421-22. If surface rights were curtailed to meet the minimum flows, none of the water realized from the curtailment would have benefitted the aquaculture facilities.[13] *Id.* Accordingly, because the Swan Falls Agreement does not define full economic development on a more regional basis and until such time as the ESPA is administered on a long range basis to meet the minimum flows[14], the Swan Falls

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[13] Former Director Dunn illustrated this problem in his testimony when he explained his understanding of what would happen if the flows at Murphy were to drop below the minimums.

> Its my opinion that the state would be obligated to do one of two things. Either have obtained storage water upstream that can be released down to augment the flow; or they're going to have to compensate Idaho Power Company in dollars to help then recover the loss of energy because the flows went down.

TR. at 1047 (Dunn).

[14] Meaning the aquifer is managed such that sources other than ground water rights from the ESPA do not need to be relied on to satisfy minimum flows in times of shortage even on a short term basis. If the minimum flows are in danger of not being met then by implication spring flows are reduced. Relying on non-ESPA sources to satisfy minimum flows effectively bypasses the springs affording no relief to the Spring Users.

Exhibit 2

Petition For Peremptory Writ Of Mandate,
North Side Canal Co. & Twin Falls Canal Co. v. Tuthill,
Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County)
(Sept. 28, 2007)

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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.

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[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

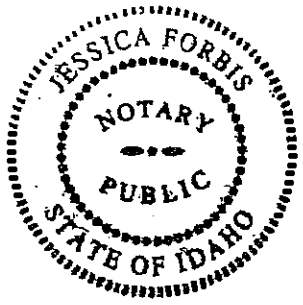
STATE OF IDAHO)
) ss.
County of Twin Falls)

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.



Notary Public for Idaho
Residing at: Twin Falls
My Commission Expires: 4/3/12

Attachment A

AMENDED

Identification No. RECEIVED

Application No. 07-7011

Power of Attorney

STATE OF IDAHO

DEPARTMENT OF WATER ADMINISTRATION

Water Resources Boise, Idaho

APPLICATION FOR PERMIT APPROVED

To Appropriate the Public Waters of the State of Idaho
(TYPE OR PRINT IN INK)

1. Name of applicant North Side Canal Company, 921 N. Lincoln Ave., Jerome, ID 83338
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 (Lot 8) (Lot 5) County; additional points of diversion if any:

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

N.S. Canal diversion - SW¼ NW¼ 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. Water will be used for the following purposes:

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

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

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

5. Total quantity to be appropriated: *(Corrections made as per telephone conversatio of 5/12/77) ADU

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 44 (Milner) 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.

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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

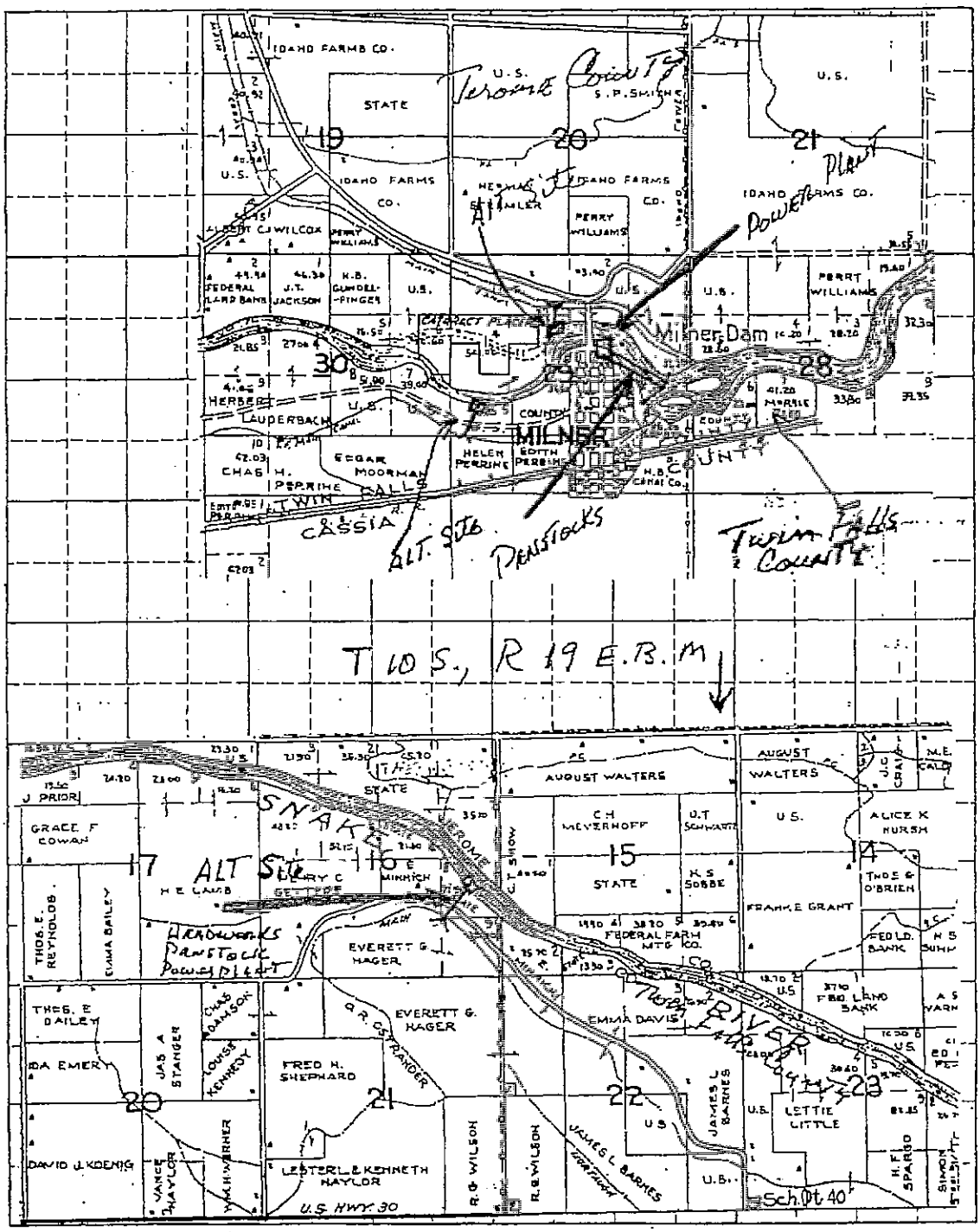
9. a. Who owns the property at the point of diversion Milner Dam owned by applicants. Bed of stream owned by State of Idaho; applicants own at alternate points of diversion.
b. Who owns the land to be irrigated or place of use Applicants own land adjacent to Milner Dam. Eventua construction would require 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, approoriate 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 recoonition of all prior existing water rights.

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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.

(Applicant) North Side Canal Company
President

(Applicant) Twin Falls Canal Company
President

AFFIDAVIT of PUBLICATION

RECEIVED

JUN 1 1977

Department of Water Resources
Southern District Office

State of Idaho, } SS.
County of Jerome }

L. E. LANGDON
ASST. PUBLISHER

being first duly sworn, deposes and says that he is the printer (publisher) of the Jerome North Side News, a newspaper published every week in Jerome, County of Jerome, State of Idaho; that said newspaper has been continuously and uninteruptedly published for a period of seventy-eight consecutive weeks prior to the first publication of the annexed notice, and is a newspaper qualified to publish legal notices as provided by act of the 1919 session of the legislature of the State of Idaho, known as House Bill 145; that the annexed advertisement was published onre each week for 2 consecutive issues in said newspaper proper and not in a supplement; that the date of the first publication of said advertisement was on the 19 day of May 1977 and the date of the last publication was on the 26 day of May 1977.

L. E. Langdon

Subscribed and sworn to before me this 31st day of May 1977.

(SEAL)

Darla Bratton
NOTARY PUBLIC

NORTH SIDE NEWS
Jerome, Idaho

COST OF PUBLICATION

Number of Lines in Notice		40
Number of Insertions		2
Lines tabular at	315c	
40 Lines straight at	21c	8.40
40 Subsequent lines at	15c	6.00
TOTAL COST		14.40

COPY OF NOTICE

(Paste Here)

Water permits #01-7011
TITLE OF NOTICE

PLAINTIFF ATTORNEY

DEFENDANT

PLAINTIFF

Dept of Water
BILL TO

NOTICE OF APPLICATION FOR WATER PERMIT

Notice is hereby given that North Side Canal Company of Jerome, Idaho, and Twin Falls Canal Company of Twin Falls, Idaho, has on March 30, 1977 submitted Application No. 01-7011 for a permit to appropriate 12,000 cubic feet per second of water from Snake River by means of dam, penstocks, powerplant within the NE¼SE¼, Sec. 29, Twp. 10S, Rge. 21E., B.M., Twin Falls County; NW¼SW¼, SW¼NW¼, Sec. 28, Twp. 10S, Rge. 21E., B.M., Jerome County to be used from Jan. 1 to Dec. 31 for power purposes within the N½, N½S½, Sec. 29, Twp. 10S, Rge. 21E. B.M., Jerome & Gooding Counties Alternate site is NE¼SE¼, Sec. 16, Twp. 10S, Rge. 19E., B.M., Twin Falls County.

If issued, this permit will be subject to all prior water rights. Protests against the granting of the permit must be filed with the Idaho Department of Water Resources, 1041 Blue Lakes Blvd., North, Twin Falls, Idaho, 83301 on or before June 6, 1977.

C. STEPHEN ALLRED
Director
5-19-2tc

ok/dm
6/3/77

No. 3583

NOTICE OF APPLICATION
FOR WATER PERMIT

Notice is hereby given that North Side Canal Company of Jerome, Idaho, and Twin Falls Canal Company of Twin Falls, Idaho has on March 30, 1977 submitted Application No. 01-7011 for a permit to appropriate 12,000 cubic feet per second of water from Snake River by means of dam, oenstocks, powerplant within the NE¼SE¼, Sec. 29, Twp. 10S, Rge. 21E., B.M., Twin Falls County; NW¼SW¼, SW¼NW¼, Sec. 28, Twp. 10S, Rge. 21E., B.M., Jerome County to be used from Jan. 1 to Dec. 31 for power purposes within the N½, N½S½, Sec. 29, Twp. 10S, Rge. 21E., B.M., Jerome & Gooding Counties Alternate site is NE¼SE¼, Sec. 16, Twp. 10S, Rge. 19E., B.M., Twin Falls County.

If issued, this permit will be subject to all prior water rights. Protests against the granting of the permit must be filed with the Idaho Department of Water Resources, 1041 Blue Lakes Blvd., North, Twin Falls, Idaho, 83301 on or before June 6, 1977.

C. STEPHEN ALLRED
Director
PUBLISH: May 19 & 26, 1977

MICROFILMED

ole/lm
6/3/77

Affidavit of Publication

RECEIVED
JUN 2 1977
Water Resources
Southern District Office

STATE OF IDAHO,
COUNTY OF TWIN FALLS } ss.

No. 6012

I, Carolyne Jennings, Depa[illegible] being first duly sworn upon oath, depose and say that I am Princ. Clerk of the TIMES-NEWS, published daily, except Saturday, at Twin Falls, Idaho, and do solemnly swear that a copy of the notice of advertisement, as per clipping attached, was published in the regular and entire issue of said newspaper, and not in any supplement thereof, for 2 consecutive Thursdays, commencing with the issue dated May 19, 19 77, and ending with the issue dated May 26, 19 77.

And I do further certify that said newspaper is a consolidation, effective February 16, 1942, of the Idaho Evening Times, published theretofore daily except Sunday, and the Twin Falls News, published theretofore daily except Monday, both of which newspapers prior to consolidation had been published under said names in said city and county continuously and uninterruptedly during a period of more than twelve consecutive months, and said TIMES-NEWS, since such consolidation, has been published as a daily newspaper except Saturday, under said name in said city and county continuously and uninterruptedly.

And I further certify that pursuant to Section 60-108 Idaho Code, Thursday of each week has been designated as the day on which legal notice by law or by order of any court of competent jurisdiction within the state of Idaho, to be published weekly, will be published; and that at the head of the editorial column of said combined newspapers, and in each issue thereof, Thursday is announced as the day on which said legal notices will be published.

Carolyne Jennings

Subscribed and sworn to before me on this 31st day of May, 19 77.

Notary Public in and for the County of Twin Falls, State of Idaho, residing at Twin Falls, Idaho

Attachment B

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Permit Report

08/08/2006

WATER RIGHT NO. 1-7011

Owner Type	Name and Address
Current Owner	NORTH SIDE CANAL CO LTD 921 N LINCOLN AVE JEROME, ID 83338 (208)324-2319
Current Owner	TWIN FALLS CANAL CO PO BOX 326 TWIN FALLS, ID 83303-0326 (208)733-6731

Priority Date: 03/30/1977
Status: Active

Source	Tributary
SNAKE RIVER	COLUMBIA RIVER

Beneficial Use	From	To	Diversion Rate	Volume
POWER	1/01	12/31	12000 CFS	
Total Diversion			12000 CFS	

Location of Point(s) of Diversion:

SNAKE RIVER	SWNW	Sec. 28	Township 10S	Range 21E	TWIN FALLS County
SNAKE RIVER	SWNW Lt 5	Sec. 28	Township 10S	Range 21E	TWIN FALLS County
SNAKE RIVER	NWSW Lt 5	Sec. 28	Township 10S	Range 21E	TWIN FALLS County

SNAKE RIVER	SENE Lt 8	Sec. 29	Township 10S	Range 21E	TWIN FALLS County
SNAKE RIVER	NESE	Sec. 29	Township 10S	Range 21E	TWIN FALLS County
SNAKE RIVER	NESE Lt 6	Sec. 29	Township 10S	Range 21E	TWIN FALLS County
SNAKE RIVER	NESE Lt 8	Sec. 29	Township 10S	Range 21E	TWIN FALLS County

POWER Use:
Hydropower Kilowatts: 0

Place(s) of use:

Place of Use Legal Description: POWER TWIN FALLS County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	A
10S	20E	25		NENW			NWNW			SWNW			SENW	
				NESE			NWSE			SWSE			SESE	
	21E	30	3			4			7			8		

Conditions of Approval:

1.	001	A measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works.
2.		P/D ALSO IN JEROME CO. 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.

Dates:
Proof Due Date: 11/01/1993
Proof Made Date: 10/29/1993
Approved Date: 06/29/1977
Moratorium Expiration Date:
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Application Received Date:
Protest Deadline Date:
Number of Protests: 0

Field Exam Date: 10/6/1993
Date Sent to State Off: 10/29/1993
Date Received at State Off: 11/1/1993

Other Information:
State or Federal:
Owner Name Connector:
Water District Number: 01
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

Attachment C

COPY

AGREEMENT REGARDING THE OWNERSHIP, CONSTRUCTION,

OPERATION AND MAINTENANCE

OF

THE MILNER HYDROELECTRIC PROJECT (FERC NO. 2859)

BY AND BETWEEN

THE TWIN FALLS CANAL COMPANY,

NORTHSIDE CANAL COMPANY, LIMITED

AND

IDAHO POWER COMPANY

of Section 407 of the License, measured as required by the Commission. "Technical Service Agreement" shall mean the Technical Service Agreement between the Parties and Morrison-Knudsen Engineers, Inc., dated as of March 16, 1983, providing for the design of the Milner Dam Rehabilitation Project.

"Total Flows" shall mean the flows in the Snake River downstream of all Power Plant units.

"Twin Falls Canal Company" shall mean the Twin Falls Canal Company, a corporation organized and existing under the laws of the State of Idaho, and its successors and assigns.

"Uncontrollable Forces" shall mean any cause beyond the control of the Party affected and which by the exercise of reasonable diligence the Party is unable to avoid and shall include, but not be limited to, an act of God, fire, flood, explosion, strike, sabotage, and act of the public enemy, civil or military authority, including court orders, injunctions, and orders of government agencies with proper jurisdiction prohibiting acts necessary to performance hereunder or permitting any such act subject to unreasonable conditions, insurrection or riot, an act of the elements, failure of equipment, or inability to obtain or ship materials or equipment because of the effect of similar causes on suppliers or carriers.

"Water Permit" shall mean Permit No. 01-7011 issued by the Idaho Department of Water Resources providing for the appropriation of public waters of the State of Idaho for use at the Power Plant as now or hereinafter in effect.

ARTICLE II

REPRESENTATIONS

Section 2.1 General Representations. The Canal Companies and the Power Company represent and warrant one to the other that:

(a) This Agreement is an agreement entered into by the Parties in order to carry

out the reconstruction, rehabilitation and improvement of the Milner Dam through the construction of the Milner Dam Rehabilitation Project and the construction and operation of the Power Plant, as contemplated in the License.

(b) In consideration of the transfer to the Power Company of an interest in the License as co-licensee and the delivery of water to the Power Plant for the purposes of generation of electric energy, the Power Company shall construct, operate, maintain and own the Power Plant, and shall make the payments required to be made to or on behalf of the Canal Companies in Article V hereof. In consideration of the advances made on behalf of the Canal Companies by the Power Company, the Canal Companies shall make the payments to the Power Company required to be made in Article V hereof.

(c) The primary uses of the water and canal facilities constituting the Milner Dam shall be irrigation and stock watering purposes and the Project shall not be operated in such manner as to interfere with, deprive, terminate or reduce the traditional irrigation and stock watering demands of the Canal Companies limited by the number of outstanding shares of record as of April 23, 1981.

(d) The canals and related facilities constituting the Milner Dam are now and shall continue to be for all times under the sole ownership, maintenance and control of the Canal Companies and the American Falls Reservoir District No. 2, and by this Agreement it is understood among the Parties that the Power Company is not assuming any of the obligations, duties or liabilities of the Canal Companies or the American Falls Reservoir District No. 2 relating to the operation of the canals and related water facilities constituting the Milner Dam.

Section 2.2. Representations of the Power Company. The Power Company represents and warrants as follows:

(a) It is a corporation duly incorporated under the laws of, and is in good standing, in the State of Idaho, has power under the laws of Idaho and its

agreement or instruments or of any order, ruling or regulation of any court or administrative agency, whether state or federal, to which the Power Company is now a party or by which it is bound, constitute a default under any of the foregoing, or result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon any of the property or assets of the Power Company under the terms of any instrument or agreement.

(f) The Power Company will take such action consistent with the requirements of this Agreement as shall be necessary under the Guaranty with respect to the Construction Debt of the Canal Companies contemplated to be incurred by the Canal Companies to repay the Canal Company Construction Advances and the Capitalized Construction Advance Interest under the provisions of Section 5.10 hereof.

(g) The Power Company will supply the Canal Companies and the Authorized Representatives of the Canal Companies from time to time such information as shall be reasonably requested by the Canal Companies, so as to enable the Canal Companies to make an informed decision with respect to the option granted to the Canal Companies in Section 4.11 hereof with respect to the Royalty and Incentive Royalty in the event that the Project is not included in the rate base of the Power Company.

Section 2.3. Representations of the Canal Companies. The Canal Companies represent and warrant as follows:

(a) The Canal Companies will hold the Power Company harmless with respect to any claims of the American Falls Reservoir District No. 2 as the owner of an interest in the Milner Dam with respect to any actions taken by the Power Company under this Agreement or in contemplation of this Agreement with respect to the Milner Dam and the Milner Dam Rehabilitation Project.

(b) The Canal Companies will use their best efforts to make water available to the

Power Company at the Power Plant to the maximum extent reasonably possible after meeting all of the Canal Companies' traditional irrigation and stock water demands, limited by the number of outstanding shares of record as of April 23, 1981. The water right at Milner for power generation shall be considered senior to other power projects on the Canal Companies' systems.

(c) The Canal Companies will be solely responsible for furnishing the water to be used in the Power Plant pursuant to the water permit for the generation of electric energy and to that end will jointly exert their best efforts with the Power Company to secure all water necessary to satisfactorily protect the Parties in the use of the water needed for the generation of electric energy at the Power Plant as part of the Project.

(d) The Canal Companies shall be solely responsible for all costs and expenditures of the Canal Companies in conducting their ordinary business affairs, particularly if related to this Agreement, the Milner Dam or the Milner Dam Rehabilitation Project and including any subsequent agreements or activities which the Parties hereto may enter into or engage in.

Section 2.4. Representations of the North Side Canal Company. The North Side Canal Company represents and warrants as follows:

(a) It is a corporation duly incorporated under the laws of, and is in good standing, in the State of Idaho, has power under the laws of Idaho and its Articles of Incorporation and By-Laws to enter into this Agreement and by proper corporate action has been duly authorized to execute and deliver this Agreement.

(b) No additional or further approval, consent or authorization of any governmental unit, public agency or authority is required to be obtained by the North Side Canal Company in connection with the execution of this Agreement and the carrying out by it of its various undertakings and obligations provided for or contemplated herein.

carrying out by it of its various undertakings and obligations provided for or contemplated herein.

(c) There is no action, suit, proceeding or investigation at law or in equity before or by any court, public board or body, pending or, to the best of the knowledge and information of the Twin Falls Canal Company, threatened against or affecting the Twin Falls Canal Company, or, to the best of the knowledge and information of the Twin Falls Canal Company, any basis for such action, suit, proceeding or investigation, wherein an unfavorable decision, ruling or finding which would adversely affect the validity or enforceability of this Agreement.

(d) Neither the execution and delivery of this Agreement, the consummation of the transactions contemplated hereby, nor the fulfillment of or compliance with the terms and conditions of this Agreement, conflict with or result in a breach of any of the terms, conditions or provisions of any corporate restriction of any agreement or instruments or of any order, ruling or regulation of any court or administrative agency, whether state or federal, to which the Twin Falls Canal Company is now a party or by which it is bound, or constitute a default under any of the foregoing, or result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon any of the property or assets of the Twin Falls Canal Company under the terms of any instrument or agreement.

ARTICLE III

LICENSE

Section 3.1. License. The License for Project No. 2899 was issued December 15, 1965, by the Commission to the Canal Companies and was supplemented by Commission Order issued May 2, 1979, adding the Power Company as a co-licensee. The License expires on November 30, 2038. The License is conditioned upon commencement of construction of the Project within two years from December 1, 1988, and upon

tion of the Project within four years from December 1, 1988. Separate commencement and completion dates are prescribed in the License with respect to the Milner Dam Rehabilitation Project.

Section 3.2. Compliance with the License. The Parties recognize that as co-licensees under the License, they are jointly and severally liable to fulfill all statutory and regulatory obligations under the License regardless of their varying interests in Project property and their contractual obligations to each other regarding the Project, as set forth herein. So long as the License shall be in full force and effect the Parties shall operate or cause the Project to be operated in good faith pursuant to the terms of the License and shall not fail to comply at all times with the terms and provisions of the License. Recognizing the ownership interests and allocation of responsibilities set forth in this Agreement, the Power Company agrees to hold the Canal Companies harmless for each and every failure of the Power Company to conform to or otherwise comply with the provisions of the License with respect to the construction, operation and maintenance of the Power Plant. The Canal Companies agree to hold the Power Company harmless for each and every failure of the Canal Companies to comply with the terms of the License in connection with the construction, operation, maintenance and ownership of the Milner Dam and the Milner Dam Rehabilitation Project.

Section 3.3. Pre-License Advances. Pursuant to the provisions of Agreement No. 1, the Power Company incurred Pre-License Advances. Under the terms of Agreement No. 1 the Canal Companies were obligated to repay 50% of the Pre-License Advances exceeding $200,000, plus interest at 10% per annum from the date of each advance, with the total liability of the Canal Companies to repay Pre-License Advances, including interest, not to exceed $800,000. Notwithstanding anything in Agreement No. 1 to the contrary, the Parties hereby agree that the amount of Pre-License Advances, including interest to date, required to be reimbursed to the Power Company by the

Attachment D

Form 209
7-80

RECEIVED
NOV 18 1981
Department of Water Resources

Identification No. 01-7011

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECEIVED
NOV 16 1981
Department of Water Resources
Southern Idaho Region

REQUEST FOR EXTENSION OF TIME

To provide additional time in which to submit proof of beneficial use on a water right permit.

Bryan Harris, Jr., President
Twin Falls Canal Company
C.J. Marshall, President
North Side Canal Company, Ltd.
(Name)

P.O. Box 326, Twin Falls, Idaho 83301
of 921 North Lincoln, Jerome, Idaho 83338
(Address)

State of Idaho, deposes and says:

That he is the holder, or the duly authorized agent of the holder*, of Permit to Appropriate the Public Waters of the State of Idaho No. 01-7011.

That under the terms and conditions of said permit, work thereunder was required to be completed on or before June 1, 1982.

That he has heretofore performed the following work described under said permit:

Preliminary engineering work was accomplished and F.E.R.C. has granted a preliminary permit to prepare to file a formal application for license. A contract for the purchase of power is being negotiated.

Costing $150,000.00

That he is unable to complete the remainder of the work within the required time for the following reasons, to-wit: The preparation of the application for license must be filed by August 12, 1983. The application will take time to process. If the license is issued the construction could take up to 2 1/2 years to complete the project.

Wherefore, he asks that the Department of Water Resources extend the time for the completion of obligations under said permit to June 1, 1987.

C.J. Marshall
Bryan Harris Jr.
(Signature)

*IF OTHER THAN HOLDER, Power of Attorney must be supplied.

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

IT IS HEREBY ORDERED that the above application for extension of time be APPROVED and the time within which to submit the statement of beneficial use is extended to June 1, 1987.

Signed this 31st day of March, 19 82.

L. Glen Saxton
Chief, Operations Bureau

REQUEST HANDLED

$15.00 fee received by mj Date 3-23-82 Receipt # 22664

RECEIVED
FEB 26 1987

FILING FEE: $15.00

Form 704
7/80

Identification No. 01-7011

STATE OF IDAHO
Department of WATER RESOURCES
DEPARTMENT OF WATER RESOURCES

REQUEST FOR EXTENSION OF TIME

To provide additional time in which to submit proof of beneficial use on a water right permit.

ROBERT REICHERT, President Twin Falls Canal Company
C.J. MARSHALL, President North Side Canal Company, Ltd. of

P.O. Box 326, Twin Falls ID 83301
921 N. Lincoln, Jerome ID 83338

(Name) (Address)

State of Idaho, deposes and says:

That he is the holder, or the duly authorized agent of the holder*, of Permit to Appropriate the Public Waters of the State of Idaho No. 01-7011.

That under the terms and conditions of said permit, work thereunder was required to be completed on or before June 1, 19 87.

That he has heretofore performed the following work described under said permit: In October of 1980, Applicants filed for Preliminary Permit with FERC. A Preliminary Permit was issued dated August 12, 1981. A license application was filed with FERC on August 1, 1984. To date no license has issued and project has been included in EIS and cumulative impact studies being conducted by FERC. Costing $ 1,200,000.00

That he is unable to complete the remainder of the work within the required time for the following reasons, to-wit: The work cannot be initiated until the FERC license is obtained. Since 6 years and 7 months will have been lost in FERC proceedings by June 1, 1987, Applicants seek extension of this Permit until Jan 1, 1995, pursuant to I.C. 42-204(1).

Wherefore, he asks that the Department of Water Resources extend the time for the completion of obligations under said permit to January 1, 19 95.

Robert Reichert
PRESIDENT--TWIN FALLS CANAL COMPANY

C. J. Marshall
PRESIDENT--NORTH SIDE CANAL COMPANY, LT
(Signature)

*IF OTHER THAN HOLDER. Power of Attorney must be supplied.

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

IT IS HEREBY ORDERED that the above application for extension of time be APPROVED and the time within which to submit proof of beneficial use is extended to November 1, 1990 with an added 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.

FEB 24 1988

A. Glen Saxton
Chief, Operations Bureau

$15.00 fee received by _____ Date 3-4-87 Receipt # 41519

Form 20
4/86

RECEIVED
OCT 25 1990
Department of Water Resources
Southern Region Office

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

For Office Use Only
$15 FEE Receipted by L.B.
Date 10/25/90
Receipt # 5012777

REQUEST FOR EXTENSION OF TIME

Provide additional time in which to submit proof of beneficial use for a water right permit

The Idaho Department of Water Resources will consider this form as a request that the permit holder(s) be granted an additional period of time in which to complete development of a water right under the provisions of Section 42-204, Idaho Code.

Permit No. 01-07011

Name(s) of Permit Holder: TWIN FALLS CANAL COMPANY / NORTH SIDE CANAL COMPANY, LTD.

Post Office Address: P.O. BOX 326, TWIN FALLS ID 83303-0326 / 921 N. LINCOLN AVENUE, JEROME ID 83338

Telephone No. 208-733-6731 / 208-324-2319

Date Proof is Due: NOVEMBER 1, 1990

Describe what work has been completed toward the development of this water right:
(This must be filled out! If no work has been completed, show "none".)

SEE ATTACHED EXHIBIT "A"

Costing $ APPROX. $10 million

The permit holder(s) has been unable to complete the remainder of the work for the following reasons:

SEE ATTACHED EXHIBIT "A"

Permit holder(s) request an extension to OCTOBER 31, 19 93.
(1 yr. minimum)

TWIN FALLS CANAL COMPANY
By: Robert Keeshill
PRESIDENT (Signature)*

NORTH SIDE CANAL COMPANY, LTD.
By: Russell Woolley
PRESIDENT

FEE: $15.00

*IF OTHER THAN PERMIT HOLDER, POWER OF ATTORNEY MUST BE SUPPLIED.

ACTION OF THE DEPARTMENT OF WATER RESOURCES

IT IS HEREBY ORDERED that the above request for extension of time be APPROVED and the time within which to submit proof of beneficial use is extended to May 1, 1992.

RECORDED
APPROVED
NOV 01 1990

Signed this 30th day of October, 19 90.

L. Glen Saxton
Chief, Water Allocation Bureau

EXHIBIT "A" TO REQUEST FOR EXTENSION OF TIME
01-07011

DESCRIBE WHAT WORK HAS BEEN COMPLETED TOWARD THE DEVELOPMENT OF THIS WATER RIGHT:

Applicants have proceeded diligently since the FERC License was issued on December 15, 1988. Pursuant to Agreement, Idaho Power Company (IPC) was added to the FERC license as a co-licensee for Project No. 2899 by FERC Order of August 4, 1989. Pursuant to a definitive Agreement finalized in December of 1989, IPC is pursuing completion of the project. Agreement provides for rehabilitation of Milner Dam to meet FERC and State of Idaho dam safety requirements. Dam rehabilitation is more than 50 percent complete with only the new spillway and gates to be installed. Work has begun on excavating for the power house in the river bottom. Major equipment has been ordered for the power facilities. The dam will be complete in 1991 and the power plant is scbeduled to operate in late 1992. The total project cost will exceed $60 million.

THE PERMIT HOLDER(S) HAS BEEN UNABLE TO COMPLETE THE REMAINDER OF THE WORK FOR THE FOLLOWING REASONS:

In February 1987 applicants sought extension of time pursuant to Idaho Code 42-204(1) for the reason that FERC had not acted on Twin Falls Canal Company--North Side Canal Company's license application. At that time it had been 6 years and 7 months. Another 1 year and 10 months went by before license issue. IDWR extended 3 years and 7 months in 1987. The elongated FERC process totaled 8 years and 5 months before the license was issued. Applicants again seek this extension pursuant to I.C. 42-204(1) so as to be able to complete project construction and make beneficial use proof within the terms of the permit.

MICROFILMED
NOV 01 1990

Form 204
4/86

RECEIVED
APR 09 1992
Department of Water Resources
Southern Region Office

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

For Office Use Only
$15 FEE Receipted by DL
Date 4/9/92
Receipt # 5014364

REQUEST FOR EXTENSION OF TIME

To provide additional time in which to submit proof of beneficial use for a water right permit

The Idaho Department of Water Resources will consider this form as a request that the permit holder(s) be granted an additional period of time in which to complete development of a water right under the provisions of Section 42-204, Idaho Code.

Permit No. 01-07011

Name(s) of Permit Holder: TWIN FALLS CANAL COMPANY; NORTH SIDE CANAL COMPANY, LTD.

Post Office Address: P.O. BOX 326, TWIN FALLS, ID 83303-0326, (208) 733-6731; 921 NORTH LINCOLN AVENUE, JEROME, ID 83338, (208) 324-2319

Telephone No.

Date Proof is Due: MAY 1, 1992

Describe what work has been completed toward the development of this water right: (This must be filled out! If no work has been completed, show "none".)

SEE ATTACHED EXHIBIT "A"

Costing $ 40 MILLION

The permit holder(s) has been unable to complete the remainder of the work for the following reasons:

SEE ATTACHED EXHIBIT "A"

Permit holder(s) request an extension to OCTOBER 31, 1993. (1 yr. minimum)

TWIN FALLS CANAL COMPANY
By: Robert W. Stoker
President (Signature)*
*IF OTHER THAN PERMIT HOLDER, POWER OF ATTORNEY MUST BE SUPPLIED.

NORTH SIDE CANAL COMPANY, LTD.
By:
President

FEE: $15.00

MAY 15 1992

ACTION OF THE DEPARTMENT OF WATER RESOURCES

IT IS HEREBY ORDERED that the above request for extension of time be APPROVED and the time within which to submit proof of beneficial use is extended to November 1, 1993.

Signed this 20th day of April, 19 92

Chief, Water Allocation Bureau

Attachment E

Form 217
11/91

RECEIVED
NOV 0 1 1993
Department of Water Resources

OFFICE USE ONLY
Amt. of Fee $_____
Date _____
Receipt No. _____
Receipt by _____

RECEIVED
OCT 29 1993
Department of Water Resources
Southern Region Office

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. 01-7011 Telephone No. 733-6731

2. Name(s) of Permit Holder(s): Twin Falls Canal Company & North Side Canal Company

3. Mailing Address: P O Box 326, Twin Falls, ID 83303-0326

4. Source of Water: Snake River

   If GROUNDWATER, Well Driller's Name: _____ Date Drilled: _____

   OPTIONAL:
   Pump horsepower: _____ 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 Power 12,000 CFS

6. Total rate and/or volume for which proof is submitted 5,714.7 cfs OR _____ acre/feet

7. Refer to the approval conditions on your permit and respond accordingly:

   Measuring device: Required? ~~/~~ Yes ___ No Installed? X Yes ___ No

   OR

   Flow Measurement Port: Required? ___ Yes ~~/~~ No Installed? ___ Yes X 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.

   Glenn W Brewer 383-2480
   Name Telephone No.

   Idaho Power Company, P O Box 70, Boise, ID 83707
   Address

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.

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9/29/93 Robert W Schaer pwcs
Date Signature (and title, if on behalf of a company or organization)

Attachment F

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OCT 29 1993
Department of Water Resources
Southern Region Office

RECEIVED
NOV 0 1 1993
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

MICROFILMED
JAN 1 0 1994

CHARLES E.
BROCKWAY,
PHD., P.E.

706 SUNRISE
BOULEVARD
NORTH

TWIN FALLS,
IDAHO 83301

208•733•0938

Form 219
6/92

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

BENEFICIAL USE FIELD REPORT

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Department of Water Resources

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:

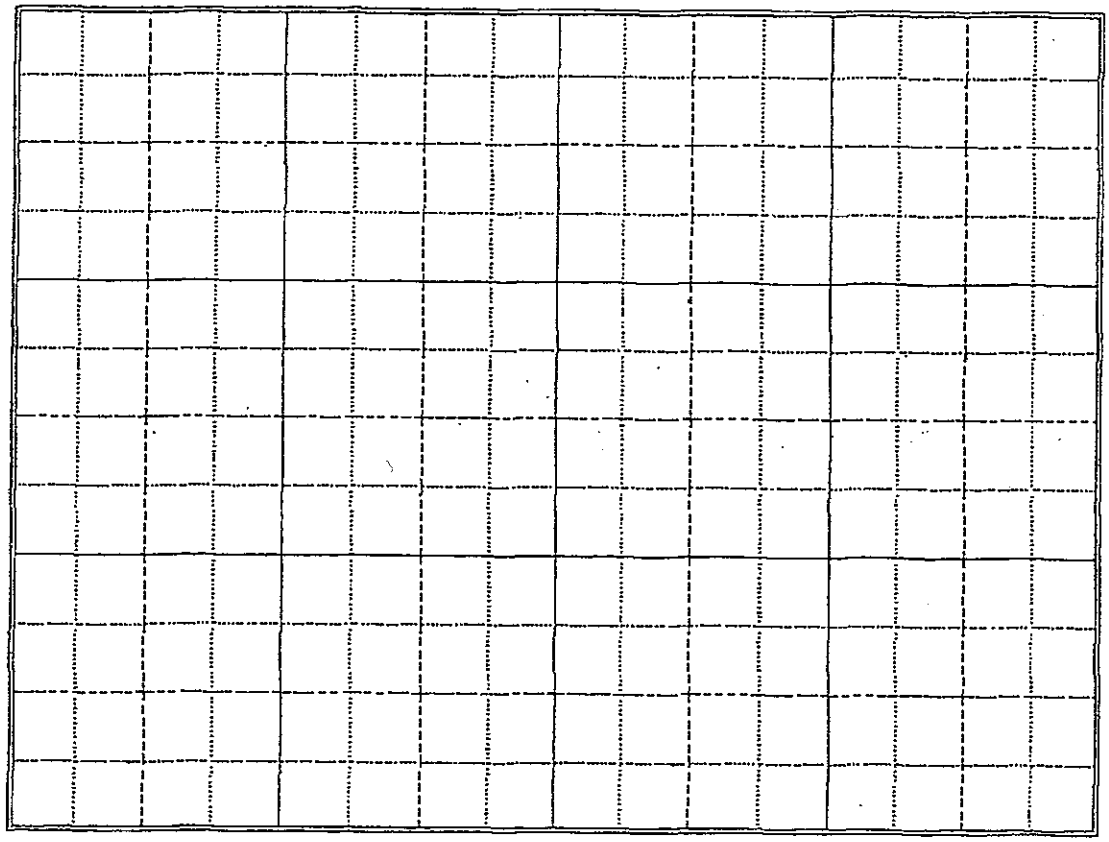
Ident No.	Gov't Lot	¼	¼	¼	Sec.	Twp.	Rge.	County	Method of Determination/Remarks
		NE	SE		29	10S	21E	TwinFalls	USGS Quad - Main Power House
		SW	NW		28	10S	21E	TwinFalls	USGS Quad - Auxilliary Power House

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 Quadrangle 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

MIDDLEBURY

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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 JAN 1 0 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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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

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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

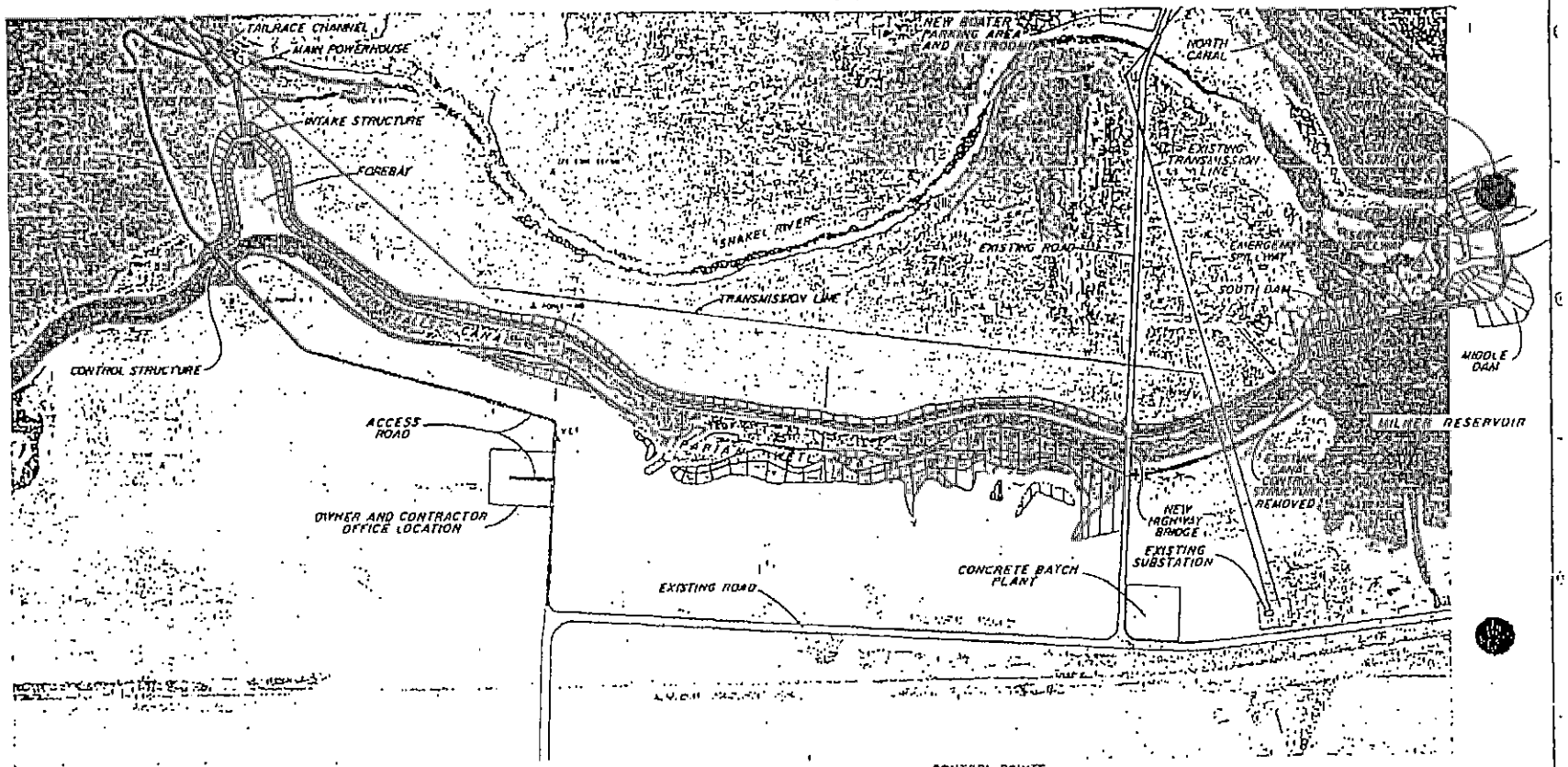
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for all units for the 24 hour period on October 21, 1993. The maximum combined flow of 5714.7 cfs occurred at 1:30 p.m. on October 21, 1993. No alternative discharge measurement method is available.

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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EXHIBIT A
PERMIT 01-7011
MILNER POWER PLANT



SURVEY CONTROL POINTS

CONTROL POINTS

POINT #	NORTH	EAST	ELEVATION

NOTE:

MORRISON-KNUDSEN ENGINEERS, INC.

IDAHO POWER COMPANY
TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.

MILNER HYDROELECTRIC PROJECT

PROJECT GENERAL ARRANGEMENT

3775-10-0005

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EXHIBIT B
PERMIT 01-7011
MILNER POWER
PLANT

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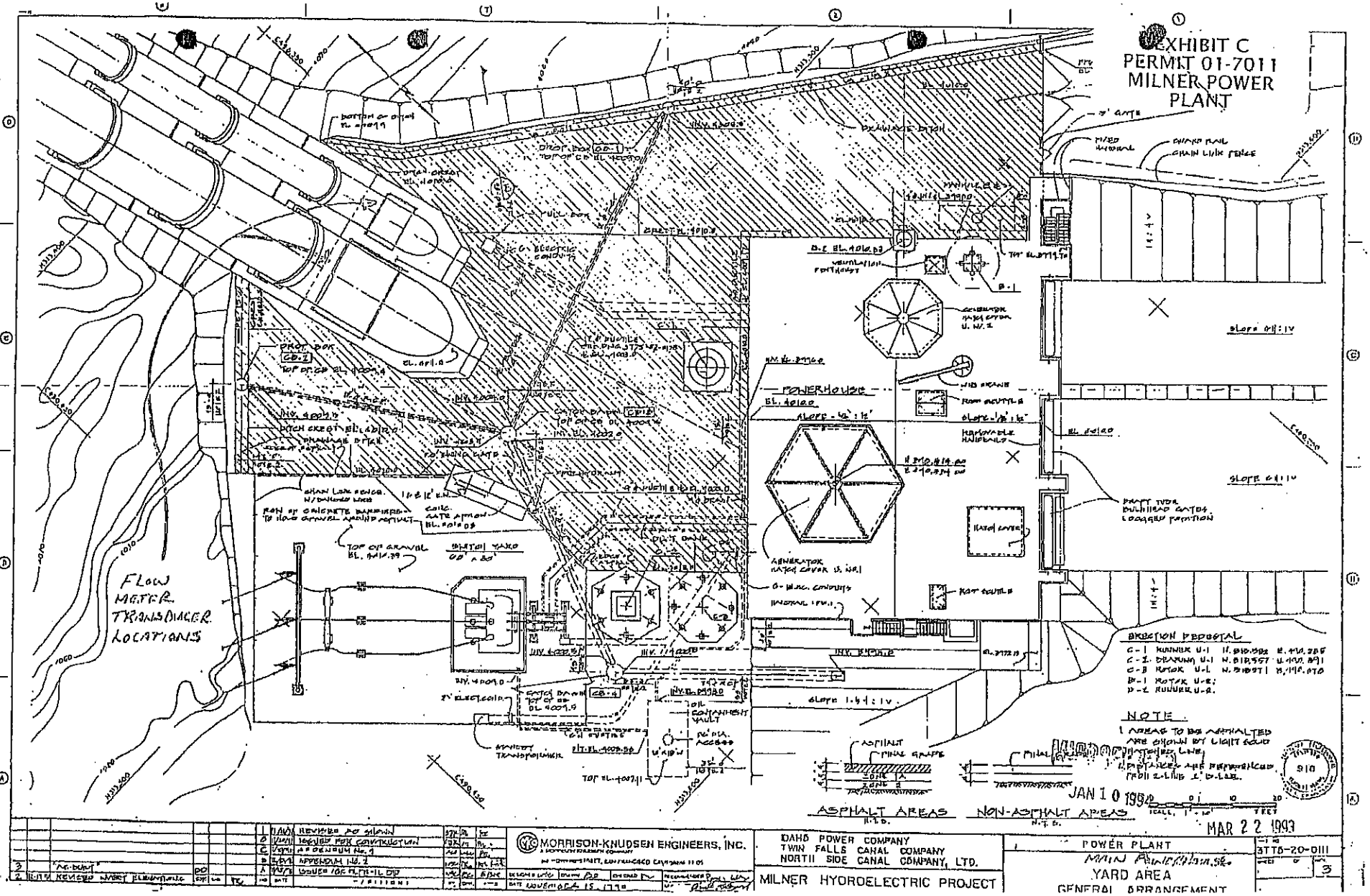
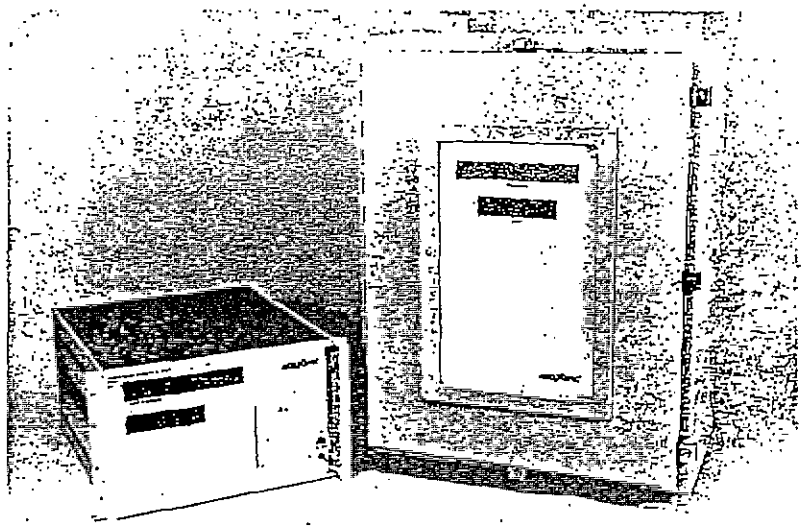

EXHIBIT C
PERMIT 01-7011
MILNER POWER
PLANT
FLOW
METER
TRANSDUCER
LOCATIONS
POWERHOUSE
ASPHALT AREAS
N.T.S.
NON-ASPHALT AREAS
N.T.S.
JAN 10 1994
MAR 22 1993
MORRISON-KNUDSEN ENGINEERS, INC.
IDAHO POWER COMPANY
TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.
MILNER HYDROELECTRIC PROJECT
POWER PLANT
YARD AREA
GENERAL ARRANGEMENT
3TTS-20-0111

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.

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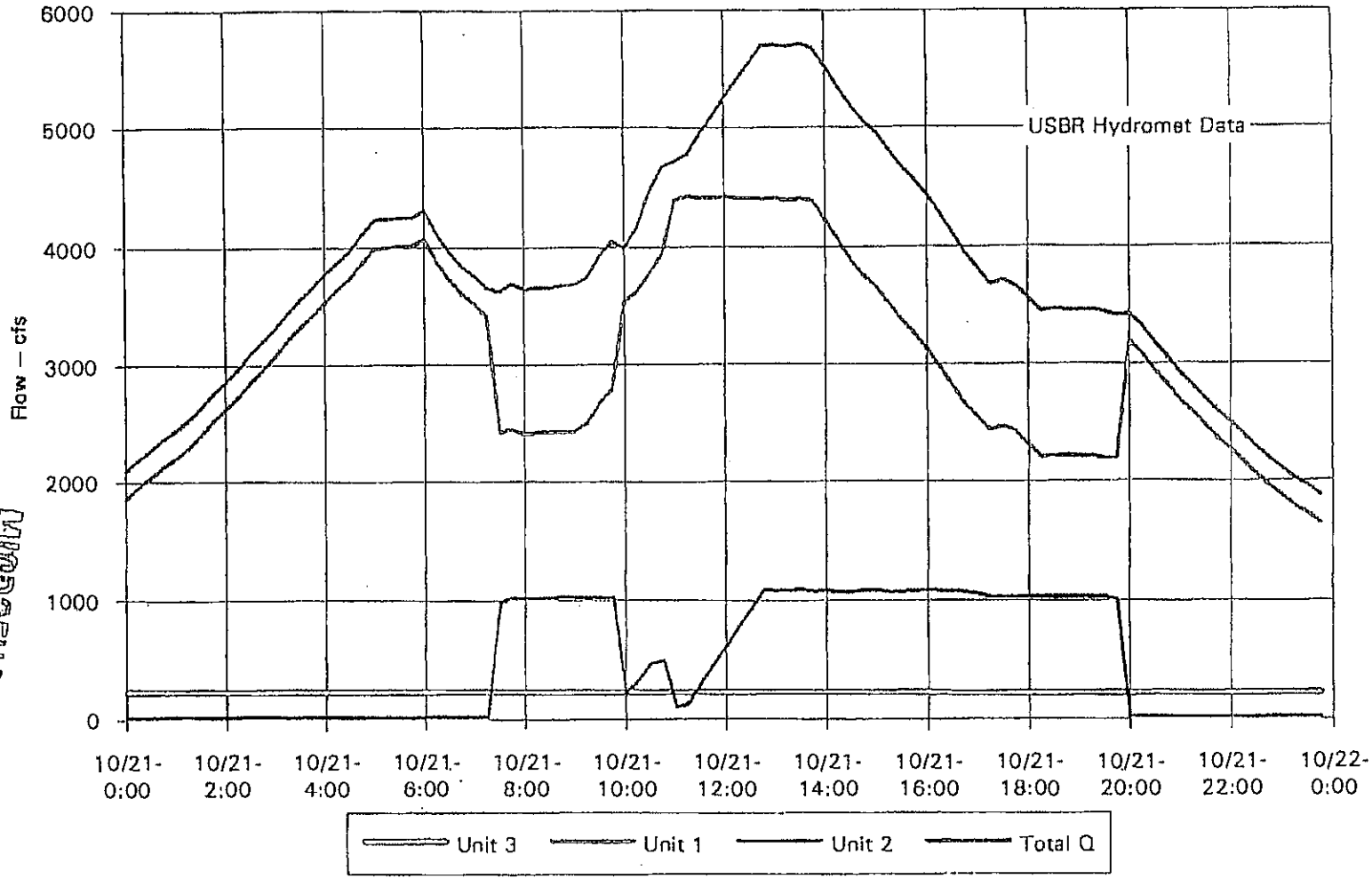
Accusonic Division, ORE International Inc. P.O.Box 709, Falmouth, Massachusetts 02541 U.S.A. Tel. (508) 549-5800 / FAX (508) 540-3835 / Telex 6817399 OREFALUW

PRODUCT MADE IN U.S.A
SPECIFICATIONS SUBJECT TO CHANGE WITHOUT NOTICE
PRINTED IN U.S.A

MILNER.XLC

EXHIBIT E
PERMIT 01-7011
MILNER POWER
PLANT

Milner Dam -- Milner Hydropower Discharge Oct 21, 1993.



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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	3619.34
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	3650.5
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	3744.61
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	3765.56	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	1076.92	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	2191.69	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

JAN 1 0 1994

10/21-23:30	223	1719.17	13.92	1956.09
10/21-23:45	223	1637.36	13.92	1874.28

JAN 1 6 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 10 1994

*212

Attachment G

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

Attachment H

NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER
Chartered
ATTORNEYS AT LAW
142 3rd AVENUE NORTH
P.O. BOX 1906
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

THOMAS G. NELSON
JOHN A. ROSHOLT
J. EVAN ROBERTSON
STEVEN K. TOLMAN
JAMES C. TUCKER

TERRY T. UNLING
F. BRUCE COVINGTON
LAIRD B. STONE
JERRY JENSEN
GARY D. SLETTE
CAROLYN M. MINDER
RUTH D. SIMPSON

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

JOHN A. ROSHOLT

JAR:dcb
43731

cc: Phil Rassier

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FEB 24 1988

RECEIVED APR - 9 1987

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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FEB 24 1988

Attachment I

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

Attachment J

December 9, 1993

Twin Falls Canal Co. and
North Side Canal Co.
P.O. Box 326
Twin Falls, ID 83303-0326

RE: Permit No. 01-07011

PROOF ACKNOWLEDGEMENT LETTER

Dear Permit Holder:

The department acknowledges receipt of the proof of beneficial use form submitted for this permit.

Enclosed is an order reinstating your water right permit. Please note that the priority date has not been penalized.

Since your use has been examined by a certified water right examiner, the Department will review the examination for the future issuance of a water right license.

If you have any questions or if we can be of any further assistance, please feel free to contact me.

Sincerely,

JULIE L. YARBROUGH
Senior Secretary

Enclosure

C: IDWR - Regional Office

RECEIVED
JAN 10 1994

ANALYSIS SHEET
FOR
PROOF OF BENEFICIAL USE

Permit No. 01-07011 Reviewed by [illegible] Date 11-08

GENERAL CONSIDERATIONS

yes Name same as permit?
NO Address same as permit?
Yes Proof timely received?
If not, complete calculation below.

TYPES OF USE

Correct Uses?

SOURCE OF WATER

✓ Surface water source
Ground water source
Drilling permit required?
Copy in the file? Drilling Permit No.
Amount paid for permit Correct?
Well log in the file?

LICENSE EXAMINATION FEE

N/A Required?
Amount Submitted
Correct?

MEASURING DEVICE

Required?
Installed?
Waiver requested?

Exam conducted by certif water rt examiner

PRIORITY CALCULATION

Date proof received
Date proof due –
No. of days late =
Priority Date +
New Priority Date

DEFICIENCIES OR ACTION ITEMS

- need to reinstate w/ no lapse in priority
- need to do data entry.
- need to send appl ackmwd letter
Since exam was conducted by cert water rt examiner ?

DATA ENTRY
New Address P.O. Box 326 Twin Falls, ID 83303-0326 Proof Made 10-29-93

Attachment K

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 beoeficial 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.

Attachment L

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

H0800.....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, Mslepeai, McGee, McKenzie, Schroeder, Sweet, Werk
Absent and excused -- None
Floor Sponsors - Burtenshaw & Williams
Ret'd to House
Filed in Office of the Chief Clerk

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, 1954, 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 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~~.

(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

3,600 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

Attachment M

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

Attachment N

Water Right Report

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

Water Right Report

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. 1-7054

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

Water Right Report

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:

Water Right Report

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 27-07842A 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.

   Conoco Martins 208-734-4338
   Name Telephone No.

   1139 Falls Ave. East, Twinfalls Idaho
   Address

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.

APR 18 1994

RECEIVED
JUL 29 1992

6/12/92 Signed by 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

01-07054
Permit No. 37-07842

A. GENERAL INFORMATION

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:

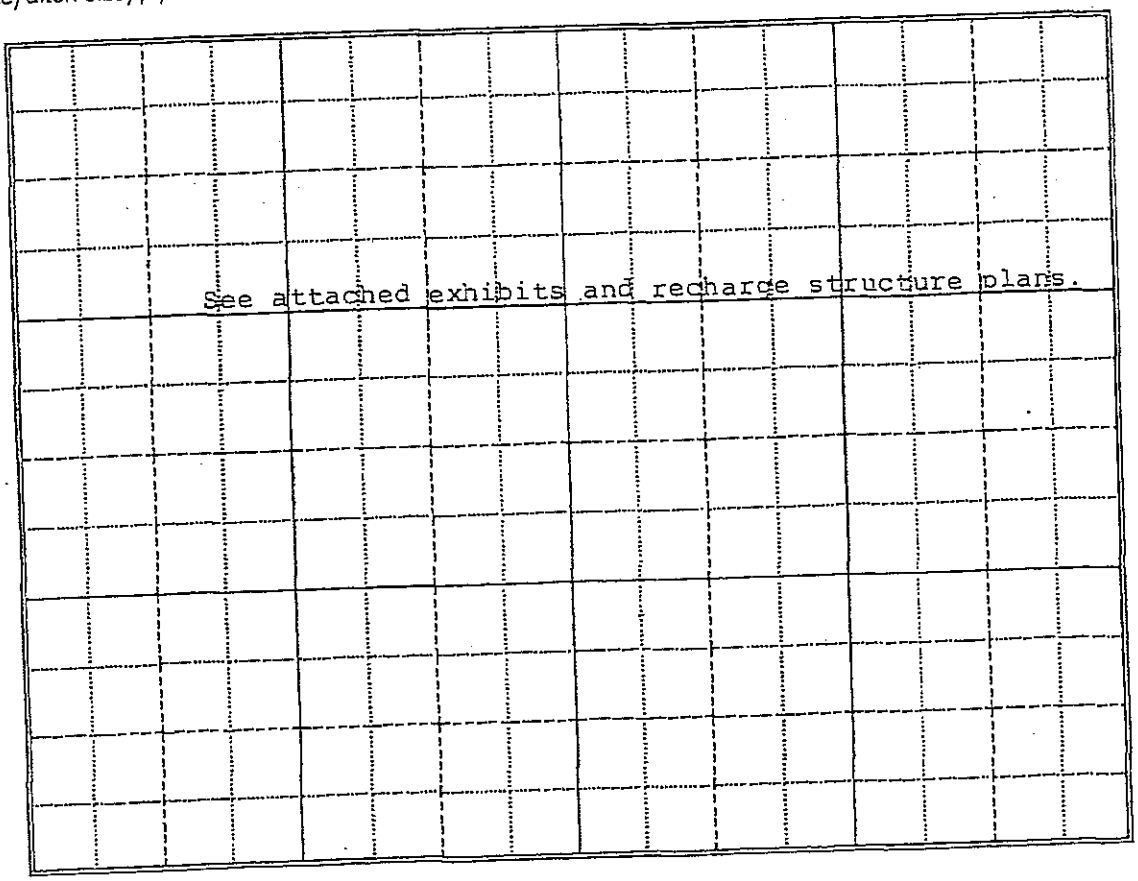
Ident No.	Gov't Lot	¼	¼	¼	Sec.	Twp.	Rge.	County	Method of Determination/Remarks
		SE	NE		22	5S	17E	Lincoln	7.5 minute quadrange

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		

-3-3

3. Delivery System Diagram: Indicate all major components and distances between components. Indicate weir size/ditch size/pipe I.d. as applicable.



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 locations. 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.

↑ this document already on file below

Have conditions of permit approval been met? X yes ___ no

-34-

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 2123 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
Exoiration 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 Total: 800.00 CFS	NA

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 18 day of April, 20 06

by JERRY R RIGBY
(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 BREHER, 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

Attachment O

P
45 FERC P 61423, 1988 WL 246992 (F.E.R.C.)

**1
Commission Opinions, Orders and Notices

Twin Falls Canal Company, North Side Canal Company, Ltd.

Project No. 2899-003

Order Issuing License (Major Project)

(Issued December 15, 1988)

*62303 Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.
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.[FN1] Due to new circumstances and new information received after the DEIS was issued, a Notice of Intent to Prepare *62304 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

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could result in near total crop failure on the 440,000 acres served by the dam. [FN2]

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 (earth quake). 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 share holders 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.

**2 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.

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.[FN3] 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.[FN4] 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.[FN5]

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,[FN6] 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 protec-

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tion 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.

The CWB proposal would require the licensees for the four project s 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 *62305 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.

**3 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.

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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, an d 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.

**4 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.[FN7] Article 402 requires CC to prepare a detailed, site-specific plan to control erosion, sediment, 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 Order No. 464.[FN8] However, since we believe the three conditions contained in the water quality certificate,*62306 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.

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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 Dem.

The Environmental Protection Agency (EPA) reports that in past years the surface waters of Milner Reservoir contained high con centrations 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 fresh water aquatic organisms.[FN5]

(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.

**5 *(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 pro posed 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

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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.[FN10] The target flows required by Articles 407 *62307 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

**6 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 non game species inhabit the reservoir. The coldwater species occur primarily at the headwaters of

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the reservoir. IDFG stocks catchable rainbow trout in the headwaters of Milner Reservoir near Burley, Idaho.

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.[FN12]

The Idaho Fisheries Management Plan[FN13] 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-cut throat 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 es Utah dace, redside shiners, and mottled sculpins dominated the catch during the low flow period.[FN13]

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 sup port the yield fishery.

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

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*62308 aquatic resources would be low because of the sediment testing and sediment removal requirements of Article 403.

**7 *(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.[FN14] 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 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 warmweter 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 deter mine 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.

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**8 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.[FN15] The proposed 58 cfs minimum flow would provide slightly improved instream flow conditions, because it would pre vent the extreme low flow events that occasion ally 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.[FN16] Proposed project operation would reduce the 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.[FN17] The DEIS also recommended a minimum flow of 300 cfs in the irrigation sea son to partially mitigate the cumulative adverse impacts to the resident trout and other *62309 resources.[FN18] Since the DEIS' 300 cfs recommendation to mitigate cumulative impacts superseded 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 sea son were needed. Flows derived by the Tennant Methodology,[FN19] the stream resource maintenance flow study,[FN20] 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 out weigh the need to protect the fishery resources. Accordingly, we will not require CC to release the flows referenced above. However, we are requiring CC, by Article 407, to release a tar get 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

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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. There fore, 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. [FN21]

**9 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 down stream 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[FN22] 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.

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. There fore, 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 *62310 deter mined that the trout stocked in the bypassed reach are not surviving, are not growing sufficiently, or are moving out immediately,

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then CC should consider stocking trout in other areas of the Snake River such as the head of Milner Reservoir near Burley, Idaho. In con junction 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 pro gram 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.

D. Ramping Rate

**10 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.[FN23]

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.

E. 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.[FN24] 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.

F. Revegetation of Disturbed Upland Habitat

During construction of the proposed project, approximately 22 acres of upland

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shrub-grass land habitat would be disturbed.[FN25] 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.[FN26] 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.

G. 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 wild life 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.

*62311 *H. Replacement of Riparian Wetlands and Upland Habitat*

**11 Approximately 6.1 acres of riparian wetlands will be eliminated by project development.[FN27] 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 guide lines.

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 wet land 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 wetlends, the wetlands comparative scarcity in the project area, and the high priority givan to the protection of

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wetlands compared to upland habitat.

IDFG agrees with this approach for replacing upland habitat with riparian habitat[FN28] 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.

I. 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.[FN29] 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. More over, 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.

J. Whitewater for Boaters

**12 1. Flows

In the 1.6-mile-long reach of the Snake River immediately below Milner Dam, expert white water boaters run continuous Class V rapids during high flows that occur in early spring and late 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.

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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 *62312 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.[FN30] 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.[FN31]

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.

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.[FN32] 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.

**13 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

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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
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 white water boating opportunities offered at Milner, from low flow technical kayaking to high flow *62313 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 avail able make it impossible for CC to meet

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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.

**14 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 stream flow 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.

K. 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.

L. Recreation Facilities

**15 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 *62314 boat dock near the existing boat

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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.

M. 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 land- scape.

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.

**16 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.

N. 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.[FN131] Project construction and rehabilitation of the Dam would require modifications to the dam and the

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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 pro poses to fence portions of the townsite and to *62315 prohibit construction activities in the vicinity of the townsite to ensure that no impacts to this site would occur.[FN34]

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.[FN35]

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: (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 boundories 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.[FN36]

**17 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 requires CC to finalize and implement its cultural resources management plan in a manner acceptable to the Advisory Council on Historic Preservation.

O. Cumulative Impacts

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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[FN37] 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*62316 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

**18 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)[FN38] was revised on rehearing by order issued April 27, 1988.[FN39] 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.

The Commission reviewed five plans that address various aspects of waterway management in relation to the proposed project.[FN40] 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*,[FN41] 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 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.[FN42]

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**19 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 accommodate 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*62317 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.[FN43] 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 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

**20 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.

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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 *62318 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.

**21 (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. - Showing

General Map - 2899-1 - 13

Project Boundary Map - 2899-2 - 14

Project Boundary Map - 2899-3 - 15

Project Boundary Map - 2899-4 - 16

Project Boundary Map - 2899-5 - 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,

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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 head works; (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.

**22 (D) This license is subject to the Articles set forth in Form L-2 [54 FPC 1808] (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.

*62319 *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

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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 aver age 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).

**23 *Article 203*. The licensees shall clear and keep clear to an adequate widtlt all lands along open conduits and shall dispose of all tetnporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which result front 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 tlte Commission and in accordance with appropriate federal, state, and local statutes and regulations.

Article 301. Tlte licensees shall begin construction of tlte project works within two years from the issuance date of tlte license and sltall contplete construction of the project within four years frotn tlte 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 scltedule for the design and construction of tlte dam safety modifications within 30 days from the issuance date of the license. The plan sltall include specific items for activities that are necessary before beginning construction activities.

Article 303. Witltin 90 days after completion of contstruction, the licensees shall file for the Contmission's approval, revised Exhibits A, F, and G, to describe and show the project as- built, including all facilities detennined by the Commission to be necessary and convenient for transmitting all of the project power to tlte 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 sltall ensure that construction of the cofferdams and deep excavations is consistent with tlte approved design. At least 30 days before starting construction of the cofferdam, the licensees shall submit to the Commission's Regional Director and to tlte 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 Contmission'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 sbowing details and analyses of design and *62320 construction features to be discussed; significant events in design and construction that have occurred since the last board of consultants' meeting; drawings; ques-

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tions 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.

**24 *Article 306.* At least 60 days before the start of construction of each major component of the project, such as the dam rehabilitation, spill way 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 Sup ply 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.

**25 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

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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 ageocies to comment and make recommendations prior to filing the plan.

No project-related land-disturbing, land- clearing, or spoil-producing activities shall *62321 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.

**26 *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 Plao 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 Com mission 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

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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.

**27 *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 *62322 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.

**28 *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 down stream 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

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Snake River's elevation provides adequate protection for the aquatic resources in the bypassed reach during project start-up 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 Commis- sion.

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*62323 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.

**29 *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

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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.

**30 *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 White water 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*62324 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

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Department of Parks and Recreation, and the Idaho White water 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 deter mine the need 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.

**31 *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, sur face 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 *62325 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.

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**32 *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 grant 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.

**33 *62326 (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

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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 shore line. 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 under ground 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.

**34 (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 pennits 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.

*62327 (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.

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(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.

**35 (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.

Commissioner Moler *concurred* with a separate statement attached.

FN1. 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.

FN2. *See*he attached Safety and Design Assessment (S&DA) for a more detailed description of the dam safety concerns regarding this project.

FN3. *See*Y40 C.F.R. §1506.11 (1988).

FN4. Letter from Martha O. Hesse, Chairman, Federal Energy Regulatory Commission, October 25, 1988.

FN5. Letter from A. Alan Hill, Chairman, CEQ, October 27, 1988.

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FN6. 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.*

FN7. *See*ection 4.1.1.1 of the DEIS.

FN8. 52 Fed. Reg. 5446 (February 23, 1987), *FERC Statutes and Regulations* ¶ 30,730 (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).

FN9. *e generally* Section 4.2.1 of the DEIS.

FN10. This fishery resource is discussed in Part II C 4, infra.

FN11. *See* Section 3.3.2.1.1 of the DEIS.

FN12. Idaho Department of Fish and Game, 1986, Fisheries Management Plan 1986-1990, Boise, Idaho, 274 pp.

FN13. *See* Section 3.3.2.1.2 of the DEIS.

FN14. *See* Section 4.2.2.1.2 of the DEIS.

FN15. *See* Section 4.2.2.1.1.3.1 of the DEIS.

FN16. *Id.*

FN17. *See* Section 4.2.2.1.2 of the DEIS.

FN18. *See* Section 5.1.2 of the DEIS.

FN19. 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.

FN20. T. Cochnauer, 1976, Stream Flow Investigation, Project F-9-R-1, Job 1, 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.

FN21. The 200 cfs target flow is not a minimum flow, and CC does not have to release the flow unless water is available.

FN22. 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.

FN23. *See* Section 4.2.2.1.2 of the DEIS.

FN24. *See* Section 4.3.1.1 of the DEIS.

FN25. *Id.*

FN26. *See generally* Section 4.3 of the DEIS.

FN27. *See* Section 4.3.1.1 of the DEIS.

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FN28. Personal communication, Dale TurnipSeed, IDFG, Jerome, Idaho, November 28, 1988.

FN29. Twin Falls Canal Company and North Side Canal Company, Ltd., Response to DEIS, March 30, 1988.

FN30. 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.

FN31. 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.

FN32. *See* Section 4.5.1.2 of the DEIS.

FN33. 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.

FN34. 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.

FN35. Letter from Dr. Merle W. Wells, State Historic Preservation Officer, Idaho State Historical Society, Boise, Idaho, February 4, 1986.

FN36. 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.

FN37. *See* Ordering Paragraph (D) hereof.

FN38. Order No. 481, 52 Fed. Reg. 39,905 (October 26, 1987), *FERC Statutes and Regulations* ¶30,773 (1987).

FN39. Order No. 481-A, [*FERC Statutes and Regulations* ¶30,811] (April 27, 1988).

FN40. 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.

FN41. 42 FERC ¶61,072 (1988), *appeal pending sub nom. Idaho Power Company v. FERC*, No. 88-1078 (D.C. Cir. filed Feb. 3, 1988).

FN42. *See First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946).

FN43. *See* [*FERC Statutes and Regulations* ¶30,811] (1988).

Safety and Design Assessment

Milner Hydroelectric Project

FERC Project No. 2899-001, ID

Project Design

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Milner Dam is located at a site on the Snake River where the river divides into three channels, separated by two islands. Before the dam was built, the north channel carried the main flow of the river, the south channel carried water only during extreme flood events, and the middle channel was dry, except during periods of high water. Milner reservoir provides water to three canals, the Twin Falls, North Side Main, and Milner Gooding Canals, and to three pumping stations, Milner Low Lift, A and B Irrigation, and North Side Pumping Company. Cumulatively, the canals and the pumping plants serve approximately 500,000 acres.

**36 Construction of Milner Dam started in 1903 and was completed in 1905. The dam has three embankments (north, middle, and south); each embankment is constructed with a trapezoidal shaped rockfill section with a vertical wood cutoff wall in the center of each embankment. The rockfill sections consist primarily of angular boulder and cobble-size blocks of olivine basalt rock. The cutoff walls were damaged during construction, and when the builder first tried to fill the reservoir, the dam leaked; on the upstream side of the embankments, non plastic sandy silt was sluiced into the rockfill to stop the leakage. Each embankment was built with a horizontal-to-vertical downstream slope of 1.5 to 1 (1.5:1) and an upstream slope of 4:1. The north embankment has a crest length of 280 feet and a crest elevation of 4,138 feet;[FN1] the middle embankment has a crest length of 404 feet and a crest elevation of 4,138 feet; and *62328 the south embankment has a crest length of 462 feet and a crest elevation of 4,138 feet.

Presently, flows are released from the dam by a gated spillway located on the southern island. The spillway is a concrete structure, 487 feet long, with a crest elevation of 4,122.5 feet and with 99 wood slide gates, each 4 feet wide by 12 feet high, which are individually lifted by a hydraulic mechanism. An ungated emergency spillway with a concrete-core cutoff wall is located on the north island; the emergency spillway is 290 feet long and has a crest elevation of 4,134 feet. The dam has no operable low-level outlet or reservoir drain.

Flows from Milner Lake to Twin Falls Main Canal are controlled by a concrete structure with seven manually operated radial gates. The headworks is located on the south abutment.

The applicants propose to construct rockfill berms on the downstream slopes of the three existing dam embankments. The top of each berm would be 15 feet wide and 10 feet below the crest of the existing embankments, and the downstream slope of each berm would be 3.75:1.

The applicants would replace the existing gated spillway with a new spillway that would have 11 radial gates, each 12 feet high and 30 feet wide. One gate would have a hinged gate flap at its crest to provide for passing floating debris. The crest elevation would remain at 4122.5 feet. The spillway outlet channel, which would be lined with concrete to prevent erosion, would have a capacity of 58,000 cubic feet per second (cfs) at a reservoir elevation of 4,133.5 feet.

The Twin Falls Main Canal has a maximum design hydraulic capacity of 3,200 cfs. The applicants propose to do the following: increase the canal capacity; modify the headworks; build a wasteway; and build a new control structure. The applicants would increase the canal's capacity to 7,000 cfs, raise the right embankment of the canal near Milner Dam to elevation 4,137.5 feet to provide four feet of freeboard and widen the crest to 20 feet. The applicants would modify the existing canal headworks structure to install stoplogs for dewatering the canal and forebay area when needed. The applicants would build a wasteway for sluicing ice from the canal and for removing flows in the canal if there is a power plant load rejection. The concrete wasteway would control flows with one hydraulically operated bascule gate designed to pass the maximum powerhouse flow of 4,000 cfs and would return flows to the Snake River. To control irrigation releases to the canal, the applicants would build a new control structure, approximately 1,600 feet downstream from the wasteway. The concrete structure would have six manually operated radial gates, each 12-foot-wide by 15-foot-high and one hydraulically operated bascule gate, 24-feet-long by 11-feet-high.

**37 The applicants would build a forebay to convey flows from the canal to the project intake and a concrete intake

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structure to convey flows to the penstock. A cable-operated, fixed-wheel gate, 14-foot-wide by 17-foot-high, would permit closing the penstock for emergency shut down or maintenance of the penstock and turbine. The penstock would be a 17-foot-diameter steel pipe, approximately 385 feet long.

The powerhouse would be a semi-outdoor, reinforced-concrete structure, approximately 89-feet-long by 56-feet-wide, housing one generating unit, rated at 43.65 megawatts (MW). The powerhouse would be located near the bottom of the Snake River Canyon. The generator would be connected to a Kaplan turbine, rated at 59,650 horsepower under a net head of 151.6 feet and a discharge of 4,000 cfs. Flows from the powerhouse would be returned to the Snake River through a 170-foot-long tailrace channel. The tailrace would have a 46-foot-wide base with side slopes of 0.25:1.

Project Safety

The hazard potential of a dam is the potential for loss of human life or property damage that would result from failure of the dam.

Starting at Milner Dam, the Snake River flows into the Snake River Gorge, a narrow, practically inaccessible, steep-walled canyon. Development downstream of Milner Dam includes four hydroelectric projects, two golf courses and a sewage treatment plant. The four hydroelectric projects do not have full time operators, and the sewage treatment plant is located 25 miles downstream of the dam. The poor access and ruggedness of the canyon limit recreational use of the Snake River below Milner Dam. Failure of the project, therefore, would result in minimal downstream impacts.

Milner Dam was inspected by the Portland Regional Office on October 13, 1988. The inspector determined that even though it poses only a minimal threat to downstream life and property, failure of Milner Dam would have the potential to cause catastrophic damage to the economy of the area, "the Magic Valley of Idaho." Approximately 500,000 acres of farm land is dependent upon irrigation water diverted at Milner Dam, and the economy of the Magic Valley depends on the agricultural production of the 500,000 acres of farmland.

Because the Regional Office rates Milner Dam as having a significant hazard potential, the dam should be modified to make it safe against failure under earthquake loading and *62329 under one-half probable maximum flood (PMF) loading (58,000 cfs) conditions.

Each of the three dam embankments, discussed earlier, consists of a large, trapezoidal rockfill section with a zone of hydraulic-fill earth material, placed directly against the upstream face, as the water barrier. Each embankment has a vertical wooden core in the center of the rockfill section. The wooden cores were damaged during construction and are assumed to be an ineffective barrier to seepage. Because there is no filter between the rockfill and the upstream earthen barrier, the upstream hydraulic-fill material, when disturbed, can be washed into and through the rockfill (piping leak or piping failure). Engineering studies performed by the consultant for the applicant show that the upstream hydraulic-fill material is comprised of very loose to loose nonplastic sandy silts and silty sands that are susceptible to liquefaction (complete loss of strength) under seismic loading conditions. The slumping of the upstream fill could open a path for water from the reservoir to pass through the earthen barrier and to enter the rockfill in the embankments. Analysis, by the applicants' consultant, of flows through the rockfill sections of the embankments, shows that a large leak could release enough water to destablize the downstream slopes of the rockfill zones. If this happens, progressive raveling of the down stream face could breech an embankment.

**38 According to the applicants' records, since 1905, Milner Dam has experienced 10 piping leaks, the first occurring in 1905 with the initial filling of the reservoir and the last in March 1983. All of the piping leaks were repaired soon after they occurred with little disruption to irrigation service. To reduce the needed time to begin leak repairs, the applicants currently stockpile earthen repair material on both banks of the river.

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To stabilize the slopes if an earthquake causes a piping failure, the applicants' consult ant proposes to construct a rockfill berm on the downstream slope of each embankment. The berms would increase the downstream slope of the embankment from 1.5:1 to 3.75:1; the major portion of the berms would consist of rock averaging 24 inches in size, while the lower portion would be faced with rock averaging 48 inches in size or larger. This repair approach would still require the applicants to maintain stockpiles of material to repair any leaks which could develop in the earthfill section.

Since the license would authorize major modifications of a dam with a significant hazard potential, the staff recommends the inclusion of special license Article 305 requiring the licensees to retain a board of consultants to review the design and construction of the project for safety and adequacy.

Because the water diverted by Milner Dam is critical to the wellbeing of the Magic Valley, the staff recommends the inclusion of special license Article 307, requiring the licensees, in consultation with the board of consultants, to develop a detailed manual of procedures for repairing Milner Dam if there is excessive leak age.

Based on an inspection of the project and on discussions with the applicants, the staff finds the project to be satisfactorily maintained. The staff found minor seepage areas on the north, middle, and south embankments. These areas will continue to be monitored in the future. The staff had trouble inspecting the toe of the dam because it is covered with vegetation. The Director of the Portland Regional Office will direct the licensees, if a license is issued, to remove the vegetation that interferes with the Commission's dam safety inspection programs.

To improve winter operations, the applicants propose to replace the existing spillway. The 99 wooden gates of the spillway now have to be raised individually. The process is slow, because the applicants have only two hoisting mechanisms. The 11 new gates would greatly improve operation and would reduce the time needed to adjust the spillage under flood conditions. The new spillway would be designed to pass an inflow design flood (IDF) of 58,000 cfs; the IDF represents a spillway capacity of one- half of the PMF. An IDF that is less than the full PMF is acceptable because the failure of Milner Dam would not threaten downstream life.

The proposed project would be safe and adequate if constructed and/or rehabilitated according to sound engineering practice, and the requirements of a license.

Primary Transmission Facilities

**39 The primary transmission line segment would include the 1.4-mile-long 138-kilovolt (kV) transmission line connecting the project generator to the interconnected transmission system at the Milner substation 138-kV bus and its support facilities.

Water Resource Planning

As stated earlier, the applicants propose to use the existing Twin Falls main irrigation canal to convey water left over from irrigation requirements to the proposed power facilities, 1.6 miles downstream of the existing Milner Dam. Any flows used for generation in the proposed powerhouse thus would bypass the 1.6 miles of river channel below Milner Dam.

The proposed powerhouse would have the capacity to use flows of from 900 to 4,000 cfs. *62330 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 about mid- June through mid-September.

The staff, on page 5-3 of its Snake River Draft Environmental Impact Statement (DEIS) for the Twin Falls, Milner, Auger Falls, and Star Falls projects, recommended that any license issued for the Milner Project require a minimum by-

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pass flow in the 1.6 mile reach below Milner Dam. The public, irrigators, the applicant, and the Idaho Department of Water Resources (IDWR) apprised the staff that requiring the licensees to maintain minimum flows below Milner Dam would be inconsistent with state requirements. All of the reservoir storage available above Milner Dam is committed and the minimum flow specified by Idaho State Water Plan (Water Plan) for the river immediately below Milner Dam is zero cfs. Because the applicants, the Northside and Twin Falls Canal Companies, are only service companies, which distribute the irrigation water to their shareholders, who hold the water rights, requiring them to maintain a minimum flow below Milner Dam other than zero would require that they release water that Idaho water law has appropriated to others.

After issuing the DEIS, the staff evaluated the feasibility of requiring any licensees of the proposed Snake River projects to rent or lease water on a short-term basis from upstream water rights holders in order to provide flows in the bypass reaches of the projects. Such flows could reduce impacts of the projects and/or improve conditions by providing flows that are greater than those that now exist. The staff uses the term Comprehensive Water Block (CWB) to refer to the volume of water that a licensee would have to rent to supplement the available river flow in order to meet the recommended target flows.

The staff identified the Upper Snake Water Supply Bank (Water Bank) as a possible source for acquiring flows for environmental mitigation and enhancement purposes. The state 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.

**40 In a letter filed with the Commission on September 30, 1988, IDWR commented on the staff's proposal, stating: "Not withstanding the applicant's increased costs in obtaining the water, it appears that structured reliance on the Water Bank through the Comprehensive Water Block mechanism can be successful in meeting prescribed mitigative flows on the mainstem of the Snake River."

The staff discussed the operation of the Water Bank with Alan Robertson, Supervisor, Hydrology Section, IDWR. It is the staff's understanding from those discussions that water has been available for lease from the Water Bank in all years since its creation and that, because of increased irrigation efficiencies, future water availability likely will increase. Idaho Power Company (IPC) has leased water for power generation from the Water Bank in every year since its creation. It is highly probable that in the future, water will be available in the Water Bank in excess of irrigation demand, except in very bad water years.

It is the staff's opinion that the short-term leasing or rental of water that is in excess of the irrigation demand each year for purposes such as environmental mitigation and enhancement, would be in the public interest, would not commit water storage to a non-agricultural use, and therefore would not violate the intent for which the Water Bank was created or the purposes for which the upstream storage projects were authorized.

The staff evaluated numerous scenarios for requiring in any license issued that mitigation and enhancement flows should be provided in the bypass reach below Milner Dam. In addition, the staff, recognizing that it might be economically beneficial to develop the hydro power potential of the target flows that may be recommended to be released at Milner Dam, performed reconnaissance-level economic analyses of the benefits of developing a powerhouse at Milner Dam, in addition to the powerhouse proposed by the applicants to be located 1.6 miles downstream. The preliminary studies showed that depending on the magnitude of target flows specified in a license for the Milner Project, it may be economically beneficial to construct a power plant at the dam. The staff, therefore, recommends the inclusion of special license Article 308, requiring the licensees to study the feasibility of constructing such a power plant, and if it is found to be feasible and economically beneficial, to submit a plan for constructing the power plant. The staff's economic analyses are discussed in

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the Economic Evaluation section of this assessment.

Section 10(a)(2)(A) of the Federal Power Act (FPA) requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans for *62331 improving, developing, or conserving a water way or waterways affected by the project.

The staff reviewed the Northwest Power Planning Council's Northwest Conservation and Electric Power Plan (Power Plan) to deter mine if the project is consistent with the Power Plan. The Council's Power Plan envisions meeting the growing regional energy requirements in the most economical manner with environmentally acceptable resources. The Power Plan considers any environmentally acceptable resource that is less expensive than coal-fueled steam electric generation as an acceptable resource for development before the development of coal-fueled power plants (the Council's planned marginal resource).

**41 The staff developed life-cycle costs of energy from the Council's planned generic coal plant, assumed to be needed in the year 2002, for determining if proposed hydroelectric projects are, consistent in the long term with the Power Plan, as required under Section 10(a)(2)(A) of the FPA. The staff assumed that new coal plant generating resources would be required within the region by the year 2002, based on the need for additional generating resources projected for the investor-owned utilities in the Pacific Northwest Region, as discussed in the Need for Power section of this assessment.

The staff found that the life-cycle levelized cost of the proposed project is less, as of its projected on-line date, than the levelized life-cycle cost of the least cost or marginal long term alternative, included in the Power Plan. Therefore, the project as proposed is not inconsistent with the Council's Power Plan, and is economically beneficial within the long-term objectives of the Power Plan.

The staff reviewed the Water Plan and found that the proposed project, both including and excluding the staff's target flow recommendations, would be consistent with the Water Plan, which requires a minimum flow below Milner dam of zero cfs. The staff's recommendation for including target flow conditions in any license issued is consistent with the Water Plan. The staff is not recommending that minimum flows be provided below Milner dam, but rather that the licensees should provide any additional water needed to meet the 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 staff reviewed the Idaho Fisheries Management Plan, the Idaho Outdoor Recreation Plan, the Idaho Water Quality Standards, and the Department of the Interior's Monument Proposed Resource Management Plan and found that the plans do not affect the proposed project's development or operation with respect to irrigation, flood control, or navigation.

A review of the Commission's Planning Status Report for the Upper Snake River Basin and the Hydroelectric Site Data Base show that there are no proposed or existing projects that would conflict with the proposed project.

Economic Evaluation

A proposed project is economically beneficial so long as its levelized cost is less than the long- term levelized cost of alternative energy to any utility in the region that can be served by the project.

The staff calculates the 50-year projected levelized alternative energy cost in the region in 1992 to be about 85 mills per kilowatt-hour (kWh). This is the levelized unit cost of energy from coal-fueled steam electric plants assumed to be needed in the year 2002, and the value of displaced fuel consumption in existing coal- fueled steam plants until that time. The staff assumed that new coal plant generating resources would be required within the region by the year 2002, based upon the projected need for additional generating resources, by the investor-owned utilities in the Pacific North west Region, as discussed in the Need for Power section of this assessment.

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**42 The applicants entered into a contract with IPC for the development of power facilities at the Milner site. Under the terms of the con tract, IPC would receive the total project power production and would pay the total project costs plus two mills/kWh (escalating 25 percent every 5 years) for all energy produced. The applicants would use the escalating energy payment, which is equivalent to 3.13 mills/kWh when levelized over 50 years, to help offset the costs of repairing the dam, as described in the Dam Safety section of this assessment.

The staff evaluated the economics of the 44-MW project the applicant proposes to construct under various target flow conditions, assumed to be required in the bypass reach of the river between Milner Dam and the pro posed powerhouse, to be located 1.6 miles downstream, as shown in Table 1.

Table 1. Summary of the generation, levelized net annual benefits, rate of return on investment (ROI), and levelized annual revenue to the licensee for the project, as proposed to be constructed by the licensee and to be operated under various mitigation/enhancement bypass-flow scenarios.

Table 1. Summary of the generation, levelized net annual benefits, rate of return on investment (ROI), and levelized annual revenue to the licensee for the project, as proposed to be constructed by the licensee and to be operated under various mitigation/enhancement bypass-flow scenarios.

Bypass flows	Average generation (GWh)	Levelized annual benefits	ROI	Levelized annual revenues
58 cfs year round	154	$4,233,000	18.6%	$482,400
58 cfs summer, 150 cfs winter	151	$3,995,000	18.2%	$473,400
200 cfs year round	147	$3,665,000	17.6%	$460,100
300 cfs year round	143	$3,305,000	17.0%	$447,400
300 cfs summer, 720 cfs winter	134	$2,522,000	15.6%	$419,400

*62332 The staff performed reconnaissance level feasibility studies evaluating the economic benefits of installing small units at the base of Milner Dam to utilize the flows that would be released at the dam. The potential power facilities to be located at Milner Dam were sized as shown in Table 2.

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Table 2. Milner Dam hydraulic capacity for various environmental mitigation/enhancement bypass flows.

Bypass flow	Unit hydraulic capacity
58 cfs year round.	50-150 cfs unit
58 cfs summer, 150 cfs winter.	50-150 cfs unit
200 cfs year round.	200-600 cfs unit
300 cfs year round.	300-900 cfs unit
300 cfs summer, 720 cfs winter.	300-900 cfs unit

The staff evaluated the economic benefits of developing capacity at Milner Dam to utilize the bypass flows as shown in Table 3.

Table 3. Summary of the generation, levelized net annual benefits, ROI, and levelized annual revenue to the licensee for generating capacity installed at Milner Dam, for various mitigation/ enhancement bypass flows.

Bypass flows	Average generation (GWh)	Capacity	Levelized annual benefits	ROI	Levelized annual revenues
58 cfs.	3.8	1 MW	($ 46,200)	9.5%	$11,700
58-150 cfs.	4.4	1 MW	$ 5,000	11.2%	$13,700
200 cfs.	11.3	3 MW	$304,000	16.4%	$35,400
300 cfs.	13.5	4 MW	$304,000	15.2%	$42,200
300-720 cfs.	16.2	4 MW	$525,500	18.2%	$50,700

Since the reconnaissance-level feasibility studies show that the addition of capacity at Milner Dam may be economically beneficial compared to the alternative cost of energy in the region, any license issued should include Article 308, requiring that the licensees study the feasibility of installing generating capacity at the dam, and, if the installation is feasible, requiring the licensees to submit a plan for developing the capacity.

The staff evaluated the economic benefits of developing the combination of the proposed project powerhouse, and a power plant at the dam as shown in Table 4.

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Table 4. Summary of levelized annual benefits of combined development of a powerhouse at Milner Dam as well as the power plant proposed to be developed downstream, for various mitigation/enhancement by pass flows.

Bypass flows	Combined capacity	Gen. (GWh)	Levelized annual benefits	Levelized annual revenues
58 cfs	44 MW[1]	154	$4,233,000	$482,400
58-150 cfs	45 MW	155	$4,238,000	$487,400
200 cfs	47 MW	158	$3,969,000	$494,500
300 cfs	48 MW	156	$3,609,000	$497,700
300-720 cfs	48 MW	150	$3,048,000	$469,500

FN1. This scenario is the same as the proposed scenario with a downstream powerhouse only, since installing a unit at the dam would not be economically beneficial under this bypass flow.
*62333 The staff evaluated the amounts and levelized costs of water that the applicants would need to lease from the Water Bank to meet the recommended mitigation/enhancement bypass flows as shown in Table 5.

The current cost of water from the Water Bank is $2.50 per acre-foot per year. In its studies, the staff used a cost of $4.32 per acre-foot, which is the levelized cost of water over 50 years, assuming that the cost of water would escalate at 5 percent annually.

Table 5. Amounts and levelized costs of the CWB needed to be leased from the Water BAnk to meet various mitigation/enhancement bypass flows.

Bypass flows	Storage (acre-feet) required	Levelized average annual cost
58 cfs	3,586	$15,500
58-150 cfs	3,586	$15,500
200 cfs	11,246	$48,600
300 cfs	22,729	$98,200

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300-720 cfs	22,729	$98,200

The staff evaluated the net annual benefits of the project including the projected cost of the CWB water for various mitigation/ enhancement bypass flows, as shown in Table 6.

Table 6. Summary of the levelized net annual benefits of the project, and combined project (including a power plant at the dam) for various mitigation/ enhancement bypass flow requirements including the levelized annual cost of the CWB.

Bypass flows	Proposed project lev. annual benefits	Combined project lev. annual benefits
58 cfs year round	$4,217,500	$4,217,500
58 cfs summer, 150 cfs winter	$3,979,500	$4,222,500
200 cfs year round	$3,616,400	$3,920,400
300 cfs year round	$3,206,800	$3,510,800
300 cfs summer, 720 cfs winter	$2,423,800	$2,949,800

In order to preserve the high-flow-condition kayaking opportunities that occur in the April- May period in the bypass reach of the river below Milner Dam, the environmental staff recommends requiring the main powerhouse to be shutdown during daylight hours in the April-May period, for the equivalent of eight full-load hours of operation (4000 cfs) for eight days, in accordance with proposed license Article 413. A shutdown of the main power plant during the spring would reduce the project generation by 42,000 kWh for each hour of shut down. The total reduction in project generation for the equivalent of 64 hours of full-load shut down is 2,688,000 kWh. At the regional levelized energy value of 85 mills/kWh, the shutdown would reduce the project benefits by approximately $228,000 annually. The shut down would reduce the project generation and therefore the revenues that the licensees would receive under the power purchase contract with IPC. The levelized value of the lost revenues to the licensees over the license period would be approximately $8,400 annually.

**43 The net annual benefits of the project including the projected cost of the spring bypass flow for kayaking under and for the other various mitigation/enhancement bypass flows, and the revenues to be received by the licensees are shown in Table 7.

Table 7. Summary of the licensees' levelized annual revenues, and the levelized net annual benefits of

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the project as proposed, and the combined project (including a power plant at the dam) for various water quality and fishery mitigation/ enhancement bypass flow requirements, including the levelized annual cost of the CWB, and the cost of plant shutdown for kayaking mitigation.

Bypass flows	Proposed project lev. annual benefits	Proposed project licensee revenues	Combined project lev. annual benefits	Combined project licensee revenues
58 cfs year round.	$3,989,500	$474,000	$3,989,500	$474,000
58 summer,.				
150 cfs winter.	$3,751,500	$465,000	$3,994,500	$479,000
200 cfs year round.	$3,388,400	$451,700	$3,692,400	$486,100
300 cfs year round.	$2,978,800	$439,000	$3,282,800	$489,300
300 cfs summer,.				
720 cfs winter.	$2,195,800	$411,000	$2,721,800	$463,100

*62334 The benefits and revenues for the combined project development scenario, as shown in on Table 7., is the same as for the proposed project, with a downstream powerhouse only, because installing a unit at the dam would not be economically beneficial under a 58-cfs bypass flow.

The levelized net annual benefits and revenues of the project to the licensees and IPC under the purchase power contract between the two with the mitigation/enhancement provisions discussed herein are summarized in Table 8 (without the generating unit at the dam) and Table 9 (with the generating unit at the dam).

Table 8. Summary of levelized net annual benefits and revenues to the licensees and IPC with mitigation/enhancement provisions

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without a generating unit at the dam.			
Total Project Benefits or Revenues as proposed . 58 cfs Summer, .150 cfs Winter	Project $3,979,500	To Licensees $473,400	To IPC $3,506,100
Loss of Benefits or Revenues for Proposals			
.200 cfs Bypass Flow	330,000#13,300	316,700	
.Water Bank Purchase	33,100	0	33,100
.8-day Kayaking Flows	228,000	8,400	219,600
.Total Mitigation Costs	591,100	21,700	569,400
.Total Project Benefits .or Revenues as Mitigated	$3,388,400	$451,700	$2,936,700

Table 9. Summary of levelized net annual benefits and revenues to the licensees and IPC with mitigation/enhancement provisions without a generating unit at the dam.

Total Project Benefits or Revenues as proposed . 58 cfs SUmmer, .150 cfs Winter	Project $3,979,500	To Licensees $473,400	To IPC $3,506,100
Loss or Benefits or Revenues for Proposals			
.200 cfs Bypass Flow	26,000	(21,100)	47,100
.Water Bank Purchase	33,100	0	33,100
.8-day Kayaking Flows	228,000	8,400	219,600
.Total Mitigation Costs	287,100	(12,700)	299,900
.Total Project Benefits .or Revenues as Mitigated	$3,692,400	$486,100	$3,206,300

Because the economic studies for the pro posed project, for all cases evaluated, show that the project power costs less than the levelized alternative regional cost of power, the project is economically beneficial. Because the applicants have

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entered into a contract to sell all of the project power to IPC, the proposed project is financially feasible.

The applicants stated that the primary purpose of proposing this project is to provide revenues to aid in paying for the dam rehabilitation, previously discussed in the Project *62335 Safety section of this assessment. In 1984, the cost of rehabilitating Milner Dam was projected to be approximately $7 million. The staff estimates the minimum long-term annual carrying charges of financing the work to be approximately $700,000. The annual revenues that the applicant would receive from IPC under the power purchase contract are projected to range from about $411,000 to about $489,000 for the various bypass-flow scenarios evaluated, so that the applicants would be required to provide from about $200,000 up to about $300,000 of the annual debt service from irrigation revenues.

Need for Power

The Northwest Power Planning Council's (NPPC) August 1988 draft update of its 1986 Northwest Power Plan (Update) shows regional resource deficits in the NPPC area in about 1992 and 2000 with medium-high and medium-low load growth scenarios, respectively. A medium load growth scenario, developed cooperatively with the Bonneville Power Administration (BPA) and included in the Update but not in the Update resource portfolios, could produce deficits about 1996. All three of these forecasts are considered to be equally probable in the probability distribution of load uncertainty assumed for development of the Update power plan. The high load projection could produce deficits by 1991, and under the low load scenario deficits would not occur before 2010. The probability distribution assumes a 76 percent probability that load will equal or exceed the medium-low load growth scenario.

The 1988 projections of the Pacific North west Utilities Conference Committee (PNUCC) project that regional resource deficits would occur in about 1994-1995 under medium load growth assumptions.

**44 NPPC, BPA, and PNUCC all acknowledge that resource deficits could occur on the investor-owned utility (IOU) systems in the NPPC area before occurring in the NPPC area as a whole. The PNUCC shows IOU deficits occurring as early as 1992-1993 under medium load growth assumptions and currently planned power purchases from BPA. The NPPC Update states that there has been little evidence to date that the NPPC area is moving toward coordinated resource development (the primary theme upon which the plan is formulated). Public utilities in the area are said to perceive the BPA future as being uncertain and to seek a higher degree of independence from BPA. This same perception of an uncertain future has discouraged IOU's from placing any significant amounts of load on the BPA system. Many of NPPC's area high load growth areas are served by IOU's that have fewer resources to meet their power requirements than the publicly owned systems. The absence of area wide coordinated planning could cause resource deficits on the IOU systems as early as 1989 and a need for additional generating resources on the IOU systems as early as 1993, under a medium-high load scenario.

Based on these predictions, a need for power could exist in the NPPC area any time from the early 1990's to late 1990's, and hydro resources coming on-line in the early 1990's could be useful in meeting a small part of that need for power. NPPC has also identified 630 average MW of new hydro power potential that adheres to development constraints imposed by the federal stream protection program and the NPPC protected areas program. The proposed project could provide a small portion of this hydro requirement.

Alternatives to the Proposed Project

Because the applicants are not electric utilities, the available options are to construct or not construct the project. If the license is not issued, the project would not be constructed, and the power that would have been developed from a renewable resource would be lost and eventually would have to be provided using nonrenewable fuels.

If the license is not issued, the applicants will not receive power generation revenues, and would therefore have to

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provide the total costs for the Milner Dam rehabilitation from irrigation revenues.

Exhibits

The following sections of Exhibit A and Exhibit F drawings, filed July 27, 1988, con form to the Commission's rules and regulations and should be approved and made a part of the license:

Exhibit A - Section III Turbine and Generator, Section IV Electrical Transmission, and Section V Accessory Equipment.

Exhibit F

Exhibit	FERC No.	Title
F-1	2899-1	Key and General Plans and Canal Sections
F-2	2899-2	Canal and Forebay Embankment Sections
F-3	2899-3	Headworks and Wasteway Plans, Sections & Details
F-4	2899-4	Control Structure Plan and Sections
F-5	2899-5	Intake Structure Plan and Section
F-6	2899-6	Powerhouse and Vicinity Plan, Profile and Sections
F-7	2899-7	Powerhouse Plans
F-8	2899-8	Powerhouse Sections
F-10	2899-10	Milner Dam Rehabilitation Plan
F-11	2899-11	New Spillway Plan and Section
F-12	2899-12	Dam Embankment Sections

FN1. All elevations are relative to mean sea level.

*62336 Elizabeth A. Moler, Commissioner, *concurring*:

I support the Commission's expedited action issuing the license in this proceeding. I do so principally because of the need to act quickly so that the applicants will be able to obtain the funds necessary to strengthen the dam.

I am aware that there are important water law issues embodied in this case. The order is consistent with the Commission's prior actions interpreting its statutory responsibilities under Section 10(a)(1) of the FPA;[FN1] however, it represents the first time I have participated in a case involving this particular matter of statutory interpretation. Ordinarily I would have asked to delay this case until I had a lengthier opportunity to review the legal issues presented. In this case, however, the public safety issue argues against a delay.

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**45 I would note that the United States Court of Appeals for the Ninth Circuit is currently considering a case involving the Commission's interpretation of Section 10(a)(1).[FN2]

I await the results of that litigation with interest. I do not want my participation in this case to indicate that I have come to any definitive legal conclusion on the matter.

FN1. See, e.g., *Horseshoe Bend Hydroelectric Company*, *42 FERC ¶61, 072.*

FN2. *ate of Calif. ex. rel. Water Resources Control Board v. FERC* (9th Cir. No. 87-7538).

Federal Energy Regulatory Commission

45 FERC P 61423, 1988 WL 246992 (F.E.R.C.)
END OF DOCUMENT

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Attachment P

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

Attachment Q

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

Attachment R

File for 01-7011 Dave

LAW OFFICES OF

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*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

Dave

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

Attachment S

Permit 01-7011 File

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APR 16
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

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IDAPA 37
TITLE 03
CHAPTER 08

37.03.08 - WATER APPROPRIATION RULES

000. LEGAL AUTHORITY (RULE 0).

The Director of the Department of Water Resources adopts these rules under the authority provided by Section 42-1805(8), Idaho Code. (7-1-93)

001. TITLE AND SCOPE (RULE 1).

01. Title. (7-1-93)

02. Scope. (7-1-93)

a. Background and Purpose. The 1985 Idaho Legislature authorized reallocation of certain hydropower water rights to new upstream beneficial uses. The reallocation is to be accomplished using statutes designed to provide for the appropriation of unappropriated public water supplemented by a public interest review of those reallocations which significantly reduce existing hydropower generation. These rules provide the procedures for obtaining the right to divert and use unappropriated public water as well as water previously appropriated for hydropower use which has been placed in trust with the State of Idaho and is subject to reallocation. Guidelines are provided for the filing and processing of applications, and criteria are established for determining the actions to be taken by the Director. (7-1-93)

b. Scope and Applicability. These rules are applicable to appropriations from all sources of unappropriated public water in the state of Idaho under the authority of Chapter 2, Title 42, Idaho Code. Sources of public water include rivers, streams, springs, lakes and groundwater. The rules are also applicable to the reallocation of hydropower water rights held in trust by the state of Idaho. The rules are applicable to all applications to appropriate water filed with the Department of Water Resources prior to the effective date of these rules upon which an action to approve or deny the application is pending and to all applications filed subsequent to adoption of the rules and regulations. In addition, the rules are applicable to existing permits to appropriate water required to be reviewed under the provisions of Section 42-203D, Idaho Code. (7-1-93)

002. WRITTEN INTERPRETATIONS (RULE 2).

003. ADMINISTRATIVE APPEALS (RULE 3).

004. – 009. (RESERVED).

010. DEFINITIONS (RULE 10).

Unless the context otherwise requires, the following definitions govern these rules:

01. Acre-Foot (AF). A volume of water sufficient to cover one (1) acre of land one (1) foot deep and is equal to forty-three thousand five hundred sixty (43,560) cubic feet. (7-1-93)

02. Advertisement. The action taken by the Director to provide notice, usually by publication of a legal notice in one (1) or more newspapers, of a proposed appropriation or other notice required in administration of his duties and responsibilities. (7-1-93)

03. Applicant. The person, corporation, association, firm, governmental agency or other entity, or the holder of a permit being reprocessed pursuant to Section 42-203D, Idaho Code, who initiates an appropriation of water or related water matter for the Director's consideration. (7-1-93)

04. Application for Permit. The written request to the department on forms furnished by the department proposing to appropriate the public waters or trust waters of the state. (7-1-93)

05. Board. The Idaho Water Resource Board. (7-1-93)

06. Beneficial Use. One (1) or more of the recognized beneficial uses of water including but not limited to, domestic, municipal, irrigation, hydropower generation, industrial, commercial, recreation, stockwatering and fish propagation uses for which permits to appropriate water can be issued as well as other uses which provide a benefit to the user of the water as determined by the Director. Industrial use as used for purposes of these rules includes, but is not limited to, manufacturing, mining and processing uses of water. (7-1-93)

07. Cubic Foot Per Second (CFS). A rate of flow approximately equal to four hundred forty-eight and eight-tenths (448.8) gallons per minute and also equals fifty (50) Idaho miner's inches. (7-1-93)

08. DCMI. An acronym for domestic, commercial, municipal and industrial. In these rules it designates certain classes of these uses presumed to satisfy public interest requirements. Domestic use, for purposes of this definition, is water for one or more households and water used for all other purposes including irrigation of a residential lot in connection with each of the households where the diversion to each household does not exceed thirteen thousand (13,000) gallons per day. Also for purposes of this definition, commercial, municipal and industrial uses are any such uses which do not deplete the system containing the trust water more than two (2) acre feet per day. (7-1-93)

09. Department. The Idaho Department of Water Resources. (7-1-93)

10. Director. The Director of the Idaho Department of Water Resources. (7-1-93)

11. Legal Subdivision. A tract of land described by the government land survey and usually is described by government lot or quarter-quarter, section, township and range. A lot and block of a subdivision plat recorded with the county recorder may be used in addition to the quarter-quarter, section, township and range description. (7-1-93)

12. Permit or Water Right Permit. The water right document issued by the Director authorizing the diversion and use of unappropriated public water of the state or water held in trust by the state. (7-1-93)

13. Priority, or Priority of Appropriation, or Priority Date. The date of appropriation established in the development of a water right. The priority of a water right for public water or trust water is used to determine the order of water delivery from a source during times of shortage. The earlier or prior date being the better right. (7-1-93)

14. Project Works. A general term which includes diversion works, conveyance works, and any devices which may be used to apply the water to the intended use. Improvements which have been made as a result of application of water, such as land preparation for cultivation, are not a part of the project works. (7-1-93)

15. Single Family Domestic Purposes. Water for household use or livestock and water used for all other purposes including irrigation of up to one half (1/2) acre of land in connection with said household where total use is not in excess of thirteen thousand (13,000) gallons per day. (7-1-93)

16. Subordinated Water Right. A water right used for hydropower generation purposes that is subject to depletion without compensation by upstream water rights which are initiated later in time and which are for a purpose other than hydropower generation purposes. (7-1-93)

17. Trust Water. That portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided by Section 42-203B(3), Idaho Code. (7-1-93)

18. Unappropriated Water. The public water of the state of Idaho in streams, rivers, lakes, springs or groundwater in excess of that necessary to satisfy prior rights including prior rights reserved by federal law. (7-1-93)

011. -- 024. (RESERVED).

025. GENERAL DESCRIPTION OF THE PROCEDURE TO BE USED FOR ALLOCATION (RULE 25).

01. Applications to Appropriate Unappropriated Water and Water Held in Trust. Applications to appropriate unappropriated water and water held in trust as provided by Section 42-203B(3), Idaho Code, will be evaluated using the criteria of Section 42-203A, Idaho Code, which requires an assessment to be made of the impact of the proposed use on water availability for existing water rights, the adequacy of the water supply for the proposed use, whether the application is filed for speculative purposes, the financial ability of the applicant to complete the project, and the effect of the proposed use on the local public interest. (7-1-93)

02. Applications to Appropriate Water from Sources Held by State in Trust. Applications to appropriate water from sources on which the state holds water in trust, pursuant to Section 203B(5), Idaho Code, will be processed in a three-step analysis. Evaluation will consider the purposes of "trust water" established in Section 42-203B, Idaho Code. (7-1-93)

a. First, the proposed use must be evaluated using the procedures and criteria of Section 42-203A, Idaho Code. If all criteria of Section 42-203A(5), Idaho Code, are satisfied, the application may be approved for unappropriated water. If the application does not satisfy the criteria of Section 42-203A(5) b, c, d, and e, Idaho Code, or is found to reduce the water to existing water rights other than those held in trust by the state, the application will be denied. If the application satisfies all criteria of Section 42-203A(5), Idaho Code, except Section 42-203A(5)a, Idaho Code, but is found to reduce water held in trust by the state, the application will be reviewed under criteria of Section 42-203C, Idaho Code. (7-1-93)

b. Second, Section 42-203C, Idaho Code, requires a determination of whether the proposed use will significantly reduce, individually or cumulatively with existing uses and other uses reasonably likely to exist within twelve months of the proposed use, the amount of trust water available to the holder of the water right used for power production that is defined by agreement pursuant to subsection (5) of Section 42-203B, Idaho Code (hereinafter termed "significant reduction"). If a significant reduction will not occur, the application may be approved without an evaluation of the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

c. Third, based upon a finding of significant reduction, the proposed use will be evaluated in terms of the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

026. – 029. (RESERVED).

030. LOCATION AND NATURE OF TRUST WATER (RULE 30).

01. Snake River Water Rights Agreement. The legislation ratifying the Snake River water rights agreement between the state of Idaho and Idaho Power Company places in trust a part of the flows available to Idaho Power Company under its hydropower water rights in the Snake River Basin between Swan Falls Dam and Milner Dam. The flows subject to the trust water provisions and reallocation under Section 42-203C(2), Idaho Code, are as follows: (7-1-93)

a. Trust water flows under the Snake River water rights agreement are located in the Snake River between Swan Falls Dam located in Section 18, Township 2 South, Range 1 East, Boise Meridian (B.M.) and Milner Dam located in Sections 28 and 29, Township 10 South, Range 21 East, Boise Meridian (B.M.) and all surface and groundwater sources tributary to the Snake River in that reach. (7-1-93)

b. Surface water and groundwater tributary to the Snake River upstream from Milner Dam is not trust water. After giving notice and considering public comment, the Director will designate the area in which groundwater is presumed to be tributary to the Snake River upstream from Milner Dam. Modification or changes in the designated boundary may be made only after providing notice and considering public comment. The area presently designated as tributary to the Snake River in the Milner Dam to Swan Falls Dam reach is appended to these rules (See Attachment A in APPENDIX A located at the end of this chapter), for information purposes only. (7-1-93)

c. Trust water flows under the Snake River water rights agreement are those occurring in the Snake River and tributaries in the geographic area designated in Rule Subsection 030.01.a. which exceed the established minimum stream flows but are less than the water rights for hydropower generating facilities in the Swan Falls Dam to Milner Dam reach of Snake River, to the extent such rights were unsubordinated prior to the Snake River water

rights agreement. Minimum average daily flows have been established by action of the Water Resource Board and legislature at the U.S. Geological Survey gauging station located near Murphy (Section 35, Township 1 South, Range 1 West B.M.) in the amount of three thousand nine hundred (3900) cfs from April 1 to October 31 and five thousand six hundred (5600) cfs from November 1 to March 31, and at Milner gauging station located in Section 29, Township 10 South, Range 21 East, B.M. in the amount of zero (0) cfs from January 1 to December 31. (7-1-93)

02. Trust Water Created by State Action. Section 42-203B(3), Idaho Code, provides that trust water can be created by state action establishing a minimum flow without an agreement with the holder of the hydropower water right. Allocation of trust water so established will be pursuant to state law except the criteria of Section 42-203C, Idaho Code, will not be considered. (7-1-93)

03. Sources of Public Water Not Trust Water. The following sources of public water are not trust water and are not subject to the public interest provisions of Section 42-203C, Idaho Code: (7-1-93)

a. Sources or tributaries to sources upon which no hydropower generating facilities are located downstream within the state of Idaho (Example - Salmon River). (7-1-93)

b. Sources or tributaries to sources which have a state hydropower water right permit or license or Federal Energy Regulatory Commission license which have not been subordinated, and the state of Idaho has not entered into an agreement with the holder of the hydropower water right pursuant to Section 42-203B(2), Idaho Code, and the State of Idaho has not established a minimum stream flow for purposes of protecting hydropower generation. (7-1-93)

c. Sources or tributaries to sources for which a state hydropower water right permit or license, or the Federal Energy Regulatory Commission license included a subordination condition. Such flows are considered to be public waters subject to appropriation under the provisions of Section 42-203A, Idaho Code (Example - Snake River downstream from Murphy gauging station). (7-1-93)

d. Flows in excess of established rights including rights used for hydropower purposes. Such flows are unappropriated waters subject to allocation under Section 42-203A, Idaho Code. (7-1-93)

e. Flows in the Snake River upstream from Milner Dam and all surface and groundwater tributaries to that reach. Such flows are subject to allocation under Section 42-203A, Idaho Code, without consideration of water rights existing downstream from Milner Dam (Reference: 42-203B(2), Idaho Code). (7-1-93)

031. – 034. (RESERVED).

035. APPLICATION REQUIREMENTS (RULE 35).

01. General Provisions. (7-1-93)

a. No person shall commence the construction of any project works or commence the diversion of the public water or trust water of the state of Idaho from any source or change the point of diversion, place, period or nature of use of any existing water right without first having filed an application for permit to appropriate the water or other appropriate form with the department and received approval from the Director, unless exempted by these rules or by statute. (7-1-93)

b. Any person proposing to commence a diversion of the public water or the trust water of the state of Idaho from a groundwater source for single family domestic purposes is exempt from the application and permit requirements of Rule Subsection 035.01.a. Any person proposing to add a single family domestic use to an existing groundwater diversion including one used for single family domestic purposes is exempt from the provisions of Rule Subsection 035.01.a. (7-1-93)

c. Any person watering livestock directly from a natural stream or natural lake without the use of a constructed diversion works is exempt from Rule Subsection 035.01.a. (7-1-93)

d. All applications for permit to appropriate public water or trust water of the state of Idaho shall be

on the form provided by the department entitled "Application for Permit to Appropriate the Public Waters of the State of Idaho" and shall include all necessary information as described in Rule Subsection 035.03. An application for permit that is not complete as described in Rule Subsection 035.03 will not be accepted for filing and will be returned along with any fees submitted to the person submitting the application. No priority will be established by an incomplete application. Applications meeting the requirements of Rule Subsection 035.03. will be accepted for filing and will be endorsed by the department as to the time and date received. The acceptability of applications requiring clarification or corrections shall be determined by the Director. (7-1-93)

e. The department will correspond with the applicant concerning applications which have been accepted for filing by the department which require clarification or correction of the information required by Rule Subsection 035.03. If the additional or corrected information is supplied after thirty (30) days, the priority date of the application will be determined by the date the additional or corrected information is received by the department unless the applicant has requested within the thirty (30) day period additional time to provide the information, has shown good reasons for needing additional time, and the Director has granted additional time. (7-1-93)

f. Failure to submit the additional or corrected information is cause for the Director to void the department's records of the application. (7-1-93)

02. Effect of an Application. (7-1-93)

a. Any application, whether filed before or after promulgation of these rules, which seeks to appropriate water from a source upon which the state holds trust water shall be considered an application for appropriation of unappropriated water. If the Director determines unappropriated water is not available, the application, if otherwise approvable, will be reviewed for compliance with provisions of Section 42-203C, Idaho Code. (7-1-93)

b. The priority of an application for unappropriated or trust water is established as of the time and date the application is received in complete form along with the statutory fee in any official office of the department. The priority of the application, remains fixed unless changed by action of the Director in accordance with applicable law. (7-1-93)

c. An application for permit to appropriate water is not a water right and does not authorize diversion or use of water until approved by the Director in accordance with statutes in effect at the time the application is approved. (7-1-93)

d. An applicant's interest in an application for permit to appropriate water is personal property. An assignment of interest in an application must include evidence satisfactory to the Director that the application was not filed for speculative purposes. (7-1-93)

03. Requirements for Applications to Be Acceptable for Filing. (7-1-93)

a. The department form entitled "Application for Permit to Appropriate the Public Waters of the State of Idaho" (hereafter termed "application for permit form") is the required form to apply for either unappropriated water or trust water. (7-1-93)

b. The following information shall be shown on an application for permit form and submitted together with the statutory fee to an office of the department before the application for permit may be accepted for filing by the department. (7-1-93)

i. The name and post office address of the applicant shall be listed. If the application is in the name of a corporation, the names and addresses of its directors and officers shall be provided. If the application is filed by or on behalf of a partnership or joint venture, the application shall provide the names and addresses of all partners and shall designate the managing partner, if any. (7-1-93)

ii. The name of the water source sought to be appropriated shall be listed. For surface water sources, the source of water shall be identified by the official geographic name listed on the U.S. Geological Survey Quadrangle map, or if no official name has been given, by the name in local common usage. If the source has not

been named, it can be described as "unnamed," but the system or river to which it is tributary shall be identified. For groundwater sources, the source shall be listed as "groundwater." Only one source shall be listed on an application unless the application is for a single system which will have more than one source. (7-1-93)

iii. The legal description of the point of diversion and place of use shall be listed. The location of the point(s) of diversion and the place of use shall be described to the nearest forty (40) acre subdivision or U.S. Government Lot of the Public Land Survey System. The location of springs shall be described to the nearest ten (10) acre tract. Subdivision names, lot and block numbers and any name in local common usage for the point of diversion, or place of use shall be included in the comments section of the application form. If irrigation is listed as a purpose of use, the number of acres in each forty (40) acre subdivision of the place of use shall be listed. (7-1-93)

iv. The quantity of water to be diverted shall be listed as a rate of flow in cubic feet per second and/or as a volume to be stored in acre-feet per year for each purpose of use requested. (7-1-93)

v. Impoundment (storage) applications shall show the maximum acre-feet requirement per year which shall not exceed the storage capacity of the impoundment structure unless the application describes a plan of operation for filling the reservoir more than once per year. (7-1-93)

vi. Every offstream storage impoundment application shall show a maximum rate of diversion to storage as well as the total storage volume. (7-1-93)

vii. The nature of the proposed beneficial use or uses of the water shall be listed. While the purpose may be described in general terms such as irrigation, industrial or municipal, a description sufficient to identify the proposed use or uses of the water shall also be included. (7-1-93)

viii. The period of each year during which water will be diverted, stored and beneficially used shall be listed. The period of use for irrigation purposes shall coincide with the annual periods of use shown in Figure 1 in APPENDIX B (located at the end of this chapter), unless it can be shown to the satisfaction of the Director that a different period of use is necessary. (7-1-93)

ix. The proposed method of diversion, conveyance system and system for distributing and using the water shall be described. (7-1-93)

x. The period of time required for completion of the project works and application of water to the proposed use shall be listed. This period of time shall not exceed the time required to diligently and uninterruptedly apply the water to beneficial use and shall not exceed five (5) years. (7-1-93)

xi. A map or plat of sufficient scale (not less than two (2) inches equal to one (1) mile) to show the project proposed shall be included. The map or plat shall agree with the legal descriptions and other information shown on the application. (7-1-93)

xii. The application form shall be signed by the applicant listed on the application or evidence must be submitted to show that the signator has authority to sign the application. An application in more than one (1) name shall be signed by each applicant unless the names are joined by "or" or "and/or." (7-1-93)

xiii. Applications by corporations, companies or municipalities or other organizations shall be signed by an officer of the corporation or company or an elected official of the municipality or an individual authorized by the organization to sign the application. The signator's title shall be shown with the signature. (7-1-93)

xiv. Applications may be signed by a person having a current "power of attorney" authorized by the applicant. A copy of the "power of attorney" shall be included with the application. (7-1-93)

xv. An application signed by a mark or "X" must have the signator's name printed or typed nearby and the mark must have been witnessed and the application signed by the witness. (7-1-93)

xvi. Applications to appropriate water in connection with Carey Act or Desert Land Entry proposals shall include evidence that appropriate applications have been filed for the lands involved in the proposed project.

(7-1-93)

xvii. The application form shall be accompanied with a fee in the amount required by Section 42-221A, Idaho Code. (7-1-93)

04. Amended Applications. (7-1-93)

a. Applications for permit shall be amended whenever significant changes to the place, period or nature of the intended use, method or location of diversion or proposed use or uses of the water or other substantial changes from that shown on the pending application are intended. An application shall be amended if the proposed change will result in a greater rate of diversion or depletion (see Rule Subsection 035.04.c.), if the point of diversion, place of use, or point of discharge of the return flow are to be altered, if the period of the year that water will be used is to be changed, or if the nature of the use is to be changed. (7-1-93)

b. An application can be amended to clarify the name of the source of water but may not be amended to change the source of water. (7-1-93)

c. An amendment which increases the rate of diversion, increases the volume of water diverted per year or the volume of water depleted, lengthens the period of use, or adds an additional purpose of use shall result in the priority of the application for permit being changed to the date the amended application is received by the department. (7-1-93)

d. An application for permit may be amended by endorsement by the applicant or his agent on the original application for permit form which endorsement shall be initialed and dated. If the changes required to the information on the application are, in the judgment of the Director, substantial enough to cause confusion in interpreting the application form, the amended application shall be submitted on a new application for permit form to be designated as an amended application. (7-1-93)

e. An amended application shall be accompanied by the additional fee required by Section 42-221A, Idaho Code, if the total rate of diversion or total volume of storage requested is increased and by the fee required by Section 42-221F, Idaho Code, for readvertising if notice of the original application has been published. (7-1-93)

f. If the applicant's name or mailing address changes, the applicant shall in writing notify the department of the change. (7-1-93)

036. -- 039. (RESERVED).

040. PROCESSING APPLICATIONS FOR PERMIT AND REPROCESSING PERMITS (RULE 40).

01. General. (7-1-93)

a. Unprotested applications, whether for unappropriated water or trust water, will be processed using the following general steps: (7-1-93)

i. Advertisement and protest period; (7-1-93)

ii. Department review of applications and additional information, including department field review if determined to be necessary by the Director; (7-1-93)

iii. Fact finding hearing if determined to be necessary by the Director; (7-1-93)

iv. Director's decision; (7-1-93)

v. Section 42-1701A, Idaho Code, hearing, if requested; and (7-1-93)

vi. Director's decision affirmed or modified. (7-1-93)

b. Protested applications, whether for unappropriated water or trust water, will be processed using the following general steps: (7-1-93)

i. Advertisement and protest period; (7-1-93)

ii. Hearing and/or conference; (7-1-93)

iii. Department review of applications, hearing record and additional information including department field review if determined to be necessary by the Director. (7-1-93)

iv. Proposed decision (unless waived by parties); (7-1-93)

v. Briefing or oral argument in accordance with the department's adopted Rules of Procedure. (7-1-93)

vi. Director's decision accepting or ntodifying the proposed decision. (7-1-93)

c. The Director's decision rejecting and denying approval of an application for permit filed for diversion from a source previously designated as a critical groundwater area or upon which a moratorium has previously been entered may be issued without advertisement of the application. (7-1-93)

d. An applicant may request in writing that commencement of processing of his or her application be delayed for a period not to exceed one (1) year or that processing be interrupted for a period not to exceed six (6) months. The Director at his discretion may approve the request unless he determines that others will be injured by the delay or that the applicant seeks the delay for the purpose of speculation, or that the public interest of the people of Idaho will not be served by the delay. The Director may approve a request for delay for a shorter period of time or upon conditions, and may renew the approval upon written request. (7-1-93)

e. As a condition of processing applications or reprocessing permits to reallocate trust water, the Director may require a cash bond or surety bond. Such bond up to five dollars ($5) per acre of land requested to be irrigated or two hundred fifty ($250) per cfs for other uses shall serve as a performance bond for satisfactory compliance with the permitted time requirements for commencement of construction, completion of project works and diversion of water to beneficial use. Failure to comply with the permitted time requirements, or such extension of time granted by the Director for good cause shown, is cause for the Director to require surrender of the bond amount to the department's Water Administration Account. The bond shall be returned to the permit holder upon satisfactory compliance with the permit's time requirements. (7-1-93)

02. Public Notice Requirement. (7-1-93)

a. Applications for permit which have not been advertised. (7-1-93)

i. Advertisement of applications for permit proposing a rate of diversion of ten (10) cfs or less or storage of one thousand (1000) AF or less shall comply with provisions of Section 42-203A, Idaho Code. The first required advertisement will be published on the first or third Thursday of a month when published in daily newspapers and on the first or third publishing day of the month for weekly newspapers. (7-1-93)

ii. Advertisement of applications for permit in excess of the amounts in Rule Subsection 040.02.a.i. shall comply with provisions of Rule Subsection 040.02.a.i. and shall also be published in a newspaper or newspapers to achieve statewide circulation. (7-1-93)

iii. Statewide circulation with respect to Section 42-203A(2), Idaho Code, shall be obtained by publication of a legal notice at least once each week for two (2) successive weeks in a newspaper, as defined in Section 60-106, Idaho Code, of general circulation in the county in which the point of diversion is located and by publication of a legal notice at least once each week for two (2) successive weeks in at least one (1) daily newspaper, as defined in Section 60-107, Idaho Code, published in each of the department's four (4) administrative regions and determined by the Director to be of general circulation within the department's region within which it is published. The administrative regions of the department are identified on Figure 2 in APPENDIX C (located at the end of this

chapter). The names of newspapers used for statewide publication are available from any department office. (7-1-93)

b. Applications for permit which have been advertised. (7-1-93)

i. Notice of applications for permit for water from the Snake River between Swan Falls Dam and Milner Dam or surface and groundwater tributaries to that reach of Snake River which were advertised prior to July 1, 1985 and have been held without final action by the department due to the Swan Falls controversy shall be readvertised by the Director in accordance with Rule Subsection 040.02.a. as appropriate to allow opportunity for protests to be entered with respect to the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

ii. Applications for permit from the Snake River or surface and groundwater sources upstream from Milner Dam which have been held without action due to the Swan Falls controversy may be processed without readvertisement. (7-1-93)

iii. The applicant shall pay the readvertisement fee provided in Section 42-221F, Idaho Code, prior to the readvertisement. (7-1-93)

iv. Failure to pay the readvertising fee within thirty (30) days after the applicant is notified to do so is cause for the Director to void the application. (7-1-93)

c. Notice of existing permits. (7-1-93)

i. Existing permits appropriating water held in trust by the state of Idaho issued prior to July 1, 1985, unless exempted by Rule Subsection 040.02.c.ii. shall be subject to the review requirements of Section 42-203D, Idaho Code, and shall be readvertised in accordance with Rule Subsection 040.02.a. as appropriate. The review is limited to the criteria described in Section 42-203C(2), Idaho Code. (7-1-93)

ii. Permits exempt from the provisions of 42-203D, Idaho Code, include: (7-1-93)

(1) Permits appropriating water not held in trust by the state of Idaho; (7-1-93)

(2) Permits for DCMI uses, stockwater uses and other essentially non-consumptive uses as determined by the Director; and (7-1-93)

(3) Permits for which an acceptable proof of beneficial use submittal was received by the department prior to July 1, 1985, or permits for which an acceptable proof of beneficial use was submitted after July 1, 1985, if evidence satisfactory to the Director has been received to show that the permit was fully developed prior to July 1, 1985 to the extent claimed on the proof of beneficial use. (7-1-93)

iii. Holders of permits subject to the review requirement of Section 42-203D, Idaho Code, shall pay in advance, upon the request of the Director, the readvertising fee required by Section 42-221F, Idaho Code. (7-1-93)

iv. Failure to pay the readvertising fee within thirty (30) days after the applicant is notified to do so is cause for the Director to cancel the permit. (7-1-93)

d. Provisions for Receiving Notice of Application for Permit by Mail. (7-1-93)

i. Pursuant to Section 42-203A(3), Idaho Code, the department will provide upon written request by regular mail, postage prepaid, the notices for all applications for permit of the classes requested. Mailings will be made on a periodic basis to include all notices of a specific class for which advertisements were prepared for publication during the previous period. Mailings will be made on or about the day of the first advertisement as provided in Rule Subsection 040.02.a.i. (7-1-93)

ii. Notice of the advertisement of application as described in Section 42-203A(3), Idaho Code, may be represented by an abstract, summary or other such representation which includes all the information required by Section 42-203A(1), Idaho Code, for a notice of an application for permit. (7-1-93)

iii. The annual mailing fee as described in Section 42-203A(3), Idaho Code, shall include all costs incurred by the department in preparation of mailing of the notices of application to those requesting them. (7-1-93)

iv. The annual fee for receiving notice of all classes will be determined by the Director and shall be paid to the department in advance on an annual basis (July 1 to June 30). The annual mailing fee shall be prorated by the department for requests encompassing less than a full year and will be increased for the additional cost the department incurs for requests encompassing fewer than all classes of notice. (7-1-93)

v. A request for a specific class of notice may be fulfilled by the mailing of notice of all applications for permit received by the department unless the additional cost to the department of preparing the requests for a specific class of notice is paid in advance. (7-1-93)

vi. A request to receive a class of notice of applications shall be effective not later than thirty (30) days after receipt by the department of the request together with the annual fee. (7-1-93)

vii. The notice published in the newspaper of an application or of a permit being reprocessed as required by Rule Subsection 040.02.a. through 040.02.c. is the official notice required by Section 42-203A, Idaho Code. Errors or omissions in the notices of applications received by mail as provided by Rule Subsection 040.02.d. or the failure of the notices to be delivered by mail does not invalidate the published notice. (7-1-93)

03. Protests, Intervention, Hearings, and Appeals. (7-1-93)

a. Protests. (7-1-93)

i. Protests against the approval of an application for permit or against a permit being reprocessed shall comply with the requirements for pleadings as described in the department's adopted Rules of Procedure. (7-1-93)

ii. Protests against the approval of an application for permit or against a permit being reprocessed 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 unless the protestant successfully intervenes in the proceeding. (7-1-93)

iii. General statements of protest (blanket protests) against appropriations for a particular class of use or from a particular source of water will not be considered as valid protests by the Director. (7-1-93)

b. Intervention. Requests to intervene in a proceeding pending before the department shall comply with the Department's adopted Rules of Procedure. (7-1-93)

c. Hearings. Hearings will be scheduled and held in accordance with the department's adopted Rules of Procedure. (7-1-93)

d. Appeals. Any final decision of the Director may be appealed in accordance with Section 42-1701A, Idaho Code. (7-1-93)

04. Burden of Proof. (7-1-93)

a. Burden of proof is divided into two (2) parts: first, the burden of coming forward with evidence to present a prima facie case, and second, the ultimate burden of persuasion. (7-1-93)

b. The burden of coming forward with evidence is divided between the applicant and the protestant as follows: (7-1-93)

i. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criteria (a) through (d) of Section 42-203A(5), Idaho Code; (7-1-93)

ii. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of

criterion (e) of Section 42-203A(5), Idaho Code, as to any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear the initial burden of coming forward with evidence for those factors relevant to criterion (e) of Section 42-203A(5), Idaho Code, of which the protestant can reasonably be expected to be more cognizant than the applicant. (7-1-93)

iii. The protestant shall bear the initial burden of coming forward with evidence for the evaluation of the public interest criteria of Section 42-203C(2), Idaho Code, and of demonstrating a significant reduction, except that the applicant shall provide details of the proposed design, construction, and operation of the project and directly associated operations to allow the impact of the project to be evaluated. (7-1-93)

c. The applicant has the ultimate burden of persuasion for the criteria of Section 42-203A, Idaho Code, and the protestant has the ultimate burden of persuasion for the criteria of Section 42-203C, Idaho Code. (7-1-93)

d. For unprotested applications or permits to be reprocessed, the Director will evaluate the application, information submitted pursuant to Rule Subsection 040.05.c. and information in the files and records of the department, and the results of any studies the department may conduct to determine compliance with the appropriate criteria. (7-1-93)

e. In protested matters the Director will take official notice of information as described in the department's adopted Rules of Procedure, and will, prior to considering, circulate to the parties information from department studies and field examinations concerning the protested application or permit being reprocessed, if such information has not otherwise been made a part of the hearing record. (7-1-93)

05. Additional Information Requirements. (7-1-93)

a. For unprotested applications and permits being reprocessed, the additional information required by Rule Subsection 040.05.c. shall be submitted within thirty (30) days after the Director notifies the applicant that the application or permit is being reviewed for decision. The Director may extend the time within which to submit the information upon request by the applicant and upon a showing of good cause. Failure to submit the required information within the time period allowed will be cause for the Director to void an application or to advance the priority of a permit being reprocessed by the number of days that the information submittal is late. The Director will provide opportunity for hearing as provided in Section 42-1701A, Idaho Code. (7-1-93)

b. For protested applications or protested permits being reprocessed, the information required by Rule Subsection 040.05.c. may be requested by the Director to be submitted within thirty (30) days after notification by the Director, may be made a part of the record of the hearing held to consider the protest, or may be made available in accordance with any pre-hearing discovery procedures. Failure to submit the required information within the time period allowed will be cause for the Director to void an application or to advance the priority of a permit being reprocessed by the number of days that the information submittal is late. (7-1-93)

c. The following information shall be submitted for applications to appropriate unappropriated water or trust water and for permits being reprocessed for trust water. The additional information submittal requirements of this rule are waived for filings which seek to appropriate five (5) cfs or less or storage of five hundred acre-feet (500 AF) or less and for filings seeking reallocation of trust water which the Director determines will reduce the flow of the Snake River measured at Murphy Gauge by not more than two (2) acre-feet per day. For filings proposing irrigation as a purpose of use, the additional information is required if more than two hundred (200) acres will be irrigated. However, the Director may specifically request submittal of any of the following information for any filing, as he determines necessary. Information relative to the effect on existing water rights, Section 42-203A(5)(a), Idaho Code, shall be submitted as follows: (7-1-93)

i. For applications appropriating springs or surface streams with five (5) or fewer existing users, either the identification number, or the name and address of the user, and the location of the point of diversion and nature of use for each existing water right shall be submitted. (7-1-93)

ii. For applications appropriating groundwater, a plat shall be submitted locating the proposed well relative to all existing wells and springs and permitted wells within a one-half mile radius of the proposed well.

(7-1-93)

iii. Information shall be submitted concerning any design, construction, or operation techniques which will be employed to eliminate or reduce the impact on other water rights. (7-1-93)

d. Information relative to sufficiency of water supply, Section 42-203A(5)(b), Idaho Code, shall be submitted as follows: (7-1-93)

i. Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year. (7-1-93)

ii. Information shall be submitted on the quantity of water available from the source applied for, including, but not limited to, information concerning flow rates for surface water sources available during periods of peak and average project water demand, information concerning the properties of the aquifers that water is to be taken from for groundwater sources, and information on other sources of supply that may be used to supplement the applied for water source. (7-1-93)

e. Information relative to good faith, delay, or speculative purposes of the applicant, Section 42-203A(5)(c), Idaho Code, shall be submitted as follows: (7-1-93)

i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest. Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code. (7-1-93)

ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials. (7-1-93)

f. Information Relative to Financial Resources, Section 42-203A(5)(d), Idaho Code, shall be submitted as follows: (7-1-93)

i. The applicant shall submit a current financial statement certified to show the accuracy of the information contained therein, or a financial commitment letter along with the financial statement of the lender or other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed. (7-1-93)

ii. The applicant shall submit plans and specifications along with estimated construction costs for the project works. The plans shall be definite enough to allow for determination of project impacts and implications. (7-1-93)

g. Information Relative to Conflict with the Local Public Interest, Section 42-203A(5)(e), Idaho Code, shall be submitted as follows: The applicant shall seek comment and shall submit all letters of comment on the effects of the construction and operation of the proposed project from the governing body of the city and/or county and tribal reservation within which the point of diversion and place of use are located, the Idaho Department of Fish and Game, the Idaho Department of Environmental Quality, and any irrigation district or canal company within which the proposed project is located and from other entities as determined by the Director. (7-1-93)

h. The following information Relative to the Public Interest Criteria of Section 42-203C(2), Idaho Code, shall be submitted by an applicant seeking reallocation of trust water for a project which the Director determines will reduce the flow of the Snake River by more than two (2) acre-feet per day. For filings proposing irrigation as a purpose of use, the additional information is required if more than two hundred (200) acres will be irrigated. The Director may request any or all of the following information for any filing seeking the reallocation of trust water. (7-1-93)

i. A project design and estimate of cost of development shall be submitted. For applications appropriating more than twenty-five (25) cfs, or ten thousand (10,000) AF of storage, or generating more than five (5) megawatts, the information shall be prepared and submitted by a qualified engineer licensed under the provisions of Chapter 12, Title 54, Idaho Code, unless waived by the Director. The design shall be definite enough to reflect the project's impacts and implications as required in subsequent rules. (7-1-93)

ii. If the project proposes development for irrigation purposes, information shall be submitted on crop rotation, including acreages, for lands when newly developed. (7-1-93)

iii. Information shall be submitted concerning the number and kinds of jobs that will be created or eliminated as a direct result of project development including both the construction and operating phases of the project. If jobs are seasonal, the estimated number of months per year of employment shall be submitted. (7-1-93)

iv. For applications or permits being reprocessed for more than twenty-five (25) cfs, or more than ten thousand (10,000) AF of storage, or more than five (5) megawatts, information shall be submitted concerning the changes to community services that will be required during the construction and operation phases of the project including, but not limited to, changes to schools, roads, housing, public utilities and public health and safety facilities, if any. (7-1-93)

v. Information shall be submitted concerning the source of energy for diverting and using water for the project, the estimated instantaneous demand and total amount of energy that will be used, the efficiency of use, and energy conservation methods. (7-1-93)

vi. Information shall be submitted concerning the location, amount, and quality of return flow water, and any water conservation features of the proposed project. (7-1-93)

vii. If the project proposes irrigation as a use, information shall be submitted concerning the kinship, if any, of the operator of the land to be irrigated by the project to the applicant, the location and acreage of other irrigated lands owned, leased, or rented by the applicant, the names, addresses and number of shares held by each shareholder if the applicant is a corporation, evidence of tax-exempt status if a corporation is so claiming, a soil survey prepared in accordance with the U.S. Soil Conservation Service irrigatable land classification system, and a schedule for bringing into production the project lands. (7-1-93)

041. -- 044. (RESERVED).

045. EVALUATION CRITERIA (RULE 45).

01. Criteria for Evaluating All Applications to Appropriate Water. The Director will use the following criteria in evaluating whether an application to appropriate unappropriated water or trust water should be approved, denied, approved for a smaller amount of water or approved with conditions. (7-1-93)

a. Criteria for determining whether the proposed use will reduce the quantity of water under existing water rights. A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if: (7-1-93)

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less. (7-1-93)

ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code; or (7-1-93)

iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense. (7-1-93)

iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director. (7-1-93)

v. The provisions of Rule Subsection 045.01.a.v. are not intended to require compensation or mitigation for loss of flow to holders of subordinated hydropower rights or those from which trust water is reallocated. (7-1-93)

b. Criteria for determining whether the water supply is insufficient for the proposed use. The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval. In assessing such noneconomic factors, the Director will also consider the impact on other water rights if the project is abandoned during construction or after completion, the impact on public resource values, and the cost to local, state and federal governments of such an abandonment. (7-1-93)

c. Criteria for determining whether the application is made in good faith. The criteria requiring that the Director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the developed project for a profit or from making a profit from the use of the water. An application will be found to have been made in good faith if: (7-1-93)

i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and (7-1-93)

ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and (7-1-93)

iii. There are no obvious impediments that prevent the successful completion of the project. (7-1-93)

d. Criteria for determining whether the applicant has sufficient financial resources to complete the project. (7-1-93)

i. An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director. This showing is required as described in Rule Subsection 040.05.c. or at the time the hearing provided by Subsection Rule 040.05.c. is conducted. (7-1-93)

ii. A governmental entity will be determined to have satisfied this requirement if it has the taxing, bonding or contracting authority necessary to raise the funds needed to commence and pursue project construction in accordance with the construction schedule. (7-1-93)

e. Criteria for determining whether the project conflicts with the local public interest. The Director will consider the following, along with any other factors he finds to be appropriate, in determining whether the project will conflict with the local public interest: (7-1-93)

i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains; (7-1-93)

ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed use; and (7-1-93)

iii. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions. (7-1-93)

iv. An application which the Director determines will conflict with the local public interest will be denied unless the Director determines that an over-riding state or national need exists for the project or that the project can be approved with conditions to resolve the conflict with the local public interest. (7-1-93)

02. Criteria for Evaluating Whether a Proposed Use of Trust Water Will Cause a Significant Reduction. Reference: Section 42-203C(1), Idaho Code and Rule Subsection 025.02.b. For purposes of reallocating trust water made available by the Snake River water rights agreement, an application for permit or a permit being reprocessed, will be presumed to not cause a significant reduction if the Director determines that it complies with both the individual and cumulative tests for evaluating significant reduction as provided in Rules Subsections 045.02.a. and 045.02.b. (7-1-93)

a. Individual test for evaluating significant reduction. A proposed use will be presumed to not cause a significant reduction if when fully developed and its impact is fully felt, the use will individually reduce the flow of the Snake River measured at Murphy Gauge by not more than two (2) acre-feet per day. An irrigation project of two hundred (200) acres or less located anywhere in the Snake River Basin above Murphy Gauge proposing to use trust water is presumed to not reduce the flow at Murphy Gauge by more than two (2) acre-feet per day. The presumption of this section is not applicable to applications or permits to be reprocessed which the Director determines to be part of a larger development. (7-1-93)

b. Cumulative test for evaluating significant reduction. A proposed use will be presumed to not cause a significant reduction, if the use, when fully developed and its impact is fully felt and when considered cumulatively with other existing uses and other uses reasonably likely to exist within twelve (12) months of the proposed use, will not deplete the flow of Snake River measured at Murphy Gauge by more than: (7-1-93)

i. Forty thousand (40,000) acre-feet per calendar year when considered with all other uses approved for development of trust water during that calendar year; (7-1-93)

ii. Forty thousand (40,000) acre-feet per calendar year using a four (4) year moving average when considered with all other uses approved for development of trust water during that four (4) year period; and (7-1-93)

iii. Twenty thousand (20,000) acre-feet per calendar year from filings approved for reallocation of trust water which meet the criteria of Rule Subsection 045.02.a. (the individual test for evaluating significant reduction). (7-1-93)

c. The Director will determine on a case-by-case basis from available information whether a permit to be reprocessed or an application for trust water which exceeds the flow depletion limits of Rule Subsection 045.02, or one which meets the flow depletion limits but has been protested, will cause a significant reduction. In making this determination, the Director will consider: (7-1-93)

i. The amount of the reduction in hydropower generation that the proposed use will cause individually and cumulatively with other uses expected to be developed within twelve (12) months of the proposed use as compared to the existing hydropower generation output of the affected facility or facilities. (7-1-93)

ii. The relative importance of the affected hydropower facility or facilities to other sources of electrical power generation available to the holder of the facility or facilities. (7-1-93)

iii. The timing of the reduction in hydropower generation both on an annual basis and on a long-term basis considering the lag time between the beginning of diversion by the proposed use and the resulting reduction in hydropower generation. (7-1-93)

iv. The effect of the reduction in hydropower generation on the unit cost of hydropower from the facility or facilities and the average cost of electrical power offered by the holder of the facility. (7-1-93)

v. The terms of contracts, mortgages, or regulatory permits and licenses which require the holder of the hydropower generation facility to retain the capability to produce hydroelectric power at a specific level. (7-1-93)

d. Other provisions of these rules not withstanding, applications or permits to be reprocessed proposing a direct diversion of water for irrigation purposes from the Snake River between Milner Dam and Swan Falls Dam or from tributary springs in this reach are presumed to cause a significant reduction. (7-1-93)

e. Other provisions of these rules not withstanding, applications or permits to be reprocessed for DCMI purposes are presumed to not cause a significant reduction. (7-1-93)

03. Criteria for Evaluating Public Interest. If the Director determines that a proposed use of trust water held by the state pursuant to Section 42-203B(5), Idaho Code, will cause a significant reduction, the Director will consider the criteria of Section 42-203C(2), Idaho Code, before acting on the application or permit being reprocessed. The Director shall consider and balance the relative benefits and detriments for each factor required to be weighed under Section 42-203C(2), Idaho Code, to determine whether a proposed reduction of the amount of water available for power production serves the greater public interest. The Director shall evaluate whether the proposed use sought in the permit being reprocessed or the application will provide the greater benefit to the people of the state of Idaho when balanced against other uses for the same water resource. In evaluating the public interest criteria, the Director will use the following guidelines: (7-1-93

a. The Director will consider the potential benefits both direct and indirect, and that the proposed use would provide to the state and local economy. The economic appraisal shall be based upon generally accepted economic analysis procedures which uniformly evaluate the following factors within the state of Idaho and the county or counties directly affected by the project: (7-1-93)

i. Direct project benefits. (7-1-93)

ii. Indirect benefits including net revenues to the processing, transportation, supply, service and government sectors of the economy. (7-1-93)

iii. Direct project costs, to include the opportunity cost of previous land use. (7-1-93)

iv. Indirect project costs, including verifiable costs to government in net lost revenue and increased regulation costs, verifiable reductions in net revenue resulting from losses to other existing instream uses, and the increased cost of replacing reduced hydropower generation from unsubordinated hydropower generating facilities. (7-1-93)

b. The Director will consider the impact the proposed use would have upon the electric utility rates in the state of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact. These evaluations will include the following considerations: (7-1-93)

i. Projections of electrical supply and demand for Idaho and the Pacific Northwest made by the Bonneville Power Administration and the Northwest Power Planning Council and information available from the Idaho Public Utilities Commission or from the electric utility from whose water right trust water is being reallocated. (7-1-93)

ii. The long term reliability of the substitute source and the cost of alternatives including the resulting impact on electrical rates. (7-1-93)

c. The Director will consider whether the proposed use will promote the family farming tradition in the state of Idaho. For purposes of this evaluation, the Director will use the following factors. (7-1-93)

d. If the total land to be irrigated by the applicant, including currently owned and leased irrigated land and land proposed to be irrigated in the application and other applications and permits of the applicant, do not exceed

nine hundred sixty (960) acres, the application will be presumed to promote the family farming tradition. (7-1-93)

e. If the requirement of Rule Subsection 045.03.c.i. is not met, the Director will consider the extent the applicant conforms to the following characteristics: (7-1-93)

i. The farming operation developed or expanded as a result of the application is operated by the applicant or a member of his family (spouse, parents or grandparents, lineal descendents, including those that are adopted, lineal descendents of parents; and spouse of lineal descendents); (7-1-93)

ii. In the event the application is filed in the name of a partnership, one or more of the partners shall operate the farming operation; and (7-1-93)

iii. If the application is in the name of a corporation, the number of stockholders does not exceed fifteen (15) persons, and one or more of the stockholders operates the farming operation unless the application is submitted by an irrigation district, drainage district, canal company or other water entity authorized to appropriate water for landowners within the district or for stockholders of the company all of whom shall meet the family farming criteria. (7-1-93)

f. The Director will consider the promotion of full economic and multiple use development of the water resources of the state of Idaho. In this regard, the extent to which the project proposed complies with the following factors will be considered: (7-1-93)

i. Promotes and conforms with the adopted State Water Plan; (7-1-93)

ii. Provides for coordination of proposed and existing uses of water to maximize the beneficial use of available water supplies; (7-1-93)

iii. Utilizes technology economically available to enhance water and energy use efficiency; (7-1-93)

iv. Provides multiple use of the water, including multipurpose storage; (7-1-93)

v. Allows opportunity for reuse of return flows; (7-1-93)

vi. Preserves or enhances water quality, fish, wildlife, recreation and aesthetic values; (7-1-93)

vii. Provides supplemental water supplies for existing uses with inadequate supplies. (7-1-93)

g. The Director will consider whether a proposed use, which includes irrigation, will conform to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period in the Snake River drainage above Murphy Gauge. In applying this criteria, the Director will consider the following: (7-1-93)

i. "Above Murphy gauge" means the Snake River and any of its surface or groundwater tributaries upstream from Murphy gauge which gauge is located on the Snake River approximately four (4) miles downstream from Swan Falls Dam from which trust water is to be reallocated; (7-1-93)

ii. Twenty thousand (20,000) acres per year or eighty thousand (80,000) acres per four (4) year period is a four (4) year moving average of Twenty thousand (20,000) acres/year of permits issued during a calendar year for irrigation development. If permits for development of less than twenty-thousand (20,000) acres are issued in a year, additional development in excess of twenty-thousand (20,000) acres can be permitted in succeeding years. Likewise, if more than twenty thousand (20,000) acres is permitted in one year (recognizing that a single large project could exceed twenty thousand (20,000) acres) the permitted development in succeeding years must be correspondingly less to maintain no greater than a twenty thousand (20,000) acres/year average for any four (4) year period; (7-1-93)

iii. The criteria of Rule Subsection 045.03.g. applies to multiple-use projects with irrigation as a principal purpose. Projects which use irrigation as only an incidental purpose, such as the land treatment of waste, shall not be included within this policy; and (7-1-93)

iv. An application determined by the Director to be otherwise approvable but found to exceed the acreage limitations, when considered with other applications approved for development, may be approved with conditions providing for the construction of project works and beneficial use of water to be commenced in a future year. (7-1-93)

h. No single public interest criterion will be entitled to greater weight than any other public interest criterion. (7-1-93)

i. Until such time as the studies prescribed in Policy 32 1 of the State Water Plan are completed and accepted by the Idaho Water Resource Board, applications and permits reprocessed which propose to divert water to surface storage from the Snake River and surface tributaries upstream from Murphy Gauging Station shall be presumed to satisfy the public interest criteria of Section 42-203C(2), Idaho Code. Applications or reprocessed permits which are approved prior to completion of the studies, will not be subject to additional reprocessing. (7-1-93)

j. Applications for permit for trust water sources filed prior to July 1, 1985, for projects for which diversion and beneficial use was complete prior to October 1, 1984, are presumed to satisfy the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

k. Applications or permits to be reprocessed proposing a direct diversion of water for irrigation purposes from the Snake River between Milner Dam and Swan Falls Dam or from tributary springs in this reach are presumed not to be in the public interest as defined by Section 42-203C, Idaho Code. Such proposals, are presumed to prevent the full economic and multiple use of water in the Snake River Basin and to adversely affect hydropower availability and electrical energy rates in the state of Idaho. (7-1-93)

l. Proposed DCMI uses which individually do not have a maximum consumptive use of more than two acre-feet/day are presumed to meet the public interest criteria of Section 42-203C(2), Idaho Code, unless protested. (7-1-93)

046. – 049. (RESERVED).

050. CONDITIONS OF APPROVAL (RULE 50).

01. Issuance of Permits with Conditions. The Director may issue permits with conditions to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and specifically to meet the criteria of Section 42-203A, Idaho Code, and to meet the requirements of Section 42-203C, Idaho Code, to the fullest extent possible including conditions to promote efficient use and conservation of energy and water. (7-1-93)

02. Requirements to Mitigate Impact of Flow Depletion. Permits to be reprocessed or applications approved to appropriate water from the main stem of the Snake River between Milner and Murphy gauging station for diversion to off-stream storage during the period November 1 to March 31 shall include requirements to mitigate, in accordance with Policy 32 1 of the State Water Plan, the impact of flow depletions on downstream generation of hydropower. (7-1-93)

03. Applications and Existing Permits That Are Junior and Subordinate. Applications and existing permits approved for hydropower generation shall be junior and subordinate to all rights to the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of the application or existing hydropower permit. A subordinated permit shall not give rise to any right or claim against future rights to the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of the application or existing hydropower permit. A permit issued for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B(6), Idaho Code. (7-1-93)

04. Permanent Flow Measuring Device Requirement. Applications approved for on-stream storage reservoirs will, unless specifically waived by the Director, require permanent flow measuring devices both upstream and downstream from the reservoir. (7-1-93)

05. Well Spacing and Well Construction Requirements. Applications approved for diversion of groundwater may include conditions requiring well spacing and well construction requirements. (7-1-93)

06. Reprocessed Permits. Permits reprocessed pursuant to Section 42-203D, Idaho Code, may be cancelled, modified or conditioned by the Director to make the permit comply in every way with any permit that would be issued for the same purpose based upon a new application processed under these rules. (7-1-93)

07. Conditioning of Permits. The Director may condition permits to require commencement of construction of project works within a designated time interval not to exceed one year and completion of construction of project works and beneficial use of water within a time interval not to exceed five (5) years. (7-1-93)

08. Voiding Approval of Permit. Permits may be conditioned to authorize the Director to void the approval of the permit if he determines that the applicant submitted false or misleading information on the application or supporting documents. (7-1-93)

09. Retetion of Jurisdiction. The Director may condition permits to retain jurisdiction to insure compliance with the design, construction and operation provisions of the permit. (7-1-93)

10. Insuring Minimum Stream Flows and Prior Rights. The Director may condition permits to insure that established minimum stream flows and prior rights including prior rights reserved by federal law are not injured. (7-1-93)

11. Insuring Compliance with Water Quality Standards. The Director may condition permits to insure compliance with Idaho's water quality standards. (7-1-93)

12. Insuring Assignment of Interest. The Director may condition a permit issued for trust water to require that any amendment (Section 42-211, Idaho Code), transfer (Section 42-222, Idaho Code), or assignment of interest in the permit by any method whatsoever shall not result in the project failing to meet the public interest criteria of Section 42-203C, Idaho Code except, however, lenders obtaining title to the project through default will have a reasonable period of time, as determined by the Director, to meet such criteria or to convey the project to a person or entity that does meet the criteria. (7-1-93)

051. – 054. (RESERVED).

055. MORATORIUM (RULE 55).

01. Applications for Permit. (7-1-93)

a. The Director may cease to approve applications for permit in a designated geographical area upon finding a need to: (7-1-93)

i. Protect existing water rights; (7-1-93)

ii. Insure compliance with the provisions of Chapter 2, Title 42, Idaho Code; and (7-1-93)

iii. Prevent reduction of flows below a minimum stream flow which has been established by the Director or the board pursuant to applicable law. (7-1-93)

b. Notice of the Director's action to cease application approval will be by: (7-1-93)

i. Summary Order served by certified mail upon the then existing affected applicants; and (7-1-93)

ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area affected. (7-1-93)

c. Objections to the DirectorDirector's action shall be considered under the department's adopted Rules of Procedure and applicable law. (7-1-93)

02. Permits. (7-1-93)

a. To the extent a permit has not been developed, the Director may cancel, or modify permits for which proof of beneficial use has not been submitted in a designated geographical area as an extension of Rule Subsection 055.01. (7-1-93)

b. Notice of the Director's action to cancel or modify permits shall be by: (7-1-93)

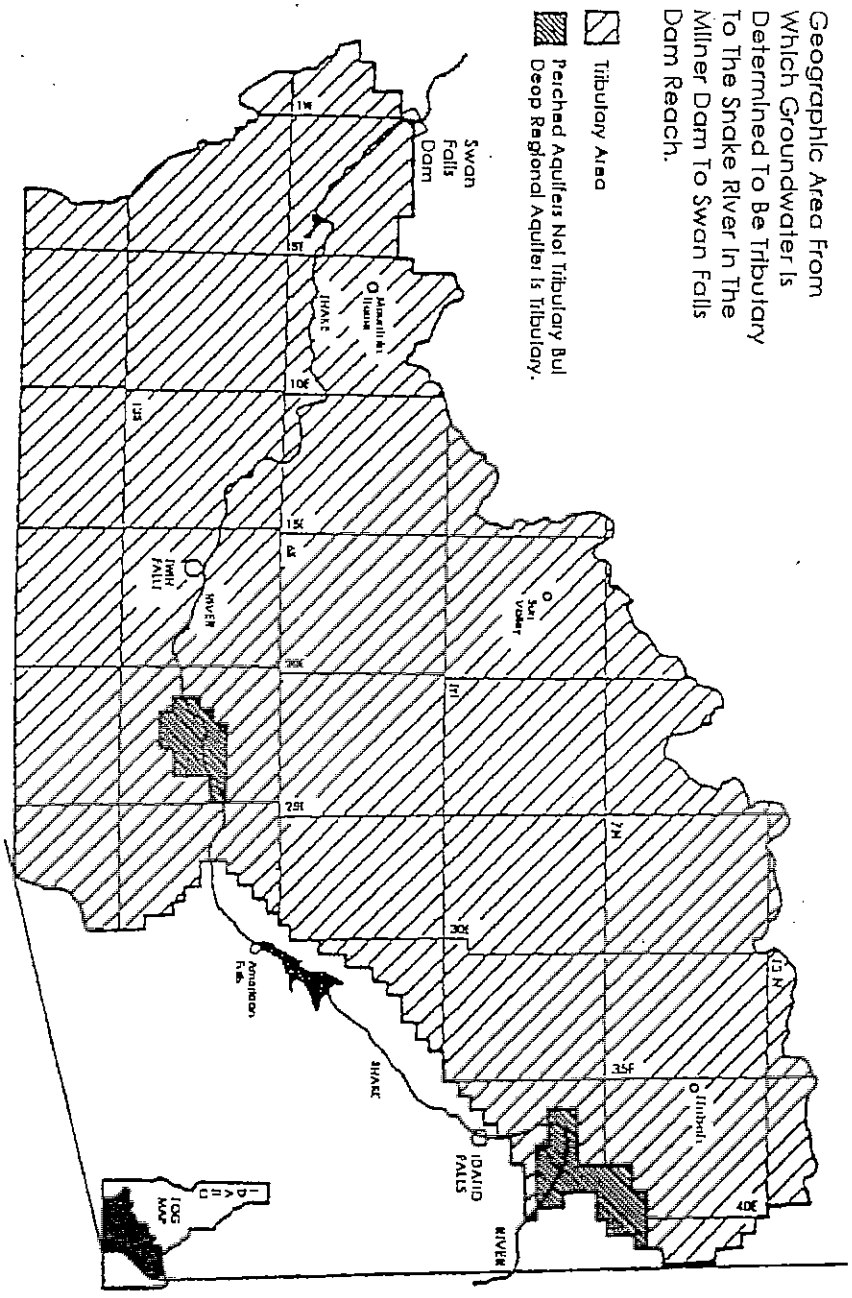
i. Summary Order served by certified mail upon the affected permit holders in the designated area. (7-1-93)

ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area. (7-1-93)

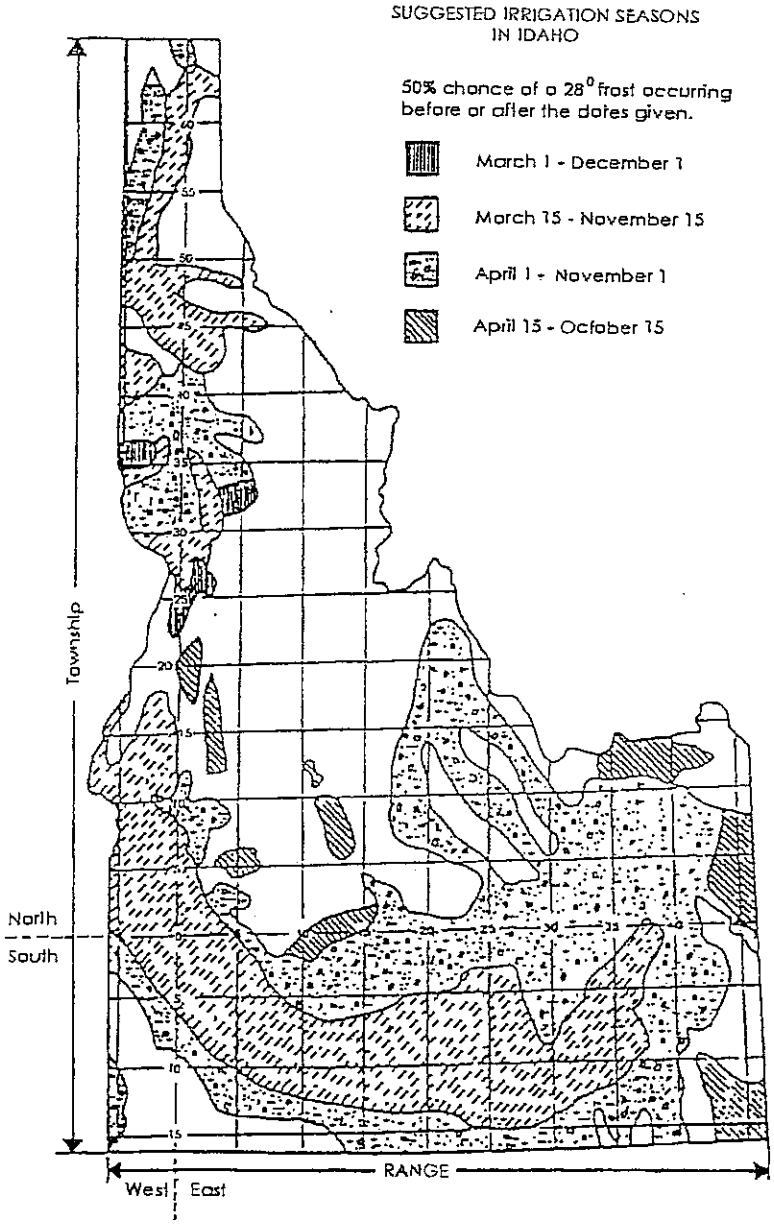
c. Objections to the Director's action shall be considered under the department's adopted Rules of Procedure and applicable law. (7-1-93)

056. – 999. (RESERVED).

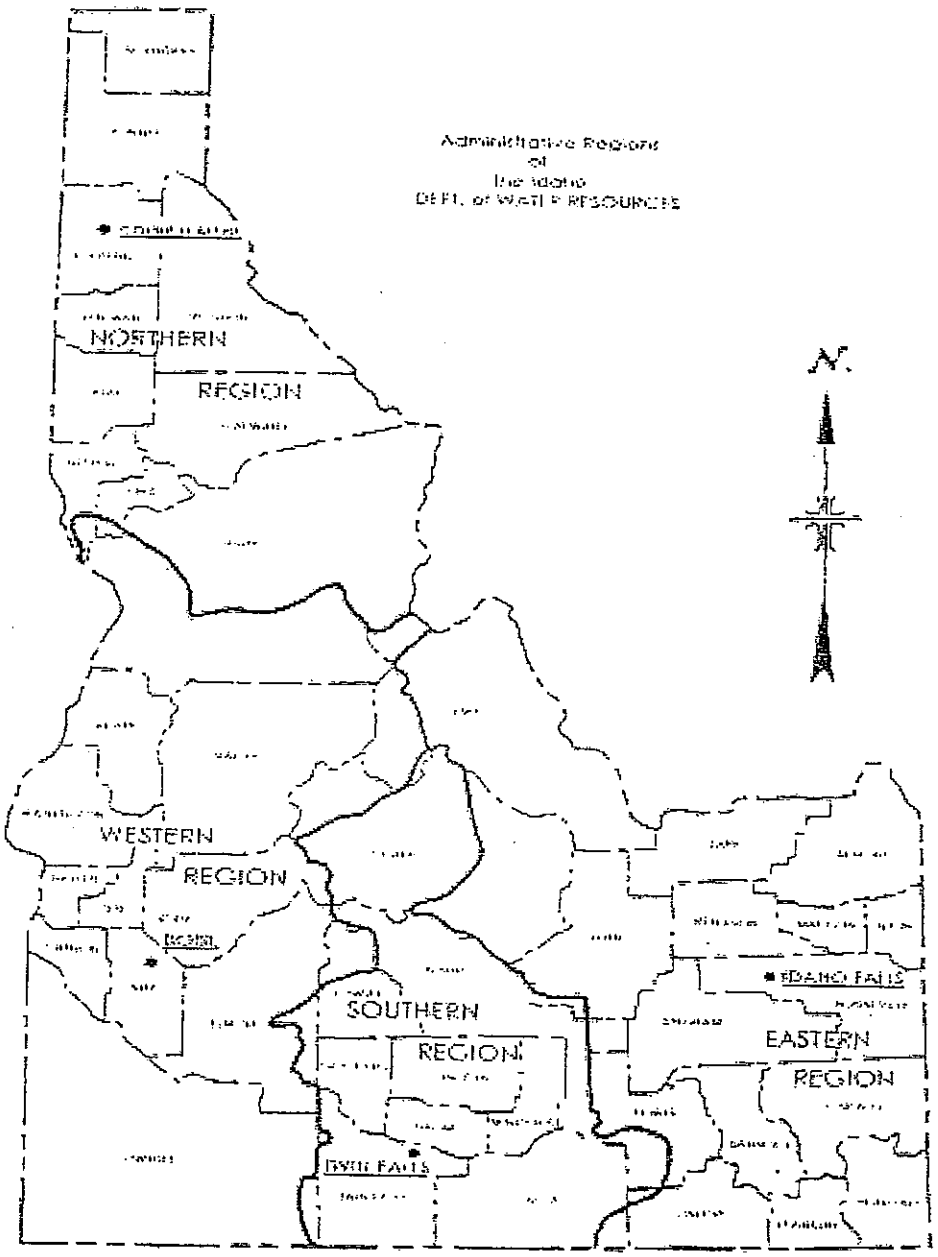
APPENDIX A


Geographic Area From Which Groundwater Is Determined To Be Tributary To The Snake River In The Milner Dam To Swan Falls Dam Reach.
Tributary Area
Perched Aquifers Not Tributary But Deep Regional Aquifer Is Tributary.
Swan Falls Dam
TWIN FALLS
IDAHO FALLS
SNAKE RIVER
LOCATION MAP

APPENDIX B


SUGGESTED IRRIGATION SEASONS
IN IDAHO
50% chance of a 28° frost occurring
before or after the dates given.
March 1 - December 1
March 15 - November 15
April 1 - November 1
April 15 - October 15
Township
North
South
RANGE
West
East

APPENDIX C


Administrative Regions
of
the Idaho
DEPT. of WATER RESOURCES
NORTHERN
REGION
WESTERN
REGION
SOUTHERN
REGION
EASTERN
REGION
IDAHO FALLS
TWIN FALLS

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Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 3

"History of Milner Dam"
(http://www.tfcanal.com/milner.htm)

MILNER DAM

Joe Yost - Dam Tender 432-5423

HISTORY OF MILNER DAM

In 1900 the entire strip of country we know as the Magic Valley was but a vast desert covered with sagebrush. The irrigation works had not been commenced, and in fact, the whole scheme of irrigation was little more than a dream

Milner Dam came about because of the vision of Ira Burton Perrine, a rancher who had developed a Shoshone Falls resort and a Blue Lakes farm down stream. Perrine chose the site of the dam and acted as his own engineer. He obtained financing for the project through Stanley B. Milner, a banker and financier from Salt Lake City, and easterners Frank H. Buhl and Peter L. Kimberly.

As a result, the Buhl-Kimberly Corp. was formed and in 1903 a contract was entered into between the State of Idaho and the Twin Falls Land and Water Co. for construction of the project. The dam was formed by three earth and rockfilled embankments, abutting against the river banks and two islands.

In 1905 construction on the dam was completed. Men with mules and scrapers had also finished their work on the canals and all was ready for the water.

"On March 1, 1905, Frank Buhl gave a ceremonial pull on the wheel on a winch and the gates of Milner Dam were closed, and the gates to a thousand miles of canal and laterals were opened, and the Snake River was diverted, and that night Shoshone Falls went dry as the water rushed across the desert far above, and Perrine's vision was realized, and 262,000 acres of desert were shortly transformed."

Milner Dam and its canal system have national significance in agricultural history. They are one of the rare examples of successful state supervised private irrigation development.

The dam performed well for decades. There were instances of leakage through the dam that required immediate repair, but it fulfilled its purpose and today provides irrigation water to more than 500,000 acres of prime Idaho farmland.

After decades of use the dam began to show signs of aging. In December 1988, the Federal Energy Regulatory Commission's Division of Dam Safety and Inspection determined there was a high risk of Milner Dam failing during an earthquake unless it was rebuilt.

The price tag to rebuild the dam was about $11 million.

The Twin Falls and North Side canal companies determined that the costs of reconstruction would result in severe economic hardship to their 7,500 shareholders who depend on irrigation water from the dam for their livelihoods.

To pay for reconstruction the canal companies made a mutually beneficial agreement with Idaho Power to rehabilitate the dam and build a new 57.5-megawatt power plant downstream. Idaho Power would loan the canal companies funds to refurbish the dam. Repayment would come in the form of royalties from the hydro project.

The new Milner power plant has two main generating units, one with an 11.5-megawatt generating capacity and the other with 46 megawatts of capacity. A small 800-kilowatt powerhouse also has been built at the dam to take advantage of minimum streamflows that must be spilled at the dam to maintain a flow in the main river channel.

The Milner project is different from most of the hydro projects Idaho Power has constructed because it is spread out over a large area. The dam is located approximately 1.5 miles upstream from the powerhouse. At the dam, water is diverted into irrigation canals where it is dispersed to the surrounding farmland through the canal systems during the irrigation season. When farmers do not need the water it flows through a widened section of the Twin Falls Canal to an intake structure that directs the water through penstocks that stretch down the steep canyon wall and into the powerhouse. From the powerhouse the water flows back into the main river channel.

FACTS ABOUT THE PROJECT

- ***Milner is Idaho Power's 17th hydroelectric power plant.***
- ***The power generating facilities cost approximately $56 million.***
- ***Up to 5,200 cfs of water, which would previously have been spilled, generates low-cost energy.***
- ***Spillway capacity of 116,750 cfs provides the capability to safely handle flood flows.***
- ***Kayaking opportunities will be available during high water years.***
- ***Recreational access to the Snake River at Milner Dam and downstream of the powerhouse is provided.***

HOME PAGE

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

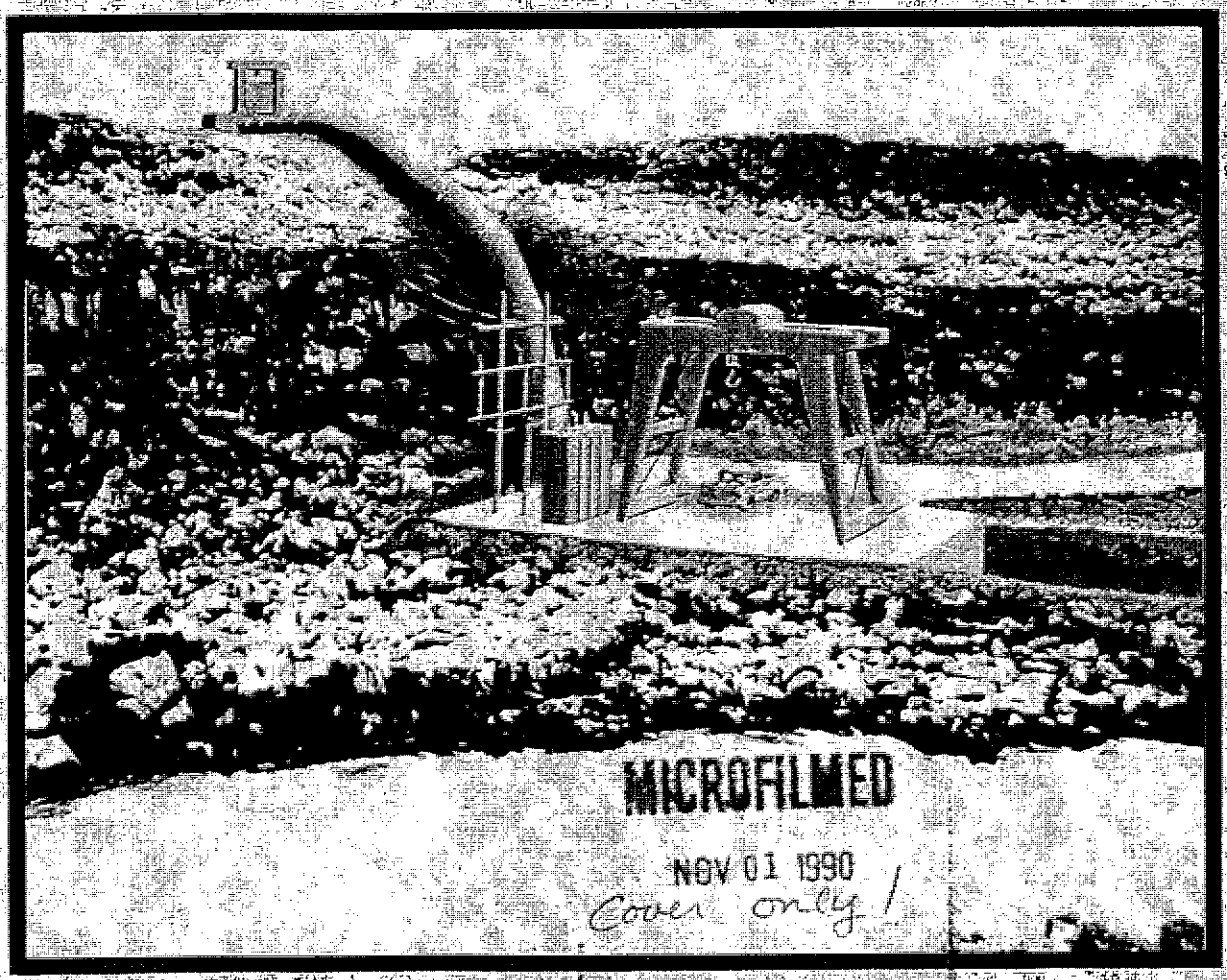
Exhibit 4

Excerpted pages of *Before The Federal Energy Regulatory Commission - Application For Initial License: Project 2899-002* (Twin Falls Canal Company, North Side Canal Company) (July 1984)

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for Initial License: Project No. 2899-002

MILNER HYDROELECTRIC PROJECT



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NOV 01 1990
Cover only!

TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.

JULY 1984

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RECEIVED
AUG 15 1985
Department of Water Resources

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

- 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

MILNER PROJECT NO. 2899-002

EXHIBIT D

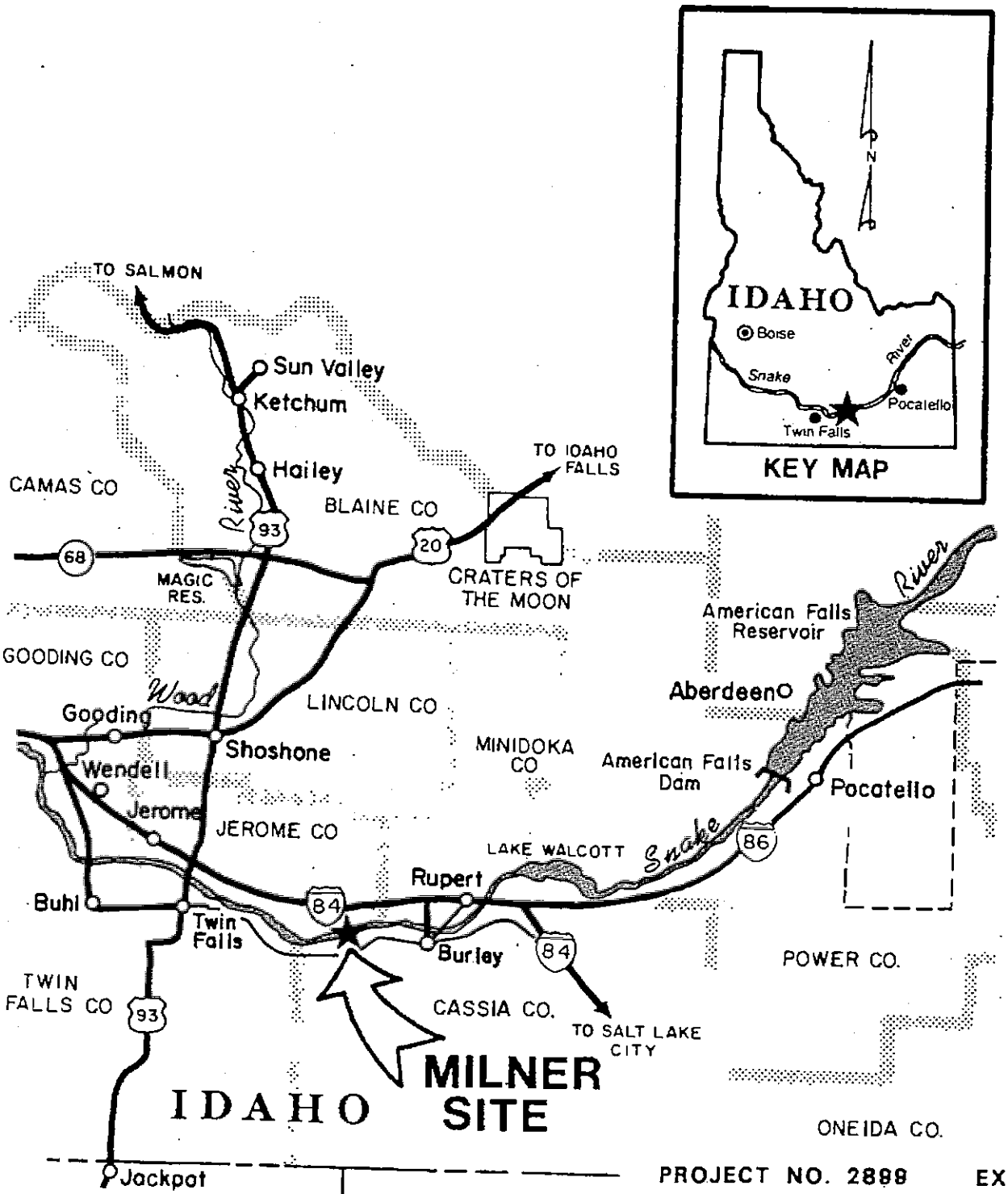
I. SOURCES AND EXTENT OF FINANCING FOR POWER FACILITIES

Applicants are Idaho corporations in which more than 80% of the stock is owned by farmers. As such, they qualify for financing through the Federal Intermediate Credit System as Co-operatives. The Spokane Bank for Co-operatives has indicated that a loan for construction of a power plant could be negotiated. The applicants would be required to give a lien of all the power facilities (except that dam, canal and reservoir), a conveyancing agreement to deliver water to the power plant, and assign the Power Sales Contract and water right as well as the other necessary permissions. It is contemplated that the applicants would sell the power pursuant to a Power Sales Contract as small power producers to Idaho Power Company pursuant to the Public Utilities Regulatory Policies Act. A short fall in revenues due to water shortage would be covered with insurance, or an adequate reserve fund would be established acceptable to the lender.

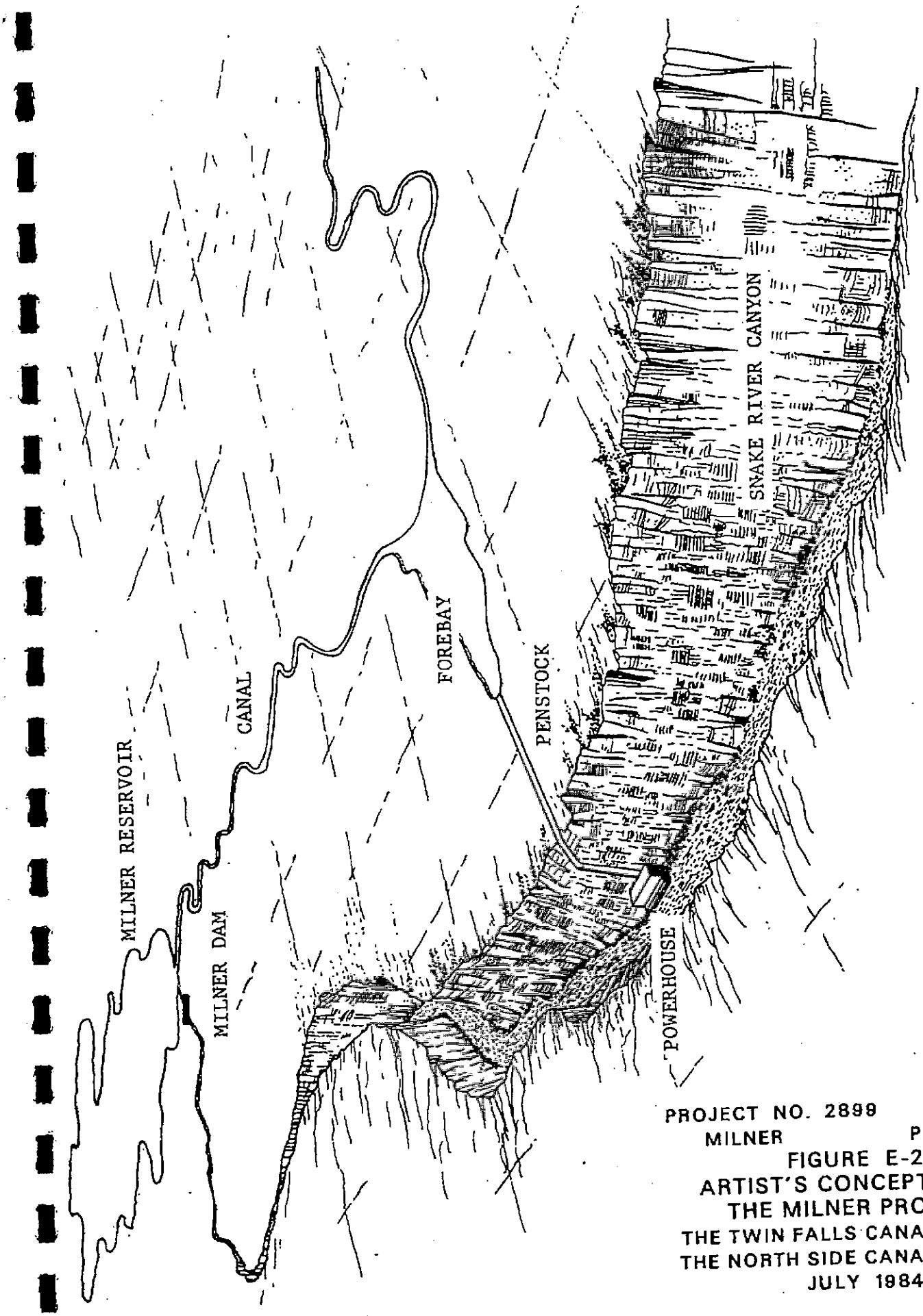
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GENERAL LOCATION MAP



PROJECT NO. 2898 EXHIBIT E
MILNER PROJECT
FIGURE E-1
GENERAL LOCATION MAP
THE TWIN FALLS CANAL CO. AND
THE NORTH SIDE CANAL CO., LTD.
JULY 1984



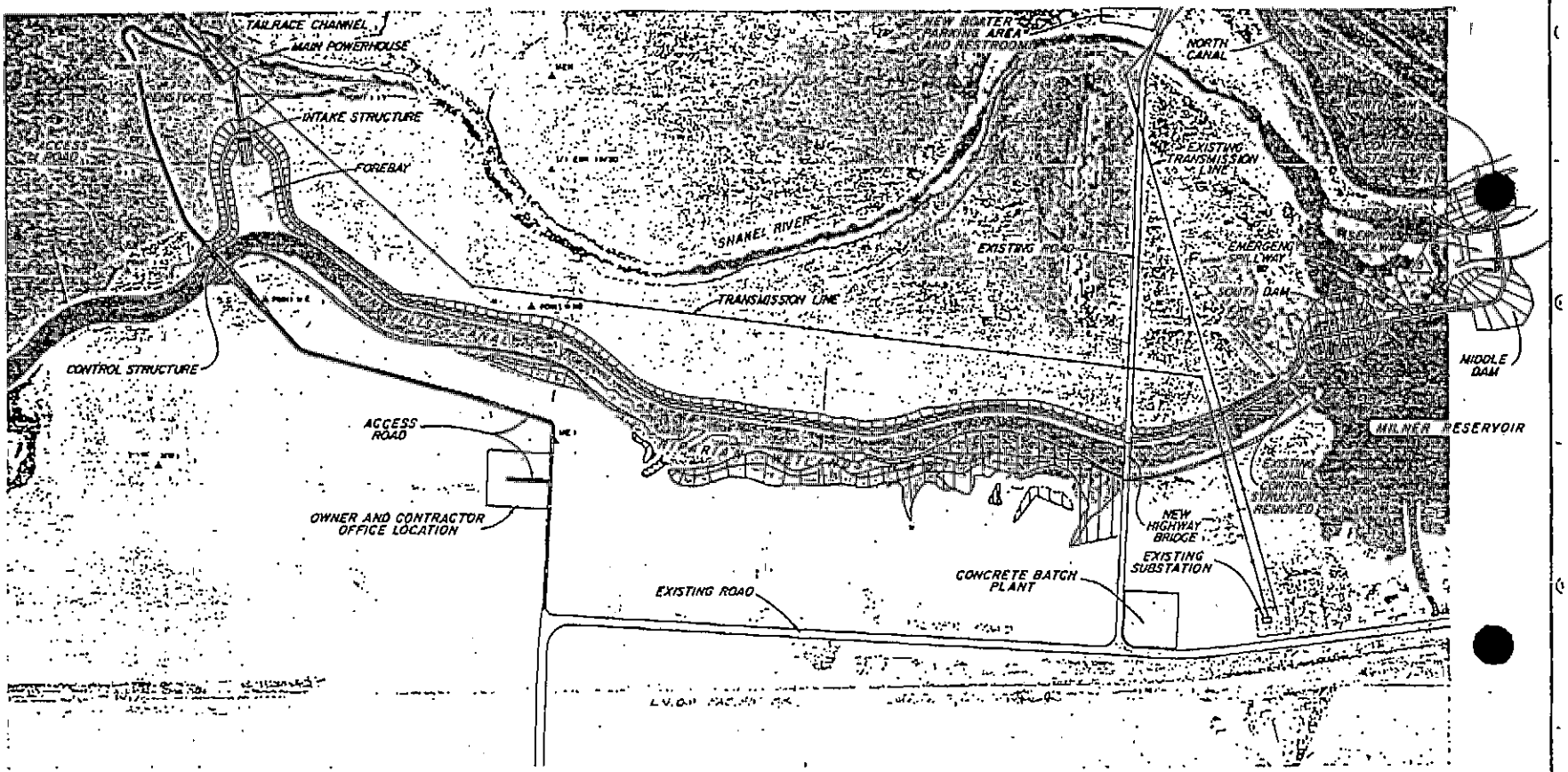
PROJECT NO. 2899 EXHIBIT E
MILNER PROJECT

FIGURE E-2
ARTIST'S CONCEPTION OF
THE MILNER PROJECT
THE TWIN FALLS CANAL CO. AND
THE NORTH SIDE CANAL CO.,LTD.
JULY 1984

Exhibit 5

Drawings of the Milner Dam and Milner hydropower project
(from IDWR website)

EXHIBIT A
PERMIT 01-7011
MILNER POWER PLANT



SURVEY CONTROL POINTS:

CONTROL POINTS

POINT #	NORTH	EAST	ELEVATION
10	38,190.8464	455,181.1963	3,936.88
11	38,154.8388	456,211.1508	3,982.88
12	38,494.7458	456,328.8698	4,036.91
13	38,336.1788	456,333.4706	4,038.33
14	38,645.3855	456,168.8825	3,995.19
15	38,164.1381	456,329.3095	3,982.42
16	38,494.8868	456,435.9729	3,981.88

NOTE:
1. COMPLETED PROJECT SHOWN.

4	11-19-99	REVISED PER CLIENT COMMENTS					
3	7-16-99	REVISED AS BUILT					
2	7-6-99	REVISED FOR CONSTRUCTION					
1	1-21-99	REVISED FOR AS BUILT PROPOSAL					
0	11-20-98	ISSUED FOR CONSTRUCTION					
NO.	DATE	REVISIONS	BY	CHK'D	APP'D		

MORRISON-KNUDSEN ENGINEERS, INC.
A MORRISON KNUDSEN COMPANY
180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105

DESIGNED: [illegible] DRAWN: [illegible] CHECKED: [illegible] RECOMMENDED: [illegible]
DATE: 9-1-00 APPROVED: [illegible]

IDAHO POWER COMPANY
TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.

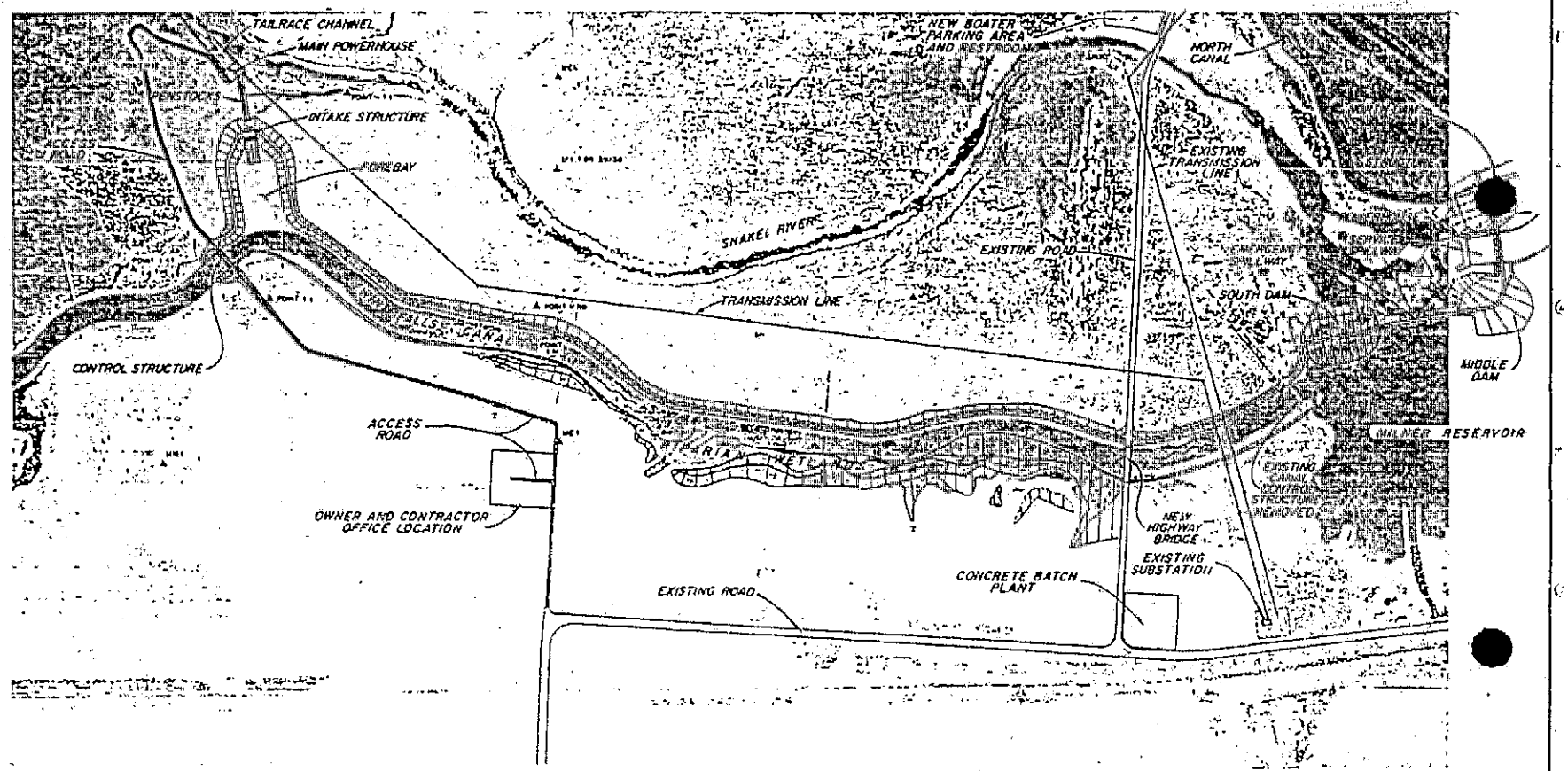
MILNER HYDROELECTRIC PROJECT

PROJECT GENERAL ARRANGEMENT

3T75-10-0005
SHEET 8 REV. 0

RECEIVED
JAN 10 1994

EXHIBIT A
PERMIT 01-7011
MILNER POWER PLANT



SURVEY CONTROL POINTS

CONTROL POINTS

POINT #	NORTH	EAST	ELEVATION

NOTE:

4							
3							
2							
1							

MORRISON-KNUDSEN ENGINEERS, INC.

IDAHO POWER COMPANY
TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.

MILNER HYDROELECTRIC PROJECT

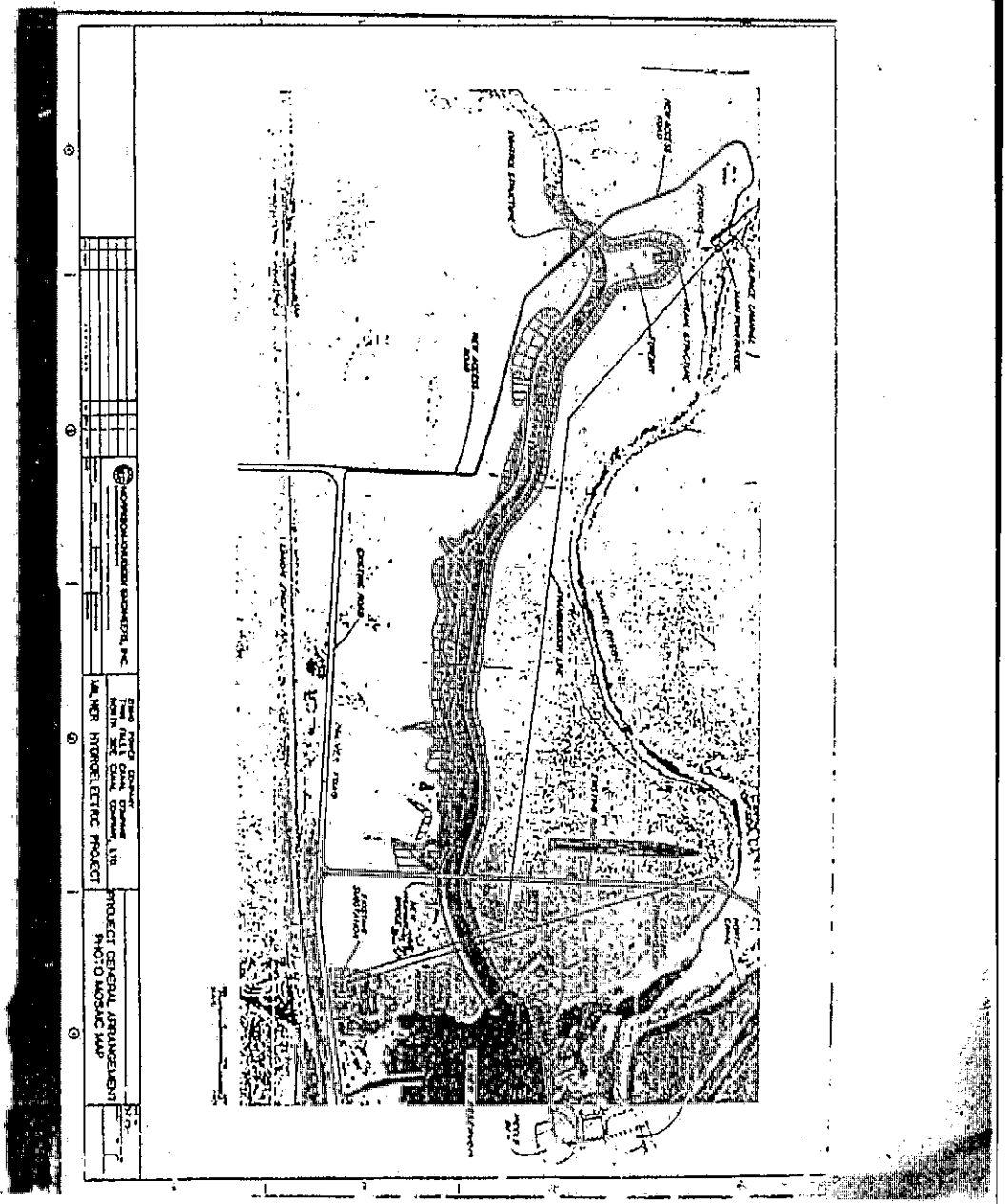
PROJECT GENERAL ARRANGEMENT

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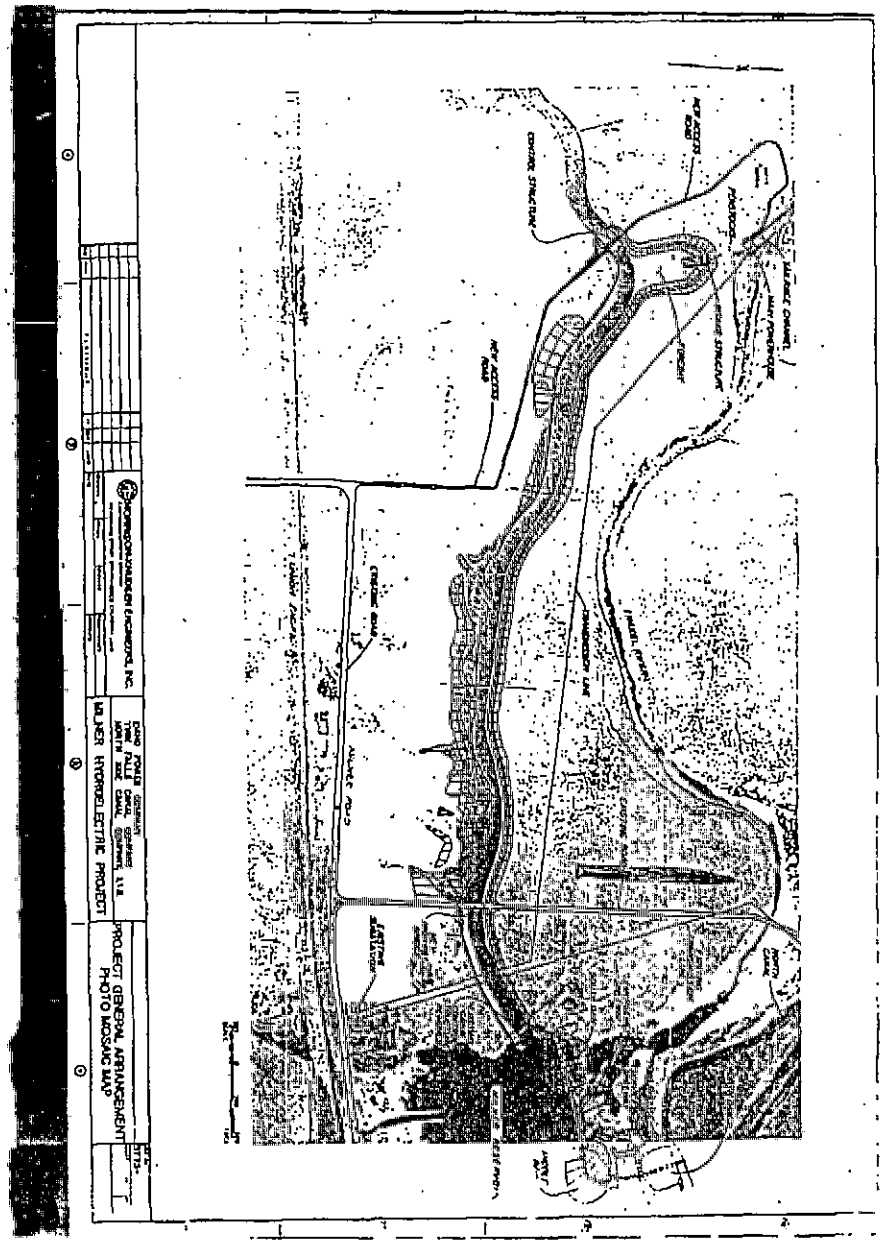
C. Filing and Service of Responsive Documents--Any filings must bear in all capital letters the title "COMMENTS," "RECOMMENDATIONS FOR TERMS AND CONDITIONS," "NOTICE OF INTENT TO FILE COMPETING APPLICATION," "COMPETING APPLICATIONS," "PROTEST" or "MOTION TO INTERVENE," as applicable, and the project number of the particular application to which the filing is in response. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: the Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 204-RB, at the above address. A copy of any notice of intent, competing application, or motion to intervene must also be served upon each representative of the applicant specified in the particular application.

Lois D. Cashell
Secretary



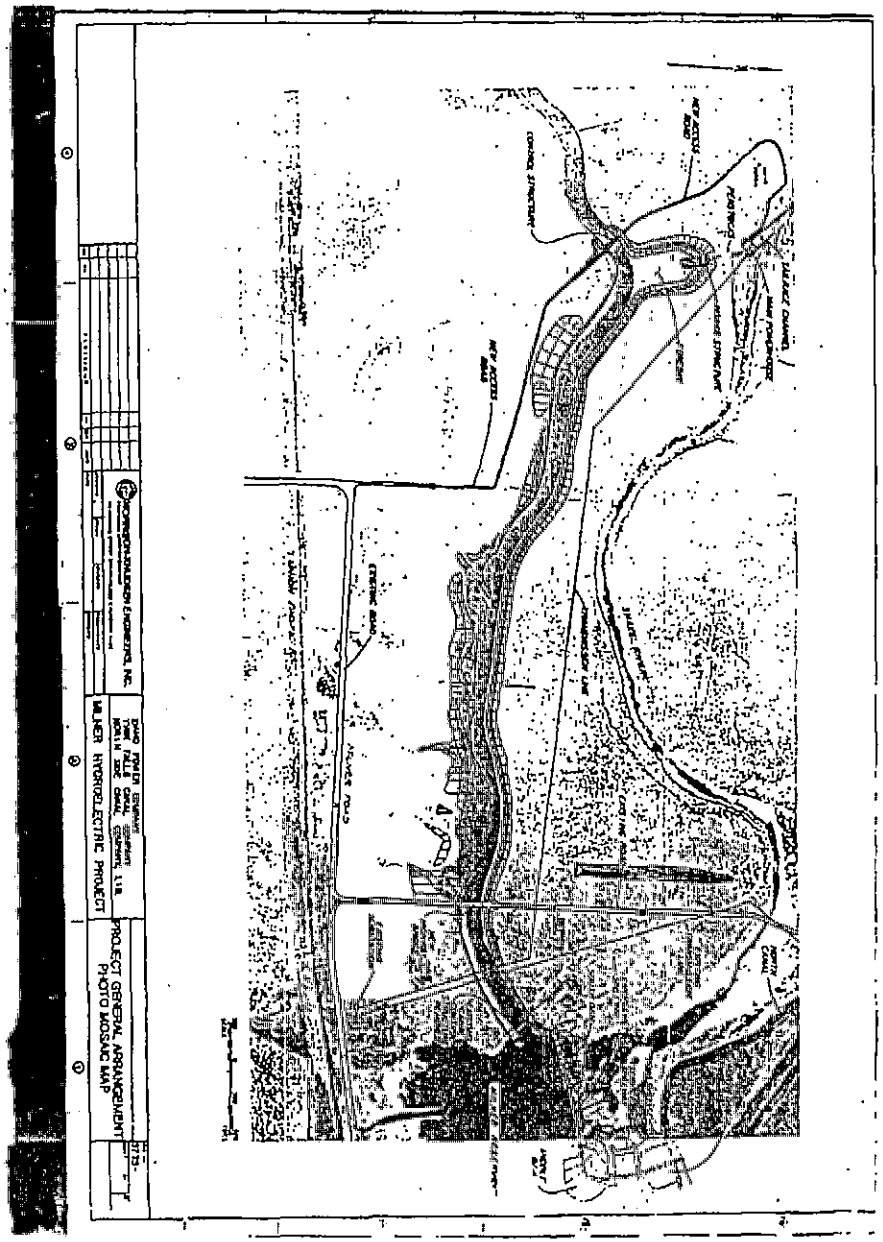
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Secretary



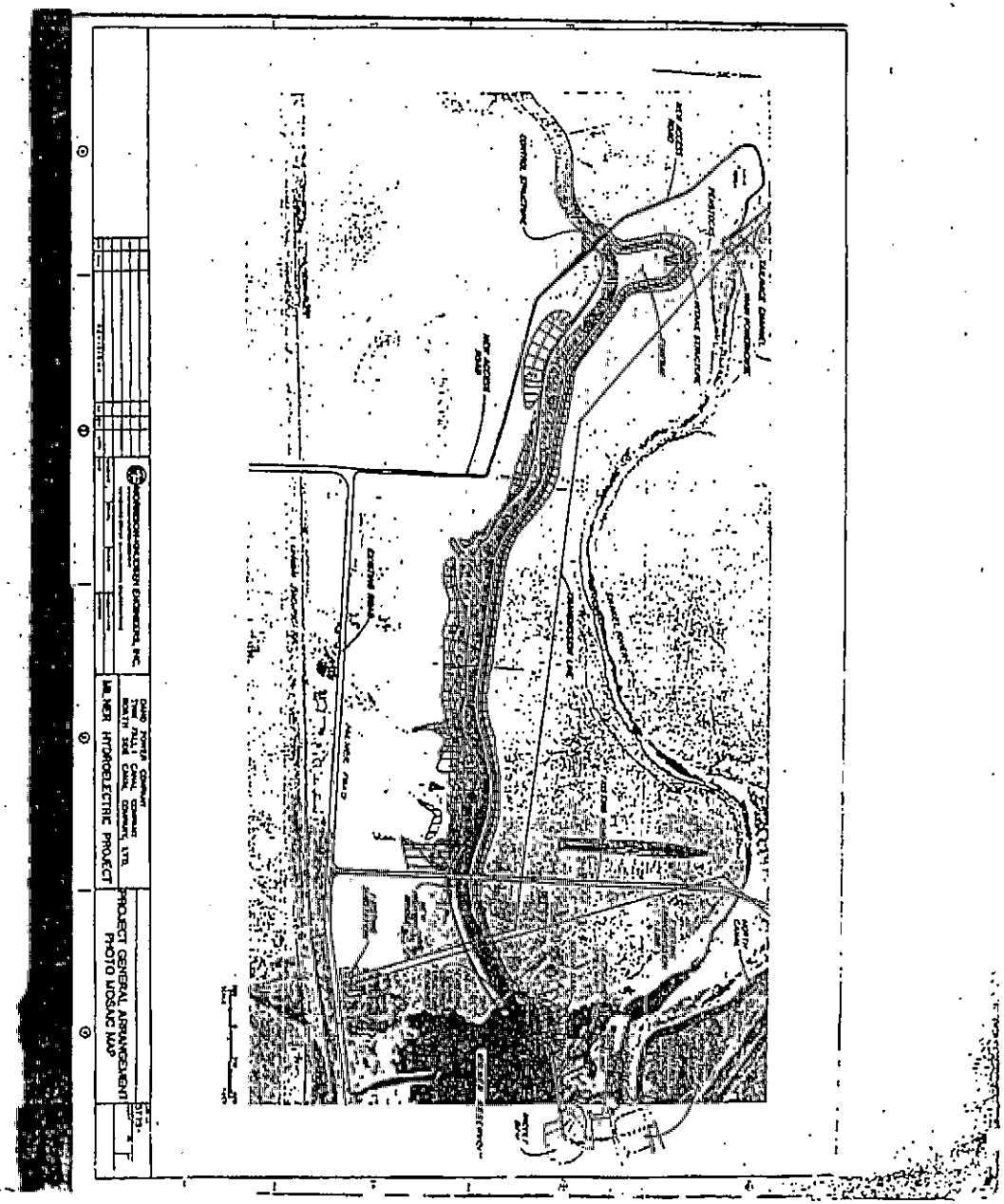
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Lois D. Cashell
Secretary



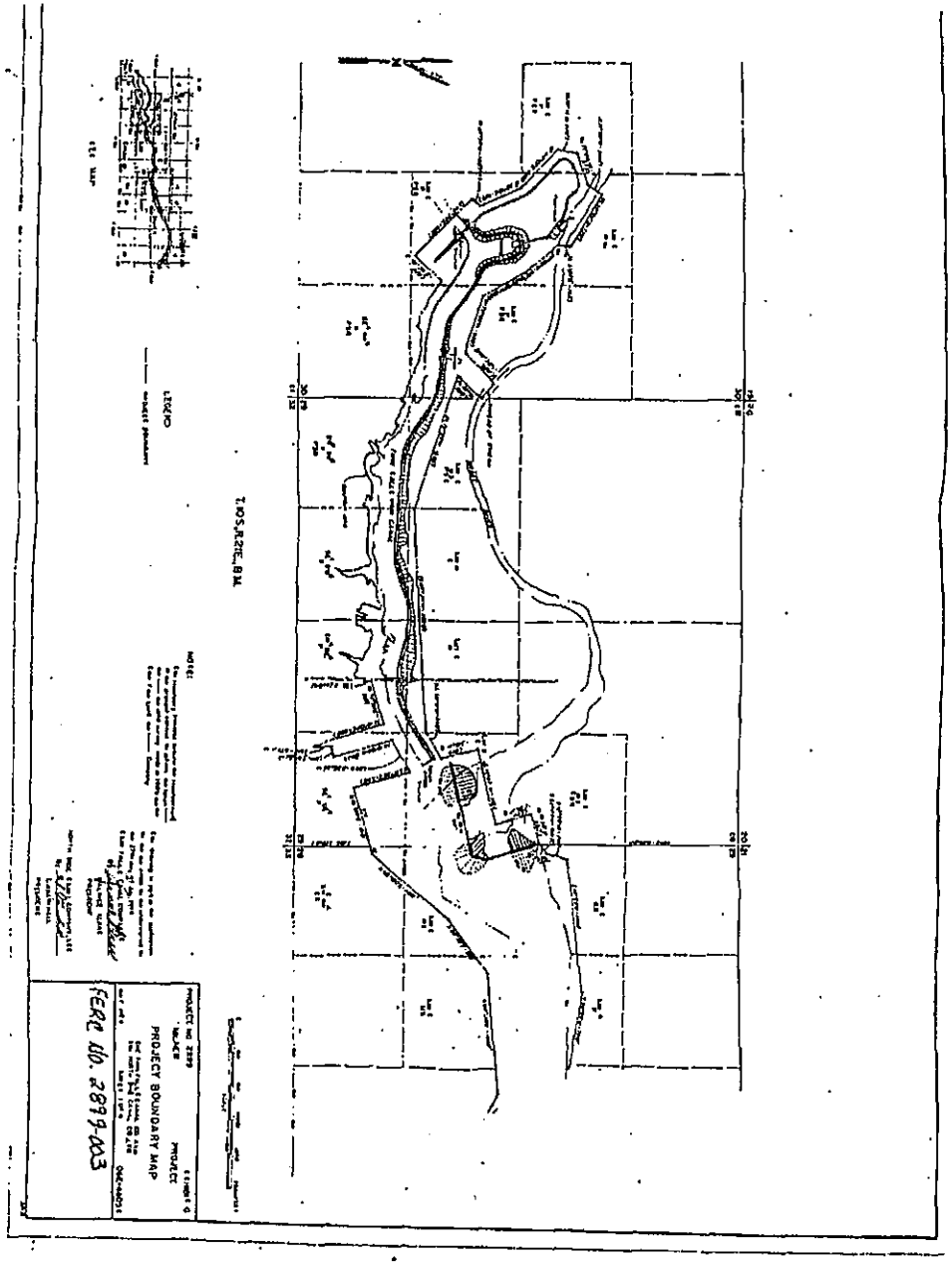
C. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS," "RECOMMENDATIONS FOR TERMS AND CONDITIONS," "NOTICE OF INTENT TO FILE COMPETING APPLICATION," "COMPETING APPLICATIONS," "PROTEST" or "MOTION TO INTERVENE," as applicable, and the project number of the particular application to which the filing is in response. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: the Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 204-RB, at the above address. A copy of any notice of intent, competing application, or motion to intervene must also be served upon each representative of the applicant specified in the particular application.

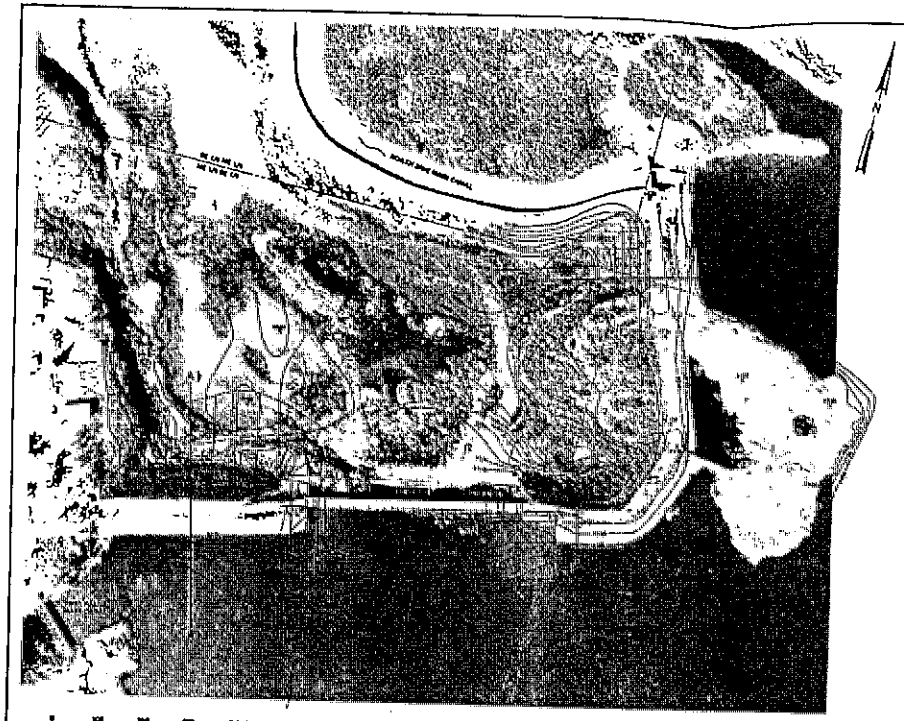
Lois D. Cashell
Secretary



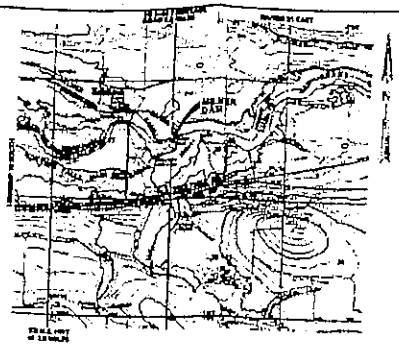
C. Filing and Service of Responsive Documents - Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST" or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing is in response. Any of the above named documents must be filed by providing the original and the number of copies required by the Commission's regulations to: Kenneth F. Plumb, Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: Mr. Fred E. Springer, Director, Division of Project Management, Federal Energy Regulatory Commission, Room 203-RB, at the above address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Kenneth F. Plumb
Secretary





SITE MAP



VICINITY MAP

This drawing is part of the application for license made by the undersigned on this 27th day of July, 1964.

TWIN FALLS CANAL COMPANY.

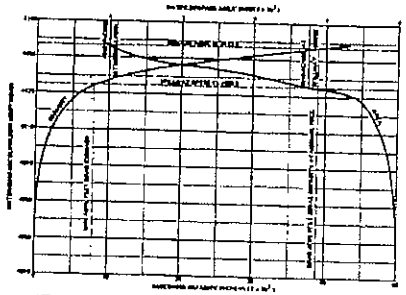
By _____

MAURICE HAAS
PRESIDENT

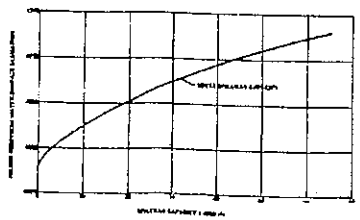
NORTH SIDE CANAL COMPANY, LTD.

By _____

C. J. MARSHALL
PRESIDENT



MILNER RESERVOIR



MILNER DAM

PROJECT NO. 2899 — EXHIBIT P

MILNER — PROJECT

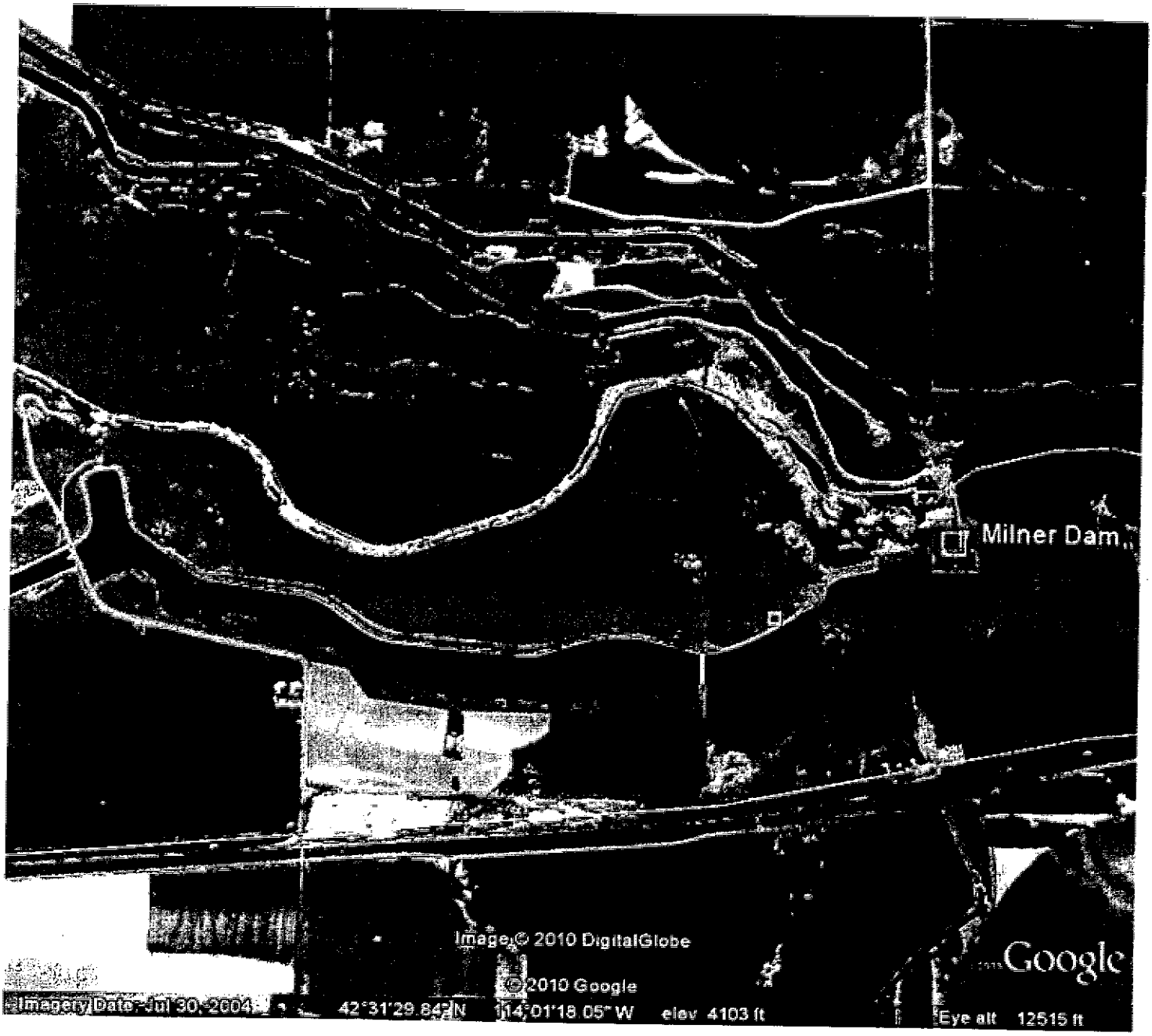
MILNER DAM
REHABILITATION PLAN

THE TWIN FALLS CANAL CO. AND
THE NORTH SIDE CANAL CO., LTD

JULY 1964 — SHEET 9 OF 12 — 06E-46088

Exhibit 6

Google Earth® printouts of Milner Dam and nearby areas.


Milner Dam
Image © 2010 DigitalGlobe
© 2010 Google
Google
Imagery Date: Jul 30, 2004
42°31'29.84" N
114°01'18.05" W
elev 4103 ft
Eye alt 12515 ft

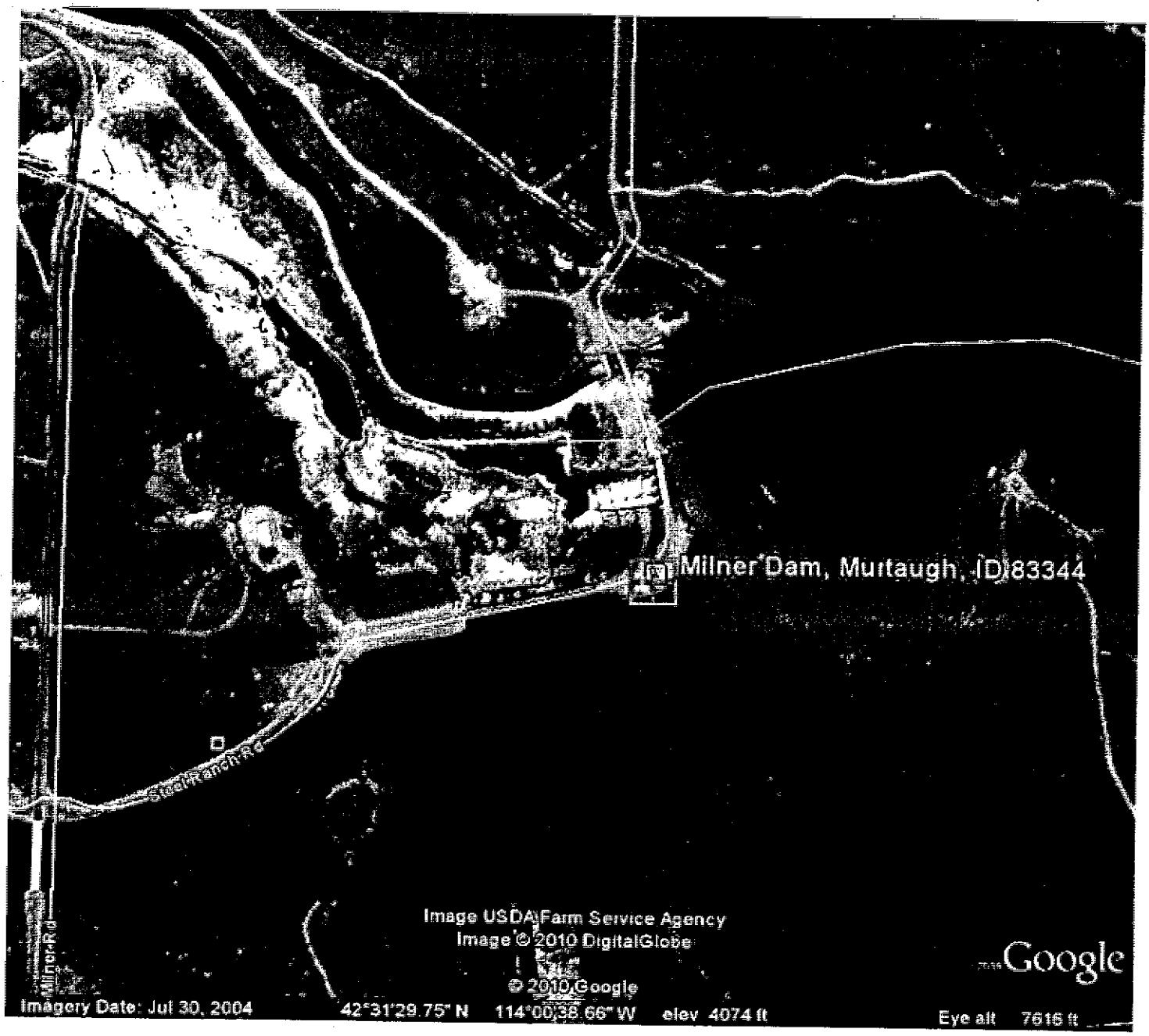

Milner Dam, Murtaugh, ID 83344
Stockton Rd
Image USDA Farm Service Agency
Image © 2010 DigitalGlobe
© 2010 Google
Google
Imagery Date: Jul 30, 2004
42°31'29.75" N 114°00'38.66" W elev 4074 ft
Eye alt 7616 ft


Image © 2010 DigitalGlobe
© 2010 Google
Google
Imagery Date: Jul 30, 2004
42°31'32.49" N
114°02'10.39" W
elev 4119 ft
Eye alt 5657 ft

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, an d 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.

**4 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.[FN81] 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 cartification was deemed waived by Order No. 464.[FN82] However, since we believe the three conditions contained in the water quality certificate,*62306 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.

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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 end 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 con centrations 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 fresh water aquatic organisms.[FN4]

(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.

**5 *(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 pro posed 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

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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.[FN10] The target flows required by Articles 407 *62307 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

**6 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 non game species inhabit the reservoir. The coldwater species occur primarily at the headwaters of

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the reservoir. IDFG stocks catchable rainbow trout in the headwaters of Milner Reservoir near Burley, Idaho.

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.[FN12]

The Idaho Fisheries Management Plan[FN13] 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-cut throat 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.[FN13]

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 sup port the yield fishery.

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

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*62308 aquatic resources would be low because of the sediment testing and sediment removal requirements of Article 403.

**7 *(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.[FN14] 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 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 deter mine 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.

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**8 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.[FN15] The proposed 58 cfs minimum flow would provide slightly improved instream flow conditions, because it would pre vent the extreme low flow events that occasion ally 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.[FN16] Proposed project operation would reduce the 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.[FN17] The DEIS also recommended a minimum flow of 300 cfs in the irrigation sea son to partially mitigate the cumulative adverse impacts to the resident trout and other *62309 resources.[FN18] Since the DEIS' 300 cfs recommendation to mitigate cumulative impacts superseded 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 sea son were needed. Flows derived by the Tennant Methodology,[FN19] the stream resource maintenance flow study,[FN20] 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 out weigh the need to protect the fishery resources. Accordingly, we will not require CC to release the flows referenced above. However, we are requiring CC, by Article 407, to release a tar get 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

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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. [FN21]

**9 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 down stream 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[FN22] 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.

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 *62310 determined that the trout stocked in the bypassed reach are not surviving, are not growing sufficiently, or are moving out immedietely,

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then CC should consider stocking trout in other areas of the Snake River such as the head of Milner Reservoir near Burley, Idaho. In con junction 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 pro gram 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.

D. Ramping Rate

**10 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.[FN23]

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.

E. 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.[FN24] 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.

F. Revegetation of Disturbed Upland Habitat

During construction of the proposed project, approximately 22 acres of upland

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shrub-grass land habitat would be disturbed.[FN25] 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.[FN26] 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.

G. 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. There fore, Article 413 requires CC to provide a detailed plan for providing the proposed wild life 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.

*62311 *H. Replacement of Riparian Wetlands and Upland Habitat*

**11 Approximately 6.1 acres of riparian wetlands will be eliminated by project development.[FN27] 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 guide lines.

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 wet land 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

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wetlands compared to upland habitat.

IDFG agrees with this approach for replacing upland habitat with riparian habitat [FN28] 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.

I. 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.[FN29] 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. More over, 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.

J. Whitewater for Boaters

**12 1. Flows

In the 1.6-mile-long reach of the Snake River immediately below Milner Dam, expert white water boaters run continuous Class V rapids during high flows that occur in early spring and late 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.

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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 *62312 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.[FN30] 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.[FN31]

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.

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.[FN32] 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.

**13 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

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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
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 white water boating opportunities offered at Milner, from low flow technical kayaking to high flow *62313 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 avail able make it impossible for CC to meet

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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.

**14 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 stream flow 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.

K. 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.

L. Recreation Facilities

**15 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 *62314 boat dock near the existing boat

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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.

M. 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 land- scape.

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.

**16 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.

N. 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.[FN131] Project construction and rehabilitation of the Dam would require modifications to the dam and the

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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 pro poses to fence portions of the townsite and to *62315 prohibit construction activities in the vicinity of the townsite to ensure that no impacts to this site would occur.[FN34]

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.[FN35]

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: (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.[FN36]

**17 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 requires CC to finalize and implement its cultural resources management plan in a manner acceptable to the Advisory Council on Historic Preservation.

O. Cumulative Impacts

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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[FN37] 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*62316 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

**18 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 con serving a waterway or waterways affected by the project. The Commission's interpretation of "comprehensive plan" under Section 10(a)(2)(A)[FN38] was revised on rehearing by order issued April 27, 1988.[FN39] 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.

The Commission reviewed five plans that address various aspects of waterway management in relation to the proposed project.[FN40] 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*,[FN41] 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 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.[FN42]

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**19 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 accommodate 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*62317 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.[FN43] 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 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

**20 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.

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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 *62318 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.

**21 (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. - Showing

General Map - 2899-1 - 13

Project Boundary Map - 2899-2 - 14

Project Boundary Map - 2899-3 - 15

Project Boundary Map - 2899-4 - 16

Project Boundary Map - 2899-5 - 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,

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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 head works; (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.

**22 (D) This license is subject to the Articles set forth in Form L-2 [54 FPC 1808] (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.

**62319 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

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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 aver age 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).

**23 *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 *62320 construction features to be discussed; significant events in design and construction that have occurred since the last board of consultants' meeting; drawings; ques-

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tions 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.

**24 *Article 306.* At least 60 days before the start of construction of each major component of the project, such as the dam rehabilitation, spill way 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 Sup ply 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.

**25 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, perinteter 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

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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 *62321 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.

**26 *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 Com mission 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

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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.

**27 *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 *62322 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.

**28 *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 down stream 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

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Snake River's elevation provides adequate protection for the aquatic resources in the bypassed reach during project start-up 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 Commis- sion.

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*62323 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.

**29 *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

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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.

**30 *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 White water 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*62324 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

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Department of Parks and Recreation, and the Idaho White water 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 deter mine the need 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.

**31 *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, sur face 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 *62325 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.

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**32 *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 grant 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 ny 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.

**33 *62326 (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

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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 shore line. 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 under ground 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.

**34 (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.

*62327 (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.

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(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.

**35 (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.

Commissioner Moler *concurred* with a separate statement attached.

FN1. 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.

FN2. *See*he attached Safety and Design Assessment (S&DA) for a more detailed description of the dam safety concerns regarding this project.

FN3. *See*Y40 C.F.R. §1506.11 (1988).

FN4. Letter from Martha O. Hesse, Chairman, Federal Energy Regulatory Commission, October 25, 1988.

FN5. Letter from A. Alan Hill, Chairman, CEQ, October 27, 1988.

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FN6. 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.*

FN7. *See*section 4.1.1.1 of the DEIS.

FN8. 52 Fed. Reg. 5446 (February 23, 1987), *FERC Statutes and Regulations* ¶ 30,730 (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).

FN9. *e generally* Section 4.2.1 of the DEIS.

FN10. This fishery resource is discussed in Part II C 4, infra.

FN11. *See* Section 3.3.2.1.1 of the DEIS.

FN12. Idaho Department of Fish and Game, 1986, Fisheries Management Plan 1986-1990, Boise, Idaho, 274 pp.

FN13. *See* Section 3.3.2.1.2 of the DEIS.

FN14. *See* Section 4.2.2.1.2 of the DEIS.

FN15. *See* Section 4.2.2.1.1.3.1 of the DEIS.

FN16. *Id.*

FN17. *See* Section 4.2.2.1.2 of the DEIS.

FN18. *See* Section 5.1.2 of the DEIS.

FN19. 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.

FN20. 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.

FN21. The 200 cfs target flow is not a minimum flow, and CC does not have to release the flow unless water is available.

FN22. 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.

FN23. *See* Section 4.2.2.1.2 of the DEIS.

FN24. *See* Section 4.3.1.1 of the DEIS.

FN25. *Id.*

FN26. *See generally* Section 4.3 of the DEIS.

FN27. *See* Section 4.3.1.1 of the DEIS.

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FN28. Personal communication, Dale TurnipSeed, IDFG, Jerome, Idaho, November 28, 1988.

FN29. Twin Falls Canal Company and North Side Canal Company, Ltd., Response to DEIS, March 30, 1988.

FN30. 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.

FN31. 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.

FN32. *See* Section 4.5.1.2 of the DEIS.

FN33. 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.

FN34. 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.

FN35. Letter from Dr. Merle W. Wells, State Historic Preservation Officer, Idaho State Historical Society, Boise, Idaho, February 4, 1986.

FN36. 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.

FN37. *See* Ordering Paragraph (D) hereof.

FN38. Order No. 481, 52 Fed. Reg. 39,905 (October 26, 1987), *FERC Statutes and Regulations* ¶30,773 (1987).

FN39. Order No. 481-A, [*FERC Statutes and Regulations* ¶30,811] (April 27, 1988).

FN40. 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.

FN41. 42 FERC ¶61,072 (1988), *appeal pending sub nom. Idaho Power Company v. FERC*, No. 88-1078 (D.C. Cir. filed Feb. 3, 1988).

FN42. *See First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946).

FN43. *See* [*FERC Statutes and Regulations* ¶30,811] (1988).

Safety and Design Assessment

Milner Hydroelectric Project

FERC Project No. 2899-001, ID

Project Design

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Milner Dam is located at a site on the Snake River where the river divides into three channels, separated by two islands. Before the dam was built, the north channel carried the main flow of the river, the south channel carried water only during extreme flood events, and the middle channel was dry, except during periods of high water. Milner reservoir provides water to three canals, the Twin Falls, North Side Main, and Milner Gooding Canals, and to three pumping stations, Milner Low Lift, A and B Irrigation, and North Side Pumping Company. Cumulatively, the canals and the pumping plants serve approximately 500,000 acres.

**36 Construction of Milner Dam started in 1903 and was completed in 1905. The dam has three embankments (north, middle, and south); each embankment is constructed with a trapezoidal shaped rockfill section with a vertical wood cutoff wall in the center of each embankment. The rockfill sections consist primarily of angular boulder and cobble-size blocks of olivine basalt rock. The cutoff walls were damaged during construction, and when the builder first tried to fill the reservoir, the dam leaked; on the upstream side of the embankments, non plastic sandy silt was sluiced into the rockfill to stop the leakage. Each embankment was built with a horizontal-to-vertical downstream slope of 1.5 to 1 (1.5:1) and an upstream slope of 4:1. The north embankment has a crest length of 280 feet and a crest elevation of 4,138 feet;[FN1] the middle embankment has a crest length of 404 feet and a crest elevation of 4,138 feet; and *62328 the south embankment has a crest length of 462 feet and a crest elevation of 4,138 feet.

Presently, flows are released from the dam by a gated spillway located on the southern island. The spillway is a concrete structure, 487 feet long, with a crest elevation of 4,122.5 feet and with 99 wood slide gates, each 4 feet wide by 12 feet high, which are individually lifted by a hydraulic mechanism. An ungated emergency spillway with a concrete-core cutoff wall is located on the north island; the emergency spillway is 290 feet long and has a crest elevation of 4,134 feet. The dam has no operable low-level outlet or reservoir drain.

Flows from Milner Lake to Twin Falls Main Canal are controlled by a concrete structure with seven manually operated radial gates. The headworks is located on the south abutment.

The applicants propose to construct rockfill berms on the downstream slopes of the three existing dam embankments. The top of each berm would be 15 feet wide and 10 feet below the crest of the existing embankments, and the downstream slope of each berm would be 3.75:1.

The applicants would replace the existing gated spillway with a new spillway that would have 11 radial gates, each 12 feet high and 30 feet wide. One gate would have a hinged gate flap at its crest to provide for passing floating debris. The crest elevation would remain at 4122.5 feet. The spillway outlet channel, which would be lined with concrete to prevent erosion, would have a capacity of 58,000 cubic feet per second (cfs) at a reservoir elevation of 4,133.5 feet.

The Twin Falls Main Canal has a maximum design hydraulic capacity of 3,200 cfs. The applicants propose to do the following: increase the canal capacity; modify the headworks; build a wasteway; and build a new control structure. The applicants would increase the canal's capacity to 7,000 cfs, raise the right embankment of the canal near Milner Dam to elevation 4,137.5 feet to provide four feet of freeboard and widen the crest to 20 feet. The applicants would modify the existing canal headworks structure to install stoplogs for dewatering the canal and forebay area when needed. The applicants would build a wasteway for sluicing ice from the canal and for removing flows in the canal if there is a power plant load rejection. The concrete wasteway would control flows with one hydraulically operated bascule gate designed to pass the maximum powerhouse flow of 4,000 cfs and would return flows to the Snake River. To control irrigation releases to the canal, the applicants would build a new control structure, approximately 1,600 feet downstream from the wasteway. The concrete structure would have six manually operated radial gates, each 12-foot-wide by 15-foot-high and one hydraulically operated bascule gate, 24-feet-long by 11-feet-high.

**37 The applicants would build a forebay to convey flows from the canal to the project intake and a concrete intake

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structure to convey flows to the penstock. A cable-operated, fixed-wheel gate, 14-foot-wide by 17-foot-high, would permit closing the penstock for emergency shut down or maintenance of the penstock and turbine. The penstock would be a 17-foot-diameter steel pipe, approximately 385 feet long.

The powerhouse would be a semi-outdoor, reinforced-concrete structure, approximately 89-feet-long by 56-feet-wide, housing one generating unit, rated at 43.65 megawatts (MW). The powerhouse would be located near the bottom of the Snake River Canyon. The generator would be connected to a Kaplan turbine, rated at 59,650 horsepower under a net head of 151.6 feet and a discharge of 4,000 cfs. Flows from the powerhouse would be returned to the Snake River through a 170-foot-long tailrace channel. The tailrace would have a 46-foot-wide base with side slopes of 0.25:1.

Project Safety

The hazard potential of a dam is the potential for loss of human life or property damage that would result from failure of the dam.

Starting at Milner Dam, the Snake River flows into the Snake River Gorge, a narrow, practically inaccessible, steep-walled canyon. Development downstream of Milner Dam includes four hydroelectric projects, two golf courses and a sewage treatment plant. The four hydroelectric projects do not have full time operators, and the sewage treatment plant is located 25 miles downstream of the dam. The poor access and ruggedness of the canyon limit recreational use of the Snake River below Milner Dam. Failure of the project, therefore, would result in minimal downstream impacts.

Milner Dam was inspected by the Portland Regional Office on October 13, 1988. The inspector determined that even though it poses only a minimal threat to downstream life and property, failure of Milner Dam would have the potential to cause catastrophic damage to the economy of the area, "the Magic Valley of Idaho." Approximately 500,000 acres of farm land is dependent upon irrigation water diverted at Milner Dam, and the economy of the Magic Valley depends on the agricultural production of the 500,000 acres of farmland.

Because the Regional Office rates Milner Dam as having a significant hazard potential, the dam should be modified to make it safe against failure under earthquake loading and *62329 under one-half probable maximum flood (PMF) loading (58,000 cfs) conditions.

Each of the three dam embankments, discussed earlier, consists of a large, trapezoidal rockfill section with a zone of hydraulic-fill earth material, placed directly against the upstream face, as the water barrier. Each embankment has a vertical wooden core in the center of the rockfill section. The wooden cores were damaged during construction and are assumed to be an ineffective barrier to seepage. Because there is no filter between the rockfill and the upstream earthen barrier, the upstream hydraulic-fill material, when disturbed, can be washed into and through the rockfill (piping leak or piping failure). Engineering studies performed by the consultant for the applicant show that the upstream hydraulic-fill material is comprised of very loose to loose nonplastic sandy silts and silty sands that are susceptible to liquefaction (complete loss of strength) under seismic loading conditions. The slumping of the upstream fill could open a path for water from the reservoir to pass through the earthen barrier and to enter the rockfill in the embankments. Analysis, by the applicants' consultant, of flows through the rockfill sections of the embankments, shows that a large leak could release enough water to destablize the downstream slopes of the rockfill zones. If this happens, progressive raveling of the down stream face could breech an embankment.

**38 According to the applicants' records, since 1905, Milner Dam has experienced 10 piping leaks, the first occurring in 1905 with the initial filling of the reservoir and the last in March 1983. All of the piping leaks were repaired soon after they occurred with little disruption to irrigation service. To reduce the needed time to begin leak repairs, the applicants currently stockpile earthen repair material on both banks of the river.

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To stabilize the slopes if an earthquake causes a piping failure, the applicants' consult ant proposes to construct a rockfill berm on the downstream slope of each embankment. The berms would increase the downstream slope of the embankment from 1.5:1 to 3.75:1; the major portion of the berms would consist of rock averaging 24 inches in size, while the lower portion would be faced with rock averaging 48 inches in size or larger. This repair approach would still require the applicants to maintain stockpiles of material to repair any leaks which could develop in the earthfill section.

Since the license would authorize major modifications of a dam with a significant hazard potential, the staff recommends the inclusion of special license Article 305 requiring the licensees to retain a board of consultants to review the design and construction of the project for safety and adequacy.

Because the water diverted by Milner Dam is critical to the wellbeing of the Magic Valley, the staff recommends the inclusion of special license Article 307, requiring the licensees, in consultation with the board of consultants, to develop a detailed manual of procedures for repairing Milner Dam if there is excessive leak age.

Based on an inspection of the project and on discussions with the applicants, the staff finds the project to be satisfactorily maintained. The staff found minor seepage areas on the north, middle, and south embankments. These areas will continue to be monitored in the future. The staff had trouble inspecting the toe of the dam because it is covered with vegetation. The Director of the Portland Regional Office will direct the licensees, if a license is issued, to remove the vegetation that interferes with the Commission's dam safety inspection programs.

To improve winter operations, the applicants propose to replace the existing spillway. The 99 wooden gates of the spillway now have to be raised individually. The process is slow, because the applicants have only two hoisting mechanisms. The 11 new gates would greatly improve operation and would reduce the time needed to adjust the spillage under flood conditions. The new spillway would be designed to pass an inflow design flood (IDF) of 58,000 cfs; the IDF represents a spillway capacity of one- half of the PMF. An IDF that is less than the full PMF is acceptable because the failure of Milner Dam would not threaten downstream life.

The proposed project would be safe and adequate if constructed and/or rehabilitated according to sound engineering practice, and the requirements of a license.

Primary Transmission Facilities

**39 The primary transmission line segment would include the 1.4-mile-long 138-kilovolt (kV) transmission line connecting the project generator to the interconnected transmission system at the Milner substation 138-kV bus and its support facilities.

Water Resource Planning

As stated earlier, the applicants propose to use the existing Twin Falls main irrigation canal to convey water left over from irrigation requirements to the proposed power facilities, 1.6 miles downstream of the existing Milner Dam. Any flows used for generation in the proposed powerhouse thus would bypass the 1.6 miles of river channel below Milner Dam.

The proposed powerhouse would have the capacity to use flows of from 900 to 4,000 cfs. *62330 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 about mid- June through mid-September.

The staff, on page 5-3 of its Snake River Draft Environmental Impact Statement (DEIS) for the Twin Falls, Milner, Auger Falls, and Star Falls projects, recommended that any license issued for the Milner Project require a minimum by-

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pass flow in the 1.6 mile reach below Milner Dam. The public, irrigators, the applicant, and the Idaho Department of Water Resources (IDWR) apprised the staff that requiring the licensees to maintain minimum flows below Milner Dam would be inconsistent with state requirements. All of the reservoir storage available above Milner Dam is committed and the minimum flow specified by Idaho State Water Plan (Water Plan) for the river immediately below Milner Dam is zero cfs. Because the applicants, the Northside and Twin Falls Canal Companies, are only service companies, which distribute the irrigation water to their shareholders, who hold the water rights, requiring them to maintain a minimum flow below Milner Dam other than zero would require that they release water that Idaho water law has appropriated to others.

After issuing the DEIS, the staff evaluated the feasibility of requiring any licensees of the proposed Snake River projects to rent or lease water on a short-term basis from upstream water rights holders in order to provide flows in the bypass reaches of the projects. Such flows could reduce impacts of the projects and/or improve conditions by providing flows that are greater than those that now exist. The staff uses the term Comprehensive Water Block (CWB) to refer to the volume of water that a licensee would have to rent to supplement the available river flow in order to meet the recommended target flows.

The staff identified the Upper Snake Water Supply Bank (Water Bank) as a possible source for acquiring flows for environmental mitigation and enhancement purposes. The state 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.

**40 In a letter filed with the Commission on September 30, 1988, IDWR commented on the staff's proposal, stating: "Not withstanding the applicant's increased costs in obtaining the water, it appears that structured reliance on the Water Bank through the Comprehensive Water Block mechanism can be successful in meeting prescribed mitigative flows on the mainstem of the Snake River."

The staff discussed the operation of the Water Bank with Alan Robertson, Supervisor, Hydrology Section, IDWR. It is the staff's understanding from those discussions that water has been available for lease from the Water Bank in all years since its creation and that, because of increased irrigation efficiencies, future water availability likely will increase. Idaho Power Company (IPC) has leased water for power generation from the Water Bank in every year since its creation. It is highly probable that in the future, water will be available in the Water Bank in excess of irrigation demand, except in very bad water years.

It is the staff's opinion that the short-term leasing or rental of water that is in excess of the irrigation demand each year for purposes such as environmental mitigation and enhancement, would be in the public interest, would not commit water storage to a non-agricultural use, and therefore would not violate the intent for which the Water Bank was created or the purposes for which the upstream storage projects were authorized.

The staff evaluated numerous scenarios for requiring in any license issued that mitigation and enhancement flows should be provided in the bypass reach below Milner Dam. In addition, the staff, recognizing that it might be economically beneficial to develop the hydro power potential of the target flows that may be recommended to be released at Milner Dam, performed reconnaissance-level economic analyses of the benefits of developing a powerhouse at Milner Dam, in addition to the powerhouse proposed by the applicants to be located 1.6 miles downstream. The preliminary studies showed that depending on the magnitude of target flows specified in a license for the Milner Project, it may be economically beneficial to construct a power plant at the dam. The staff, therefore, recommends the inclusion of special license Article 308, requiring the licensees to study the feasibility of constructing such a power plant, and if it is found to be feasible and economically beneficial, to submit a plan for constructing the power plant. The staff's economic analyses are discussed in

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the Economic Evaluation section of this assessment.

Section 10(a)(2)(A) of the Federal Power Act (FPA) requires the Commission to consider the extent to which a project is consistent with federal or state contprehensive plans for *62331 improving, developing, or conserving a water way or waterways affected by the project.

The staff reviewed the Northwest Power Planning Council's Northwest Conservation and Electric Power Plan (Power Plan) to deter mine if the project is consistent with the Power Plan. The Council's Power Plan envisions meeting the growing regional energy requirements in the most economical manner with environmentally acceptable resources. The Power Plan considers any environmentally acceptable resource that is less expensive than coal-fueled steam electric generation as an acceptable resource for development before the development of coal-fueled power plants (the Council's planned marginal resource).

**41 The staff developed life-cycle costs of energy from the Council's planned generic coal plant, assumed to be needed in the year 2002, for determining if proposed hydroelectric projects are, consistent in the long term with the Power Plan, as required under Section 10(a)(2)(A) of the FPA. The staff assumed that new coal plant generating resources would be required within the region by the year 2002, based on the need for additional generating resources projected for the investor-owned utilities in the Pacific Northwest Region, as discussed in the Need for Power section of this assessment.

The staff found that the life-cycle levelized cost of the proposed project is less, as of its projected on-line date, than the levelized life-cycle cost of the least cost or marginal long term alternative, included in the Power Plan. Therefore, the project as proposed is not inconsistent with the Council's Power Plan, and is economically beneficial within the long-term objectives of the Power Plan.

The staff reviewed the Water Plan and found that the proposed project, both including and excluding the staff's target flow recommendations, would be consistent with the Water Plan, which requires a minimum flow below Milner dam of zero cfs. The staff's recommendation for including target flow conditions in any license issued is consistent with the Water Plan. The staff is not recommending that minimum flows be provided below Milner dam, but rather that the licensees should provide any additional water needed to meet the 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 staff reviewed the Idaho Fisheries Management Plan, the Idaho Outdoor Recreation Plan, the Idaho Water Quality Standards, and the Department of the Interior's Monument Proposed Resource Management Plan and found that the plans do not affect the proposed project's development or operation with respect to irrigation, flood control, or navigation.

A review of the Commission's Planning Status Report for the Upper Snake River Basin and the Hydroelectric Site Data Base show that there are no proposed or existing projects that would conflict with the proposed project.

Economic Evaluation

A proposed project is economically beneficial so long as its levelized cost is less than the long- term levelized cost of alternative energy to any utility in the region that can be served by the project.

The staff calculates the 50-year projected levelized alternative energy cost in the region in 1992 to be about 85 mills per kilowatt-hour (kWh). This is the levelized unit cost of energy from coal-fueled steam electric plants assumed to be needed in the year 2002, and the value of displaced fuel consumption in existing coal- fueled steam plants until that time. The staff assumed that new coal plant generating resources would be required within the region by the year 2002, based upon the projected need for additional generating resources, by the investor-owned utilities in the Pacific North west Region, as discussed in the Need for Power section of this assessment.

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**42 The applicants entered into a contract with IPC for the development of power facilities at the Milner site. Under the terms of the con tract, IPC would receive the total project power production and would pay the total project costs plus two mills/kWh (escalating 25 percent every 5 years) for all energy produced. The applicants would use the escalating energy payment, which is equivalent to 3.13 mills/kWh when levelized over 50 years, to help offset the costs of repairing the dam, as described in the Dam Safety section of this assessment.

The staff evaluated the economics of the 44-MW project the applicant proposes to construct under various target flow conditions, assumed to be required in the bypass reach of the river between Milner Dam and the pro posed powerhouse, to be located 1.6 miles downstream, as shown in Table 1.

Table 1. Summary of the generation, levelized net annual benefits, rate of return on investment (ROI), and levelized annual revenue to the licensee for the project, as proposed to be constructed by the licensee and to be operated under various mitigation/enhancement bypass-flow scenarios.

Table 1. Summary of the generation, levelized net annual benefits, rate of return on investment (ROI), and levelized annual revenue to the licensee for the project, as proposed to be constructed by the licensee and to be operated under various mitigation/enhancement bypass-flow scenarios.

Bypass flows	Average generation (GWh)	Levelized annual benefits	ROI	Levelized annual revenues
58 cfs year round	154	$4,233,000	18.6%	$482,400
58 cfs summer, 150 cfs winter	151	$3,995,000	18.2%	$473,400
200 cfs year round	147	$3,665,000	17.6%	$460,100
300 cfs year round	143	$3,305,000	17.0%	$447,400
300 cfs summer, 720 cfs winter	134	$2,522,000	15.6%	$419,400

*62332 The staff perfonned reconnaissance level feasibility studies evaluating the economic benefits of installing small units at the base of Milner Dam to utilize the flows that would be released at the dam. The potential power facilities to be located at Milner Dam were sized as shown in Table 2.

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Table 2. Milner Dam hydraulic capacity for various environmental mitigation/enhancement bypass flows.

Bypass flow	Unit hydraulic capacity
58 cfs year round.	50-150 cfs unit
58 cfs summer, 150 cfs winter.	50-150 cfs unit
200 cfs year round.	200-600 cfs unit
300 cfs year round.	300-900 cfs unit
300 cfs summer, 720 cfs winter.	300-900 cfs unit

The staff evaluated the economic benefits of developing capacity at Milner Dam to utilize the bypass flows as shown in Table 3.

Table 3. Summary of the generation, levelized net annual benefits, ROI, and levelized annual revenue to the licensee for generating capacity installed at Milner Dam, for various mitigation/ enhancement bypass flows.

Bypass flows	Average generation (GWh)	Capacity	Levelized annual benefits	ROI	Levelized annual revenues
58 cfs.	3.8	1 MW	($ 46,200)	9.5%	$11,700
58-150 cfs.	4.4	1 MW	$ 5,000	11.2%	$13,700
200 cfs.	11.3	3 MW	$304,000	16.4%	$35,400
300 cfs.	13.5	4 MW	$304,000	15.2%	$42,200
300-720 cfs.	16.2	4 MW	$525,500	18.2%	$50,700

Since the reconnaissance-level feasibility studies show that the addition of capacity at Milner Dam may be economically beneficial compared to the alternative cost of energy in the region, any license issued should include Article 308, requiring that the licensees study the feasibility of installing generating capacity at the dam, and, if the installation is feasible, requiring the licensees to submit a plan for developing the capacity.

The staff evaluated the economic benefits of developing the combination of the proposed project powerhouse, and a power plant at the dam as shown in Table 4.

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Table 4. Summary of levelized annual benefits of combined development of a powerhouse at Milner Dam as well as the power plant proposed to be developed downstream, for various mitigation/enhancement by pass flows.

Bypass flows	Combined capacity	Gen. (GWh)	Levelized annual benefits	Levelized annual revenues
58 cfs	44 MW[1]	154	$4,233,000	$482,400
58-150 cfs	45 MW	155	$4,238,000	$487,400
200 cfs	47 MW	158	$3,969,000	$494,500
300 cfs	48 MW	156	$3,609,000	$497,700
300-720 cfs	48 MW	150	$3,048,000	$469,500

FN1. This scenario is the same as the proposed scenario with a downstream powerhouse only, since installing a unit at the dam would not be economically beneficial under this bypass flow.

*62333 The staff evaluated the amounts and levelized costs of water that the applicants would need to lease from the Water Bank to meet the recommended mitigation/enhancement bypass flows as shown in Table 5.

The current cost of water from the Water Bank is $2.50 per acre-foot per year. In its studies, the staff used a cost of $4.32 per acre- foot, which is the levelized cost of water over 50 years, assuming that the cost of water would escalate at 5 percent annually.

Table 5. Amounts and levelized costs of the CWB needed to be leased from the Water BAnk to meet various mitigation/enhancement bypass flows.

Bypass flows	Storage (acre-feet) required	Levelized average annual cost
58 cfs	3,586	$15,500
58-150 cfs	3,586	$15,500
200 cfs	11,246	$48,600
300 cfs	22,729	$98,200

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300-720 cfs	22,729	$98,200

The staff evaluated the net annual benefits of the project including the projected cost of the CWB water for various mitigation/ enhancement bypass flows, as shown in Table 6.

Table 6. Summary of the levelized net annual benefits of the project, and combined project (including a power plant at the dam) for various mitigation/ enhancement bypass flow requirements including the levelized annual cost of the CWB.

Bypass flows	Proposed project lev. annual benefits	Combined project lev. annual benefits
58 cfs year round	$4,217,500	$4,217,500
58 cfs summer, 150 cfs winter	$3,979,500	$4,222,500
200 cfs year round	$3,616,400	$3,920,400
300 cfs year round	$3,206,800	$3,510,800
300 cfs summer, 720 cfs winter	$2,423,800	$2,949,800

In order to preserve the high-flow-condition kayaking opportunities that occur in the April- May period in the bypass reach of the river below Milner Dam, the environmental staff recommends requiring the main powerhouse to be shutdown during daylight hours in the April-May period, for the equivalent of eight full-load hours of operation (4000 cfs) for eight days, in accordance with proposed license Article 413. A shutdown of the main power plant during the spring would reduce the project generation by 42,000 kWh for each hour of shut down. The total reduction in project generation for the equivalent of 64 hours of full-load shut down is 2,688,000 kWh. At the regional levelized energy value of 85 mills/kWh, the shutdown would reduce the project benefits by approximately $228,000 annually. The shut down would reduce the project generation and therefore the revenues that the licensees would receive under the power purchase contract with IPC. The levelized value of the lost revenues to the licensees over the license period would be approximately $8,400 annually.

**43 The net annual benefits of the project including the projected cost of the spring bypass flow for kayaking under and for the other various mitigation/enhancement bypass flows, and the revenues to be received by the licensees are shown in Table 7.

Table 7. Summary of the licensees' levelized annual revenues, and the levelized net annual benefits of

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the project as proposed, and the combined project (including a power plant at the dam) for various water quality and fishery mitigation/ enhancement bypass flow requirements, including the levelized annual cost of the CWB, and the cost of plant shutdown for kayaking mitigation.

Bypass flows	Proposed project lev. annual benefits	Proposed project licensee revenues	Combined project lev. annual benefits	Combined project licensee revenues
58 cfs year round.	$3,989,500	$474,000	$3,989,500	$474,000
58 summer,.				
150 cfs winter.	$3,751,500	$465,000	$3,994,500	$479,000
200 cfs year round.	$3,388,400	$451,700	$3,692,400	$486,100
300 cfs year round.	$2,978,800	$439,000	$3,282,800	$489,300
300 cfs summer,.				
720 cfs winter.	$2,195,800	$411,000	$2,721,800	$461,100

*62334 The benefits and revenues for the combined project development scenario, as shown in on Table 7., is the same as for the proposed project, with a downstream powerhouse only, because installing a unit at the dam would not be economically beneficial under a 58-cfs bypass flow.

The levelized net annual benefits and revenues of the project to the licensees and IPC under the purchase power contract between the two with the mitigation/enhancement provisions discussed herein are summarized in Table 8 (without the generating unit at the dam) and Table 9 (with the generating unit at the dam).

Table 8. Summary of levelized net annual benefits and revenues to the licensees and IPC with mitigation/enhancement provisions

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without a generating unit at the dam.			
Total Project Benefits or Revenues as proposed	Project	To Licensees	To IPC
. 58 cfs Summer, .150 cfs Winter	$3,979,500	$473,400	$3,506,100
Loss of Benefits or Revenues for Proposals			
.200 cfs Bypass Flow	330,000#13,300	316,700	
.Water Bank Purchase	33,100	0	33,100
.8-day Kayaking Flows	228,000	8,400	219,600
.Total Mitigation Costs	591,100	21,700	569,400
.Total Project Benefits .or Revenues as Mitigated	$3,388,400	$451,700	$2,936,700

Table 9. Summary of levelized net annual benefits and revenues to the licensees and IPC with mitigation/enhancement provisions without a generating unit at the dam.

Total Project Benefits or Revenues as proposed	Project	To Licensees	To IPC
. 58 cfs SUmmer, .150 cfs Winter	$3,979,500	$473,400	$3,506,100
Loss or Benefits or Revenues for Proposals			
.200 cfs Bypass Flow	26,000	(21,100)	47,100
.Water Bank Purchase	33,100	0	33,100
.8-day Kayaking Flows	228,000	8,400	219,600
.Total Mitigation Costs	287,100	(12,700)	299,900
.Total Project Benefits .or Revenues as Mitigated	$3,692,400	$486,100	$3,206,300

Because the economic studies for the pro posed project, for all cases evaluated, show that the project power costs less than the levelized alternative regional cost of power, the project is economically beneficial. Because the applicants have

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entered into a contract to sell all of the project power to IPC, the proposed project is financially feasible.

The applicants stated that the primary purpose of proposing this project is to provide revenues to aid in paying for the dam rehabilitation, previously discussed in the Project #62335 Safety section of this assessment. In 1984, the cost of rehabilitating Milner Dam was projected to be approximately $7 million. The staff estimates the minimum long-term annual carrying charges of financing the work to be approximately $700,000. The annual revenues that the applicant would receive from IPC under the power purchase contract are projected to range from about $411,000 to about $489,000 for the various bypass-flow scenarios evaluated, so that the applicants would be required to provide from about $200,000 up to about $300,000 of the annual debt service from irrigation revenues.

Need for Power

The Northwest Power Planning Council's (NPPC) August 1988 draft update of its 1986 Northwest Power Plan (Update) shows regional resource deficits in the NPPC area in about 1992 and 2000 with medium-high and medium- low load growth scenarios, respectively. A medium load growth scenario, developed cooperatively with the Bonneville Power Administration (BPA) and included in the Update but not in the Update resource portfolios, could produce deficits about 1996. All three of these forecasts are considered to be equally probable in the probability distribution of load uncertainty assumed for development of the Updaie power plan. The high load projection could produce deficits by 1991, and under the low load scenario deficits would not occur before 2010. The probability distribution assumes a 76 percent probability that load will equal or exceed the medium-low load growth scenario.

The 1988 projections of the Pacific North west Utilities Conference Committee (PNUCC) project that regional resource deficits would occur in about 1994-1995 under medium load growth assumptions.

**44 NPPC, BPA, and PNUCC all acknowledge that resource deficits could occur on the investor-owned utility (IOU) systems in the NPPC area before occurring in the NPPC area as a whole. The PNUCC shows IOU deficits occur ring as early as 1992-1993 under medium load growth assumptions and currently planned power purchases from BPA. The NPPC Update states that there has been little evidence to date that the NPPC area is moving toward coordinated resource development (the primary theme upon which the plan is formulated). Public utilities in the area are said to perceive the BPA future as being uncertain and to seek a higher degree of independence from BPA. This same perception of an uncertain future has discouraged IOU's from placing any significant amounts of load on the BPA system. Many of NPPC's area high load growth areas are served by IOU's that have fewer resources to meet their power requirements than the publicly owned systems. The absence of area wide coordinated planning could cause resource deficits on the IOU systems as early as 1989 and a need for additional generating resources on the IOU systems as early as 1993, under a medium-high load scenario.

Based on these predictions, a need for power could exist in the NPPC area any time from the early 1990's to late 1990's, and hydro resources coming on-line in the early 1990's could be useful in meeting a small part of that need for power. NPPC has also identified 630 average MW of new hydro power potential that adheres to development constraints imposed by the federal stream protection program and the NPPC protected areas program. The proposed project could provide a small portion of this hydro requirement.

Alternatives to the Proposed Project

Because the applicants are not electric utilities, the available options are to construct or not construct the project. If the license is not issued, the project would not be constructed, and the power that would have been developed from a renewable resource would be lost and eventually would have to be provided using nonrenewable fuels.

If the license is not issued, the applicants will not receive power generation revenues, and would therefore have to

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provide the total costs for the Milner Dam rehabilitation from irrigation revenues.

Exhibits

The following sections of Exhibit A and Exhibit F drawings, filed July 27, 1988, con form to the Commission's rules and regulations and should be approved and made a part of the license:

Exhibit A - Section III Turbine and Generator, Section IV Electrical Transmission, and Section V Accessory Equipment.

Exhibit F

Exhibit	FERC No.	Title
F-1	2899-1	Key and General Plans and Canal Sections
F-2	2899-2	Canal and Forebay Embankment Sections
F-3	2899-3	Headworks and Wasteway Plans, Sections & Details
F-4	2899-4	Control Structure Plan and Sections
F-5	2899-5	Intake Structure Plan and Section
F-6	2899-6	Powerhouse and Vicinity Plan, Profile and Sections
F-7	2899-7	Powerhouse Plans
F-8	2899-8	Powerhouse Sections
F-10	2899-10	Milner Dam Rehabilitation Plan
F-11	2899-11	New Spillway Plan and Section
F-12	2899-12	Dam Embankment Sections

FN1. All elevations are relative to mean sea level.

*62336 Elizabeth A. Moler, Commissioner, *concurring*:

I support the Commission's expedited action issuing the license in this proceeding. I do so principally because of the need to act quickly so that the applicants will be able to obtain the funds necessary to strengthen the dam.

I am aware that there are important water law issues embodied in this case. The order is consistent with the Commission's prior actions interpreting its statutory responsibilities under Section 10(a)(1) of the FPA;[FN1] however, it represents the first time I have participated in a case involving this particular matter of statutory interpretation. Ordinarily I would have asked to delay this case until I had a lengthier opportunity to review the legal issues presented. In this case, however, the public safety issue argues against a delay.

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**45 I would note that the United States Court of Appeals for the Ninth Circuit is currently considering a case involving the Commission's interpretation of Section 10(a)(1).[FN2]

I await the results of that litigation with interest. I do not want my participation in this case to indicate that I have come to any definitive legal conclusion on the matter.

FN1. See, e.g., *Horseshoe Bend Hydroelectric Company, 42 FERC ¶61, 072.*

FN2. *ate of Calif. ex. rel. Water Resources Control Board* v. *FERC* (9th Cir. No. 87-7538).

Federal Energy Regulatory Commission

45 FERC P 61423, 1988 WL 246992 (F.E.R.C.)
END OF DOCUMENT

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Attachment P

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

Attachment Q

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

Attachment R

File for 01-7011 Dave

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††ALSO MEMBER MO BAR
‡ALSO MEMBER IL BAR
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February 5, 2007

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

Attachment S

Permit 01-7011 File

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APR 16

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

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IDAPA 37
TITLE 03
CHAPTER 08

37.03.08 - WATER APPROPRIATION RULES

000. LEGAL AUTHORITY (RULE 0).
The Director of the Department of Water Resources adopts these rules under the authority provided by Section 42-1805(8), Idaho Code. (7-1-93)

001. TITLE AND SCOPE (RULE 1).

01. Tttle. (7-1-93)

02. Scope. (7-1-93)

a. Background and Purpose. The 1985 Idaho Legislature authorized reallocation of certain hydropower water rights to new upstream beneficial uses. The reallocation is to be accomplished using statutes designed to provide for the appropriation of unappropriated public water supplemented by a public interest review of those reallocations which significantly reduce existing hydropower generation. These rules provide the procedures for obtaining the right to divert and use ttnappropriated public water as well as water previously appropriated for hydropower use which has been placed in trust with the State of Idaho and is subject to reallocation. Guidelines are provided for the filing and processing of applications, and criteria are established for determining the actions to be taken by the Director. (7-1-93)

b. Scope and Applicability. These rules are applicable to appropriations from all sources of unappropriated public water in the state of Idaho under the authority of Chapter 2, Title 42, Idaho Code. Sources of public water include rivers, streams, springs, lakes and groundwater. The rules are also applicable to the reallocation of hydropower water rights held in trust by the state of Idaho. The rules are applicable to all applications to appropriate water filed with the Department of Water Resources prior to the effective date of these rules upon which an action to approve or deny the application is pending and to all applications filed subsequent to adoption of the rules and regulations. In addition, the rules are applicable to existing permits to appropriate water required to be reviewed under the provisions of Section 42-203D, Idaho Code. (7-1-93)

002. WRITTEN INTERPRETATIONS (RULE 2).

003. ADMINISTRATIVE APPEALS (RULE 3).

004. – 009. (RESERVED).

010. DEFINITIONS (RULE 10).
Unless the context otherwise requires, the following definitions govern these rules:

01. Acre-Foot (AF). A volume of water sufficient to cover one (1) acre of land one (1) foot deep and is equal to forty-three thousand five hundred sixty (43,560) cubic feet. (7-1-93)

02. Advertisement. The action taken by the Director to provide notice, usually by publication of a legal notice in one (1) or more newspapers, of a proposed appropriation or other notice required in administration of his duties and responsibilities. (7-1-93)

03. Applicant. The person, corporation, association, firm, governmental agency or other entity, or the holder of a permit being reprocessed pursuant to Section 42-203D, Idaho Code, who initiates an appropriation of water or related water matter for the Director's consideration. (7-1-93)

04. Application for Permit. The written request to the department on forms furnished by the department proposing to appropriate the public waters or trust waters of the state. (7-1-93)

05. Board. The Idaho Water Resource Board. (7-1-93)

06. Beneficial Use. One (1) or more of the recognized beneficial uses of water including but not limited to, domestic, municipal, irrigation, hydropower generation, industrial, commercial, recreation, stockwatering and fish propagation uses for which permits to appropriate water can be issued as well as other uses which provide a benefit to the user of the water as determined by the Director. Industrial use as used for purposes of these rules includes, but is not limited to, manufacturing, mining and processing uses of water. (7-1-93)

07. Cubic Foot Per Second (CFS). A rate of flow approximately equal to four hundred forty-eight and eight-tenths (448.8) gallons per minute and also equals fifty (50) Idaho miner's inches. (7-1-93)

08. DCMI. An acronym for domestic, commercial, municipal and industrial. In these rules it designates certain classes of these uses presumed to satisfy public interest requirements. Domestic use, for purposes of this definition, is water for one or more households and water used for all other purposes including irrigation of a residential lot in connection with each of the households where the diversion to each household does not exceed thirteen thousand (13,000) gallons per day. Also for purposes of this definition, commercial, municipal and industrial uses are any such uses which do not deplete the system containing the trust water more than two (2) acre feet per day. (7-1-93)

09. Department. The Idaho Department of Water Resources. (7-1-93)

10. Director. The Director of the Idaho Department of Water Resources. (7-1-93)

11. Legal Subdivision. A tract of land described by the government land survey and usually is described by government lot or quarter-quarter, section, township and range. A lot and block of a subdivision plat recorded with the county recorder may be used in addition to the quarter-quarter, section, township and range description. (7-1-93)

12. Permit or Water Right Permit. The water right document issued by the Director authorizing the diversion and use of unappropriated public water of the state or water held in trust by the state. (7-1-93)

13. Priority, or Priority of Appropriation, or Priority Date. The date of appropriation established in the development of a water right. The priority of a water right for public water or trust water is used to determine the order of water delivery from a source during times of shortage. The earlier or prior date being the better right. (7-1-93)

14. Project Works. A general term which includes diversion works, conveyance works, and any devices which may be used to apply the water to the intended use. Improvements which have been made as a result of application of water, such as land preparation for cultivation, are not a part of the project works. (7-1-93)

15. Single Family Domestic Purposes. Water for household use or livestock and water used for all other purposes including irrigation of up to one half (1/2) acre of land in connection with said household where total use is not in excess of thirteen thousand (13,000) gallons per day. (7-1-93)

16. Subordinated Water Right. A water right used for hydropower generation purposes that is subject to depletion without compensation by upstream water rights which are initiated later in time and which are for a purpose other than hydropower generation purposes. (7-1-93)

17. Trust Water. That portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided by Section 42-203B(3), Idaho Code. (7-1-93)

18. Unappropriated Water. The public water of the state of Idaho in streams, rivers, lakes, springs or groundwater in excess of that necessary to satisfy prior rights including prior rights reserved by federal law. (7-1-93)

011. -- 024. (RESERVED).

025. GENERAL DESCRIPTION OF THE PROCEDURE TO BE USED FOR ALLOCATION (RULE 25).

01. Applications to Appropriate Unappropriated Water and Water Held in Trust. Applications to appropriate unappropriated water and water held in trust as provided by Section 42-203B(3), Idaho Code, will be evaluated using the criteria of Section 42-203A, Idaho Code, which requires an assessment to be made of the impact of the proposed use on water availability for existing water rights, the adequacy of the water supply for the proposed use, whether the application is filed for speculative purposes, the financial ability of the applicant to complete the project, and the effect of the proposed use on the local public interest. (7-1-93)

02. Applications to Appropriate Water from Sources Held by State in Trust. Applications to appropriate water from sources on which the state holds water in trust, pursuant to Section 203B(5), Idaho Code, will be processed in a three-step analysis. Evaluation will consider the purposes of "trust water" established in Section 42-203B, Idaho Code. (7-1-93)

a. First, the proposed use must be evaluated using the procedures and criteria of Section 42-203A, Idaho Code. If all criteria of Section 42-203A(5), Idaho Code, are satisfied, the application may be approved for unappropriated water. If the application does not satisfy the criteria of Section 42-203A(5) b, c, d, and e, Idaho Code, or is found to reduce the water to existing water rights other than those held in trust by the state, the application will be denied. If the application satisfies all criteria of Section 42-203A(5), Idaho Code, except Section 42-203A(5)a, Idaho Code, but is found to reduce water held in trust by the state, the application will be reviewed under criteria of Section 42-203C, Idaho Code. (7-1-93)

b. Second, Section 42-203C, Idaho Code, requires a determination of whether the proposed use will significantly reduce, individually or cumulatively with existing uses and other uses reasonably likely to exist within twelve months of the proposed use, the amount of trust water available to the holder of the water right used for power production that is defined by agreement pursuant to subsection (5) of Section 42-203B, Idaho Code (hereinafter termed "significant reduction"). If a significant reduction will not occur, the application may be approved without an evaluation of the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

c. Third, based upon a finding of significant reduction, the proposed use will be evaluated in terms of the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

026. – 029. (RESERVED).

030. LOCATION AND NATURE OF TRUST WATER (RULE 30).

01. Snake River Water Rights Agreement. The legislation ratifying the Snake River water rights agreement between the state of Idaho and Idaho Power Company places in trust a part of the flows available to Idaho Power Company under its hydropower water rights in the Snake River Basin between Swan Falls Dam and Milner Dam. The flows subject to the trust water provisions and reallocation under Section 42-203C(2), Idaho Code, are as follows: (7-1-93)

a. Trust water flows under the Snake River water rights agreement are located in the Snake River between Swan Falls Dam located in Section 18, Township 2 South, Range 1 East, Boise Meridian (B.M.) and Milner Dam located in Sections 28 and 29, Township 10 South, Range 21 East, Boise Meridian (B.M.) and all surface and groundwater sources tributary to the Snake River in that reach. (7-1-93)

b. Surface water and groundwater tributary to the Snake River upstream from Milner Dam is not trust water. After giving notice and considering public comment, the Director will designate the area in which groundwater is presumed to be tributary to the Snake River upstream from Milner Dam. Modification or changes in the designated boundary may be made only after providing notice and considering public comment. The area presently designated as tributary to the Snake River in the Milner Dam to Swan Falls Dam reach is appended to these rules (See Attachment A in APPENDIX A located at the end of this chapter), for information purposes only. (7-1-93)

c. Trust water flows under the Snake River water rights agreement are those occurring in the Snake River and tributaries in the geographic area designated in Rule Subsection 030.01.a. which exceed the established minimum stream flows but are less than the water rights for hydropower generating facilities in the Swan Falls Dam to Milner Dam reach of Snake River, to the extent such rights were unsubordinated prior to the Snake River water

rights agreement. Minimum average daily flows have been established by action of the Water Resource Board and legislature at the U.S. Geological Survey gauging station located near Murphy (Section 35, Township 3 South, Range 1 West B.M.) in the amount of three thousand nine hundred (3900) cfs from April 1 to October 31 and five thousand six hundred (5600) cfs from November 1 to March 31, and at Milner gauging station located in Section 29, Township 10 South, Range 21 East, B.M. in the amount of zero (0) cfs from January 1 to December 31. (7-1-93)

02. Trust Water Created by State Action. Section 42-203B(3), Idaho Code, provides that trust water can be created by state action establishing a minimum flow without an agreement with the holder of the hydropower water right. Allocation of trust water so established will be pursuant to state law except the criteria of Section 42-203C, Idaho Code, will not be considered. (7-1-93)

03. Sources of Public Water Not Trust Water. The following sources of public water are not trust water and are not subject to the public interest provisions of Section 42-203C, Idaho Code: (7-1-93)

a. Sources or tributaries to sources upon which no hydropower generating facilities are located downstream within the state of Idaho (Example - Salmon River). (7-1-93)

b. Sources or tributaries to sources which have a state hydropower water right permit or license or Federal Energy Regulatory Commission license which have not been subordinated, and the state of Idaho has not entered into an agreement with the holder of the hydropower water right pursuant to Section 42-203B(2), Idaho Code, and the State of Idaho has not established a minimum stream flow for purposes of protecting hydropower generation. (7-1-93)

c. Sources or tributaries to sources for which a state hydropower water right permit or license, or the Federal Energy Regulatory Commission license included a subordination condition. Such flows are considered to be public waters subject to appropriation under the provisions of Section 42-203A, Idaho Code (Example - Snake River downstream from Murphy gauging station). (7-1-93)

d. Flows in excess of established rights including rights used for hydropower purposes. Such flows are unappropriated waters subject to allocation under Section 42-203A, Idaho Code. (7-1-93)

e. Flows in the Snake River upstream from Milner Dam and all surface and groundwater tributaries to that reach. Such flows are subject to allocation under Section 42-203A, Idaho Code, without consideration of water rights existing downstream from Milner Dam (Reference: 42-203B(2), Idaho Code). (7-1-93)

031. -- 034. (RESERVED).

035. APPLICATION REQUIREMENTS (RULE 35).

01. General Provisions. (7-1-93)

a. No person shall commence the construction of any project works or commence the diversion of the public water or trust water of the state of Idaho from any source or change the point of diversion, place, period or nature of use of any existing water right without first having filed an application for permit to appropriate the water or other appropriate form with the department and received approval from the Director, unless exempted by these rules or by statute. (7-1-93)

b. Any person proposing to commence a diversion of the public water or the trust water of the state of Idaho from a groundwater source for single family domestic purposes is exempt from the application and permit requirements of Rule Subsection 035.01.a. Any person proposing to add a single family domestic use to an existing groundwater diversion including one used for single family domestic purposes is exempt from the provisions of Rule Subsection 035.01.a. (7-1-93)

c. Any person watering livestock directly from a natural stream or natural lake without the use of a constructed diversion works is exempt from Rule Subsection 035.01.a. (7-1-93)

d. All applications for permit to appropriate public water or trust water of the state of Idaho shall be

on the form provided by the department entitled "Application for Permit to Appropriate the Public Waters of the State of Idaho" and shall include all necessary information as described in Rule Subsection 035.03. An application for permit that is not complete as described in Rule Subsection 035.03 will not be accepted for filing and will be returned along with any fees submitted to the person submitting the application. No priority will be established by an incomplete application. Applications meeting the requirements of Rule Subsection 035.03. will be accepted for filing and will be endorsed by the department as to the time and date received. The acceptability of applications requiring clarification or corrections shall be determined by the Director. (7-1-93)

e. The department will correspond with the applicant concerning applications which have been accepted for filing by the department which require clarification or correction of the information required by Rule Subsection 035.03. If the additional or corrected information is supplied after thirty (30) days, the priority date of the application will be determined by the date the additional or corrected information is received by the department unless the applicant has requested within the thirty (30) day period additional time to provide the information, has shown good reasons for needing additional time, and the Director has granted additional time. (7-1-93)

f. Failure to submit the additional or corrected information is cause for the Director to void the department's records of the application. (7-1-93)

02. Effect of an Application. (7-1-93)

a. Any application, whether filed before or after promulgation of these rules, which seeks to appropriate water from a source upon which the state holds trust water shall be considered an application for appropriation of unappropriated water. If the Director determines unappropriated water is not available, the application, if otherwise approvable, will be reviewed for compliance with provisions of Section 42-203C, Idaho Code. (7-1-93)

b. The priority of an application for unappropriated or trust water is established as of the time and date the application is received in complete form along with the statutory fee in any official office of the department. The priority of the application, remains fixed unless changed by action of the Director in accordance with applicable law. (7-1-93)

c. An application for permit to appropriate water is not a water right and does not authorize diversion or use of water until approved by the Director in accordance with statutes in effect at the time the application is approved. (7-1-93)

d. An applicant's interest in an application for permit to appropriate water is personal property. An assignment of interest in an application must include evidence satisfactory to the Director that the application was not filed for speculative purposes. (7-1-93)

03. Requirements for Applications to Be Acceptable for Filing. (7-1-93)

a. The department form entitled "Application for Permit to Appropriate the Public Waters of the State of Idaho" (hereafter termed "application for permit form") is the required form to apply for either unappropriated water or trust water. (7-1-93)

b. The following information shall be shown on an application for permit form and submitted together with the statutory fee to an office of the department before the application for permit may be accepted for filing by the department. (7-1-93)

i. The name and post office address of the applicant shall be listed. If the application is in the name of a corporation, the names and addresses of its directors and officers shall be provided. If the application is filed by or on behalf of a partnership or joint venture, the application shall provide the names and addresses of all partners and shall designate the managing partner, if any. (7-1-93)

ii. The name of the water source sought to be appropriated shall be listed. For surface water sources, the source of water shall be identified by the official geographic name listed on the U.S. Geological Survey Quadrangle map, or if no official name has been given, by the name in local common usage. If the source has not

been named, it can be described as "unnamed," but the system or river to which it is tributary shall be identified. For groundwater sources, the source shall be listed as "groundwater." Only one source shall be listed on an application unless the application is for a single system which will have more than one source. (7-1-93)

iii. The legal description of the point of diversion and place of use shall be listed. The location of the point(s) of diversion and the place of use shall be described to the nearest forty (40) acre subdivision or U.S. Government Lot of the Public Land Survey System. The location of springs shall be described to the nearest ten (10) acre tract. Subdivision names, lot and block numbers and any name in local common usage for the point of diversion, or place of use shall be included in the comments section of the application form. If irrigation is listed as a purpose of use, the number of acres in each forty (40) acre subdivision of the place of use shall be listed. (7-1-93)

iv. The quantity of water to be diverted shall be listed as a rate of flow in cubic feet per second and/or as a volume to be stored in acre-feet per year for each purpose of use requested. (7-1-93)

v. Impoundment (storage) applications shall show the maximum acre-feet requirement per year which shall not exceed the storage capacity of the impoundment structure unless the application describes a plan of operation for filling the reservoir more than once per year. (7-1-93)

vi. Every offstream storage impoundment application shall show a maximum rate of diversion to storage as well as the total storage volume. (7-1-93)

vii. The nature of the proposed beneficial use or uses of the water shall be listed. While the purpose may be described in general terms such as irrigation, industrial or municipal, a description sufficient to identify the proposed use or uses of the water shall also be included. (7-1-93)

viii. The period of each year during which water will be diverted, stored and beneficially used shall be listed. The period of use for irrigation purposes shall coincide with the annual periods of use shown in Figure 1 in APPENDIX B (located at the end of this chapter), unless it can be shown to the satisfaction of the Director that a different period of use is necessary. (7-1-93)

ix. The proposed method of diversion, conveyance system and system for distributing and using the water shall be described. (7-1-93)

x. The period of time required for completion of the project works and application of water to the proposed use shall be listed. This period of time shall not exceed the time required to diligently and uninterruptedly apply the water to beneficial use and shall not exceed five (5) years. (7-1-93)

xi. A map or plat of sufficient scale (not less than two (2) inches equal to one (1) mile) to show the project proposed shall be included. The map or plat shall agree with the legal descriptions and other information shown on the application. (7-1-93)

xii. The application form shall be signed by the applicant listed on the application or evidence must be submitted to show that the signator has authority to sign the application. An application in more than one (1) name shall be signed by each applicant unless the names are joined by "or" or "and/or." (7-1-93)

xiii. Applications by corporations, companies or municipalities or other organizations shall be signed by an officer of the corporation or company or an elected official of the municipality or an individual authorized by the organization to sign the application. The signator's title shall be shown with the signature. (7-1-93)

xiv. Applications may be signed by a person having a current "power of attorney" authorized by the applicant. A copy of the "power of attorney" shall be included with the application. (7-1-93)

xv. An application signed by a mark or "X" must have the signator's name printed or typed nearby and the mark must have been witnessed and the application signed by the witness. (7-1-93)

xvi. Applications to appropriate water in connection with Carey Act or Desert Land Entry proposals shall include evidence that appropriate applications have been filed for the lands involved in the proposed project.

(7-1-93)

xvii. The application form shall be accompanied with a fee in the amount required by Section 42-221A, Idaho Code. (7-1-93)

04. Amended Applications. (7-1-93)

a. Applications for permit shall be amended whenever significant changes to the place, period or nature of the intended use, method or location of diversion or proposed use or uses of the water or other substantial changes from that shown on the pending application are intended. An application shall be amended if the proposed change will result in a greater rate of diversion or depletion (see Rule Subsection 035.04.c.), if the point of diversion, place of use, or point of discharge of the return flow are to be altered, if the period of the year that water will be used is to be changed, or if the nature of the use is to be changed. (7-1-93)

b. An application can be amended to clarify the name of the source of water but may not be amended to change the source of water. (7-1-93)

c. An amendment which increases the rate of diversion, increases the volume of water diverted per year or the volume of water depleted, lengthens the period of use, or adds an additional purpose of use shall result in the priority of the application for permit being changed to the date the amended application is received by the department. (7-1-93)

d. An application for permit may be amended by endorsement by the applicant or his agent on the original application for permit form which endorsement shall be initialed and dated. If the changes required to the information on the application are, in the judgment of the Director, substantial enough to cause confusion in interpreting the application form, the amended application shall be submitted on a new application for permit form to be designated as an amended application. (7-1-93)

e. An amended application shall be accompanied by the additional fee required by Section 42-221A, Idaho Code, if the total rate of diversion or total volume of storage requested is increased and by the fee required by Section 42-221F, Idaho Code, for readvertising if notice of the original application has been published. (7-1-93)

f. If the applicant's name or mailing address changes, the applicant shall in writing notify the department of the change. (7-1-93)

036. -- 039. (RESERVED).

040. PROCESSING APPLICATIONS FOR PERMIT AND REPROCESSING PERMITS (RULE 40).

01. General. (7-1-93)

a. Unprotested applications, whether for unappropriated water or trust water, will be processed using the following general steps: (7-1-93)

i. Advertisement and protest period; (7-1-93)

ii. Department review of applications and additional information, including department field review if determined to be necessary by the Director; (7-1-93)

iii. Fact finding hearing if determined to be necessary by the Director; (7-1-93)

iv. Director's decision; (7-1-93)

v. Section 42-1701A, Idaho Code, hearing, if requested; and (7-1-93)

vi. Director's decision affirmed or modified. (7-1-93)

b. Protested applications, whether for unappropriated water or trust water, will be processed using the following general steps: (7-1-93)

i. Advertisement and protest period; (7-1-93)

ii. Hearing and/or conference; (7-1-93)

iii. Department review of applications, hearing record and additional information including department field review if determined to be necessary by the Director. (7-1-93)

iv. Proposed decision (unless waived by parties); (7-1-93)

v. Briefing or oral argument in accordance with the department's adopted Rules of Procedure. (7-1-93)

vi. Director's decision accepting or modifying the proposed decision. (7-1-93)

c. The Director's decision rejecting and denying approval of an application for permit filed for diversion from a source previously designated as a critical groundwater area or upon which a moratorium has previously been entered may be issued without advertisement of the application. (7-1-93)

d. An applicant may request in writing that commencement of processing of his or her application be delayed for a period not to exceed one (1) year or that processing be interrupted for a period not to exceed six (6) months. The Director at his discretion may approve the request unless he determines that others will be injured by the delay or that the applicant seeks the delay for the purpose of speculation, or that the public interest of the people of Idaho will not be served by the delay. The Director may approve a request for delay for a shorter period of time or upon conditions, and may renew the approval upon written request. (7-1-93)

e. As a condition of processing applications or reprocessing permits to reallocate trust water, the Director may require a cash bond or surety bond. Such bond up to five dollars ($5) per acre of land requested to be irrigated or two hundred fifty ($250) per cfs for other uses shall serve as a performance bond for satisfactory compliance with the permitted time requirements for commencement of construction, completion of project works and diversion of water to beneficial use. Failure to comply with the permitted time requirements, or such extension of time granted by the Director for good cause shown, is cause for the Director to require surrender of the bond amount to the department's Water Administration Account. The bond shall be returned to the permit holder upon satisfactory compliance with the permit's time requirements. (7-1-93)

02. Public Notice Requirement. (7-1-93)

a. Applications for permit which have not been advertised. (7-1-93)

i. Advertisement of applications for permit proposing a rate of diversion of ten (10) cfs or less or storage of one thousand (1000) AF or less shall comply with provisions of Section 42-203A, Idaho Code. The first required advertisement will be published on the first or third Thursday of a month when published in daily newspapers and on the first or third publishing day of the month for weekly newspapers. (7-1-93)

ii. Advertisement of applications for permit in excess of the amounts in Rule Subsection 040.02.a.i. shall comply with provisions of Rule Subsection 040.02.a.i. and shall also be published in a newspaper or newspapers to achieve statewide circulation. (7-1-93)

iii. Statewide circulation with respect to Section 42-203A(2), Idaho Code, shall be obtained by publication of a legal notice at least once each week for two (2) successive weeks in a newspaper, as defined in Section 60-106, Idaho Code, of general circulation in the county in which the point of diversion is located and by publication of a legal notice at least once each week for two (2) successive weeks in at least one (1) daily newspaper, as defined in Section 60-107, Idaho Code, published in each of the department's four (4) administrative regions and determined by the Director to be of general circulation within the department's region within which it is published. The administrative regions of the department are identified on Figure 2 in APPENDIX C (located at the end of this

chapter). The names of newspapers used for statewide publication are available from any department office. (7-1-93)

b. Applications for permit which have been advertised. (7-1-93)

i. Notice of applications for permit for water from the Snake River between Swan Falls Dam and Milner Dam or surface and groundwater tributaries to that reach of Snake River which were advertised prior to July 1, 1985 and have been held without final action by the department due to the Swan Falls controversy shall be readvertised by the Director in accordance with Rule Subsection 040.02.a. as appropriate to allow opportunity for protests to be entered with respect to the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

ii. Applications for permit from the Snake River or surface and groundwater sources upstream from Milner Dam which have been held without action due to the Swan Falls controversy may be processed without readvertisement. (7-1-93)

iii. The applicant shall pay the readvertisement fee provided in Section 42-221F, Idaho Code, prior to the readvertisement. (7-1-93)

iv. Failure to pay the readvertising fee within thirty (30) days after the applicant is notified to do so is cause for the Director to void the application. (7-1-93)

c. Notice of existing permits. (7-1-93)

i. Existing permits appropriating water held in trust by the state of Idaho issued prior to July 1, 1985, unless exempted by Rule Subsection 040.02.c.ii. shall be subject to the review requirements of Section 42-203D, Idaho Code, and shall be readvertised in accordance with Rule Subsection 040.02.a. as appropriate. The review is limited to the criteria described in Section 42-203C(2), Idaho Code. (7-1-93)

ii. Permits exempt from the provisions of 42-203D, Idaho Code, include: (7-1-93)

(1) Permits appropriating water not held in trust by the state of Idaho; (7-1-93)

(2) Permits for DCMI uses, stockwater uses and other essentially non-consumptive uses as determined by the Director; and (7-1-93)

(3) Permits for which an acceptable proof of beneficial use submittal was received by the department prior to July 1, 1985, or permits for which an acceptable proof of beneficial use was submitted after July 1, 1985, if evidence satisfactory to the Director has been received to show that the permit was fully developed prior to July 1, 1985 to the extent claimed on the proof of beneficial use. (7-1-93)

iii. Holders of permits subject to the review requirement of Section 42-203D, Idaho Code, shall pay in advance, upon the request of the Director, the readvertising fee required by Section 42-221F, Idaho Code. (7-1-93)

iv. Failure to pay the readvertising fee within thirty (30) days after the applicant is notified to do so is cause for the Director to cancel the permit. (7-1-93)

d. Provisions for Receiving Notice of Application for Permit by Mail. (7-1-93)

i. Pursuant to Section 42-203A(3), Idaho Code, the department will provide upon written request by regular mail, postage prepaid, the notices for all applications for permit of the classes requested. Mailings will be made on a periodic basis to include all notices of a specific class for which advertisements were prepared for publication during the previous period. Mailings will be made on or about the day of the first advertisement as provided in Rule Subsection 040.02.a.i. (7-1-93)

ii. Notice of the advertisement of application as described in Section 42-203A(3), Idaho Code, may be represented by an abstract, summary or other such representation which includes all the information required by Section 42-203A(1), Idaho Code, for a notice of an application for permit. (7-1-93)

iii. The annual mailing fee as described in Section 42-203A(3), Idaho Code, shall include all costs incurred by the department in preparation of mailing of the notices of application to those requesting them. (7-1-93)

iv. The annual fee for receiving notice of all classes will be determined by the Director and shall be paid to the department in advance on an annual basis (July 1 to June 30). The annual mailing fee shall be prorated by the department for requests encompassing less than a full year and will be increased for the additional cost the department incurs for requests encompassing fewer than all classes of notice. (7-1-93)

v. A request for a specific class of notice may be fulfilled by the mailing of notice of all applications for permit received by the department unless the additional cost to the department of preparing the requests for a specific class of notice is paid in advance. (7-1-93)

vi. A request to receive a class of notice of applications shall be effective not later than thirty (30) days after receipt by the department of the request together with the annual fee. (7-1-93)

vii. The notice publisited in the newspaper of an application or of a permit being reprocessed as required by Rule Subsection 040.02.a. through 040.02.c. is the official notice required by Section 42-203A, Idaho Code. Errors or omissions in the notices of applications received by mail as provided by Rule Subsection 040.02.d. or the failure of the notices to be delivered by mail does not invalidate the published notice. (7-1-93)

03. Protests, Intervention, Hearings, and Appeals. (7-1-93)

a. Protests. (7-1-93)

i. Protests against the approval of an application for permit or against a permit being reprocessed shall comply with the requirements for pleadings as described in the department's adopted Rules of Procedure. (7-1-93)

ii. Protests against the approval of an application for permit or against a permit being reprocessed will ooly 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 unless the protestant successfully intervenes in the proceeding. (7-1-93)

iii. General statements of protest (blanket protests) against appropriations for a particular class of use or from a particular source of water will not be considered as valid protests by the Director. (7-1-93)

b. Intervention. Requests to intervene in a proceeding pending before the department shall comply with the Department's adopted Rules of Procedure. (7-1-93)

c. Hearings. Hearings will be scheduled and held in accordance with the department's adopted Rules of Procedure. (7-1-93)

d. Appeals. Any final decision of the Director may be appealed in accordance with Section 42-1701A, Idaho Code. (7-1-93)

04. Burden of Proof. (7-1-93)

a. Burden of proof is divided into two (2) parts: first, the burden of coming forward with evidence to present a prima facie case, and second, the ultimate burden of persuasion. (7-1-93)

b. The burden of coming forward with evidence is divided between the applicant *and* the protestant as follows: (7-1-93)

i. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criteria (a) through (d) of Section 42-203A(5), Idaho Code; (7-1-93)

ii. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of

criterion (e) of Section 42-203A(5), Idaho Code, as to any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear the initial burden of coming forward with evidence for those factors relevant to criterion (e) of Section 42-203A(5), Idaho Code, of which the protestant can reasonably be expected to be more cognizant than the applicant. (7-1-93)

iii. The protestant shall bear the initial burden of coming forward with evidence for the evaluation of the public interest criteria of Section 42-203C(2), Idaho Code, and of demonstrating a significant reduction, except that the applicant shall provide details of the proposed design, construction, and operation of the project and directly associated operations to allow the impact of the project to be evaluated. (7-1-93)

c. The applicant has the ultimate burden of persuasion for the criteria of Section 42-203A, Idaho Code, and the protestant has the ultimate burden of persuasion for the criteria of Section 42-203C, Idaho Code. (7-1-93)

d. For unprorested applications or permits to be reprocessed, the Director will evaluate the application, information submitted pursuant to Rule Subsection 040.05.c. and information in the files and records of the department, and the results of any studies the department may conduct to determine compliance with the appropriate criteria. (7-1-93)

e. In protested matters the Director will take official notice of information as described in the department's adopted Rules of Procedure, and will, prior to considering, circulate to the parties information from department studies and field examinations concerning the protested application or permit being reprocessed, if such information has not otherwise been made a part of the hearing record. (7-1-93)

05. Additional Information Requirements. (7-1-93)

a. For unprotested applications and permits being reprocessed, the additional information required by Rule Subsection 040.05.c. shall be submitted within thirty (30) days after the Director notifies the applicant that the application or permit is being reviewed for decision. The Director may extend the time within which to submit the information upon request by the applicant and upon a showing of good cause. Failure to submit the required information within the time period allowed will be cause for the Director to void an application or to advance the priority of a permit being reprocessed by the number of days that the information submittal is late. The Director will provide opportunity for hearing as provided in Section 42-1701A, Idaho Code. (7-1-93)

b. For protested applications or protested permits being reprocessed, the information required by Rule Subsection 040.05.c. may be requested by the Director to be submitted within thirty (30) days after notification by the Director, may be made a part of the record of the hearing held to consider the protest, or may be made available in accordance with any pre-hearing discovery procedures. Failure to submit the required information within the time period allowed will be cause for the Director to void an application or to advance the priority of a permit being reprocessed by the number of days that the information submittal is late. (7-1-93)

c. The following information shall be submitted for applications to appropriate unappropriated water or trust water and for permits being reprocessed for trust water. The additional information submittal requirements of this rule are waived for filings which seek to appropriate five (5) cfs or less or storage of five hundred acre-feet (500 AF) or less and for filings seeking reallocation of trust water which the Director determines will reduce the flow of the Snake River measured at Murphy Gauge by not more than two (2) acre-feet per day. For filings proposing irrigation as a purpose of use, the additional information is required if more than two hundred (200) acres will be irrigated. However, the Director may specifically request submittal of any of the following information for any filing, as he determines necessary. Information relative to the effect on existing water rights, Section 42-203A(5)(a), Idaho Code, shall be submitted as follows: (7-1-93)

i. For applications appropriating springs or surface streams with five (5) or fewer existing users, either the identification number, or the name and address of the user, and the location of the point of diversion and nature of use for each existing water right shall be submitted. (7-1-93)

ii. For applications appropriating groundwater, a plat shall be submitted locating the proposed well relative to all existing wells and springs and permitted wells within a one-half mile radius of the proposed well.

(7-1-93)

iii. Information shall be submitted concerning any design, construction, or operation techniques which will be employed to eliminate or reduce the impact on other water rights. (7-1-93)

d. Information relative to sufficiency of water supply, Section 42-203A(5)(b), Idaho Code, shall be submitted as follows: (7-1-93)

i. Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year. (7-1-93)

ii. Information shall be submitted on the quantity of water available from the source applied for, including, but not limited to, information concerning flow rates for surface water sources available during periods of peak and average project water demand, information concerning the properties of the aquifers that water is to be taken from for groundwater sources, and information on other sources of supply that may be used to supplement the applied for water source. (7-1-93)

e. Information relative to good faith, delay, or speculative purposes of the applicant, Section 42-203A(5)(c), Idaho Code, shall be submitted as follows: (7-1-93)

i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest. Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code. (7-1-93)

ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials. (7-1-93)

f. Information Relative to Financial Resources, Section 42-203A(5)(d), Idaho Code, shall be submitted as follows: (7-1-93)

i. The applicant shall submit a current financial statement certified to show the accuracy of the information contained therein, or a financial commitment letter along with the financial statement of the lender or other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed. (7-1-93)

ii. The applicant shall submit plans and specifications along with estimated construction costs for the project works. The plans shall be definite enough to allow for determination of project impacts and implications. (7-1-93)

g. Information Relative to Conflict with the Local Public Interest, Section 42-203A(5)(e), Idaho Code, shall be submitted as follows: The applicant shall seek comment and shall submit all letters of comment on the effects of the construction and operation of the proposed project from the governing body of the city and/or county and tribal reservation within which the point of diversion and place of use are located, the Idaho Department of Fish and Game, the Idaho Department of Environmental Quality, and any irrigation district or canal company within which the proposed project is located and from other entities as determined by the Director. (7-1-93)

h. The following information Relative to the Public Interest Criteria of Section 42-203C(2), Idaho Code, shall be submitted by an applicant seeking reallocation of trust water for a project which the Director determines will reduce the flow of the Snake River by more than two (2) acre-feet per day. For filings proposing irrigation as a purpose of use, the additional information is required if more than two hundred (200) acres will be irrigated. The Director may request any or all of the following information for any filing seeking the reallocation of trust water. (7-1-93)

i. A project design and estimate of cost of development shall be submitted. For applications appropriating more than twenty-five (25) cfs, or ten thousand (10,000) AF of storage, or generating more than five (5) megawatts, the information shall be prepared and submitted by a qualified engineer licensed under the provisions of Chapter 12, Title 54, Idaho Code, unless waived by the Director. The design shall be definite enough to reflect the project's impacts and implications as required in subsequent rules. (7-1-93)

ii. If the project proposes development for irrigation purposes, information shall be submitted on crop rotation, including acreages, for lands when newly developed. (7-1-93)

iii. Information shall be submitted concerning the number and kinds of jobs that will be created or eliminated as a direct result of project development including both the construction and operating phases of the project. If jobs are seasonal, the estimated number of months per year of employment shall be submitted. (7-1-93)

iv. For applications or permits being reprocessed for more than twenty-five (25) cfs, or more than ten thousand (10,000) AF of storage, or more than five (5) megawatts, information shall be submitted concerning the changes to community services that will be required during the construction and operation phases of the project including, but not limited to, changes to schools, roads, housing, public utilities and public health and safety facilities, if any. (7-1-93)

v. Information shall be submitted concerning the source of energy for diverting and using water for the project, the estimated instantaneous demand and total amount of energy that will be used, the efficiency of use, and energy conservation methods. (7-1-93)

vi. Information shall be submitted concerning the location, amount, and quality of return flow water, and any water conservation features of the proposed project. (7-1-93)

vii. If the project proposes irrigation as a use, information shall be submitted concerning the kinship, if any, of the operator of the land to be irrigated by the project to the applicant, the location and acreage of other irrigated lands owned, leased, or rented by the applicant, the names, addresses and number of shares held by each shareholder if the applicant is a corporation, evidence of tax-exempt status if a corporation is so claiming, a soil survey prepared in accordance with the U.S. Soil Conservation Service irrigatable land classification system, and a schedule for bringing into production the project lands. (7-1-93)

041. – 044. (RESERVED).

045. EVALUATION CRITERIA (RULE 45).

01. Criteria for Evaluating All Applications to Appropriate Water. The Director will use the following criteria in evaluating whether an application to appropriate unappropriated water or trust water should be approved, denied, approved for a smaller amount of water or approved with conditions. (7-1-93)

a. Criteria for determining whether the proposed use will reduce the quantity of water under existing water rights. A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if: (7-1-93)

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less. (7-1-93)

ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code; or (7-1-93)

iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense. (7-1-93)

iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director. (7-1-93)

v. The provisions of Rule Subsection 045.01.a.v. are not intended to require compensation or mitigation for loss of flow to holders of subordinated hydropower rights or those from which trust water is reallocated. (7-1-93)

b. Criteria for determining whether the water supply is insufficient for the proposed use. The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval. In assessing such noneconomic factors, the Director will also consider the impact on other water rights if the project is abandoned during construction or after completion, the impact on public resource values, and the cost to local, state and federal governments of such an abandonment. (7-1-93)

c. Criteria for determining whether the application is made in good faith. The criteria requiring that the Director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the developed project for a profit or from making a profit from the use of the water. An application will be found to have been made in good faith if: (7-1-93)

i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and (7-1-93)

ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and (7-1-93)

iii. There are no obvious impediments that prevent the successful completion of the project. (7-1-93)

d. Criteria for determining whether the applicant has sufficient financial resources to complete the project. (7-1-93)

i. An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director. This showing is required as described in Rule Subsection 040.05.c. or at the time the hearing provided by Subsection Rule 040.05.c. is conducted. (7-1-93)

ii. A governmental entity will be determined to have satisfied this requirement if it has the taxing, bonding or contracting authority necessary to raise the funds needed to commence and pursue project construction in accordance with the construction schedule. (7-1-93)

e. Criteria for determining whether the project conflicts with the local public interest. The Director will consider the following, along with any other factors he finds to be appropriate, in determining whether the project will conflict with the local public interest: (7-1-93)

i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains; (7-1-93)

ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed use; and (7-1-93)

iii. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions. (7-1-93)

iv. An application which the Director determines will conflict with the local public interest will be denied unless the Director determines that an over-riding state or national need exists for the project or that the project can be approved with conditions to resolve the conflict with the local public interest. (7-1-93)

02. Criteria for Evaluating Whether a Proposed Use of Trust Water Will Cause a Significant Reduction. Reference: Section 42-203C(1), Idaho Code and Rule Subsection 025.02.b. For purposes of reallocating trust water made available by the Snake River water rights agreement, an application for permit or a permit being reprocessed, will be presumed to not cause a significant reduction if the Director determines that it complies with both the individual and cumulative tests for evaluating significant reduction as provided in Rules Subsections 045.02.a. and 045.02.b. (7-1-93)

a. Individual test for evaluating significant reduction. A proposed use will be presumed to not cause a significant reduction if when fully developed and its impact is fully felt, the use will individually reduce the flow of the Snake River measured at Murphy Gauge by not more than two (2) acre-feet per day. An irrigation project of two hundred (200) acres or less located anywhere in the Snake River Basin above Murphy Gauge proposing to use trust water is presumed to not reduce the flow at Murphy Gauge by more than two (2) acre-feet per day. The presumption of this section is not applicable to applications or permits to be reprocessed which the Director determines to be part of a larger development. (7-1-93)

b. Cumulative test for evaluating significant reduction. A proposed use will be presumed to not cause a significant reduction, if the use, when fully developed and its impact is fully felt and when considered cumulatively with other existing uses and other uses reasonably likely to exist within twelve (12) months of the proposed use, will not deplete the flow of Snake River measured at Murphy Gauge by more than: (7-1-93)

i. Forty thousand (40,000) acre-feet per calendar year when considered with all other uses approved for development of trust water during that calendar year; (7-1-93)

ii. Forty thousand (40,000) acre-feet per calendar year using a four (4) year moving average when considered with all other uses approved for development of trust water during that four (4) year period; and (7-1-93)

iii. Twenty thousand (20,000) acre-feet per calendar year from filings approved for reallocation of trust water which meet the criteria of Rule Subsection 045.02.a. (the individual test for evaluating significant reduction). (7-1-93)

c. The Director will determine on a case-by-case basis from available information whether a permit to be reprocessed or an application for trust water which exceeds the flow depletion limits of Rule Subsection 045.02, or one which meets the flow depletion limits but has been protested, will cause a significant reduction. In making this determination, the Director will consider: (7-1-93)

i. The amount of the reduction in hydropower generation that the proposed use will cause individually and cumulatively with other uses expected to be developed within twelve (12) months of the proposed use as compared to the existing hydropower generation output of the affected facility or facilities. (7-1-93)

ii. The relative importance of the affected hydropower facility or facilities to other sources of electrical power generation available to the holder of the facility or facilities. (7-1-93)

iii. The timing of the reduction in hydropower generation both on an annual basis and on a long-term basis considering the lag time between the beginning of diversion by the proposed use and the resulting reduction in hydropower generation. (7-1-93)

iv. The effect of the reduction in hydropower generation on the unit cost of hydropower from the facility or facilities and the average cost of electrical power offered by the holder of the facility. (7-1-93)

v. The terms of contracts, mortgages, or regulatory permits and licenses which require the holder of the hydropower generation facility to retain the capability to produce hydroelectric power at a specific level. (7-1-93)

d. Other provisions of these rules not withstanding, applications or permits to be reprocessed proposing a direct diversion of water for irrigation purposes from the Snake River between Milner Dam and Swan Falls Dam or from tributary springs in this reach are presumed to cause a significant reduction. (7-1-93)

e. Other provisions of these rules not withstanding, applications or permits to be reprocessed for DCMI purposes are presumed to not cause a significant reduction. (7-1-93)

03. Criteria for Evaluating Public Interest. If the Director determines that a proposed use of trust water held by the state pursuant to Section 42-203B(5), Idaho Code, will cause a significant reduction, the Director will consider the criteria of Section 42-203C(2), Idaho Code, before acting on the application or permit being reprocessed. The Director shall consider and balance the relative benefits and detriments for each factor required to be weighed under Section 42-203C(2), Idaho Code, to determine whether a proposed reduction of the amount of water available for power production serves the greater public interest. The Director shall evaluate whether the proposed use sought in the permit being reprocessed or the application will provide the greater benefit to the people of the state of Idaho when balanced against other uses for the same water resource. In evaluating the public interest criteria, the Director will use the following guidelines: (7-1-93

a. The Director will consider the potential benefits both direct and indirect, and that the proposed use would provide to the state and local economy. The economic appraisal shall be based upon generally accepted economic analysis procedures which uniformly evaluate the following factors within the state of Idaho and the county or counties directly affected by the project: (7-1-93)

i. Direct project benefits. (7-1-93)

ii. Indirect benefits including net revenues to the processing, transportation, supply, service and government sectors of the economy. (7-1-93)

iii. Direct project costs, to include the opportunity cost of previous land use. (7-1-93)

iv. Indirect project costs, including verifiable costs to government in net lost revenue and increased regulation costs, verifiable reductions in net revenue resulting from losses to other existing instream uses, and the increased cost of replacing reduced hydropower generation from unsubordinated hydropower generating facilities. (7-1-93)

b. The Director will consider the impact the proposed use would have upon the electric utility rates in the state of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact. These evaluations will include the following considerations: (7-1-93)

i. Projections of electrical supply and demand for Idaho and the Pacific Northwest made by the Bonneville Power Administration and the Northwest Power Planning Council and information available from the Idaho Public Utilities Commission or from the electric utility from whose water right trust water is being reallocated. (7-1-93)

ii. The long term reliability of the substitute source and the cost of alternatives including the resulting impact on electrical rates. (7-1-93)

c. The Director will consider whether the proposed use will promote the family farming tradition in the state of Idaho. For purposes of this evaluation, the Director will use the following factors. (7-1-93)

d. If the total land to be irrigated by the applicant, including currently owned and leased irrigated land and land proposed to be irrigated in the application and other applications and permits of the applicant, do not exceed

nine hundred sixty (960) acres, the application will be presumed to promote the family farming tradition. (7-1-93)

e. If the requirement of Rule Subsection 045.03.c.i. is not met, the Director will consider the extent the applicant conforms to the following characteristics: (7-1-93)

i. The farming operation developed or expanded as a result of the application is operated by the applicant or a member of his family (spouse, parents or grandparents, lineal descendents, including those that are adopted, lineal descendents of parents; and spouse of lineal descendents); (7-1-93)

ii. In the event the application is filed in the name of a partnership, one or more of the partners shall operate the farming operation; and (7-1-93)

iii. If the application is in the name of a corporation, the number of stockholders does not exceed fifteen (15) persons, and one or more of the stockholders operates the farming operation unless the application is submitted by an irrigation district, drainage district, canal company or other water entity authorized to appropriate water for landowners within the district or for stockholders of the company all of whom shall meet the family farming criteria. (7-1-93)

f. The Director will consider the promotion of full economic and multiple use development of the water resources of the state of Idaho. In this regard, the extent to which the project proposed complies with the following factors will be considered: (7-1-93)

i. Promotes and conforms with the adopted State Water Plan; (7-1-93)

ii. Provides for coordination of proposed and existing uses of water to maximize the beneficial use of available water supplies; (7-1-93)

iii. Utilizes technology economically available to enhance water and energy use efficiency; (7-1-93)

iv. Provides multiple use of the water, including multipurpose storage; (7-1-93)

v. Allows opportunity for reuse of return flows; (7-1-93)

vi. Preserves or enhances water quality, fish, wildlife, recreation and aesthetic values; (7-1-93)

vii. Provides supplemental water supplies for existing uses with inadequate supplies. (7-1-93)

g. The Director will consider whether a proposed use, which includes irrigation, will conform to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period in the Snake River drainage above Murphy Gauge. In applying this criteria, the Director will consider the following: (7-1-93)

i. "Above Murphy gauge" means the Snake River and any of its surface or groundwater tributaries upstream from Murphy gauge which gauge is located on the Snake River approximately four (4) miles downstream from Swan Falls Dam from which trust water is to be reallocated; (7-1-93)

ii. Twenty thousand (20,000) acres per year or eighty thousand (80,000) acres per four (4) year period is a four (4) year moving average of Twenty thousand (20,000) acres/year of permits issued during a calendar year for irrigation development. If permits for development of less than twenty-thousand (20,000) acres are issued in a year, additional development in excess of twenty-thousand (20,000) acres can be permitted in succeeding years. Likewise, if more than twenty thousand (20,000) acres is permitted in one year (recognizing that a single large project could exceed twenty thousand (20,000) acres) the permitted development in succeeding years must be correspondingly less to maintain no greater than a twenty thousand (20,000) acres/year average for any four (4) year period; (7-1-93)

iii. The criteria of Rule Subsection 045.03.g. applies to multiple-use projects with irrigation as a principal purpose. Projects which use irrigation as only an incidental purpose, such as the land treatment of waste, shall not be included within this policy; and (7-1-93)

iv. An application determined by the Director to be otherwise approvable but found to exceed the acreage limitations, when considered with other applications approved for development, may be approved with conditions providing for the construction of project works and beneficial use of water to be commenced in a future year. (7-1-93)

h. No single public interest criterion will be entitled to greater weight than any other public interest criterion. (7-1-93)

i. Until such time as the studies prescribed in Policy 32 I of the State Water Plan are completed and accepted by the Idaho Water Resource Board, applications and permits reprocessed which propose to divert water to surface storage from the Snake River and surface tributaries upstream from Murphy Gauging Station shall be presumed to satisfy the public interest criteria of Section 42-203C(2), Idaho Code. Applications or reprocessed permits which are approved prior to completion of the studies, will not be subject to additional reprocessing. (7-1-93)

j. Applications for permit for trust water sources filed prior to July 1, 1985, for projects for which diversion and beneficial use was complete prior to October 1, 1984, are presumed to satisfy the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

k. Applications or permits to be reprocessed proposing a direct diversion of water for irrigation purposes from the Snake River between Milner Dam and Swan Falls Dam or from tributary springs in this reach are presumed not to be in the public interest as defined by Section 42-203C, Idaho Code. Such proposals, are presumed to prevent the full economic and multiple use of water in the Snake River Basin and to adversely affect hydropower availability and electrical energy rates in the state of Idaho. (7-1-93)

l. Proposed DCMI uses which individually do not have a maximum consumptive use of more than two acre-feet/day are presumed to meet the public interest criteria of Section 42-203C(2), Idaho Code, unless protested. (7-1-93)

046. – 049. (RESERVED).

050. CONDITIONS OF APPROVAL (RULE 50).

01. Issuance of Permits with Conditions. The Director may issue permits with conditions to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and specifically to meet the criteria of Section 42-203A, Idaho Code, and to meet the requirements of Section 42-203C, Idaho Code, to the fullest extent possible including conditions to promote efficient use and conservation of energy and water. (7-1-93)

02. Requirements to Mitigate Impact of Flow Depletion. Permits to be reprocessed or applications approved to appropriate water from the main stem of the Snake River between Milner and Murphy gauging station for diversion to off-stream storage during the period November 1 to March 31 shall include requirements to mitigate, in accordance with Policy 32 I of the State Water Plan, the impact of flow depletions on downstream generation of hydropower. (7-1-93)

03. Applications and Existing Permits That Are Junior and Subordinate. Applications and existing permits approved for hydropower generation shall be junior and subordinate to all rights to the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of the application or existing hydropower permit. A subordinated permit shall not give rise to any right or claim against future rights to the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of the application or existing hydropower permit. A permit issued for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B(6), Idaho Code. (7-1-93)

04. Permanent Flow Measuring Device Requirement. Applications approved for on-stream storage reservoirs will, unless specifically waived by the Director, require permanent flow measuring devices both upstream and downstream from the reservoir. (7-1-93)

05. Well Spacing and Well Construction Requirements. Applications approved for diversion of groundwater may include conditions requiring well spacing and well construction requirements. (7-1-93)

06. Reprocessed Permits. Permits reprocessed pursuant to Section 42-203D, Idaho Code, may be cancelled, modified or conditioned by the Director to make the permit comply in every way with any permit that would be issued for the same purpose based upon a new application processed under these rules. (7-1-93)

07. Conditioning of Permits. The Director may condition permits to require commencement of construction of project works within a designated time interval not to exceed one year and completion of construction of project works and beneficial use of water within a time interval not to exceed five (5) years. (7-1-93)

08. Voiding Approval of Permit. Permits may be conditioned to authorize the Director to void the approval of the permit if he determines that the applicant submitted false or misleading information on the application or supporting documents. (7-1-93)

09. Retetion of Jurisdiction. The Director may condition permits to retain jurisdiction to insure compliance with the design, construction and operation provisions of the permit. (7-1-93)

10. Insuring Minimum Stream Flows and Prior Rights. The Director may condition permits to insure that established minimum stream flows and prior rights including prior rights reserved by federal law are not injured. (7-1-93)

11. Insuring Compliance with Water Quality Standards. The Director may condition permits to insure compliance with Idaho's water quality standards. (7-1-93)

12. Insuring Assignment of Interest. The Director may condition a permit issued for trust water to require that any amendment (Section 42-211, Idaho Code), transfer (Section 42-222, Idaho Code), or assignment of interest in the permit by any method whatsoever shall not result in the project failing to meet the public interest criteria of Section 42-203C, Idaho Code except, however, lenders obtaining title to the project through default will have a reasonable period of time, as determined by the Director, to meet such criteria or to convey the project to a person or entity that does meet the criteria. (7-1-93)

051. – 054. (RESERVED).

055. MORATORIUM (RULE 55).

01. Applications for Permit. (7-1-93)

a. The Director may cease to approve applications for permit in a designated geographical area upon finding a need to: (7-1-93)

i. Protect existing water rights; (7-1-93)

ii. Insure compliance with the provisions of Chapter 2, Title 42, Idaho Code; and (7-1-93)

iii. Prevent reduction of flows below a minimum stream flow which has been established by the Director or the board pursuant to applicable law. (7-1-93)

b. Notice of the Director's action to cease application approval will be by: (7-1-93)

i. Summary Order served by certified mail upon the then existing affected applicants; and (7-1-93)

ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area affected. (7-1-93)

c. Objections to the DirectorDirector's action shall be considered under the department's adopted Rules of Procedure and applicable law. (7-1-93)

02. Permits. (7-1-93)

a. To the extent a permit has not been developed, the Director may cancel, or modify permits for which proof of beneficial use has not been submitted in a designated geographical area as an extension of Rule Subsection 055.01. (7-1-93)

b. Notice of the Director's action to cancel or modify permits shall be by: (7-1-93)

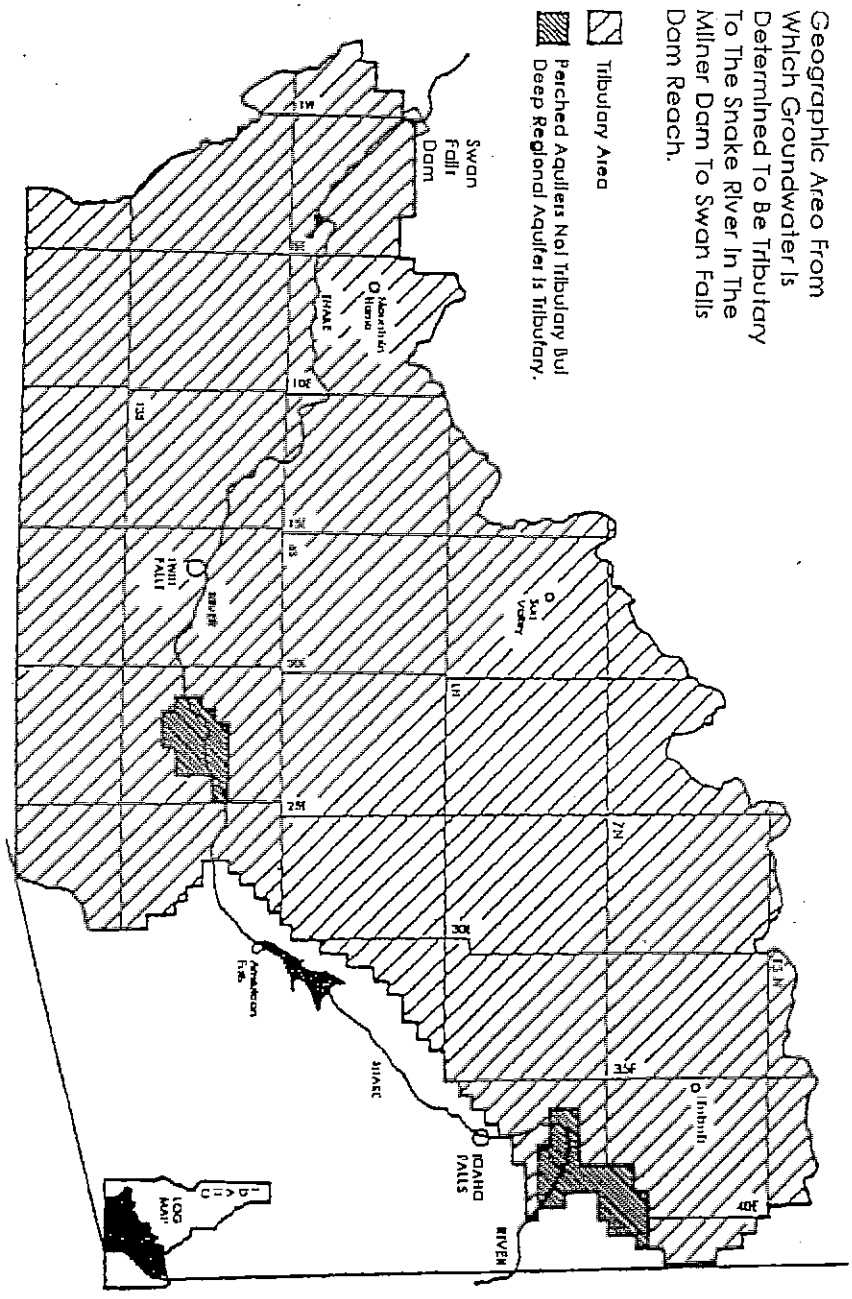
i. Summary Order served by certified mail upon the affected permit holders in the designated area. (7-1-93)

ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area. (7-1-93)

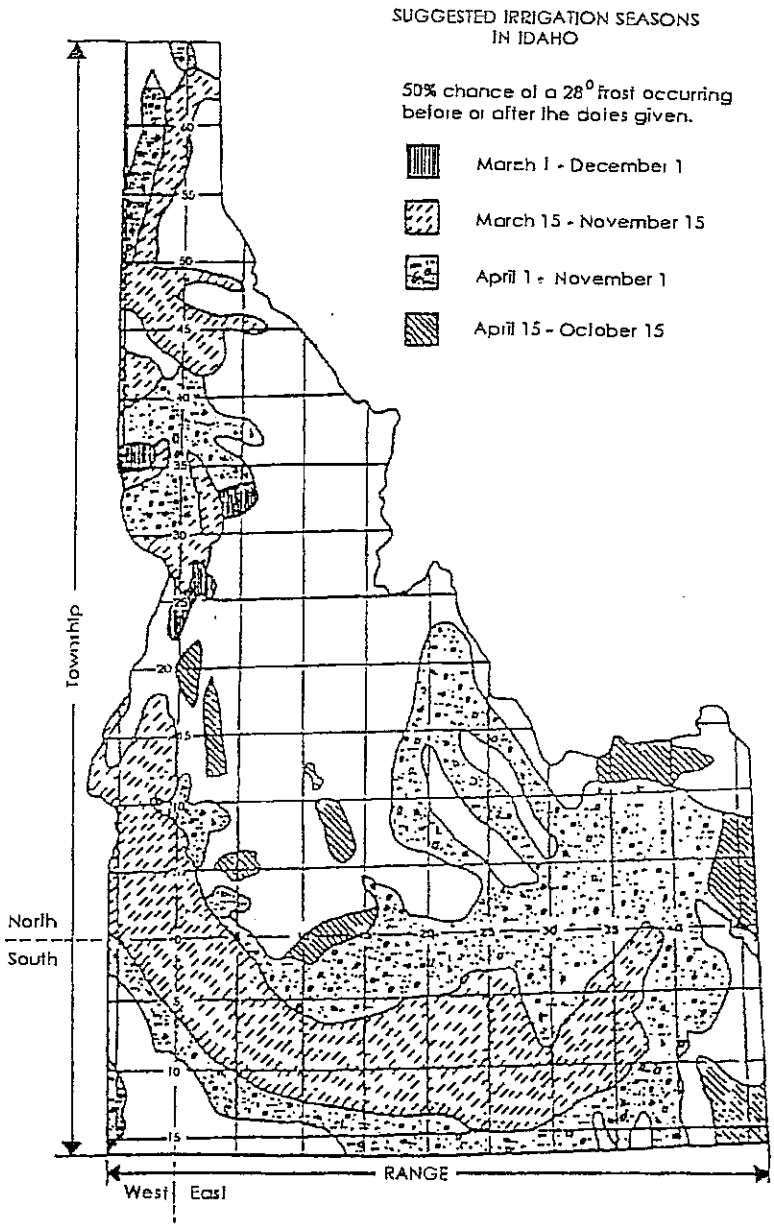
c. Objections to the Director's action shall be considered under the department's adopted Rules of Procedure and applicable law. (7-1-93)

056. – 999. (RESERVED).

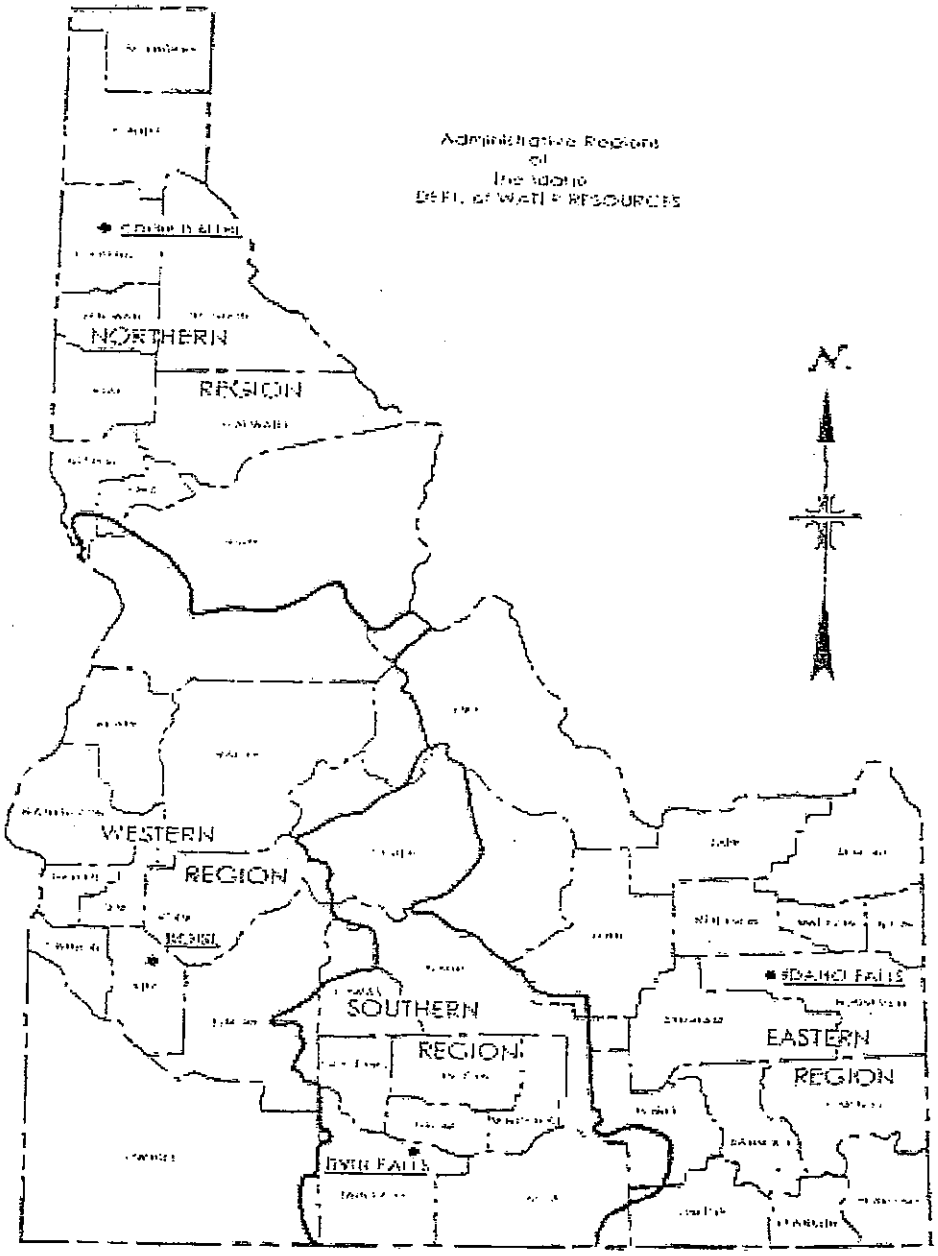
APPENDIX A


Geographic Area From Which Groundwater Is Determined To Be Tributary To The Snake River In The Milner Dam To Swan Falls Dam Reach.
Tributary Area
Perched Aquifers Not Tributary But Deep Regional Aquifer Is Tributary.
Swan Falls Dam
IDAHO FALLS
RIVER

APPENDIX B


SUGGESTED IRRIGATION SEASONS
IN IDAHO
50% chance of a 28° frost occurring
before or after the dates given.
March 1 - December 1
March 15 - November 15
April 1 - November 1
April 15 - October 15
Township
North
South
RANGE
West
East

APPENDIX C


Administrative Regions
of
the Idaho
DEPT. of WATER RESOURCES
NORTHERN
REGION
WESTERN
REGION
SOUTHERN
REGION
EASTERN
REGION
IDAHO FALLS
TWIN FALLS
N

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Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 3

"History of Milner Dam"
(http://www.tfcanal.com/milner.htm)

MILNER DAM

Joe Yost - Dam Tender 432-5423

HISTORY OF MILNER DAM

In 1900 the entire strip of country we know as the Magic Valley was but a vast desert covered with sagebrush. The irrigation works had not been commenced, and in fact, the whole scheme of irrigation was little more than a dream

Milner Dam came about because of the vision of Ira Burton Perrine, a rancher who had developed a Shoshone Falls resort and a Blue Lakes farm down stream. Perrine chose the site of the dam and acted as his own engineer. He obtained financing for the project through Stanley B. Milner, a banker and financier from Salt Lake City, and easterners Frank H. Buhl and Peter L. Kimberly.

As a result, the Buhl-Kimberly Corp. was formed and in 1903 a contract was entered into between the State of Idaho and the Twin Falls Land and Water Co. for construction of the project. The dam was formed by three earth and rockfilled embankments, abutting against the river banks and two islands.

In 1905 construction on the dam was completed. Men with mules and scrapers had also finished their work on the canals and all was ready for the water.

"On March 1, 1905, Frank Buhl gave a ceremonial pull on the wheel on a winch and the gates of Milner Dam were closed, and the gates to a thousand miles of canal and laterals were opened, and the Snake River was diverted, and that night Shoshone Falls went dry as the water rushed across the desert far above, and Perrine's vision was realized, and 262,000 acres of desert were shortly transformed."

Milner Dam and its canal system have national significance in agricultural history. They are one of the rare examples of successful state supervised private irrigation development.

The dam performed well for decades. There were instances of leakage through the dam that required immediate repair, but it fulfilled its purpose and today provides irrigation water to more than 500,000 acres of prime Idaho farmland.

After decades of use the dam began to show signs of aging. In December 1988, the Federal Energy Regulatory Commission's Division of Dam Safety and Inspection determined there was a high risk of Milner Dam failing during an earthquake unless it was rebuilt.

The price tag to rebuild the dam was about $11 million.

The Twin Falls and North Side canal companies determined that the costs of reconstruction would result in severe economic hardship to their 7,500 shareholders who depend on irrigation water from the dam for their livelihoods.

To pay for reconstruction the canal companies made a mutually beneficial agreement with Idaho Power to rehabilitate the dam and build a new 57.5-megawatt power plant downstream. Idaho Power would loan the canal companies funds to refurbish the dam. Repayment would come in the form of royalties from the hydro project.

The new Milner power plant has two main generating units, one with an 11.5-megawatt generating capacity and the other with 46 megawatts of capacity. A small 800-kilowatt powerhouse also has been built at the dam to take advantage of minimum streamflows that must be spilled at the dam to maintain a flow in the main river channel.

The Milner project is different from most of the hydro projects Idaho Power has constructed because it is spread out over a large area. The dam is located approximately 1.5 miles upstream from the powerhouse. At the dam, water is diverted into irrigation canals where it is dispersed to the surrounding farmland through the canal systems during the irrigation season. When farmers do not need the water it flows through a widened section of the Twin Falls Canal to an intake structure that directs the water through penstocks that stretch down the steep canyon wall and into the powerhouse. From the powerhouse the water flows back into the main river channel.

FACTS ABOUT THE PROJECT

- ***Milner is Idaho Power's 17th hydroelectric power plant.***
- ***The power generating facilities cost approximately $56 million.***
- ***Up to 5,200 cfs of water, which would previously have been spilled, generates low-cost energy.***
- ***Spillway capacity of 116,750 cfs provides the capability to safely handle flood flows.***
- ***Kayaking opportunities will be available during high water years.***
- ***Recreational access to the Snake River at Milner Dam and downstream of the powerhouse is provided.***

HOME PAGE 

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

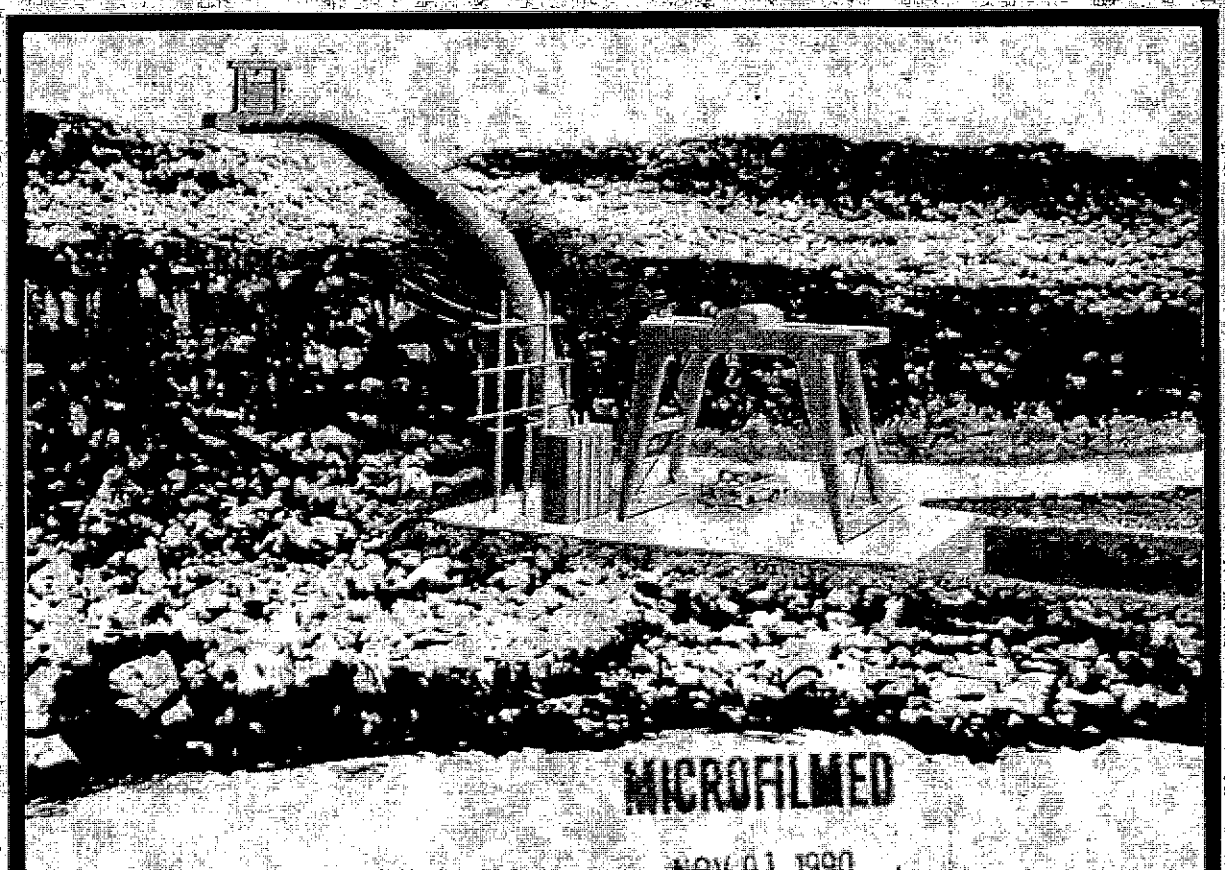
Exhibit 4

Excerpted pages of *Before The Federal Energy Regulatory Commission - Application For Initial License: Project 2899-002* (Twin Falls Canal Company, North Side Canal Company) (July 1984)

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for Initial License: Project No. 2899-002

MILNER
HYDROELECTRIC PROJECT



MICROFILMED
NOV 01 1990
Cover only

TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.

JULY 1984

RECEIVED
AUG 15, 1985
Department of Water Resources

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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

- 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

MILNER PROJECT NO. 2899-002

EXHIBIT D

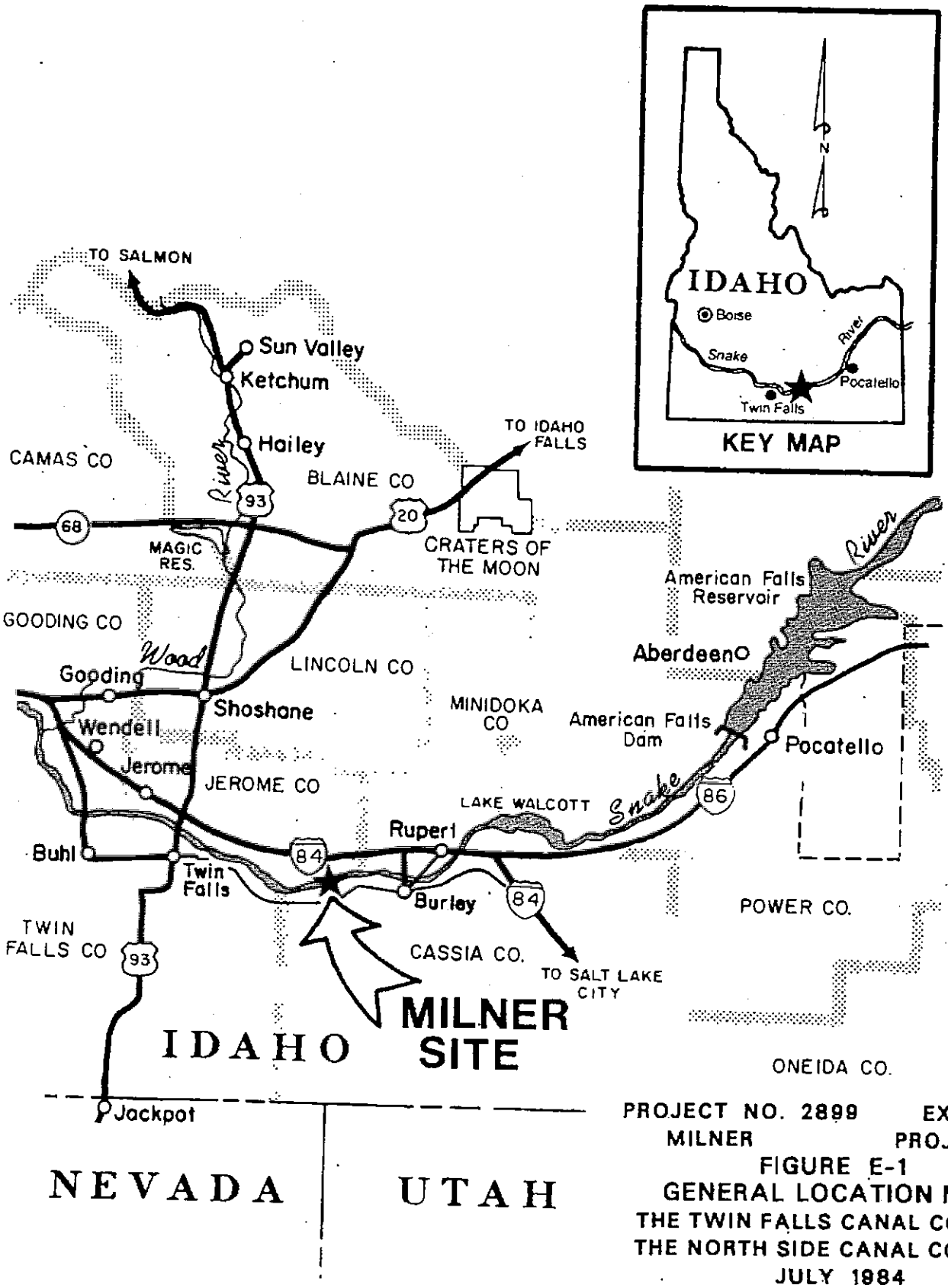
I. SOURCES AND EXTENT OF FINANCING FOR POWER FACILITIES

Applicants are Idaho corporations in which more than 80% of the stock is owned by farmers. As such, they qualify for financing through the Federal Intermediate Credit System as Co-operatives. The Spokane Bank for Co-operatives has indicated that a loan for construction of a power plant could be negotiated. The applicants would be required to give a lien of all the power facilities (except that dam, canal and reservoir), a conveyancing agreement to deliver water to the power plant, and assign the Power Sales Contract and water right as well as the other necessary permissions. It is contemplated that the applicants would sell the power pursuant to a Power Sales Contract as small power producers to Idaho Power Company pursuant to the Public Utilities Regulatory Policies Act. A short fall in revenues due to water shortage would be covered with insurance, or an adequate reserve fund would be established acceptable to the lender.

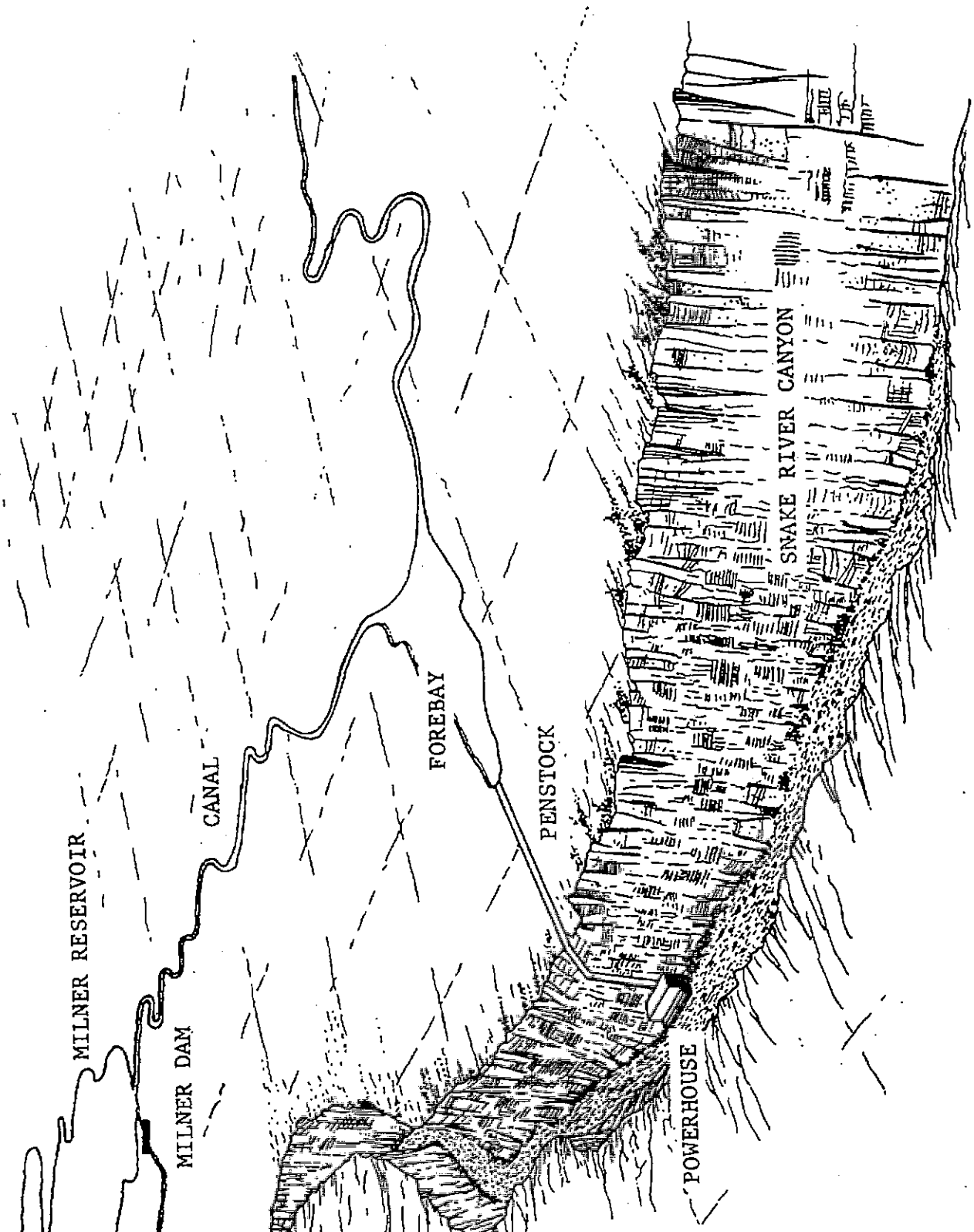
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GENERAL LOCATION MAP



PROJECT NO. 2899 EXHIBIT E
MILNER PROJECT
FIGURE E-1
GENERAL LOCATION MAP
THE TWIN FALLS CANAL CO. AND
THE NORTH SIDE CANAL CO., LTD.
JULY 1984



PROJECT NO. 2899 EXHIBIT E
MILNER PROJECT

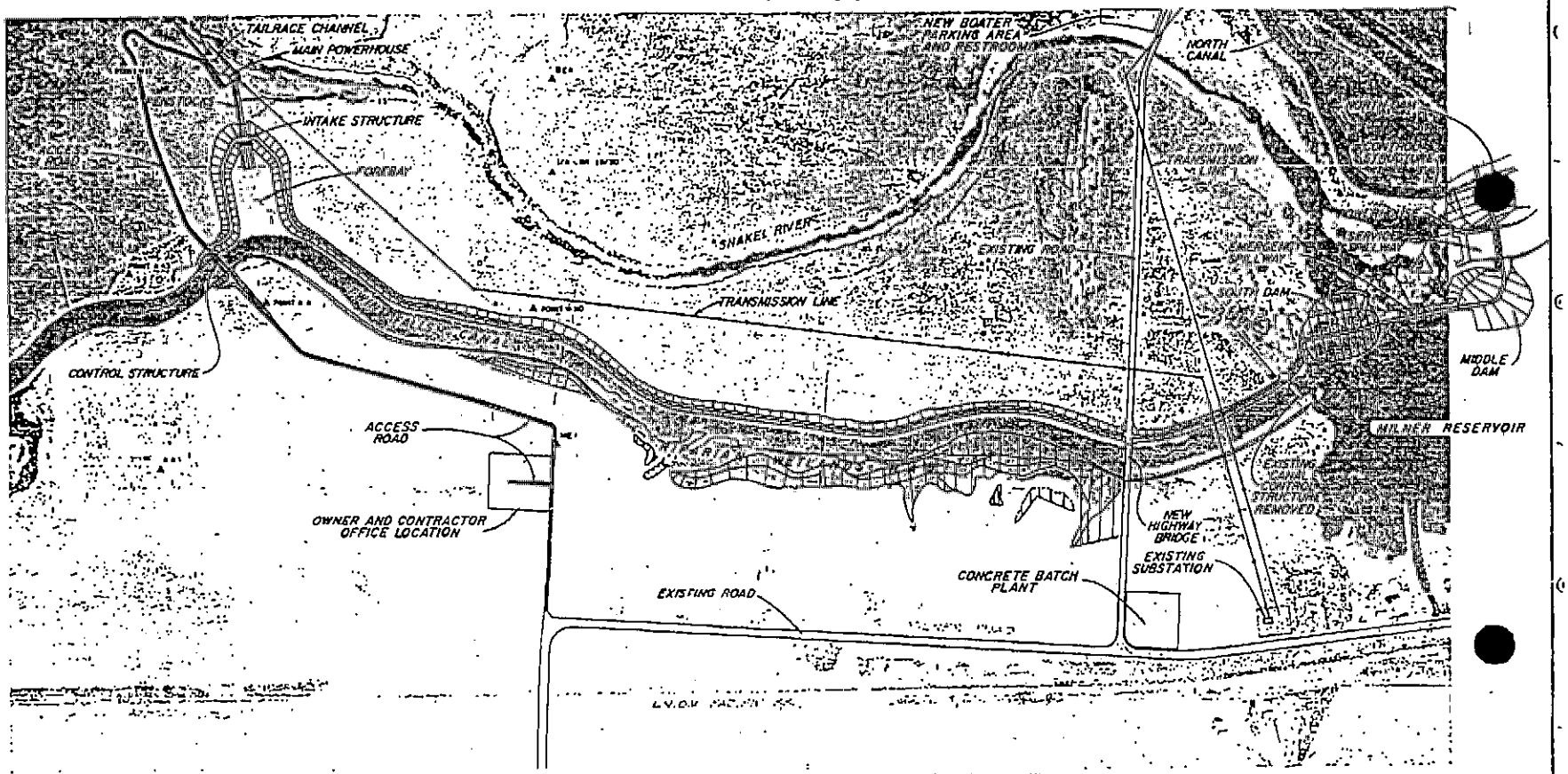
FIGURE E-2
ARTIST'S CONCEPTION OF
THE MILNER PROJECT
THE TWIN FALLS CANAL CO. AND
THE NORTH SIDE CANAL CO., LTD.
JULY 1984

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 5

Drawings of the Milner Dam and Milner hydropower project (from IDWR website)

EXHIBIT A
PERMIT 01-7011
MILNER POWER PLANT



SURVEY CONTROL POINTS:

CONTROL POINTS

POINT #	NORTH	EAST	ELEVATION
110	36,158.9484	482,861.9563	4,015.88
111	382,154.8196	-12,234.5960	4,332.81
112	382,175.7051	498,829.1439	4,256.49
113	381,538.3788	499,135.1106	4,238.16
114	383,645.2411	499,188.2115	4,893.61
115	383,661.1361	-82,239.3811	4,869.43
116	383,486.9468	199,111.5729	4,214.11

NOTE:
1. COMPLETED PROJECTS SHOWN.

A	JAN	ISSUED FOR 404 - 401 - 2 AGENCY REVIEW	JAN	ASC	1	ISSUED FOR PLANS II BID PROPOSAL	JAN 94	EEC
7	MAR	ISSUED FOR FINAL DESIGN REVIEW	MAR	EEC	2	ISSUED FOR PLANS II BID PROPOSAL	MAR 94	EEC
6	MAR	ISSUED FOR CONSTRUCTION	MAR	EEC	3	ISSUED FOR PLANS II BID PROPOSAL	MAR 94	EEC
5	MAR	ISSUED FOR 404 - 401 - 2 AGENCY REVIEW	MAR	EEC	4	ISSUED FOR PLANS II BID PROPOSAL	MAR 94	EEC
4	MAR	ISSUED FOR 404 - 401 - 2 AGENCY REVIEW	MAR	EEC	5	ISSUED FOR PLANS II BID PROPOSAL	MAR 94	EEC
NO	DATE	REVISIONS	BY	CHK	NO	DATE	REVISIONS	BY	CHK

MORRISON-KNUDSEN ENGINEERS, INC.
A MORRISON KNUDSEN COMPANY
180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105

IDAHO POWER COMPANY
TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.

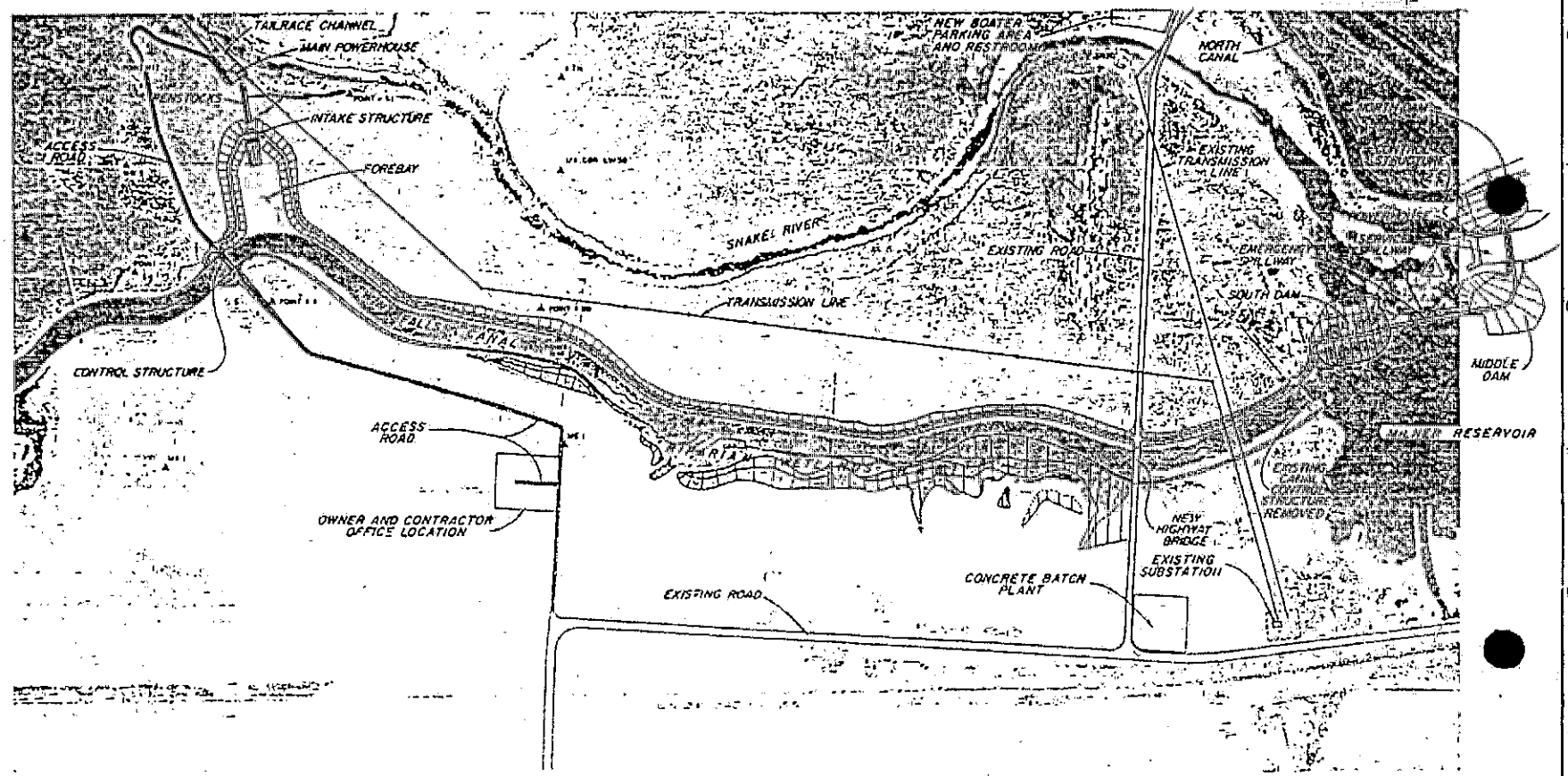
MILNER HYDROELECTRIC PROJECT

PROJECT GENERAL ARRANGEMENT

3773-10-0005
SHEET OF REV. 8

JAN 10 1994

EXHIBIT A
PERMIT 01-7011
MILNER POWER PLANT



SURVEY CONTROL POINTS

NO.	N&E	N&E	VELOCITY (FPS)	NO.

CONTROL POINTS

POINT #	NORTH	EAST	ELEVATION

NOTE:
1. COMPLETED PROJECT SHOWN

MORRISON-KNUDSEN ENGINEERS, INC.

IDAHO POWER COMPANY
TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.

MILNER HYDROELECTRIC PROJECT

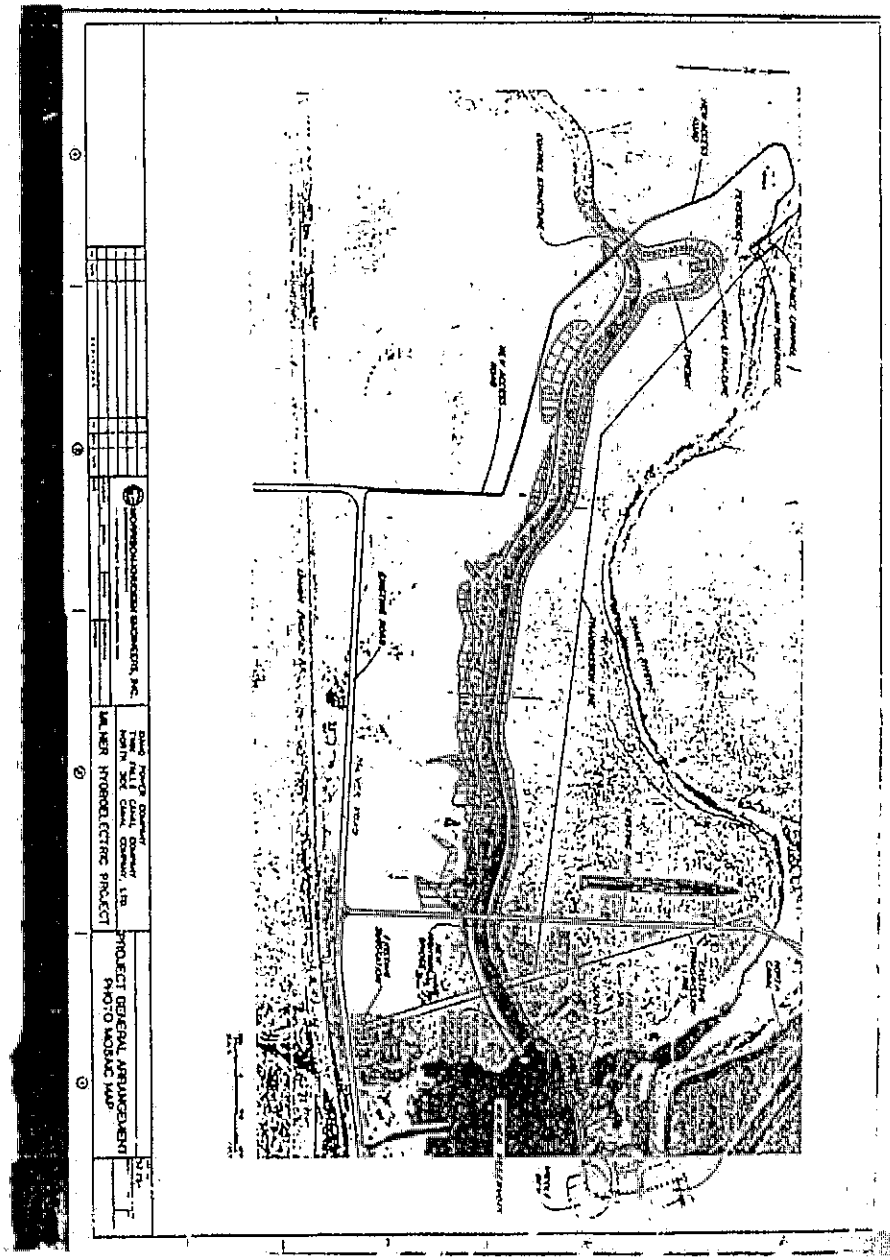
PROJECT GENERAL ARRANGEMENT

3775-10-0005

JAN 10 1994

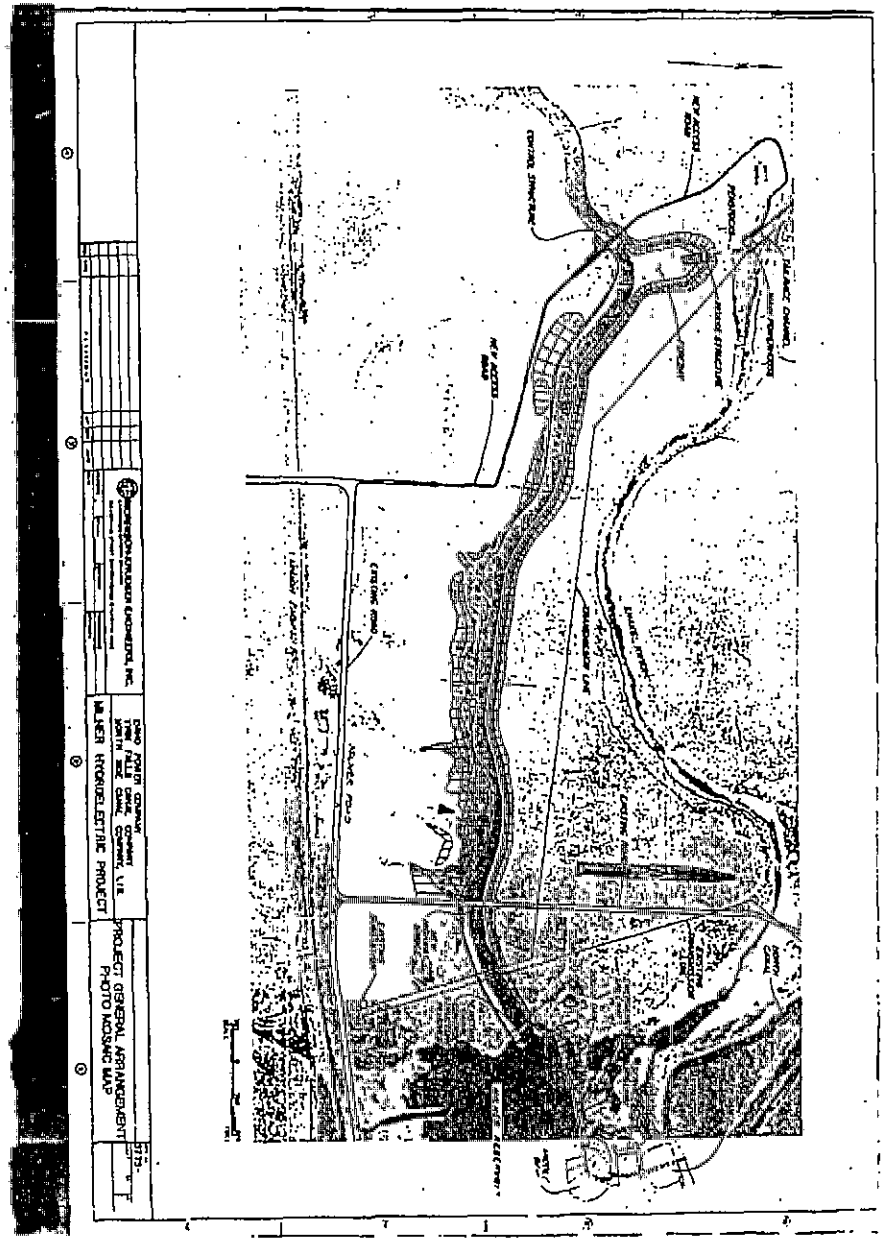
C. Filing and Service of Responsive Documents--Any filings must bear in all capital letters the title "COMMENTS," "RECOMMENDATIONS FOR TERMS AND CONDITIONS," "NOTICE OF INTENT TO FILE COMPETING APPLICATION," "COMPETING APPLICATIONS," "PROTEST" or "MOTION TO INTERVENE," as applicable, and the project number of the particular application to which the filing is in response. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: the Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 204-RB, at the above address. A copy of any notice of intent, competing application, or motion to intervene must also be served upon each representative of the applicant specified in the particular application.

Lois D. Cashell
Secretary



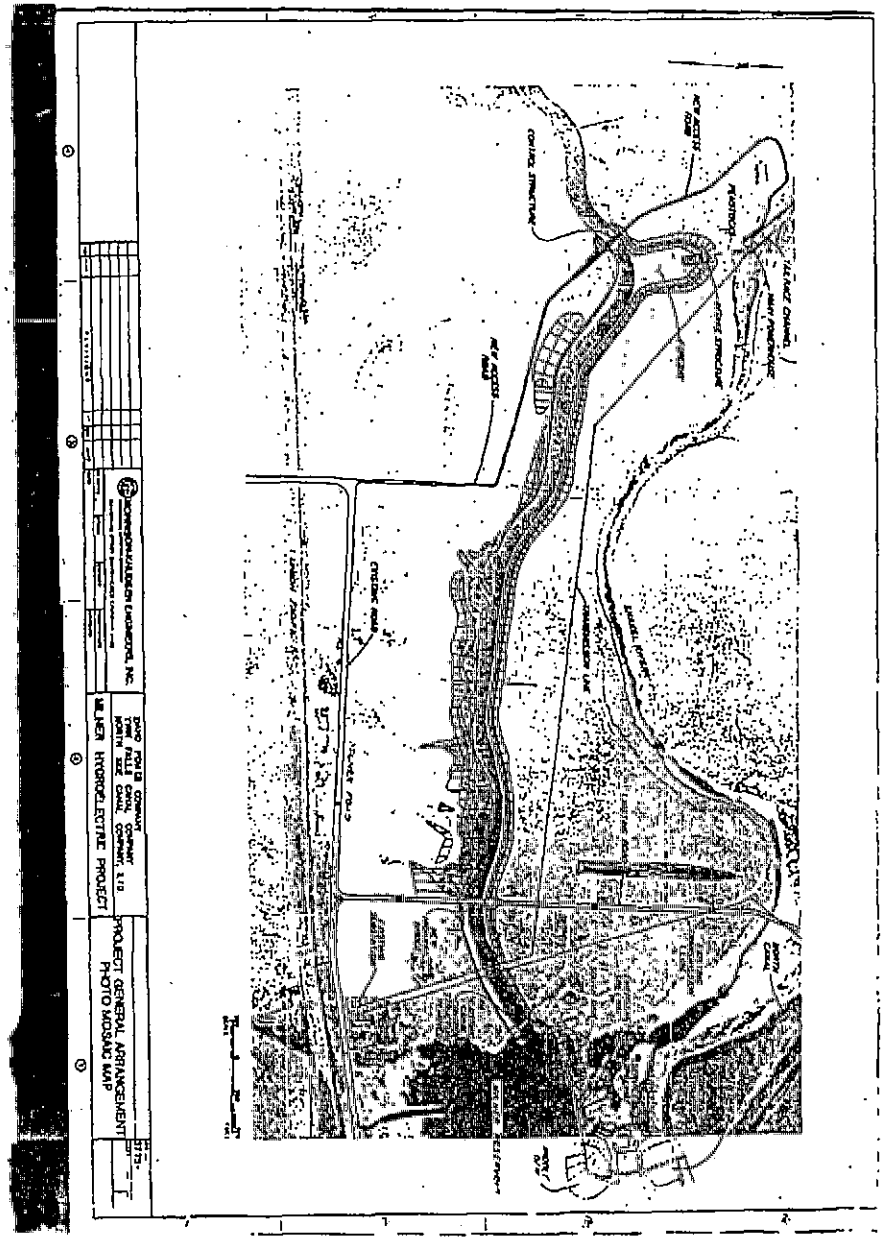
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Lois D. Cashell
Secretary



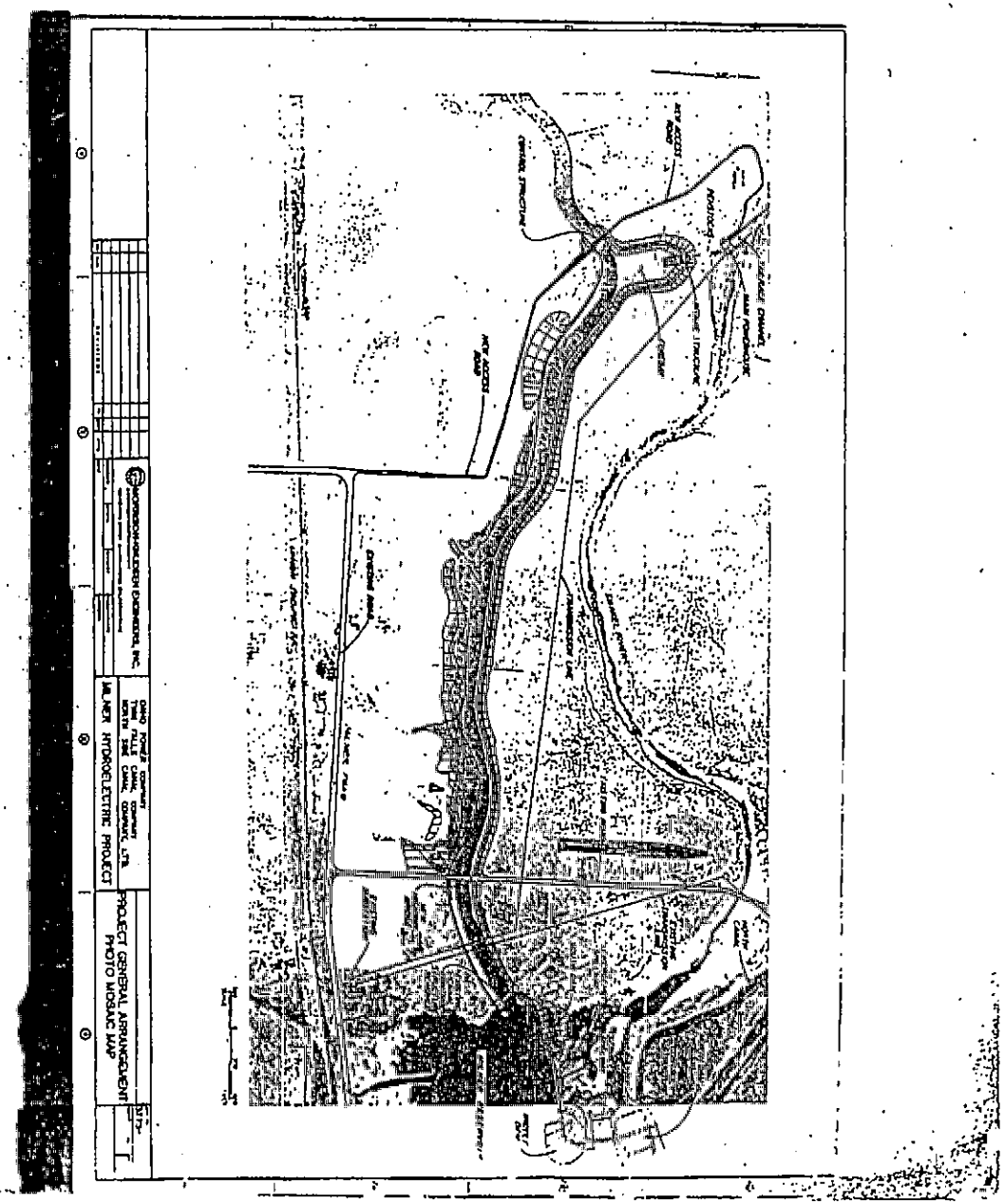
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Lois D. Cashell
Secretary



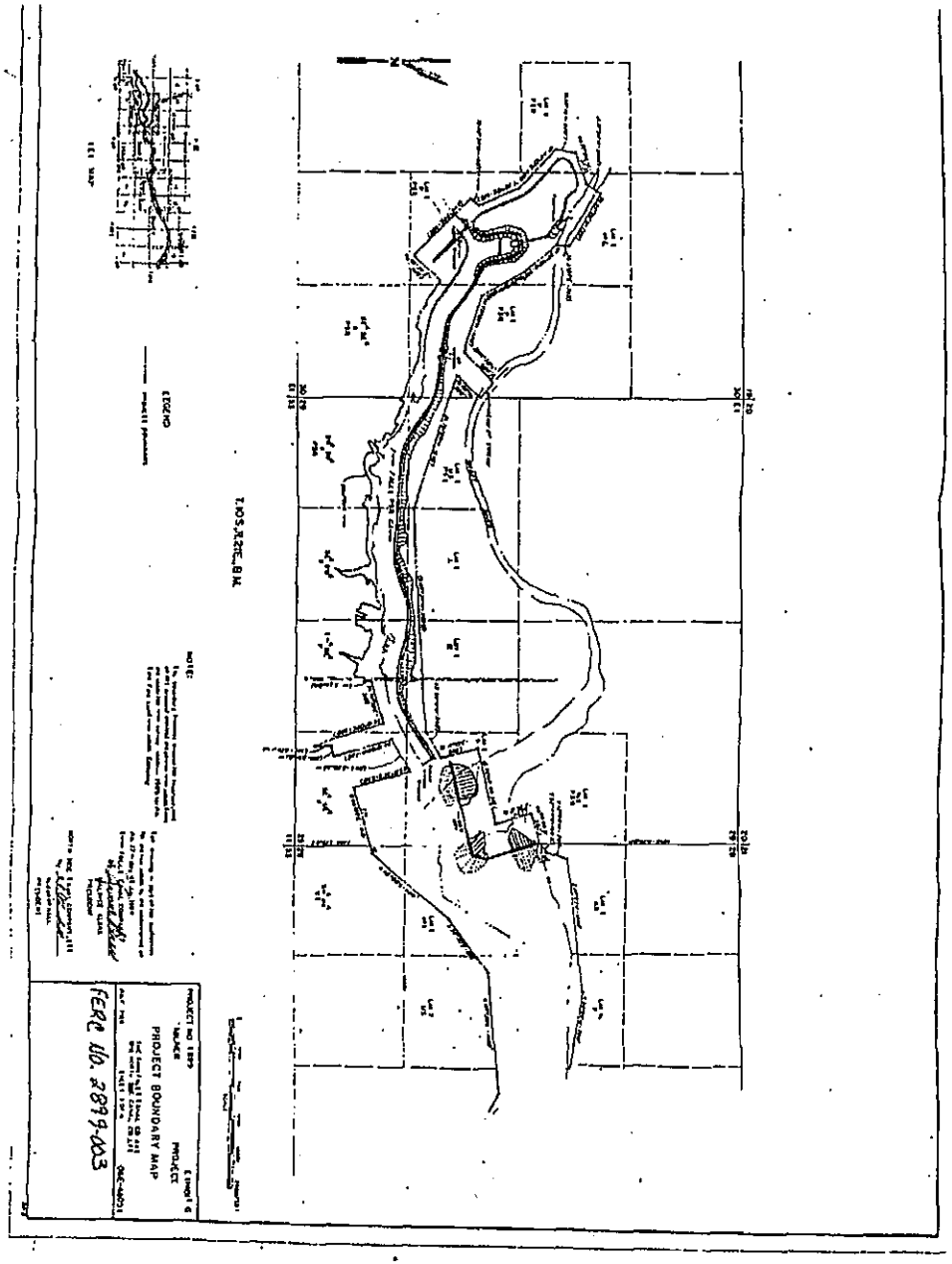
C. Filing and Service of Responsive Documents--Any filings must bear in all capital letters the title "COMMENTS," "RECOMMENDATIONS FOR TERMS AND CONDITIONS," "NOTICE OF INTENT TO FILE COMPETING APPLICATION," "COMPETING APPLICATIONS," "PROTEST" or "MOTION TO INTERVENE," as applicable, and the project number of the particular application to which the filing is in response. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: the Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 204-RB, at the above address. A copy of any notice of intent, competing application, or motion to intervene must also be served upon each representative of the applicant specified in the particular application.

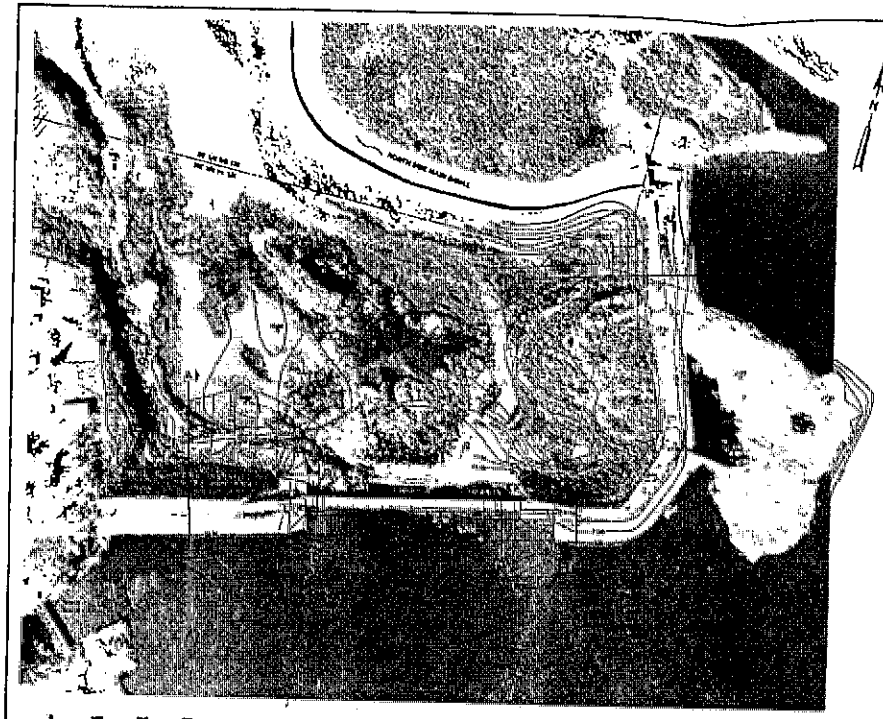
Lois D. Cashell
Secretary



C. Filing and Service of Responsive Documents - Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST" or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing is in response. Any of the above named documents must be filed by providing the original and the number of copies required by the Commission's regulations to: Kenneth F. Plumb, Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: Mr. Fred E. Springer, Director, Division of Project Management, Federal Energy Regulatory Commission, Room 203-RB, at the above address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

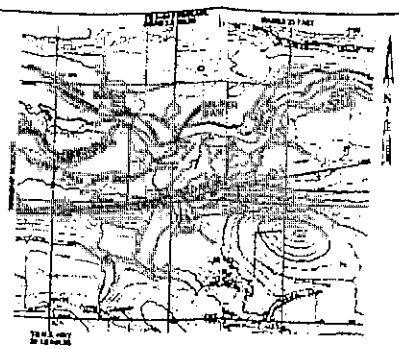
Kenneth F. Plumb
Secretary



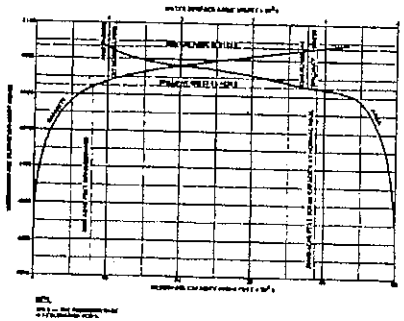


SITE MAP

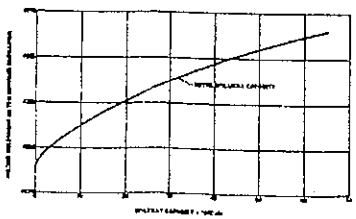
NOTE: SECTIONS SHOWN ON DRAWING 12



VICINITY MAP



MILNER RESERVOIR
AREA AND CAPACITY CURVES



MILNER DAM
RELIABILITY CURVE FOR
PROPOSED SPILLWAY

This drawing is part of the application for license made by the undersigned on the 27th day of July, 1984.

TWIN FALLS CANAL COMPANY.

By _____
MAURICE ALLAIS
PRESIDENT

NORTH SIDE CANAL COMPANY, LTD.

By _____
C. J. MARSHALL
PRESIDENT

PROJECT NO. 2899 EXHIBIT F

MILNER PROJECT

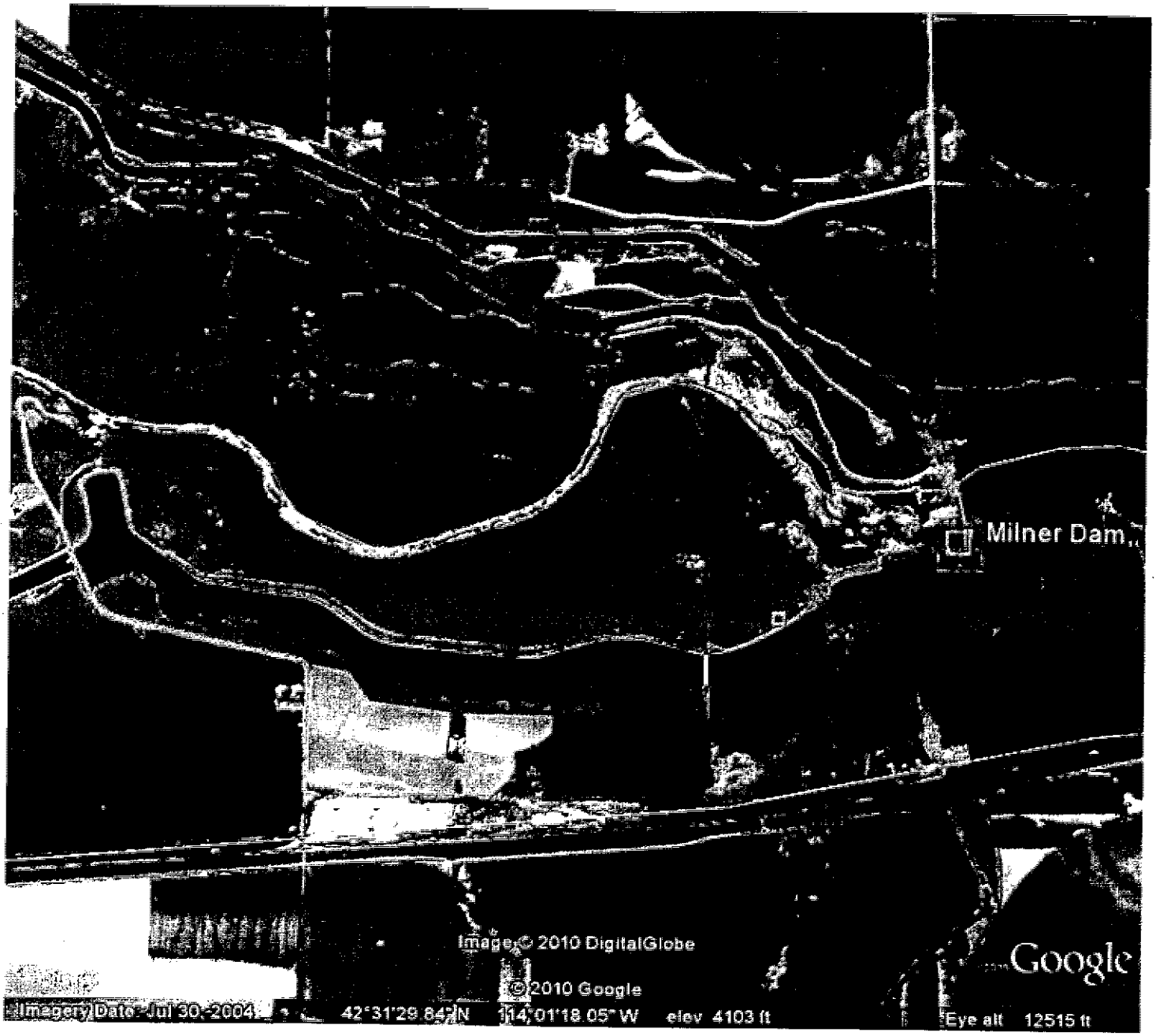
MILNER DAM
REHABILITATION PLAN

THE TWIN FALLS CANAL CO. AND
THE NORTH SIDE CANAL CO., LTD

JULY 1984 SHEET 10 OF 12 06E-46059

Exhibit 6

Google Earth® printouts of Milner Dam and nearby areas.


Milner Dam
Image © 2010 DigitalGlobe
© 2010 Google
Google
Imagery Date: Jul 30, 2004
42°31'29.84" N
114°01'18.05" W
elev 4103 ft
Eye alt 12515 ft

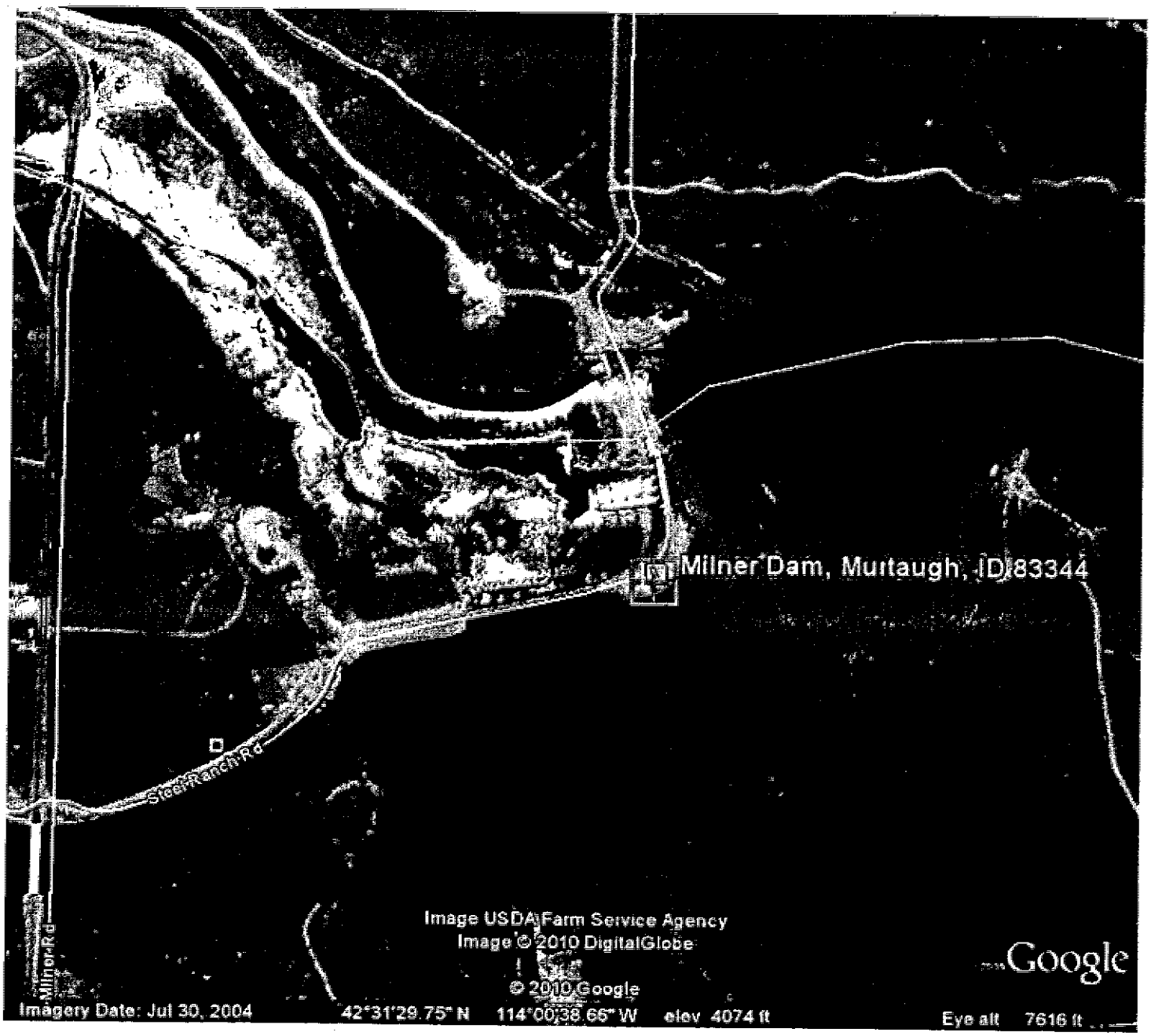

Milner Dam, Murtaugh, ID 83344
Steer Ranch Rd
Image USDA Farm Service Agency
Image © 2010 DigitalGlobe
© 2010 Google
Google
Imagery Date: Jul 30, 2004
42°31'29.75" N
114°00'38.66" W
elev 4074 ft
Eye alt 7616 ft


Image © 2010 DigitalGlobe
© 2010 Google
Google
Imagery Date: Jul 30, 2004 42°31'32.49" N 114°02'10.39" W elev 4119 ft Eye alt 5657 ft

Exhibit 7

2009 annual reports of Twin Falls Canal Company
and Milner Dam, Inc.
(from Idaho Secretary of State's website)

No. **C 6549**	**Due no later than Nov 30, 2009** **Annual Report Form**	2. Registered Agent and Address **(NO PO BOX)**
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 **NO FILING FEE IF RECEIVED BY DUE DATE**	**1. Mailing Address: Correct in this box if needed.** TWIN FALLS CANAL COMPANY BRIAN E OLMSTEAD P O BOX 326 TWIN FALLS ID 83303-0326 USA	BRIAN OLMSTEAD 357 6TH AVE W TWIN FALLS ID 83301 3. New Registered Agent Signature:*

4. Corporations: Enter Names and Business Addresses of President, Secretary, Directors and(optional) Treasurer.

Office Held	Name	Street or PO Address	City	State	Country	Postal Code
DIRECTOR	CHARLES COINER	3866 N 3800 E	HANSEN	ID	USA	83334
DIRECTOR	PHIL BLICK	3550 N 700 E	CASTLEFORD	ID	USA	83321
TREASURER	ROGER BLASS	2178 E 4400 N	FILER	ID	USA	83328
SECRETARY	JOHN HONCIK	1403 E 4340 N	BUHL	ID	USA	83316
PRESIDENT	DAN SHEWMAKER	3528 E 3600 N	KIMBERLY	ID	USA	83341

5. Organized Under the Laws of:	6. Annual Report must be signed.*	
ID **C 6549**	Signature: Brian Olmstead	Date: 09/08/2009
	Name (type or print): Brian Olmstead	Title: General Manager
Processed 09/08/2009	* Electronically provided signatures are accepted as original signatures.	

No. **C 96431**	**Due no later than Oct 31, 2009** **Annual Report Form**	2. Registered Agent and Address **(NO PO BOX)**
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 **NO FILING FEE IF RECEIVED BY DUE DATE**	**1. Mailing Address: Correct in this box if needed.** MILNER DAM, INC. BRIAN OLMSTEAD P O BOX 326 TWIN FALLS ID 83303-0326	BRIAN OLMSTEAD 3S7 6TH AVE WEST TWIN FALLS ID 83301 3. New Registered Agent Signature:*

4. Corporations: Enter Names and Business Addresses of President, Secretary, Directors and(optional) Treasurer.

Office Held	Name	Street or PO Address	City	State	Country	Postal Code
TREASURER	PHIL BLICK	3SS0 N 700 E	CASTLEFORD	ID	USA	83321
SECRETARY	PHIL BLICK	3SS0 N 700 E	CASTLEFORD	ID	USA	83321
PRESIDENT	JOHN HONCIK	1403 E 4340 N	BUHL	ID	USA	83316

5. Organized Under the Laws of:	6. Annual Report must be signed.*	
ID **C 96431**	Signature: Brian Olmstead	Date: 08/13/2009
	Name (type or print): Brian Olmstead	Title: Authorized Representative

Processed 08/13/2009 * Electronically provided signatures are accepted as original signatures.

Exhibit 8

Application For Alternative Writ Of Mandate,
North Side Canal Co. & Twin Falls Canal Co. v. Tuthill,
Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County)
(Sept. 28, 2007)

COPY

DISTRICT COURT
FIFTH JUDICIAL DIST
JEROME COUNTY, IDAHO

2007 SEP 26 PM 1 19
Michelle Emerson
CLERK
BY /s/ Linda Owens
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 APPLICATION FOR ALTERNATIVE WRIT OF MANDATE

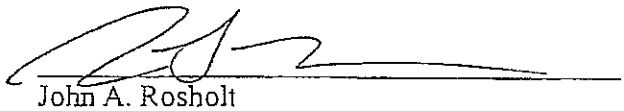
COME NOW, the Petitioners, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, (hereinafter referred to as "Petitioners") by and through their attorneys of record, Barker Rosholt & Simpson LLP, and hereby make application to the Court pursuant to Rule 74(b) of the Idaho Rules of Civil Procedure for an Alternative Writ of Mandate compelling the Respondents to void the September 5, 2007, *Notice of Intent to Issue License* and

close all protest or comment period *In the Matter of Licensing Water Right Permit No. 01-7011 in the Name of Twin Falls Canal Company and North Side Canal Company*, and to issue the Petitioners a license for their water right permit no. 01-7011, pursuant to the beneficial use examination received by Respondents on November 1, 1993, and the conditions on the existing water right permit no. 01-7011 in compliance with Idaho Code § 42-219, and to appear before the Court at a time a place certain, and show cause, in any they have, why they have not complied with the terms of the Alternative Writ of Mandate.

This Application is supported by the *Petition for Peremptory Writ of Mandate*, setting forth the facts and grounds upon which the Application is based.

DATED THIS 26th day of September, 2007.

BARKER ROSHOLT & SIMPSON LLP



John A. Rosholt
John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for North Side Canal Company and Twin Falls Canal Company

Attachment T

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IDAPA 37
TITLE 03
CHAPTER 08

37.03.08 - WATER APPROPRIATION RULES

000. LEGAL AUTHORITY (RULE 0).

The Director of the Department of Water Resources adopts these rules under the authority provided by Section 42-1805(8), Idaho Code. (7-1-93)

001. TITLE AND SCOPE (RULE 1).

01. Title. (7-1-93)

02. Scope. (7-1-93)

a. Background and Purpose. The 1985 Idaho Legislature authorized reallocation of certain hydropower water rights to new upstream beneficial uses. The reallocation is to be accomplished using statutes designed to provide for the appropriation of unappropriated public water supplemented by a public interest review of those reallocations which significantly reduce existing hydropower generation. These rules provide the procedures for obtaining the right to divert and use unappropriated public water as well as water previously appropriated for hydropower use which has been placed in trust with the State of Idaho and is subject to reallocation. Guidelines are provided for the filing and processing of applications, and criteria are established for determining the actions to be taken by the Director. (7-1-93)

b. Scope and Applicability. These rules are applicable to appropriations from all sources of unappropriated public water in the state of Idaho under the authority of Chapter 2, Title 42, Idaho Code. Sources of public water include rivers, streams, springs, lakes and groundwater. The rules are also applicable to the reallocation of hydropower water rights held in trust by the state of Idaho. The rules are applicable to all applications to appropriate water filed with the Department of Water Resources prior to the effective date of these rules upon which an action to approve or deny the application is pending and to all applications filed subsequent to adoption of the rules and regulations. In addition, the rules are applicable to existing permits to appropriate water required to be reviewed under the provisions of Section 42-203D, Idaho Code. (7-1-93)

002. WRITTEN INTERPRETATIONS (RULE 2).

003. ADMINISTRATIVE APPEALS (RULE 3).

004. – 009. (RESERVED).

010. DEFINITIONS (RULE 10).

Unless the context otherwise requires, the following definitions govern these rules:

01. Acre-Foot (AF). A volume of water sufficient to cover one (1) acre of land one (1) foot deep and is equal to forty-three thousand five hundred sixty (43,560) cubic feet. (7-1-93)

02. Advertisement. The action taken by the Director to provide notice, usually by publication of a legal notice in one (1) or more newspapers, of a proposed appropriation or other notice required in administration of his duties and responsibilities. (7-1-93)

03. Applicant. The person, corporation, association, firm, governmental agency or other entity, or the holder of a permit being reprocessed pursuant to Section 42-203D, Idaho Code, who initiates an appropriation of water or related water matter for the Director's consideration. (7-1-93)

04. Application for Permit. The written request to the department on forms furnished by the department proposing to appropriate the public waters or trust waters of the state. (7-1-93)

05. Board. The Idaho Water Resource Board. (7-1-93)

06. Beneficial Use. One (1) or more of the recognized beneficial uses of water including but not limited to, domestic, municipal, irrigation, hydropower generation, industrial, commercial, recreation, stockwatering and fish propagation uses for which permits to appropriate water can be issued as well as other uses which provide a benefit to the user of the water as determined by the Director. Industrial use as used for purposes of these rules includes, but is not limited to, manufacturing, mining and processing uses of water. (7-1-93)

07. Cubic Foot Per Second (CFS). A rate of flow approximately equal to four hundred forty-eight and eight-tenths (448.8) gallons per minute and also equals fifty (50) Idaho miner's inches. (7-1-93)

08. DCMI. An acronym for domestic, commercial, municipal and industrial. In these rules it designates certain classes of these uses presumed to satisfy public interest requirements. Domestic use, for purposes of this definition, is water for one or more households and water used for all other purposes including irrigation of a residential lot in connection with each of the households where the diversion to each household does not exceed thirteen thousand (13,000) gallons per day. Also for purposes of this definition, commercial, municipal and industrial uses are any such uses which do not deplete the system containing the trust water more than two (2) acre feet per day. (7-1-93)

09. Department. The Idaho Department of Water Resources. (7-1-93)

10. Director. The Director of the Idaho Department of Water Resources. (7-1-93)

11. Legal Subdivision. A tract of land described by the government land survey and usually is described by government lot or quarter-quarter, section, township and range. A lot and block of a subdivision plat recorded with the county recorder may be used in addition to the quarter-quarter, section, township and range description. (7-1-93)

12. Permit or Water Right Permit. The water right document issued by the Director authorizing the diversion and use of unappropriated public water of the state or water held in trust by the state. (7-1-93)

13. Priority, or Priority of Appropriation, or Priority Date. The date of appropriation established in the development of a water right. The priority of a water right for public water or trust water is used to determine the order of water delivery from a source during times of shortage. The earlier or prior date being the better right. (7-1-93)

14. Project Works. A general term which includes diversion works, conveyance works, and any devices which may be used to apply the water to the intended use. Improvements which have been made as a result of application of water, such as land preparation for cultivation, are not a part of the project works. (7-1-93)

15. Single Family Domestic Purposes. Water for household use or livestock and water used for all other purposes including irrigation of up to one half (1/2) acre of land in connection with said household where total use is not in excess of thirteen thousand (13,000) gallons per day. (7-1-93)

16. Subordinated Water Right. A water right used for hydropower generation purposes that is subject to depletion without compensation by upstream water rights which are initiated later in time and which are for a purpose other than hydropower generation purposes. (7-1-93)

17. Trust Water. That portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided by Section 42-203B(3), Idaho Code. (7-1-93)

18. Unappropriated Water. The public water of the state of Idaho in streams, rivers, lakes, springs or groundwater in excess of that necessary to satisfy prior rights including prior rights reserved by federal law. (7-1-93)

011. – 024. (RESERVED).

025. GENERAL DESCRIPTION OF THE PROCEDURE TO BE USED FOR ALLOCATION (RULE 25).

01. Applications to Appropriate Unappropriated Water and Water Held in Trust. Applications to appropriate unappropriated water and water held in trust as provided by Section 42-203B(3), Idaho Code, will be evaluated using the criteria of Section 42-203A, Idaho Code, which requires an assessment to be made of the impact of the proposed use on water availability for existing water rights, the adequacy of the water supply for the proposed use, whether the application is filed for speculative purposes, the financial ability of the applicant to complete the project, and the effect of the proposed use on the local public interest. (7-1-93)

02. Applications to Appropriate Water from Sources Held by State in Trust. Applications to appropriate water from sources on which the state holds water in trust, pursuant to Section 203B(5), Idaho Code, will be processed in a three-step analysis. Evaluation will consider the purposes of "trust water" established in Section 42-203B, Idaho Code. (7-1-93)

a. First, the proposed use must be evaluated using the procedures and criteria of Section 42-203A, Idaho Code. If all criteria of Section 42-203A(5), Idaho Code, are satisfied, the application may be approved for unappropriated water. If the application does not satisfy the criteria of Section 42-203A(5) b, c, d, and e, Idaho Code, or is found to reduce the water to existing water rights other than those held in trust by the state, the application will be denied. If the application satisfies all criteria of Section 42-203A(5), Idaho Code, except Section 42-203A(5)a, Idaho Code, but is found to reduce water held in trust by the state, the application will be reviewed under criteria of Section 42-203C, Idaho Code. (7-1-93)

b. Second, Section 42-203C, Idaho Code, requires a determination of whether the proposed use will significantly reduce, individually or cumulatively with existing uses and other uses reasonably likely to exist within twelve months of the proposed use, the amount of trust water available to the holder of the water right used for power production that is defined by agreement pursuant to subsection (5) of Section 42-203B, Idaho Code (hereinafter termed "significant reduction"). If a significant reduction will not occur, the application may be approved without an evaluation of the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

c. Third, based upon a finding of significant reduction, the proposed use will be evaluated in terms of the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

026. – 029. (RESERVED).

030. LOCATION AND NATURE OF TRUST WATER (RULE 30).

01. Snake River Water Rights Agreement. The legislation ratifying the Snake River water rights agreement between the state of Idaho and Idaho Power Company places in trust a part of the flows available to Idaho Power Company under its hydropower water rights in the Snake River Basin between Swan Falls Dam and Milner Dam. The flows subject to the trust water provisions and reallocation under Section 42-203C(2), Idaho Code, are as follows: (7-1-93)

a. Trust water flows under the Snake River water rights agreement are located in the Snake River between Swan Falls Dam located in Section 18, Township 2 South, Range 1 East, Boise Meridian (B.M.) and Milner Dam located in Sections 28 and 29, Township 10 South, Range 21 East, Boise Meridian (B.M.) and all surface and groundwater sources tributary to the Snake River in that reach. (7-1-93)

b. Surface water and groundwater tributary to the Snake River upstream from Milner Dam is not trust water. After giving notice and considering public comment, the Director will designate the area in which groundwater is presumed to be tributary to the Snake River upstream from Milner Dam. Modification or changes in the designated boundary may be made only after providing notice and considering public comment. The area presently designated as tributary to the Snake River in the Milner Dam to Swan Falls Dam reach is appended to these rules (See Attachment A in APPENDIX A located at the end of this chapter), for information purposes only. (7-1-93)

c. Trust water flows under the Snake River water rights agreement are those occurring in the Snake River and tributaries in the geographic area designated in Rule Subsection 030.01.a. which exceed the established minimum stream flows but are less than the water rights for hydropower generating facilities in the Swan Falls Dam to Milner Dam reach of Snake River, to the extent such rights were unsubordinated prior to the Snake River water

rights agreement. Minimum average daily flows have been established by action of the Water Resource Board and legislature at the U.S. Geological Survey gauging station located near Murphy (Section 35, Township 1 South, Range 1 West B.M.) in the amount of three thousand nine hundred (3900) cfs from April 1 to October 31 and five thousand six hundred (5600) cfs from November 1 to March 31, and at Milner gauging station located in Section 29, Township 10 South, Range 21 East, B.M. in the amount of zero (0) cfs from January 1 to December 31. (7-1-93)

02. Trust Water Created by State Action. Section 42-203B(3), Idaho Code, provides that trust water can be created by state action establishing a minimum flow without an agreement with the holder of the hydropower water right. Allocation of trust water so established will be pursuant to state law except the criteria of Section 42-203C, Idaho Code, will not be considered. (7-1-93)

03. Sources of Public Water Not Trust Water. The following sources of public water are not trust water and are not subject to the public interest provisions of Section 42-203C, Idaho Code: (7-1-93)

a. Sources or tributaries to sources upon which no hydropower generating facilities are located downstream within the state of Idaho (Example - Salmon River). (7-1-93)

b. Sources or tributaries to sources which have a state hydropower water right permit or license or Federal Energy Regulatory Commission license which have not been subordinated, and the state of Idaho has not entered into an agreement with the holder of the hydropower water right pursuant to Section 42-203B(2), Idaho Code, and the State of Idaho has not established a minimum stream flow for purposes of protecting hydropower generation. (7-1-93)

c. Sources or tributaries to sources for which a state hydropower water right permit or license, or the Federal Energy Regulatory Commission license included a subordination condition. Such flows are considered to be public waters subject to appropriation under the provisions of Section 42-203A, Idaho Code (Example - Snake River downstream from Murphy gauging station). (7-1-93)

d. Flows in excess of established rights including rights used for hydropower purposes. Such flows are unappropriated waters subject to allocation under Section 42-203A, Idaho Code. (7-1-93)

e. Flows in the Snake River upstream from Milner Dam and all surface and groundwater tributaries to that reach. Such flows are subject to allocation under Section 42-203A, Idaho Code, without consideration of water rights existing downstream from Milner Dam (Reference: 42-203B(2), Idaho Code). (7-1-93)

031. -- 034. (RESERVED).

035. APPLICATION REQUIREMENTS (RULE 35).

01. General Provisions. (7-1-93)

a. No person shall commence the construction of any project works or commence the diversion of the public water or trust water of the state of Idaho from any source or change the point of diversion, place, period or nature of use of any existing water right without first having filed an application for permit to appropriate the water or other appropriate form with the department and received approval from the Director, unless exempted by these rules or by statute. (7-1-93)

b. Any person proposing to commence a diversion of the public water or the trust water of the state of Idaho from a groundwater source for single family domestic purposes is exempt from the application and permit requirements of Rule Subsection 035.01.a. Any person proposing to add a single family domestic use to an existing groundwater diversion including one used for single family domestic purposes is exempt from the provisions of Rule Subsection 035.01.a. (7-1-93)

c. Any person watering livestock directly from a natural stream or natural lake without the use of a constructed diversion works is exempt from Rule Subsection 035.01.a. (7-1-93)

d. All applications for permit to appropriate public water or trust water of the state of Idaho shall be

on the form provided by the department entitled "Application for Permit to Appropriate the Public Waters of the State of Idaho" and shall include all necessary information as described in Rule Subsection 035.03. An application for permit that is not complete as described in Rule Subsection 035.03 will not be accepted for filing and will be returned along with any fees submitted to the person submitting the application. No priority will be established by an incomplete application. Applications meeting the requirements of Rule Subsection 035.03. will be accepted for filing and will be endorsed by the department as to the time and date received. The acceptability of applications requiring clarification or corrections shall be determined by the Director. (7-1-93)

e. The department will correspond with the applicant concerning applications which have been accepted for filing by the department which require clarification or correction of the information required by Rule Subsection 035.03. If the additional or corrected information is supplied after thirty (30) days, the priority date of the application will be determined by the date the additional or corrected information is received by the department unless the applicant has requested within the thirty (30) day period additional time to provide the information, has shown good reasons for needing additional time, and the Director has granted additional time. (7-1-93)

f. Failure to submit the additional or corrected information is cause for the Director to void the department's records of the application. (7-1-93)

02. Effect of an Application. (7-1-93)

a. Any application, whether filed before or after promulgation of these rules, which seeks to appropriate water from a source upon which the state holds trust water shall be considered an application for appropriation of unappropriated water. If the Director determines unappropriated water is not available, the application, if otherwise approvable, will be reviewed for compliance with provisions of Section 42-203C, Idaho Code. (7-1-93)

b. The priority of an application for unappropriated or trust water is established as of the time and date the application is received in complete form along with the statutory fee in any official office of the department. The priority of the application, remains fixed unless changed by action of the Director in accordance with applicable law. (7-1-93)

c. An application for permit to appropriate water is not a water right and does not authorize diversion or use of water until approved by the Director in accordance with statutes in effect at the time the application is approved. (7-1-93)

d. An applicant's interest in an application for permit to appropriate water is personal property. An assignment of interest in an application must include evidence satisfactory to the Director that the application was not filed for speculative purposes. (7-1-93)

03. Requirements for Applications to Be Acceptable for Filing. (7-1-93)

a. The department form entitled "Application for Permit to Appropriate the Public Waters of the State of Idaho" (hereafter termed "application for permit form") is the required form to apply for either unappropriated water or trust water. (7-1-93)

b. The following information shall be shown on an application for permit form and submitted together with the statutory fee to an office of the department before the application for permit may be accepted for filing by the department. (7-1-93)

i. The name and post office address of the applicant shall be listed. If the application is in the name of a corporation, the names and addresses of its directors and officers shall be provided. If the application is filed by or on behalf of a partnership or joint venture, the application shall provide the names and addresses of all partners and shall designate the managing partner, if any. (7-1-93)

ii. The name of the water source sought to be appropriated shall be listed. For surface water sources, the source of water shall be identified by the official geographic name listed on the U.S. Geological Survey Quadrangle map, or if no official name has been given, by the name in local common usage. If the source has not

been named, it can be described as "unnamed," but the system or river to which it is tributary shall be identified. For groundwater sources, the source shall be listed as "groundwater." Only one source shall be listed on an application unless the application is for a single system which will have more than one source. (7-1-93)

iii. The legal description of the point of diversion and place of use shall be listed. The location of the point(s) of diversion and the place of use shall be described to the nearest forty (40) acre subdivision or U.S. Government Lot of the Public Land Survey System. The location of springs shall be described to the nearest ten (10) acre tract. Subdivision names, lot and block numbers and any name in local common usage for the point of diversion, or place of use shall be included in the comments section of the application form. If irrigation is listed as a purpose of use, the number of acres in each forty (40) acre subdivision of the place of use shall be listed. (7-1-93)

iv. The quantity of water to be diverted shall be listed as a rate of flow in cubic feet per second and/or as a volume to be stored in acre-feet per year for each purpose of use requested. (7-1-93)

v. Impoundment (storage) applications shall show the maximum acre-feet requirement per year which shall not exceed the storage capacity of the impoundment structure unless the application describes a plan of operation for filling the reservoir more than once per year. (7-1-93)

vi. Every offstream storage impoundment application shall show a maximum rate of diversion to storage as well as the total storage volume. (7-1-93)

vii. The nature of the proposed beneficial use or uses of the water shall be listed. While the purpose may be described in general terms such as irrigation, industrial or municipal, a description sufficient to identify the proposed use or uses of the water shall also be included. (7-1-93)

viii. The period of each year during which water will be diverted, stored and beneficially used shall be listed. The period of use for irrigation purposes shall coincide with the annual periods of use shown in Figure 1 in APPENDIX B (located at the end of this chapter), unless it can be shown to the satisfaction of the Director that a different period of use is necessary. (7-1-93)

ix. The proposed method of diversion, conveyance system and system for distributing and using the water shall be described. (7-1-93)

x. The period of time required for completion of the project works and application of water to the proposed use shall be listed. This period of time shall not exceed the time required to diligently and uninterruptedly apply the water to beneficial use and shall not exceed five (5) years. (7-1-93)

xi. A map or plat of sufficient scale (not less than two (2) inches equal to one (1) mile) to show the project proposed shall be included. The map or plat shall agree with the legal descriptions and other information shown on the application. (7-1-93)

xii. The application form shall be signed by the applicant listed on the application or evidence must be submitted to show that the signator has authority to sign the application. An application in more than one (1) name shall be signed by each applicant unless the names are joined by "or" or "and/or." (7-1-93)

xiii. Applications by corporations, companies or municipalities or other organizations shall be signed by an officer of the corporation or company or an elected official of the municipality or an individual authorized by the organization to sign the application. The signator's title shall be shown with the signature. (7-1-93)

xiv. Applications may be signed by a person having a current "power of attorney" authorized by the applicant. A copy of the "power of attorney" shall be included with the application. (7-1-93)

xv. An application signed by a mark or "X" must have the signator's name printed or typed nearby and the mark must have been witnessed and the application signed by the witness. (7-1-93)

xvi. Applications to appropriate water in connection with Carey Act or Desert Land Entry proposals shall include evidence that appropriate applications have been filed for the lands involved in the proposed project.

(7-1-93)

xvii. The application form shall be accompanied with a fee in the amount required by Section 42-221A, Idaho Code. (7-1-93)

04. Amended Applications. (7-1-93)

a. Applications for permit shall be amended whenever significant changes to the place, period or nature of the intended use, method or location of diversion or proposed use or uses of the water or other substantial changes from that shown on the pending application are intended. An application shall be amended if the proposed change will result in a greater rate of diversion or depletion (see Rule Subsection 035.04.c.), if the point of diversion, place of use, or point of discharge of the return flow are to be altered, if the period of the year that water will be used is to be changed, or if the nature of the use is to be changed. (7-1-93)

b. An application can be amended to clarify the name of the source of water but may not be amended to change the source of water. (7-1-93)

c. An amendment which increases the rate of diversion, increases the volume of water diverted per year or the volume of water depleted, lengthens the period of use, or adds an additional purpose of use shall result in the priority of the application for permit being changed to the date the amended application is received by the department. (7-1-93)

d. An application for permit may be amended by endorsement by the applicant or his agent on the original application for permit form which endorsement shall be initialed and dated. If the changes required to the information on the application are, in the judgment of the Director, substantial enough to cause confusion in interpreting the application form, the amended application shall be submitted on a new application for permit form to be designated as an amended application. (7-1-93)

e. An amended application shall be accompanied by the additional fee required by Section 42-221A, Idaho Code, if the total rate of diversion or total volume of storage requested is increased and by the fee required by Section 42-221F, Idaho Code, for readvertising if notice of the original application has been published. (7-1-93)

f. If the applicant's name or mailing address changes, the applicant shall in writing notify the department of the change. (7-1-93)

036. – 039. (RESERVED).

040. PROCESSING APPLICATIONS FOR PERMIT AND REPROCESSING PERMITS (RULE 40).

01. General. (7-1-93)

a. Unprotested applications, whether for unappropriated water or trust water, will be processed using the following general steps: (7-1-93)

i. Advertisement and protest period; (7-1-93)

ii. Department review of applications and additional information, including department field review if determined to be necessary by the Director; (7-1-93)

iii. Fact finding hearing if determined to be necessary by the Director; (7-1-93)

iv. Director's decision; (7-1-93)

v. Section 42-1701A, Idaho Code, hearing, if requested; and (7-1-93)

vi. Director's decision affirmed or modified. (7-1-93)

b. Protested applications, whether for unappropriated water or trust water, will be processed using the following general steps: (7-1-93)

i. Advertisement and protest period; (7-1-93)

ii. Hearing and/or conference; (7-1-93)

iii. Department review of applications, hearing record and additional information including department field review if determined to be necessary by the Director. (7-1-93)

iv. Proposed decision [unless waived by parties); (7-1-93)

v. Briefing or oral argument in accordance with the department's adopted Rules of Procedure. (7-1-93)

vi. Director's decision accepting or modifying the proposed decision. 17-1-93)

c. The Director's decision rejecting and denying approval of an application for permit filed for diversion from a source previously designated as a critical groundwater area or upon which a moratorium has previously been entered may be issued without advertisement of the application. (7-1-93)

d. An applicant may request in writing that commencement of processing of his or her application be delayed for a period not to exceed one (1) year or that processing be interrupted for a period not to exceed six (6) months. The Director at his discretion may approve the request unless he determines that others will be injured by the delay or that the applicant seeks the delay for the purpose of speculation, or that the public interest of the people of Idaho will not be served by the delay. The Director may approve a request for delay for a shorter period of time or upon conditions, and may renew the approval upon written request. (7-1-93)

e. As a condition of processing applications or reprocessing permits to reallocate trust water, the Director may require a cash bond or surety bond. Such bond up to five dollars ($5) per acre of land requested to be irrigated or two hundred fifty ($250) per cfs for other uses shall serve as a performance bond for satisfactory compliance with the permitted time requirements for commencement of construction, completion of project works and diversion of water to beneficial use. Failure to comply with the permitted time requirements, or such extension of time granted by the Director for good cause shown, is cause for the Director to require surrender of the bond amount to the department's Water Administration Account. The bond shall be returned to the permit holder upon satisfactory compliance with the permit's time requirements. (7-1-93)

02. Public Notice Requirement. (7-1-93)

a. Applications for permit which have not been advertised. (7-1-93)

i. Advertisement of applications for permit proposing a rate of diversion of ten (10) cfs or less or storage of one thousand (1000) AF or less shall comply with provisions of Section 42-203A, Idaho Code. The first required advertisement will be published on the first or third Thursday of a month when published in daily newspapers and on the first or third publishing day of the month for weekly newspapers. (7-1-93)

ii. Advertisement of applications for permit in excess of the amounts in Rule Subsection 040.02.a.i. shall comply with provisions of Rule Subsection 040.02.a.i. and shall also be published in a newspaper or newspapers to achieve statewide circulation. (7-1-93)

iii. Statewide circulation with respect to Section 42-203A(2), Idaho Code, shall be obtained by publication of a legal notice at least once each week for two (2) successive weeks in a newspaper, as defined in Section 60-106, Idaho Code, of general circulation in the county in which the point of diversion is located and by publication of a legal notice at least once each week for two (2) successive weeks in at least one (1) daily newspaper, as defined in Section 60-107, Idaho Code, published in each of the department's four (4) administrative regions and determined by the Director to be of general circulation within the department's region within which it is published. The administrative regions of the department are identified on Figure 2 in APPENDIX C (located at the end of this

chapter). The names of newspapers used for statewide publication are available from any department office. (7-1-93)

b. Applications for permit which have been advertised. (7-1-93)

i. Notice of applications for permit for water from the Snake River between Swan Falls Dam and Milner Dam or surface and groundwater tributaries to that reach of Snake River which were advertised prior to July 1, 1985 and have been held without final action by the department due to the Swan Falls controversy shall be readvertised by the Director in accordance with Rule Subsection 040.02.a. as appropriate to allow opportunity for protests to be entered with respect to the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

ii. Applications for permit from the Snake River or surface and groundwater sources upstream from Milner Dam which have been held without action due to the Swan Falls controversy may be processed without readvertisement. (7-1-93)

iii. The applicant shall pay the readvertisement fee provided in Section 42-221F, Idaho Code, prior to the readvertisement. (7-1-93)

iv. Failure to pay the readvertising fee within thirty (30) days after the applicant is notified to do so is cause for the Director to void the application. (7-1-93)

c. Notice of existing permits. (7-1-93)

i. Existing permits appropriating water held in trust by the state of Idaho issued prior to July 1, 1985, unless exempted by Rule Subsection 040.02.c.ii. shall be subject to the review requirements of Section 42-203D, Idaho Code, and shall be readvertised in accordance with Rule Subsection 040.02.a. as appropriate. The review is limited to the criteria described in Section 42-203C(2), Idaho Code. (7-1-93)

ii. Permits exempt from the provisions of 42-203D, Idaho Code, include: (7-1-93)

(1) Permits appropriating water not held in trust by the state of Idaho; (7-1-93)

(2) Permits for DCMI uses, stockwater uses and other essentially non-consumptive uses as determined by the Director; and (7-1-93)

(3) Permits for which an acceptable proof of beneficial use submittal was received by the department prior to July 1, 1985, or permits for which an acceptable proof of beneficial use was submitted after July 1, 1985, if evidence satisfactory to the Director has been received to show that the permit was fully developed prior to July 1, 1985 to the extent claimed on the proof of beneficial use. (7-1-93)

iii. Holders of permits subject to the review requirement of Section 42-203D, Idaho Code, shall pay in advance, upon the request of the Director, the readvertising fee required by Section 42-221F, Idaho Code. (7-1-93)

iv. Failure to pay the readvertising fee within thirty (30) days after the applicant is notified to do so is cause for the Director to cancel the permit. (7-1-93)

d. Provisions for Receiving Notice of Application for Permit by Mail. (7-1-93)

i. Pursuant to Section 42-203A(3), Idaho Code, the department will provide upon written request by regular mail, postage prepaid, the notices for all applications for permit of the classes requested. Mailings will be made on a periodic basis to include all notices of a specific class for which advertisements were prepared for publication during the previous period. Mailings will be made on or about the day of the first advertisement as provided in Rule Subsection 040.02.a.i. (7-1-93)

ii. Notice of the advertisement of application as described in Section 42-203A(3), Idaho Code, may be represented by an abstract, summary or other such representation which includes all the information required by Section 42-203A(1), Idaho Code, for a notice of an application for permit. (7-1-93)

iii. The annual mailing fee as described in Section 42-203A(3), Idaho Code, shall include all costs incurred by the department in preparation of mailing of the notices of application to those requesting them. (7-1-93)

iv. The annual fee for receiving notice of all classes will be determined by the Director and shall be paid to the department in advance on an annual basis (July 1 to June 30). The annual mailing fee shall be prorated by the department for requests encompassing less than a full year and will be increased for the additional cost the department incurs for requests encompassing fewer than all classes of notice. (7-1-93)

v. A request for a specific class of notice may be fulfilled by the mailing of notice of all applications for permit received by the department unless the additional cost to the department of preparing the requests for a specific class of notice is paid in advance. (7-1-93)

vi. A request to receive a class of notice of applications shall be effective not later than thirty (30) days after receipt by the department of the request together with the annual fee. (7-1-93)

vii. The notice published in the newspaper of an application or of a permit being reprocessed as required by Rule Subsection 040.02.a. through 040.02.c. is the official notice required by Section 42-203A, Idaho Code. Errors or omissions in the notices of applications received by mail as provided by Rule Subsection 040.02.d. or the failure of the notices to be delivered by mail does not invalidate the published notice. (7-1-93)

03. Protests, Intervention, Hearings, and Appeals. (7-1-93)

a. Protests. (7-1-93)

i. Protests against the approval of an application for permit or against a permit being reprocessed shall comply with the requirements for pleadings as described in the department's adopted Rules of Procedure. (7-1-93)

ii. Protests against the approval of an application for permit or against a permit being reprocessed 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 unless the protestant successfully intervenes in the proceeding. (7-1-93)

iii. General statements of protest (blanket protests) against appropriations for a particular class of use or from a particular source of water will not be considered as valid protests by the Director. (7-1-93)

b. Intervention. Requests to intervene in a proceeding pending before the department shall comply with the Department's adopted Rules of Procedure. (7-1-93)

c. Hearings. Hearings will be scheduled and held in accordance with the department's adopted Rules of Procedure. (7-1-93)

d. Appeals. Any final decision of the Director may be appealed in accordance with Section 42-1701A, Idaho Code. (7-1-93)

04. Burden of Proof. (7-1-93)

a. Burden of proof is divided into two (2) parts: first, the burden of coming forward with evidence to present a prima facie case, and second, the ultimate burden of persuasion. (7-1-93)

b. The burden of coming forward with evidence is divided between the applicant and the protestant as follows: (7-1-93)

i. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criteria (a) through (d) of Section 42-203A(5), Idaho Code; (7-1-93)

ii. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of

criterion (e) of Section 42-203A(5), Idaho Code, as to any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear the initial burden of coming forward with evidence for those factors relevant to criterion (e) of Section 42-203A(5), Idaho Code, of which the protestant can reasonably be expected to be more cognizant than the applicant. (7-1-93)

iii. The protestant shall bear the initial burden of coming forward with evidence for the evaluation of the public interest criteria of Section 42-203C(2), Idaho Code, and of demonstrating a significant reduction, except that the applicant shall provide details of the proposed design, construction, and operation of the project and directly associated operations to allow the impact of the project to be evaluated. (7-1-93)

c. The applicant has the ultimate burden of persuasion for the criteria of Section 42-203A, Idaho Code, and the protestant has the ultimate burden of persuasion for the criteria of Section 42-203C, Idaho Code. (7-1-93)

d. For unprotested applications or permits to be reprocessed, the Director will evaluate the application, information submitted pursuant to Rule Subsection 040.05.c. and information in the files and records of the department, and the results of any studies the department may conduct to determine compliance with the appropriate criteria. (7-1-93)

e. In protested matters the Director will take official notice of information as described in the department's adopted Rules of Procedure, and will, prior to considering, circulate to the parties information from department studies and field examinations concerning the protested application or permit being reprocessed, if such information has not otherwise been made a part of the hearing record. (7-1-93)

05. Additional Information Requirements. (7-1-93)

a. For unprotested applications and permits being reprocessed, the additional information required by Rule Subsection 040.05.c. shall be submitted within thirty (30) days after the Director notifies the applicant that the application or permit is being reviewed for decision. The Director may extend the time within which to submit the information upon request by the applicant and upon a showing of good cause. Failure to submit the required information within the time period allowed will be cause for the Director to void an application or to advance the priority of a permit being reprocessed by the number of days that the information submittal is late. The Director will provide opportunity for hearing as provided in Section 42-1701A, Idaho Code. (7-1-93)

b. For protested applications or protested permits being reprocessed, the information required by Rule Subsection 040.05.c. may be requested by the Director to be submitted within thirty (30) days after notification by the Director, may be made a part of the record of the hearing held to consider the protest, or may be made available in accordance with any pre-hearing discovery procedures. Failure to submit the required information within the time period allowed will be cause for the Director to void an application or to advance the priority of a permit being reprocessed by the number of days that the information submittal is late. (7-1-93)

c. The following information shall be submitted for applications to appropriate unappropriated water or trust water and for permits being reprocessed for trust water. The additional information submittal requirements of this rule are waived for filings which seek to appropriate five (5) cfs or less or storage of five hundred acre-feet (500 AF) or less and for filings seeking reallocation of trust water which the Director determines will reduce the flow of the Snake River measured at Murphy Gauge by not more than two (2) acre-feet per day. For filings proposing irrigation as a purpose of use, the additional information is required if more than two hundred (200) acres will be irrigated. However, the Director may specifically request submittal of any of the following information for any filing, as he determines necessary. Information relative to the effect on existing water rights, Section 42-203A(5)(a), Idaho Code, shall be submitted as follows: (7-1-93)

i. For applications appropriating springs or surface streams with five (5) or fewer existing users, either the identification number, or the name and address of the user, and the location of the point of diversion and nature of use for each existing water right shall be submitted. (7-1-93)

ii. For applications appropriating groundwater, a plat shall be submitted locating the proposed well relative to all existing wells and springs and permitted wells within a one-half mile radius of the proposed well.

(7-1-93)

iii. Information shall be submitted concerning any design, construction, or operation techniques which will be employed to eliminate or reduce the impact on other water rights. (7-1-93)

d. Information relative to sufficiency of water supply, Section 42-203A(5)(b), Idaho Code, shall be submitted as follows: (7-1-93)

i. Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year. (7-1-93)

ii. Information shall be submitted on the quantity of water available from the source applied for, including, but not limited to, information concerning flow rates for surface water sources available during periods of peak and average project water demand, information concerning the properties of the aquifers that water is to be taken from for groundwater sources, and information on other sources of supply that may be used to supplement the applied for water source. (7-1-93)

e. Information relative to good faith, delay, or speculative purposes of the applicant, Section 42-203A(5)(c), Idaho Code, shall be submitted as follows: (7-1-93)

i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest. Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code. (7-1-93)

ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials. (7-1-93)

f. Information Relative to Financial Resources, Section 42-203A(5)(d), Idaho Code, shall be submitted as follows: (7-1-93)

i. The applicant shall submit a current financial statement certified to show the accuracy of the information contained therein, or a financial commitment letter along with the financial statement of the lender or other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed. (7-1-93)

ii. The applicant shall submit plans and specifications along with estimated construction costs for the project works. The plans shall be definite enough to allow for determination of project impacts and implications. (7-1-93)

g. Information Relative to Conflict with the Local Public Interest, Section 42-203A(5)(e), Idaho Code, shall be submitted as follows: The applicant shall seek comment and shall submit all letters of comment on the effects of the construction and operation of the proposed project from the governing body of the city and/or county and tribal reservation within which the point of diversion and place of use are located, the Idaho Department of Fish and Game, the Idaho Department of Environmental Quality, and any irrigation district or canal company within which the proposed project is located and from other entities as determined by the Director. (7-1-93)

h. The following information Relative to the Public Interest Criteria of Section 42-203C(2), Idaho Code, shall be submitted by an applicant seeking reallocation of trust water for a project which the Director determines will reduce the flow of the Snake River by more than two (2) acre-feet per day. For filings proposing irrigation as a purpose of use, the additional information is required if more than two hundred (200) acres will be irrigated. The Director may request any or all of the following information for any filing seeking the reallocation of trust water. (7-1-93)

i. A project design and estimate of cost of development shall be submitted. For applications appropriating more than twenty-five (25) cfs, or ten thousand (10,000) AF of storage, or generating more than five (5) megawatts, the information shall be prepared and submitted by a qualified engineer licensed under the provisions of Chapter 12, Title 54, Idaho Code, unless waived by the Director. The design shall be definite enough to reflect the project's impacts and implications as required in subsequent rules. (7-1-93)

ii. If the project proposes development for irrigation purposes, information shall be submitted on crop rotation, including acreages, for lands when newly developed. (7-1-93)

iii. Information shall be submitted concerning the number and kinds of jobs that will be created or eliminated as a direct result of project development including both the construction and operating phases of the project. If jobs are seasonal, the estimated number of months per year of employment shall be submitted. (7-1-93)

iv. For applications or permits being reprocessed for more than twenty-five (25) cfs, or more than ten thousand (10,000) AF of storage, or more than five (5) megawatts, information shall be submitted concerning the changes to community services that will be required during the construction and operation phases of the project including, but not limited to, changes to schools, roads, housing, public utilities and public health and safety facilities, if any. (7-1-93)

v. Information shall be submitted concerning the source of energy for diverting and using water for the project, the estimated instantaneous demand and total amount of energy that will be used, the efficiency of use, and energy conservation methods. (7-1-93)

vi. Information shall be submitted concerning the location, amount, and quality of return flow water, and any water conservation features of the proposed project. (7-1-93)

vii. If the project proposes irrigation as a use, information shall be submitted concerning the kinship, if any, of the operator of the land to be irrigated by the project to the applicant, the location and acreage of other irrigated lands owned, leased, or rented by the applicant, the names, addresses and number of shares held by each shareholder if the applicant is a corporation, evidence of tax-exempt status if a corporation is so claiming, a soil survey prepared in accordance with the U.S. Soil Conservation Service irrigatable land classification system, and a schedule for bringing into production the project lands. (7-1-93)

041. -- 044. (RESERVED).

045. EVALUATION CRITERIA (RULE 45).

01. Criteria for Evaluating All Applications to Appropriate Water. The Director will use the following criteria in evaluating whether an application to appropriate unappropriated water or trust water should be approved, denied, approved for a smaller amount of water or approved with conditions. (7-1-93)

a. Criteria for determining whether the proposed use will reduce the quantity of water under existing water rights. A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if: (7-1-93)

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less. (7-1-93)

ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code; or (7-1-93)

iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense. (7-1-93)

iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director. (7-1-93)

v. The provisions of Rule Subsection 045.01.a.v. are not intended to require compensation or mitigation for loss of flow to holders of subordinated hydropower rights or those from which trust water is reallocated. (7-1-93)

b. Criteria for determining whether the water supply is insufficient for the proposed use. The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval. In assessing such noneconomic factors, the Director will also consider the impact on other water rights if the project is abandoned during construction or after completion, the impact on public resource values, and the cost to local, state and federal governments of such an abandonment. (7-1-93)

c. Criteria for determining whether the application is made in good faith. The criteria requiring that the Director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the developed project for a profit or from making a profit from the use of the water. An application will be found to have been made in good faith if: (7-1-93)

i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and (7-1-93)

ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and (7-1-93)

iii. There are no obvious impediments that prevent the successful completion of the project. (7-1-93)

d. Criteria for determining whether the applicant has sufficient financial resources to complete the project. (7-1-93)

i. An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director. This showing is required as described in Rule Subsection 040.05.c. or at the time the hearing provided by Subsection Rule 040.05.c. is conducted. (7-1-93)

ii. A governmental entity will be determined to have satisfied this requirement if it has the taxing, bonding or contracting authority necessary to raise the funds needed to commence and pursue project construction in accordance with the construction schedule. (7-1-93)

e. Criteria for determining whether the project conflicts with the local public interest. The Director will consider the following, along with any other factors he finds to be appropriate, in determining whether the project will conflict with the local public interest: (7-1-93)

i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains; (7-1-93)

ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed use; and (7-1-93)

iii. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions. (7-1-93)

iv. An application which the Director determines will conflict with the local public interest will be denied unless the Director determines that an over-riding state or national need exists for the project or that the project can be approved with conditions to resolve the conflict with the local public interest. (7-1-93)

02. Criteria for Evaluating Whether a Proposed Use of Trust Water Will Cause a Significant Reduction. Reference: Section 42-203C(1), Idaho Code and Rule Subsection 025.02.b. For purposes of reallocating trust water made available by the Snake River water rights agreement, an application for permit or a permit being reprocessed, will be presumed to not cause a significant reduction if the Director determines that it complies with both the individual and cumulative tests for evaluating significant reduction as provided in Rules Subsections 045.02.a. and 045.02.b. (7-1-93)

a. Individual test for evaluating significant reduction. A proposed use will be presumed to not cause a significant reduction if when fully developed and its impact is fully felt, the use will individually reduce the flow of the Snake River measured at Murphy Gauge by not more than two (2) acre-feet per day. An irrigation project of two hundred (200) acres or less located anywhere in the Snake River Basin above Murphy Gauge proposing to use trust water is presumed to not reduce the flow at Murphy Gauge by more than two (2) acre-feet per day. The presumption of this section is not applicable to applications or permits to be reprocessed which the Director determines to be part of a larger development. (7-1-93)

b. Cumulative test for evaluating significant reduction. A proposed use will be presumed to not cause a significant reduction, if the use, when fully developed and its impact is fully felt and when considered cumulatively with other existing uses and other uses reasonably likely to exist within twelve (12) months of the proposed use, will not deplete the flow of Snake River measured at Murphy Gauge by more than: (7-1-93)

i. Forty thousand (40,000) acre-feet per calendar year when considered with all other uses approved for development of trust water during that calendar year; (7-1-93)

ii. Forty thousand (40,000) acre-feet per calendar year using a four (4) year moving average when considered with all other uses approved for development of trust water during that four (4) year period; and (7-1-93)

iii. Twenty thousand (20,000) acre-feet per calendar year from filings approved for reallocation of trust water which meet the criteria of Rule Subsection 045.02.a. (the individual test for evaluating significant reduction). (7-1-93)

c. The Director will determine on a case-by-case basis from available information whether a permit to be reprocessed or an application for trust water which exceeds the flow depletion limits of Rule Subsection 045.02, or one which meets the flow depletion limits but has been protested, will cause a significant reduction. In making this determination, the Director will consider: (7-1-93)

i. The amount of the reduction in hydropower generation that the proposed use will cause individually and cumulatively with other uses expected to be developed within twelve (12) months of the proposed use as compared to the existing hydropower generation output of the affected facility or facilities. (7-1-93)

ii. The relative importance of the affected hydropower facility or facilities to other sources of electrical power generation available to the holder of the facility or facilities. (7-1-93)

iii. The timing of the reduction in hydropower generation both on an annual basis and on a long-term basis considering the lag time between the beginning of diversion by the proposed use and the resulting reduction in hydropower generation. (7-1-93)

iv. The effect of the reduction in hydropower generation on the unit cost of hydropower from the facility or facilities and the average cost of electrical power offered by the holder of the facility. (7-1-93)

v. The terms of contracts, mortgages, or regulatory permits and licenses which require the holder of the hydropower generation facility to retain the capability to produce hydroelectric power at a specific level. (7-1-93)

d. Other provisions of these rules not withstanding, applications or permits to be reprocessed proposing a direct diversion of water for irrigation purposes from the Snake River between Milner Dam and Swan Falls Dam or from tributary springs in this reach are presumed to cause a significant reduction. (7-1-93)

e. Other provisions of these rules not withstanding, applications or permits to be reprocessed for DCMI purposes are presumed to not cause a significant reduction. (7-1-93)

03. Criteria for Evaluating Public Interest. If the Director determines that a proposed use of trust water held by the state pursuant to Section 42-203B(5), Idaho Code, will cause a significant reduction, the Director will consider the criteria of Section 42-203C(2), Idaho Code, before acting on the application or permit being reprocessed. The Director shall consider and balance the relative benefits and detriments for each factor required to be weighed under Section 42-203C(2), Idaho Code, to determine whether a proposed reduction of the amount of water available for power production serves the greater public interest. The Director shall evaluate whether the proposed use sought in the permit being reprocessed or the application will provide the greater benefit to the people of the state of Idaho when balanced against other uses for the same water resource. In evaluating the public interest criteria, the Director will use the following guidelines: (7-1-93

a. The Director will consider the potential benefits both direct and indirect, and that the proposed use would provide to the state and local economy. The economic appraisal shall be based upon generally accepted economic analysis procedures which uniformly evaluate the following factors within the state of Idaho and the county or counties directly affected by the project: (7-1-93)

i. Direct project benefits. (7-1-93)

ii. Indirect benefits including net revenues to the processing, transportation, supply, service and government sectors of the economy. (7-1-93)

iii. Direct project costs, to include the opportunity cost of previous land use. (7-1-93)

iv. Indirect project costs, including verifiable costs to government in net lost revenue and increased regulation costs, verifiable reductions in net revenue resulting from losses to other existing instream uses, and the increased cost of replacing reduced hydropower generation from unsubordinated hydropower generating facilities. (7-1-93)

b. The Director will consider the impact the proposed use would have upon the electric utility rates in the state of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact. These evaluations will include the following considerations: (7-1-93)

i. Projections of electrical supply and demand for Idaho and the Pacific Northwest made by the Bonneville Power Administration and the Northwest Power Planning Council and information available from the Idaho Public Utilities Commission or from the electric utility from whose water right trust water is being reallocated. (7-1-93)

ii. The long term reliability of the substitute source and the cost of alternatives including the resulting impact on electrical rates. (7-1-93)

c. The Director will consider whether the proposed use will promote the family farming tradition in the state of Idaho. For purposes of this evaluation, the Director will use the following factors. (7-1-93)

d. If the total land to be irrigated by the applicant, including currently owned and leased irrigated land and land proposed to be irrigated in the application and other applications and permits of the applicant, do not exceed

nine hundred sixty (960) acres, the application will be presumed to promote the family farming tradition. (7-1-93)

e. If the requirement of Rule Subsection 045.03.c.i. is not met, the Director will consider the extent the applicant conforms to the following characteristics: (7-1-93)

i. The farming operation developed or expanded as a result of the application is operated by the applicant or a member of his family (spouse, parents or grandparents, lineal descendents, including those that are adopted, lineal descendents of parents; and spouse of lineal descendents); (7-1-93)

ii. In the event the application is filed in the name of a partnership, one or more of the partners shall operate the farming operation; and (7-1-93)

iii. If the application is in the name of a corporation, the number of stockholders does not exceed fifteen (15) persons, and one or more of the stockholders operates the farming operation unless the application is submitted by an irrigation district, drainage district, canal company or other water entity authorized to appropriate water for landowners within the district or for stockholders of the company all of whom shall meet the family farming criteria. (7-1-93)

f. The Director will consider the promotion of full economic and multiple use development of the water resources of the state of Idaho. In this regard, the extent to which the project proposed complies with the following factors will be considered: (7-1-93)

i. Promotes and conforms with the adopted State Water Plan; (7-1-93)

ii. Provides for coordination of proposed and existing uses of water to maximize the beneficial use of available water supplies; (7-1-93)

iii. Utilizes technology economically available to enhance water and energy use efficiency; (7-1-93)

iv. Provides multiple use of the water, including multipurpose storage; (7-1-93)

v. Allows opportunity for reuse of return flows; (7-1-93)

vi. Preserves or enhances water quality, fish, wildlife, recreation and aesthetic values; (7-1-93)

vii. Provides supplemental water supplies for existing uses with inadequate supplies. (7-1-93)

g. The Director will consider whether a proposed use, which includes irrigation, will conform to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period in the Snake River drainage above Murphy Gauge. In applying this criteria, the Director will consider the following: (7-1-93)

i. "Above Murphy gauge" means the Snake River and any of its surface or groundwater tributaries upstream from Murphy gauge which gauge is located on the Snake River approximately four (4) miles downstream from Swan Falls Dam from which trust water is to be reallocated; (7-1-93)

ii. Twenty thousand (20,000) acres per year or eighty thousand (80,000) acres per four (4) year period is a four (4) year moving average of Twenty thousand (20,000) acres/year of permits issued during a calendar year for irrigation development. If permits for development of less than twenty-thousand (20,000) acres are issued in a year, additional development in excess of twenty-thousand (20,000) acres can be permitted in succeeding years. Likewise, if more than twenty thousand (20,000) acres is permitted in one year (recognizing that a single large project could exceed twenty thousand (20,000) acres) the permitted development in succeeding years must be correspondingly less to maintain no greater than a twenty thousand (20,000) acres/year average for any four (4) year period; (7-1-93)

iii. The criteria of Rule Subsection 045.03.g. applies to multiple-use projects with irrigation as a principal purpose. Projects which use irrigation as only an incidental purpose, such as the land treatment of waste, shall not be included within this policy; and (7-1-93)

iv. An application determined by the Director to be otherwise approvable but found to exceed the acreage limitations, when considered with other applications approved for development, may be approved with conditions providing for the construction of project works and beneficial use of water to be commenced in a future year. (7-1-93)

h. No single public interest criterion will be entitled to greater weight than any other public interest criterion. (7-1-93)

i. Until such time as the studies prescribed in Policy 32 1 of the State Water Plan are completed and accepted by the Idaho Water Resource Board, applications and permits reprocessed which propose to divert water to surface storage from the Snake River and surface tributaries upstream from Murphy Gauging Station shall be presumed to satisfy the public interest criteria of Section 42-203C(2), Idaho Code. Applications or reprocessed permits which are approved prior to completion of the studies, will not be subject to additional reprocessing. (7-1-93)

j. Applications for permit for trust water sources filed prior to July 1, 1985, for projects for which diversion and beneficial use was complete prior to October 1, 1984, are presumed to satisfy the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

k. Applications or permits to be reprocessed proposing a direct diversion of water for irrigation purposes from the Snake River between Milner Dam and Swan Falls Dam or from tributary springs in this reach are presumed not to be in the public interest as defined by Section 42-203C, Idaho Code. Such proposals, are presumed to prevent the full economic and multiple use of water in the Snake River Basin and to adversely affect hydropower availability and electrical energy rates in the state of Idaho. (7-1-93)

l. Proposed DCMI uses which individually do not have a maximum consumptive use of more than two acre-feet/day are presumed to meet the public interest criteria of Section 42-203C(2), Idaho Code, unless protested. (7-1-93)

046. – 049. (RESERVED).

050. CONDITIONS OF APPROVAL (RULE 50).

01. Issuance of Permits with Conditions. The Director may issue permits with conditions to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and specifically to meet the criteria of Section 42-203A, Idaho Code, and to meet the requirements of Section 42-203C, Idaho Code, to the fullest extent possible including conditions to promote efficient use and conservation of energy and water. (7-1-93)

02. Requirements to Mitigate Impact of Flow Depletion. Permits to be reprocessed or applications approved to appropriate water from the main stem of the Snake River between Milner and Murphy gauging station for diversion to off-stream storage during the period November 1 to March 31 shall include requirements to mitigate, in accordance with Policy 32 1 of the State Water Plan, the impact of flow depletions on downstream generation of hydropower. (7-1-93)

03. Applications and Existing Permits That Are Junior and Subordinate. Applications and existing permits approved for hydropower generation shall be junior and subordinate to all rights to the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of the application or existing hydropower permit. A subordinated permit shall not give rise to any right or claim against future rights to the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of the application or existing hydropower permit. A permit issued for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B(6), Idaho Code. (7-1-93)

04. Permanent Flow Measuring Device Requirement. Applications approved for on-stream storage reservoirs will, unless specifically waived by the Director, require permanent flow measuring devices both upstream and downstream from the reservoir. (7-1-93)

05. Well Spacing and Well Construction Requirements. Applications approved for diversion of groundwater may include conditions requiring well spacing and well construction requirements. (7-1-93)

06. Reprocessed Permits. Permits reprocessed pursuant to Section 42-203D, Idaho Code, may be cancelled, modified or conditioned by the Director to make the permit comply in every way with any permit that would be issued for the same purpose based upon a new application processed under these rules. (7-1-93)

07. Conditioning of Permits. The Director may condition permits to require commencement of construction of project works within a designated time interval not to exceed one year and completion of construction of project works and beneficial use of water within a time interval not to exceed five (5) years. (7-1-93)

08. Voiding Approval of Permit. Permits may be conditioned to authorize the Director to void the approval of the permit if he determines that the applicant submitted false or misleading information on the application or supporting documents. (7-1-93)

09. Retetion of Jurisdiction. The Director may condition permits to retain jurisdiction to insure compliance with the design, construction and operation provisions of the permit. (7-1-93)

10. Insuring Minimum Stream Flows and Prior Rights. The Director may condition permits to insure that established minimum stream flows and prior rights including prior rights reserved by federal law are not injured. (7-1-93)

11. Insuring Compliance with Water Quality Standards. The Director may condition permits to insure compliance with Idaho's water quality standards. (7-1-93)

12. Insuring Assignment of Interest. The Director may condition a permit issued for trust water to require that any amendment (Section 42-211, Idaho Code), transfer (Section 42-222, Idaho Code), or assignment of interest in the permit by any method whatsoever shall not result in the project failing to meet the public interest criteria of Section 42-203C, Idaho Code except, however, lenders obtaining title to the project through default will have a reasonable period of time, as determined by the Director, to meet such criteria or to convey the project to a person or entity that does meet the criteria. (7-1-93)

051. – 054. (RESERVED).

055. MORATORIUM (RULE 55).

01. Applications for Permit. (7-1-93)

a. The Director may cease to approve applications for permit in a designated geographical area upon finding a need to: (7-1-93)

i. Protect existing water rights; (7-1-93)

ii. Insure compliance with the provisions of Chapter 2, Title 42, Idaho Code; and (7-1-93)

iii. Prevent reduction of flows below a minimum stream flow which has been established by the Director or the board pursuant to applicable law. (7-1-93)

b. Notice of the Director's action to cease application approval will be by: (7-1-93)

i. Summary Order served by certified mail upon the then existing affected applicants; and (7-1-93)

ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area affected. (7-1-93)

c. Objections to the DirectorDirector's action shall be considered under the department's adopted Rules of Procedure and applicable law. (7-1-93)

02. Permits. (7-1-93)

a. To the extent a permit has not been developed, the Director may cancel, or modify permits for which proof of beneficial use has not been submitted in a designated geographical area as an extension of Rule Subsection 055.01. (7-1-93)

b. Notice of the Director's action to cancel or modify permits shall be by: (7-1-93)

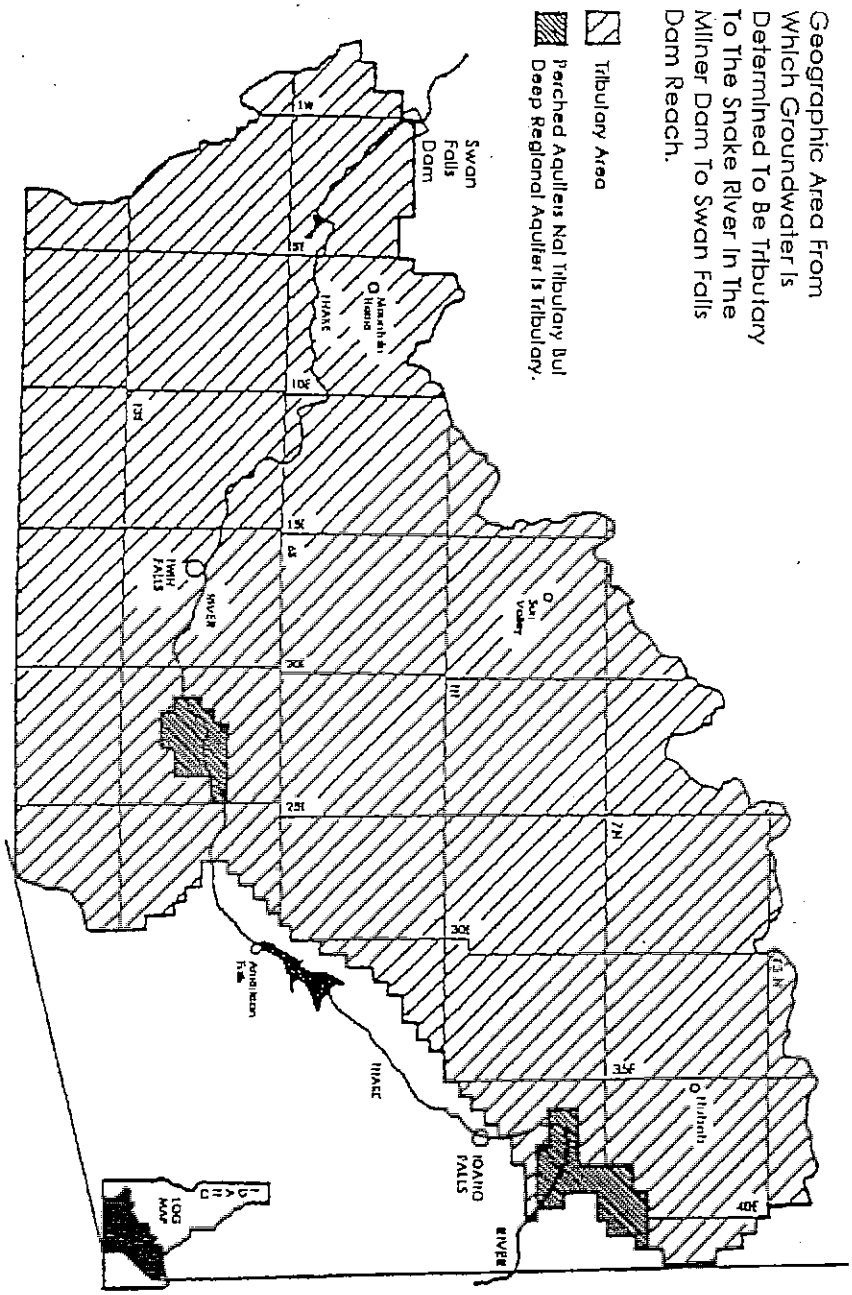
i. Summary Order served by certified mail upon the affected permit holders in the designated area. (7-1-93)

ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area. (7-1-93)

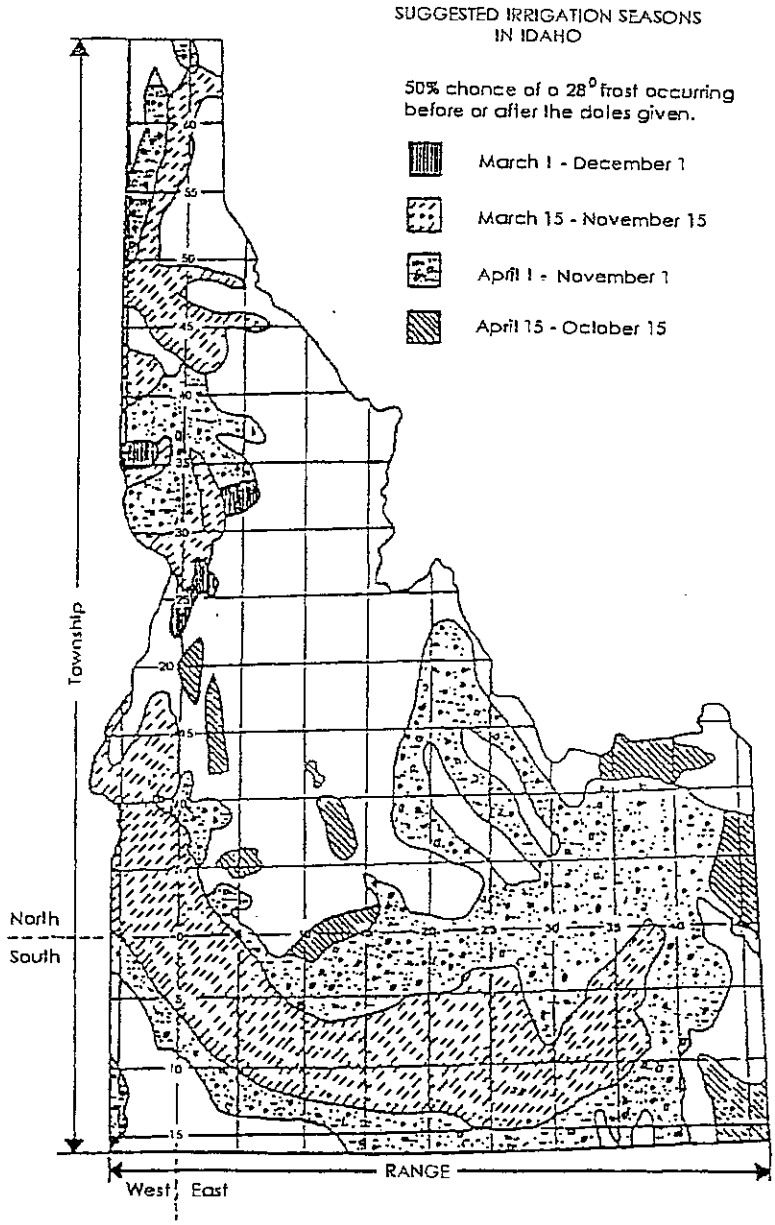
c. Objections to the Director's action shall be considered under the department's adopted Rules of Procedure and applicable law. (7-1-93)

056. – 999. (RESERVED).

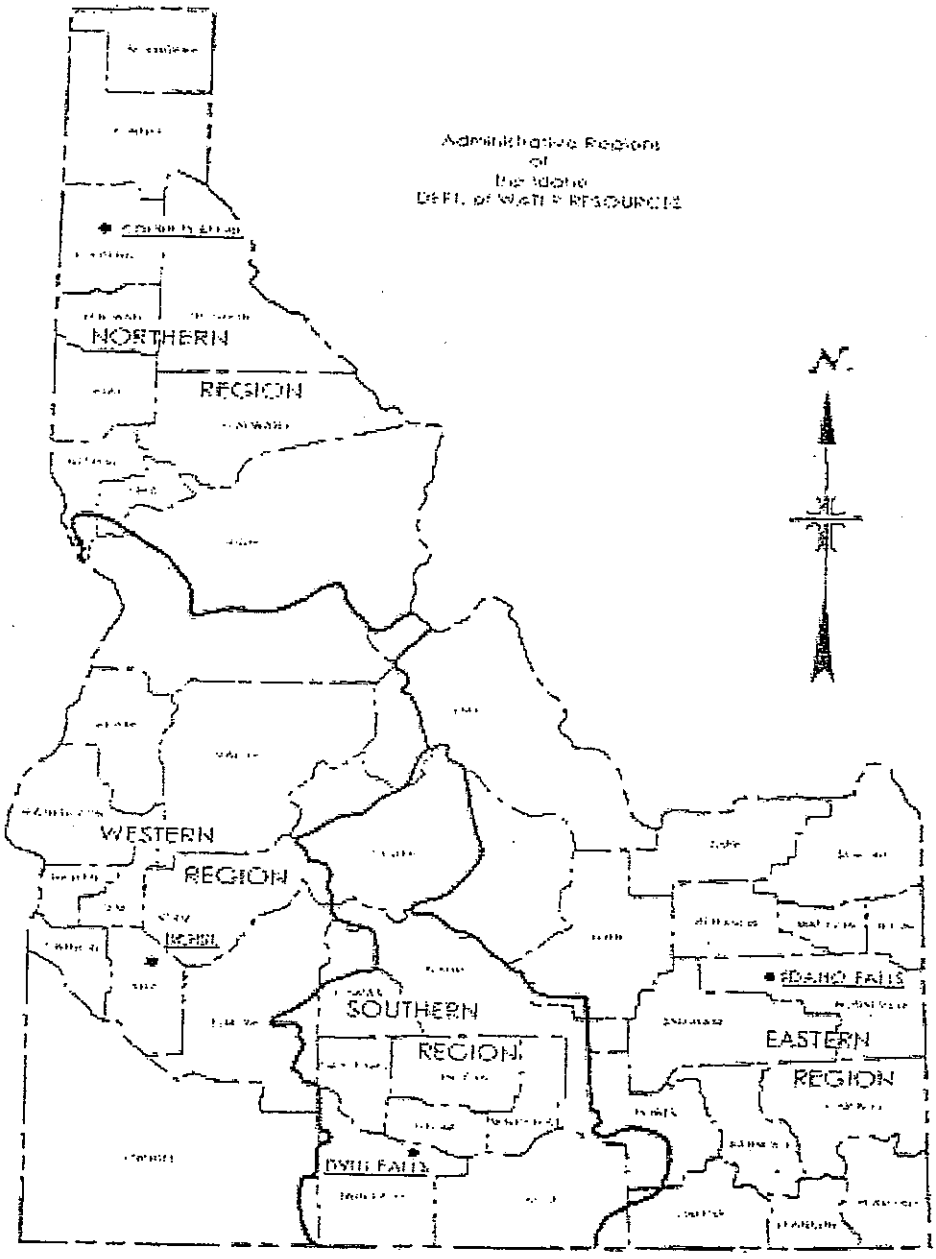
APPENDIX A


Geographic Area From Which Groundwater Is Determined To Be Tributary To The Snake River In The Milner Dam To Swan Falls Dam Reach.
Tributary Area
Perched Aquifers Not Tributary But Deep Regional Aquifer Is Tributary.
Swan Falls Dam
TWIN FALLS
SHOSHONE FALLS
IDAHO FALLS
RIVER
LOCATION MAP

APPENDIX B


SUGGESTED IRRIGATION SEASONS
IN IDAHO
50% chance of a 28° frost occurring
before or after the dates given.
March 1 - December 1
March 15 - November 15
April 1 - November 1
April 15 - October 15
Township
North
South
RANGE
West
East

APPENDIX C


NORTHERN
REGION
WESTERN
REGION
SOUTHERN
REGION
EASTERN
REGION
IDAHO FALLS
TWIN FALLS

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Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 3

"History of Milner Dam"
(http://www.tfcanal.com/milner.htm)

MILNER DAM

Joe Yost - Dam Tender 432-5423

HISTORY OF MILNER DAM

In 1900 the entire strip of country we know as the Magic Valley was but a vast desert covered with sagebrush. The irrigation works had not been commenced, and in fact, the whole scheme of irrigation was little more than a dream

Milner Dam came about because of the vision of Ira Burton Perrine, a rancher who had developed a Shoshone Falls resort and a Blue Lakes farm down stream. Perrine chose the site of the dam and acted as his own engineer. He obtained financing for the project through Stanley B. Milner, a banker and financier from Salt Lake City, and easterners Frank H. Buhl and Peter L. Kimberly.

As a result, the Buhl-Kimberly Corp. was formed and in 1903 a contract was entered into between the State of Idaho and the Twin Falls Land and Water Co. for construction of the project. The dam was formed by three earth and rockfilled embankments, abutting against the river banks and two islands.

In 1905 construction on the dam was completed. Men with mules and scrapers had also finished their work on the canals and all was ready for the water.

"On March 1, 1905, Frank Buhl gave a ceremonial pull on the wheel on a winch and the gates of Milner Dam were closed, and the gates to a thousand miles of canal and laterals were opened, and the Snake River was diverted, and that night Shoshone Falls went dry as the water rushed across the desert far above, and Perrine's vision was realized, and 262,000 acres of desert were shortly transformed."

Milner Dam and its canal system have national significance in agricultural history. They are one of the rare examples of successful state supervised private irrigation development.

The dam performed well for decades. There were instances of leakage through the dam that required immediate repair, but it fulfilled its purpose and today provides irrigation water to more than 500,000 acres of prime Idaho farmland.

After decades of use the dam began to show signs of aging. In December 1988, the Federal Energy Regulatory Commission's Division of Dam Safety and Inspection determined there was a high risk of Milner Dam failing during an earthquake unless it was rebuilt.

The price tag to rebuild the dam was about $11 million.

The Twin Falls and North Side canal companies determined that the costs of reconstruction would result in severe economic hardship to their 7,500 shareholders who depend on irrigation water from the dam for their livelihoods.

To pay for reconstruction the canal companies made a mutually beneficial agreement with Idaho Power to rehabilitate the dam and build a new 57.5-megawatt power plant downstream. Idaho Power would loan the canal companies funds to refurbish the dam. Repayment would come in the form of royalties from the hydro project.

The new Milner power plant has two main generating units, one with an 11.5-megawatt generating capacity and the other with 46 megawatts of capacity. A small 800-kilowatt powerhouse also has been built at the dam to take advantage of minimum streamflows that must be spilled at the dam to maintain a flow in the main river channel.

The Milner project is different from most of the hydro projects Idaho Power has constructed because it is spread out over a large area. The dam is located approximately 1.5 miles upstream from the powerhouse. At the dam, water is diverted into irrigation canals where it is dispersed to the surrounding farmland through the canal systems during the irrigation season. When farmers do not need the water it flows through a widened section of the Twin Falls Canal to an intake structure that directs the water through penstocks that stretch down the steep canyon wall and into the powerhouse. From the powerhouse the water flows back into the main river channel.

FACTS ABOUT THE PROJECT

- ***Milner is Idaho Power's 17th hydroelectric power plant.***
- ***The power generating facilities cost approximately $56 million.***
- ***Up to 5,200 cfs of water, which would previously have been spilled, generates low-cost energy.***
- ***Spillway capacity of 116,750 cfs provides the capability to safely handle flood flows.***
- ***Kayaking opportunities will be available during high water years.***
- ***Recreational access to the Snake River at Milner Dam and downstream of the powerhouse is provided.***

HOME PAGE ☒

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

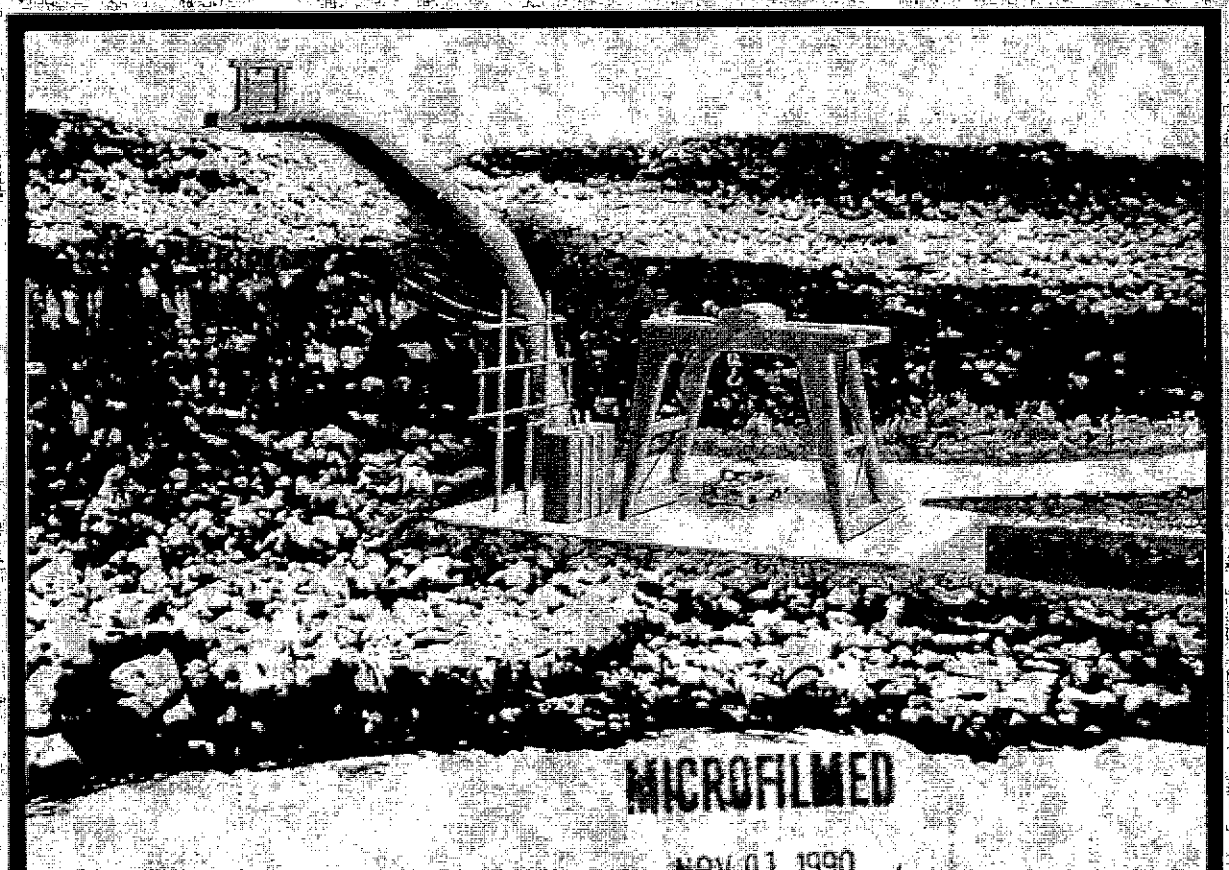
Exhibit 4

Excerpted pages of *Before The Federal Energy Regulatory Commission - Application For Initial License: Project 2899-002* (Twin Falls Canal Company, North Side Canal Company) (July 1984)

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for Initial License: Project No. 2899-002

MILNER
HYDROELECTRIC PROJECT



MICROFILMED
NOV 01 1990
Cover only

TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.

JULY 1984

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Department of Water Resources

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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

- 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

MILNER PROJECT NO. 2899-002

EXHIBIT D

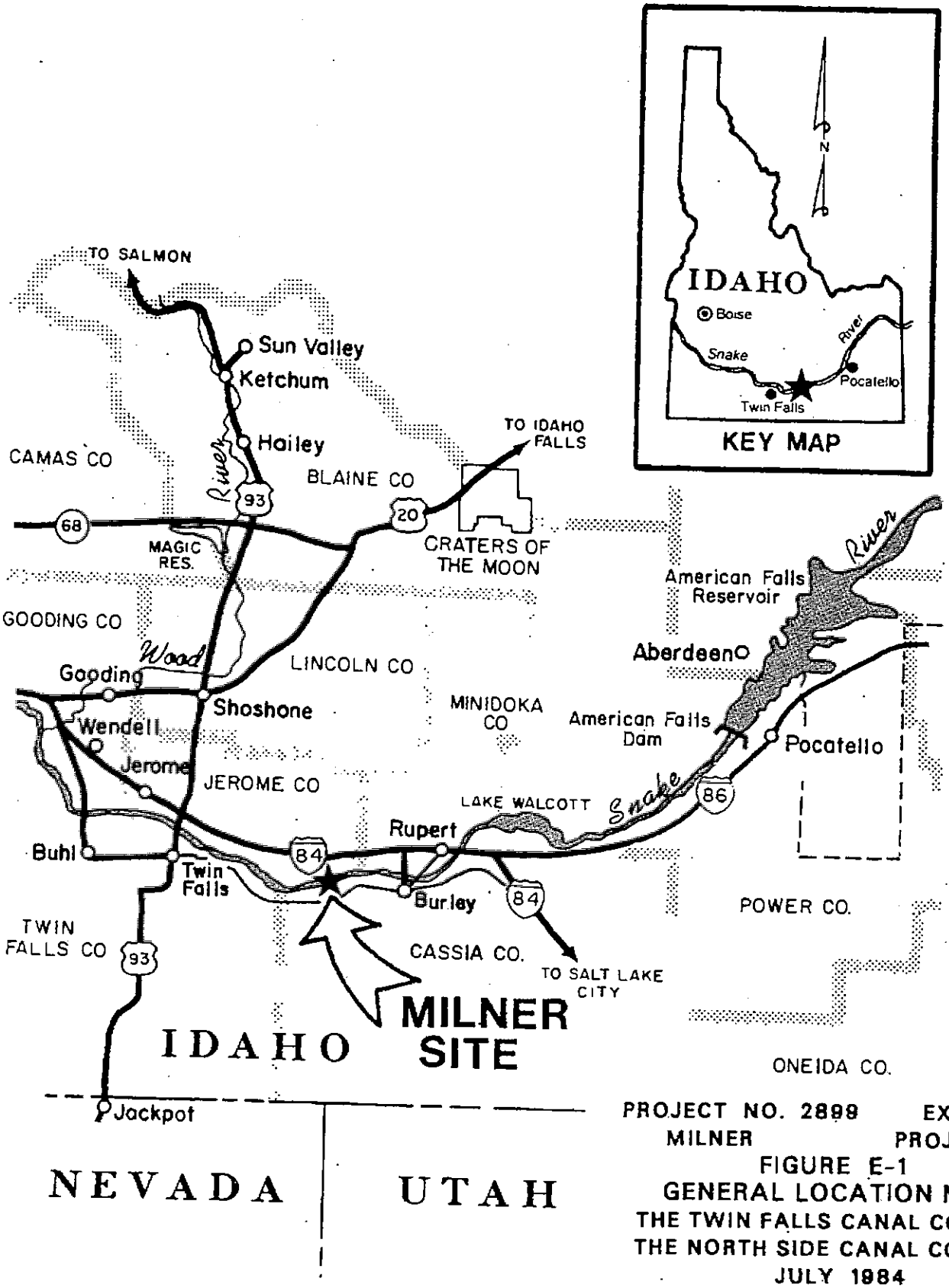
I. SOURCES AND EXTENT OF FINANCING FOR POWER FACILITIES

Applicants are Idaho corporations in which more than 80% of the stock is owned by farmers. As such, they qualify for financing through the Federal Intermediate Credit System as Co-operatives. The Spokane Bank for Co-operatives has indicated that a loan for construction of a power plant could be negotiated. The applicants would be required to give a lien of all the power facilities (except that dam, canal and reservoir), a conveyancing agreement to deliver water to the power plant, and assign the Power Sales Contract and water right as well as the other necessary permissions. It is contemplated that the applicants would sell the power pursuant to a Power Sales Contract as small power producers to Idaho Power Company pursuant to the Public Utilities Regulatory Policies Act. A short fall in revenues due to water shortage would be covered with insurance, or an adequate reserve fund would be established acceptable to the lender.

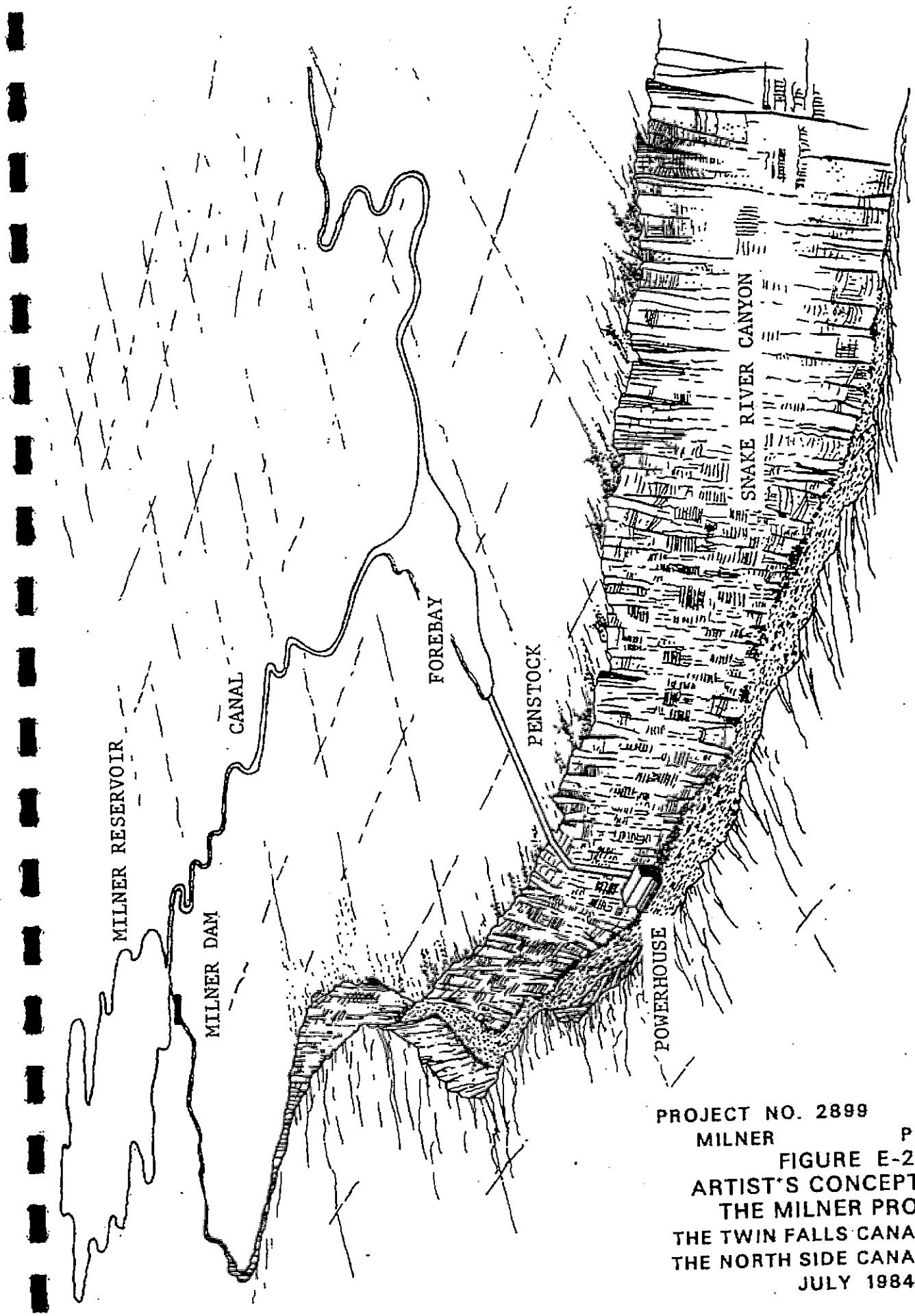
Figures

Number	
E-1	General Location Map
E-2	Artist's Conception Of The Milner Project
E-3	Physiographic Provinces Of Idaho
E-4	Potential Vegetation Of Idaho
E-5	General Soil Map
E-6	Upper Snake River Basin
E-7	Average Monthly Flows At USGS Gages
E-8	Existing Rapids Below Proposed Powerhouse
E-9	Proposed Project Area, Water Quality And Fishery Sample Sites
E-10	Waterfowl Distribution Minidoka NWR To Murtaugh Bridge
E-11	Generalized Vegetation Cover And Impact Areas
E-12	Existing And Proposed Recreation Facilities
E-13	Recreation Survey Vicinity Map
E-14	Recreation Activities Milner Reservoir
E-15	Recreation Activities Snake River
E-16	Recreation Activities Murtaugh Lake
E-17	Recreation Activities Twin Falls Reservoir
E-18	Generalized Land Uses
E-19	Artist's Conception - Power Plant And Penstock
E-20	Artist's Conception - Power Plant And Penstock

GENERAL LOCATION MAP



PROJECT NO. 2899 EXHIBIT E
MILNER PROJECT
FIGURE E-1
GENERAL LOCATION MAP
THE TWIN FALLS CANAL CO. AND
THE NORTH SIDE CANAL CO., LTD.
JULY 1984



PROJECT NO. 2899 EXHIBIT E
MILNER PROJECT

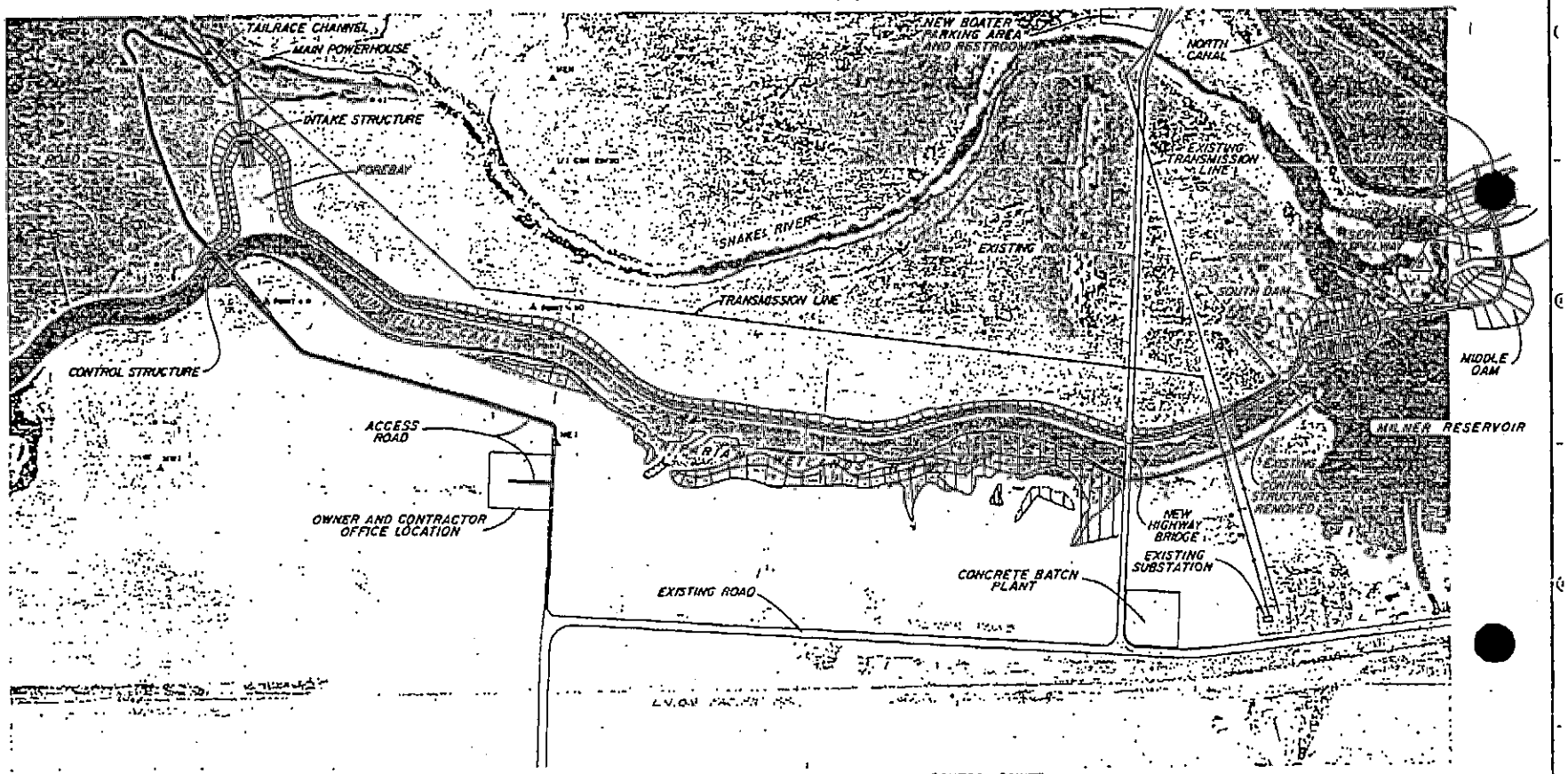
FIGURE E-2
ARTIST'S CONCEPTION OF
THE MILNER PROJECT
THE TWIN FALLS CANAL CO. AND
THE NORTH SIDE CANAL CO.,LTD.
JULY 1984

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 5

Drawings of the Milner Dam and Milner hydropower project (from IDWR website)

EXHIBIT A
PERMIT 01-7011
MILNER POWER PLANT



SURVEY CONTROL POINTS

CONTROL POINTS

POINT #	NORTH	EAST	ELEVATION
10	38,230.9694	418,861.3983	4,217.44
11	38,956.9288	418,231.9508	4,232.68
12	38,276.7853	398,328.8938	4,245.98
13	38,396.6788	420,125.6788	4,258.45
14	37,647.2611	418,648.8975	4,254.98
15	38,699.1381	419,239.8975	4,262.41
16	38,488.9898	398,828.9728	4,261.12

NOTE:
1. COMPLETED PROJECT SHOWN.

4											
3											
2											
1											
0											

MORRISON-KNUDSEN ENGINEERS, INC.

IDAHO POWER COMPANY
TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.

MILNER HYDROELECTRIC PROJECT

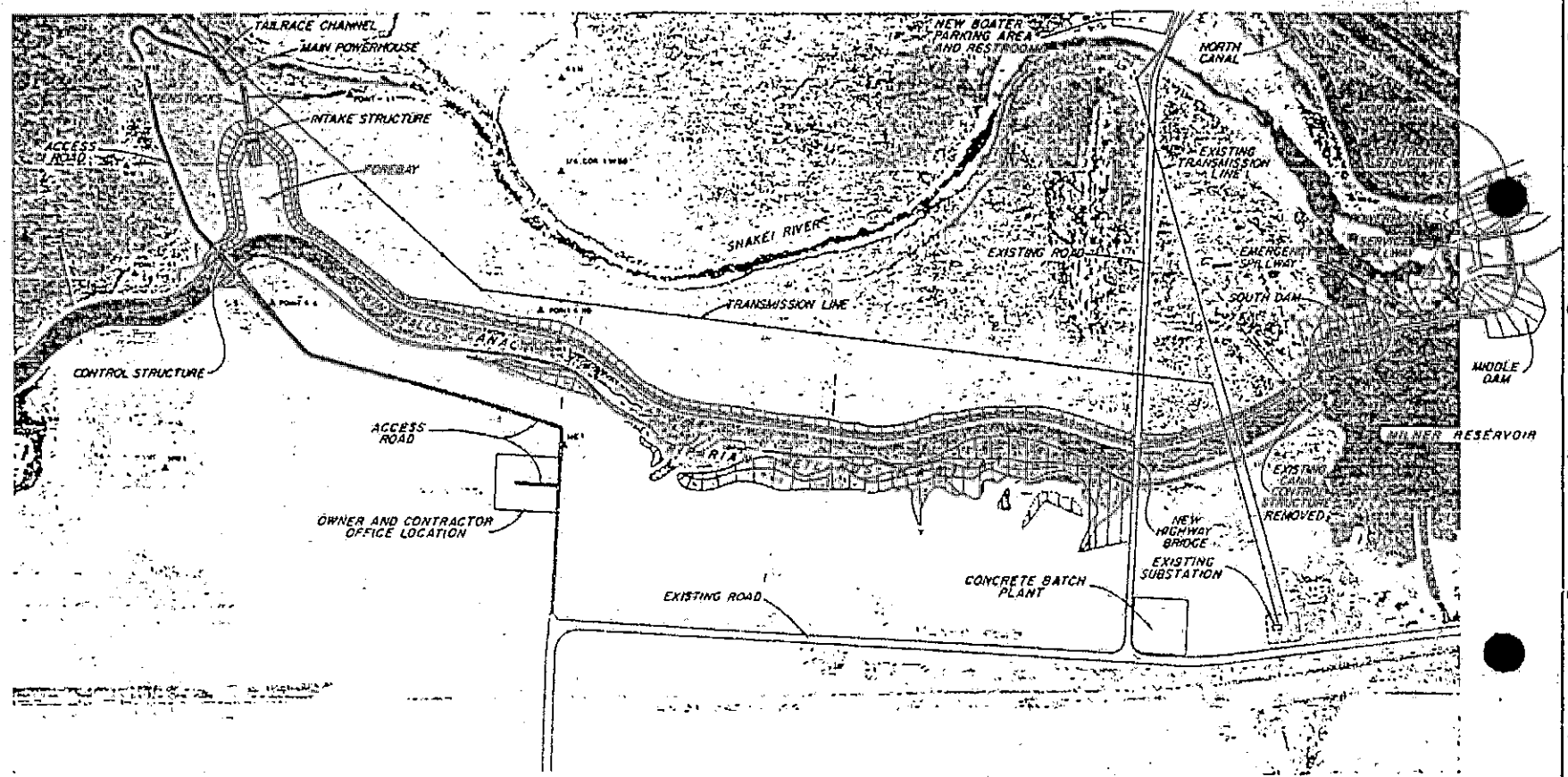
PROJECT GENERAL ARRANGEMENT

3773-10-0005

SHEET 1 OF 8

JAN 10 1994

EXHIBIT A
PERMIT 01-7011
MILNER POWER PLANT



SURVEY CONTROL POINTS

CONTROL POINTS

POINT #	NORTH	EAST	ELEVATION
110			
111			
114			
115			
116			
117			
118			

NOTE:
1. COMPLETED PROJECT SHOWN

8	10-94	REVISED PER OWNER'S COMMENTS	MJB	MJH	S. SHEPHERD AS BUILT	MJB	JCC
7	10-94	REVISED AS BUILT	MJB	MJH	ADDED NOTE, REVISED TRANSMISSION LINE	MJB	JCC
6	11-93	REVISED PER OWNER'S COMMENTS	MJB	MJH	REVISED PER OWNER'S COMMENTS	MJB	JCC
5	10-93	REVISED PER OWNER'S COMMENTS	MJB	MJH	REVISED PER OWNER'S COMMENTS	MJB	JCC
NO.	DATE	DESCRIPTION	BY	CHK	DESCRIPTION	BY	CHK

MORRISON-KNUDSEN ENGINEERS, INC.

IDAHO POWER COMPANY
TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL COMPANY, LTD.

MILNER HYDROELECTRIC PROJECT

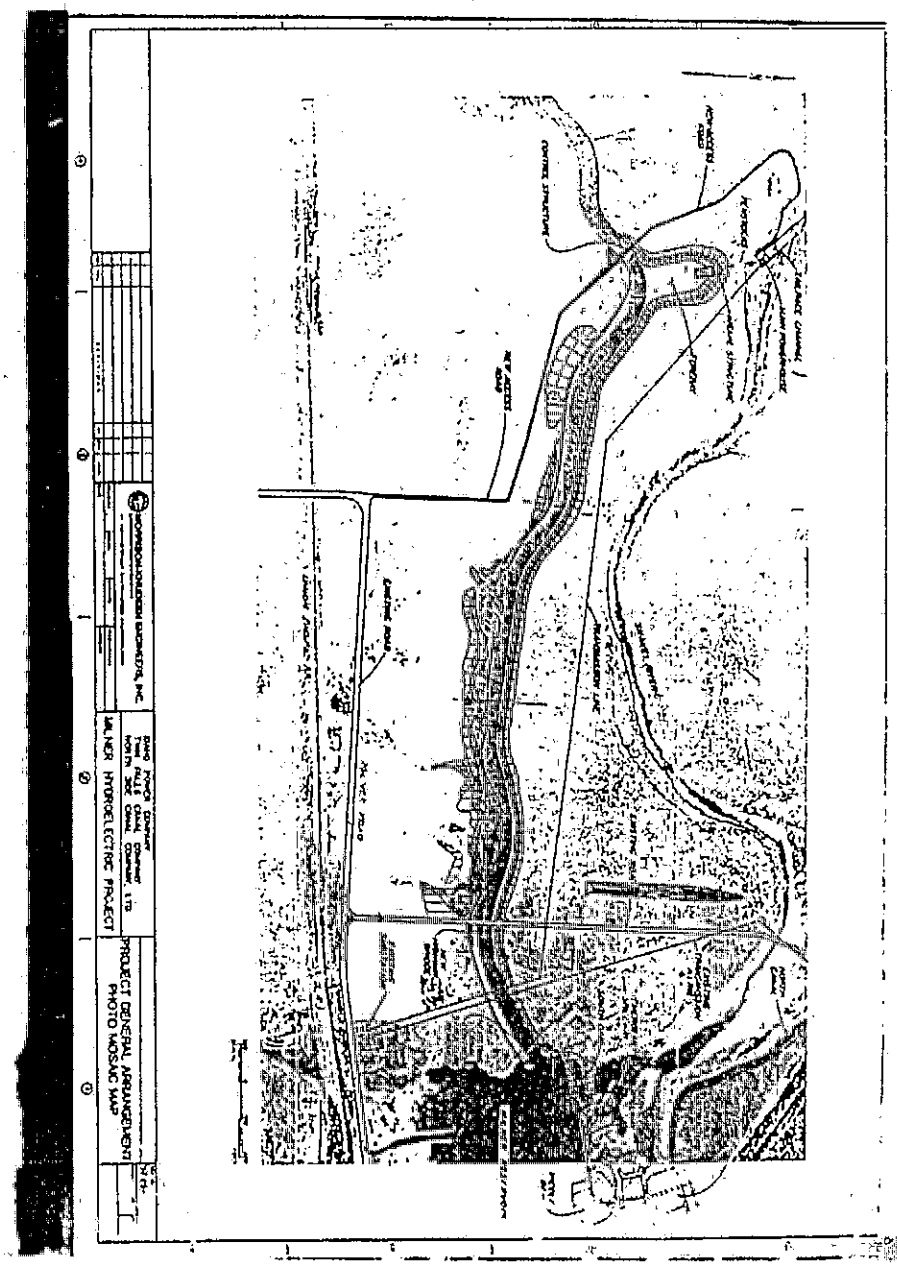
PROJECT GENERAL ARRANGEMENT

3775-10-0005

JAN 10 1994

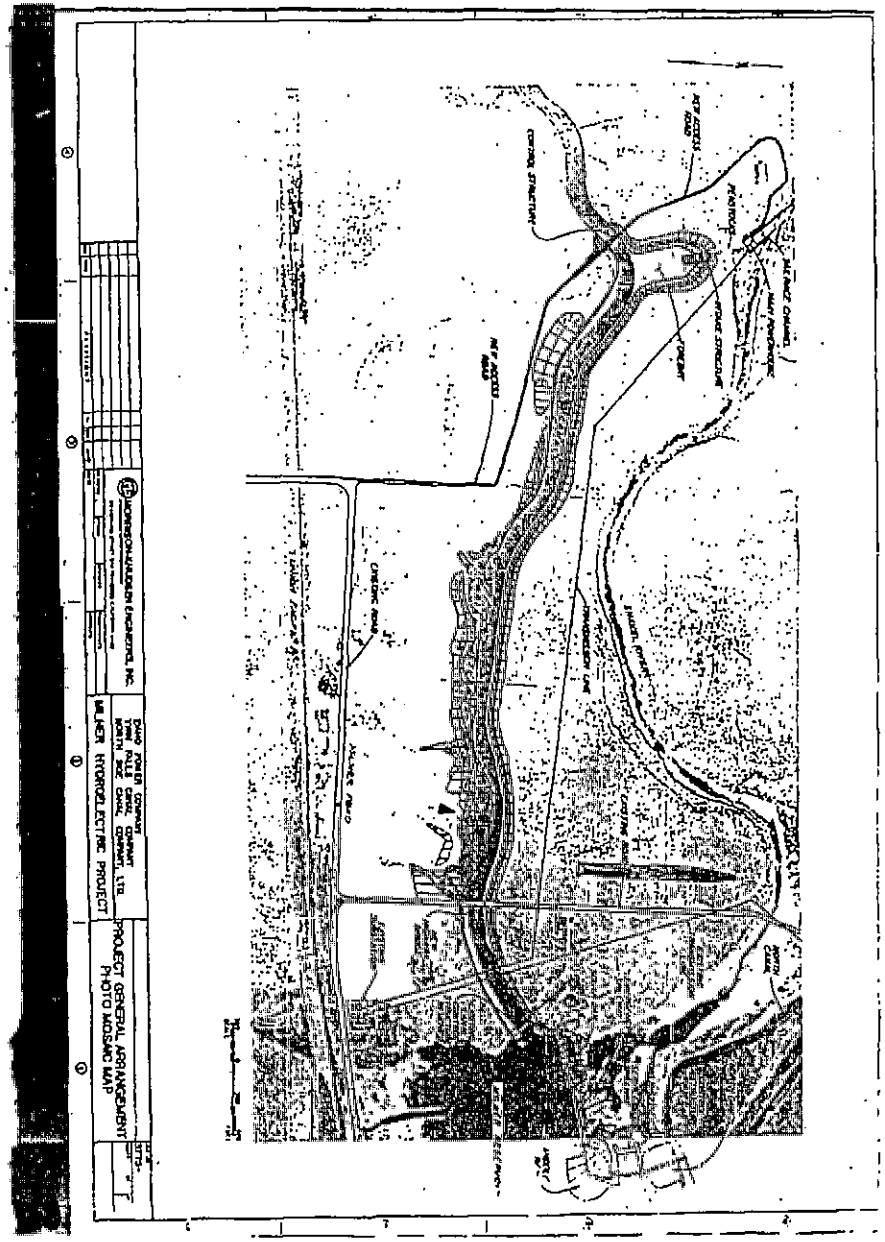
C. Filing and Service of Responsive Documents--Any filings must bear in all capital letters the title "COMMENTS," "RECOMMENDATIONS FOR TERMS AND CONDITIONS," "NOTICE OF INTENT TO FILE COMPETING APPLICATION," "COMPETING APPLICATIONS," "PROTEST" or "MOTION TO INTERVENE," as applicable, and the project number of the particular application to which the filing is in response. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: the Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 204-RB, at the above address. A copy of any notice of intent, competing application, or motion to intervene must also be served upon each representative of the applicant specified in the particular application.

Lois D. Cashell
Secretary



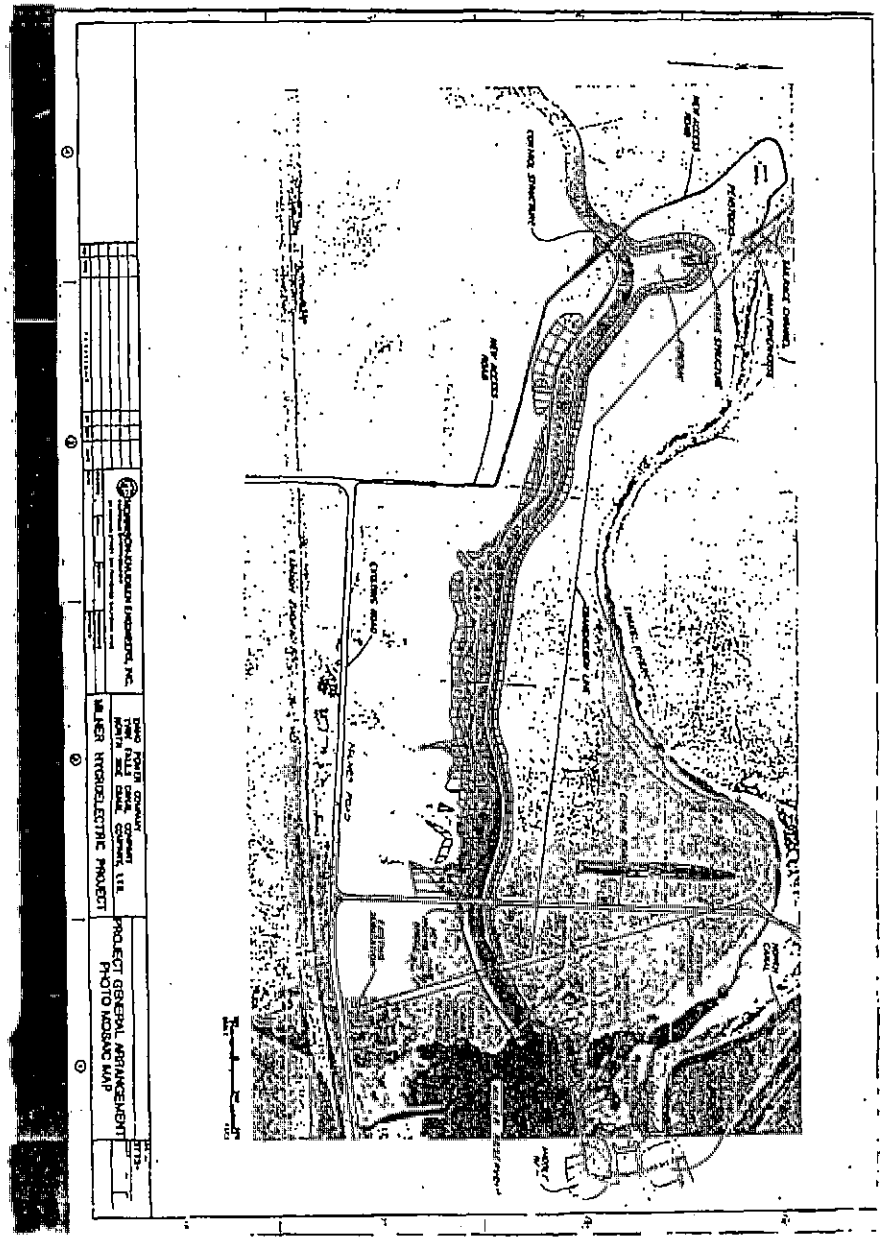
c. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS," "RECOMMENDATIONS FOR TERMS AND CONDITIONS," "NOTICE OF INTENT TO FILE COMPETING APPLICATION," "COMPETING APPLICATIONS," "PROTEST" or "MOTION TO INTERVENE," as applicable, and the project number of the particular application to which the filing is in response. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: the Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 204-RB, at the above address. A copy of any notice of intent, competing application, or motion to intervene must also be served upon each representative of the applicant specified in the particular application.

Lois D. Cashell
Secretary



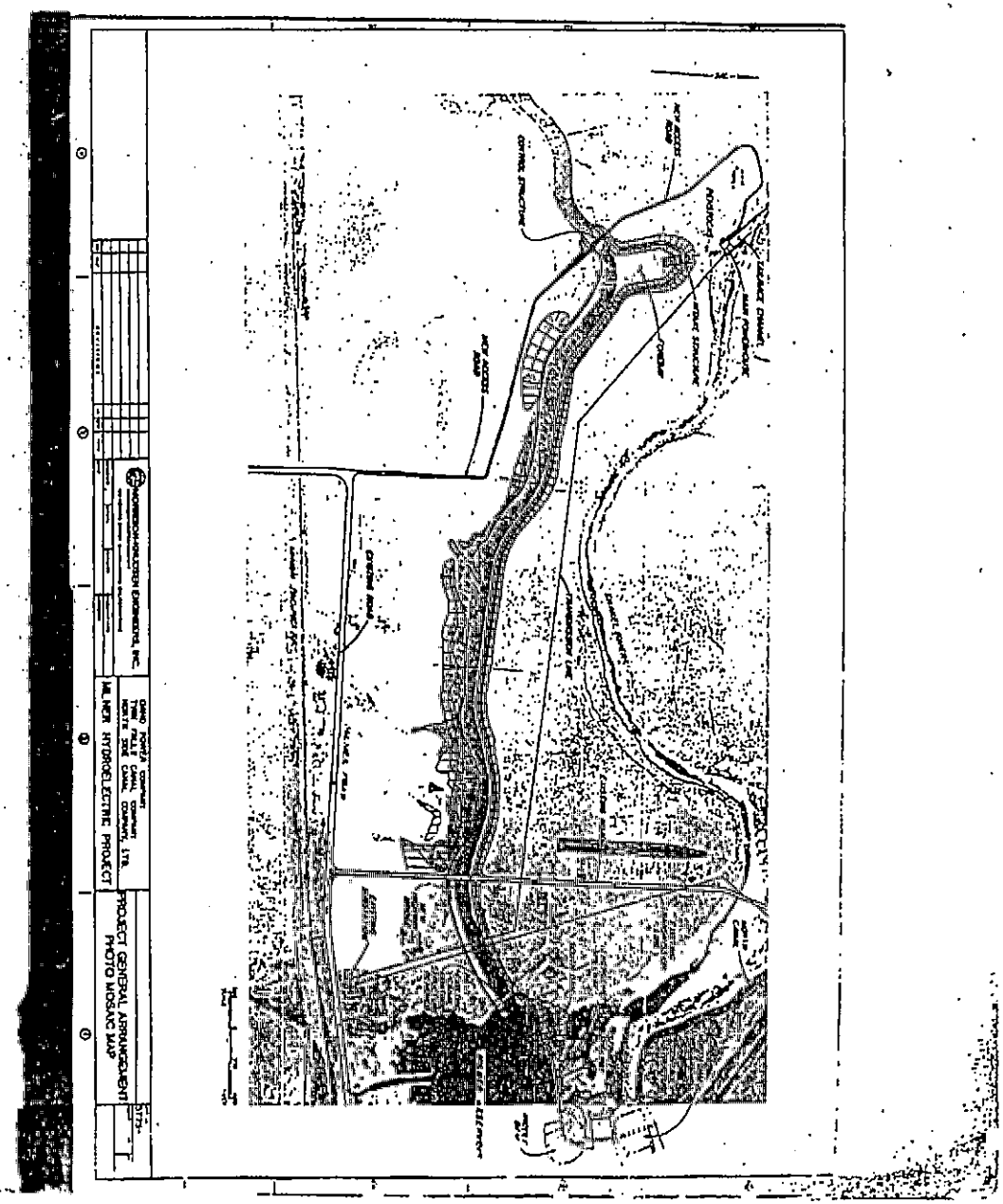
c. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS," "RECOMMENDATIONS FOR TERMS AND CONDITIONS," "NOTICE OF INTENT TO FILE COMPETING APPLICATION," "COMPETING APPLICATIONS," "PROTEST" or "MOTION TO INTERVENE," as applicable, and the project number of the particular application to which the filing is in response. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: the Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 204-RB, at the above address. A copy of any notice of intent, competing application, or motion to intervene must also be served upon each representative of the applicant specified in the particular application.

Lois D. Cashell
Secretary



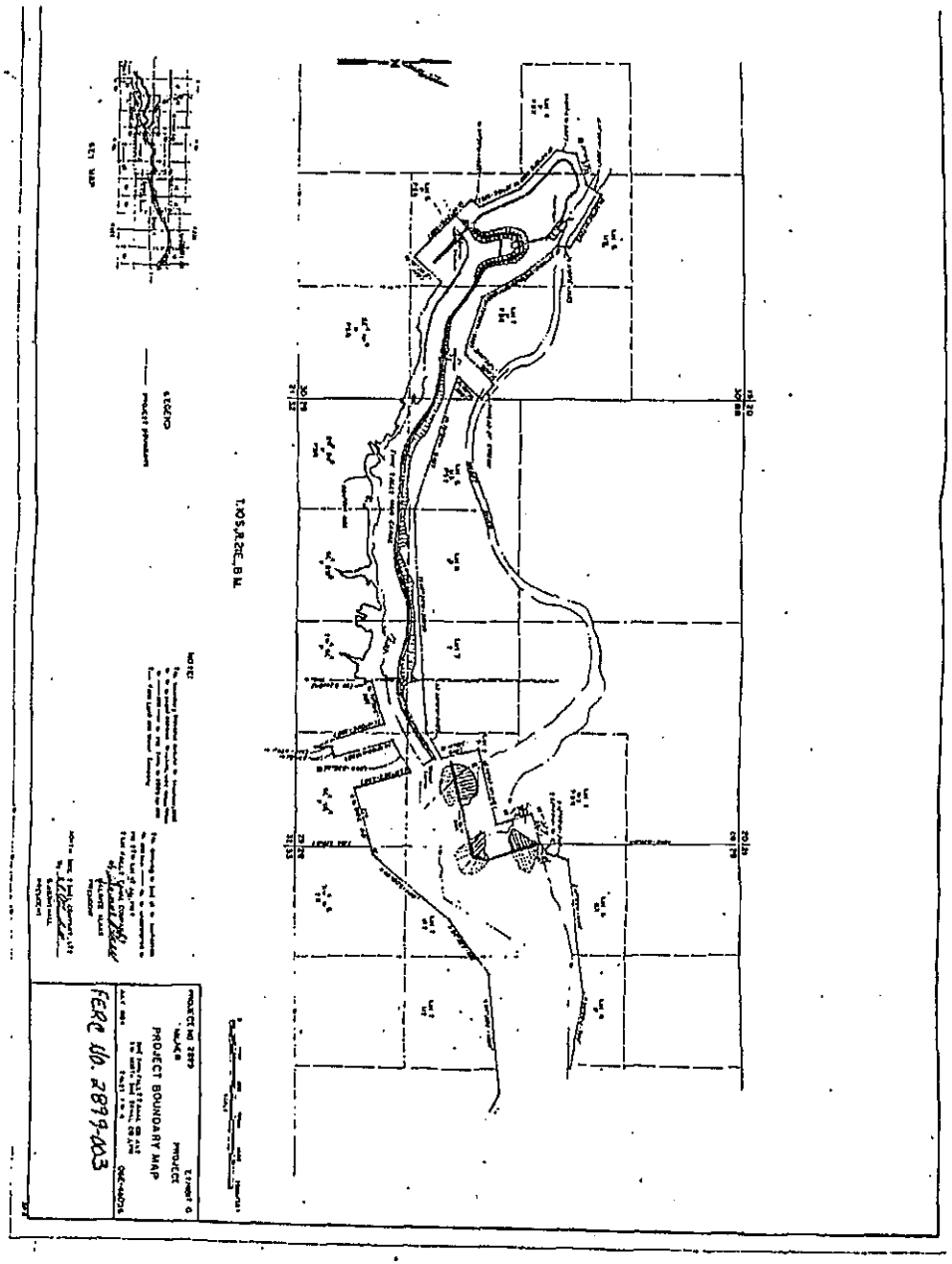
C. Filing and Service of Responsive Documents--Any filings must bear in all capital letters the title "COMMENTS," "RECOMMENDATIONS FOR TERMS AND CONDITIONS," "NOTICE OF INTENT TO FILE COMPETING APPLICATION," "COMPETING APPLICATIONS," "PROTEST" or "MOTION TO INTERVENE," as applicable, and the project number of the particular application to which the filing is in response. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: the Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 204-RB, at the above address. A copy of any notice of intent, competing application, or motion to intervene must also be served upon each representative of the applicant specified in the particular application.

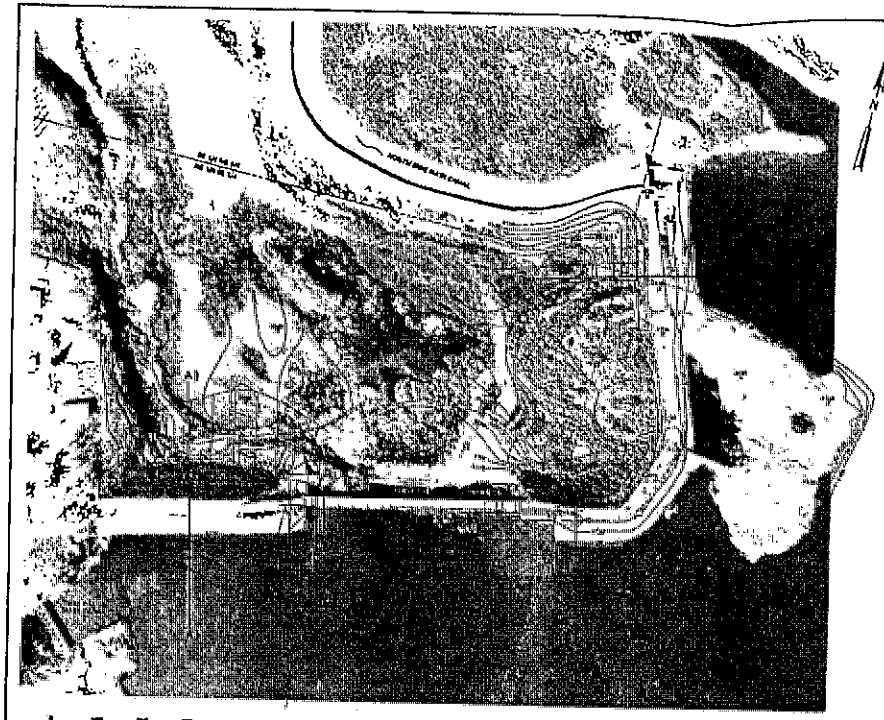
Lois D. Cashell
Secretary



c. Filing and Service of Responsive Documents - Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST" or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing is in response. Any of the above named documents must be filed by providing the original and the number of copies required by the Commission's regulations to: Kenneth F. Plumb, Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: Mr. Fred E. Springer, Director, Division of Project Management, Federal Energy Regulatory Commission, Room 203-RB, at the above address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

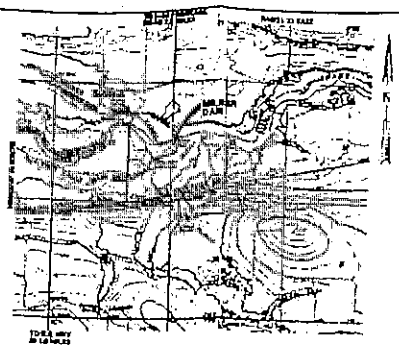
Kenneth F. Plumb
Secretary



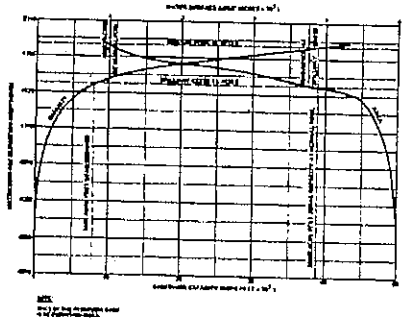


SITE MAP

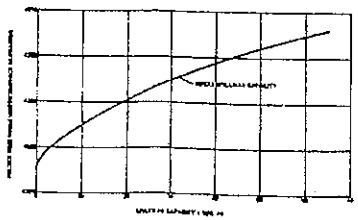
NOTE: SECTIONS SHOWN ON DRAWING 12



VICINITY MAP



MILNER RESERVOIR



MILNER DAM

This drawing is part of the application for license made by the undersigned on the 27th day of July, 1964.

TWIN FALLS CANAL COMPANY.

By _____

MAURICE KLAAS
PRESIDENT

NORTH SIDE CANAL COMPANY, LTD.

By _____

C. V. MARSHALL
PRESIDENT

PROJECT NO. 6998 EXHIBIT #

MILNER PROJECT

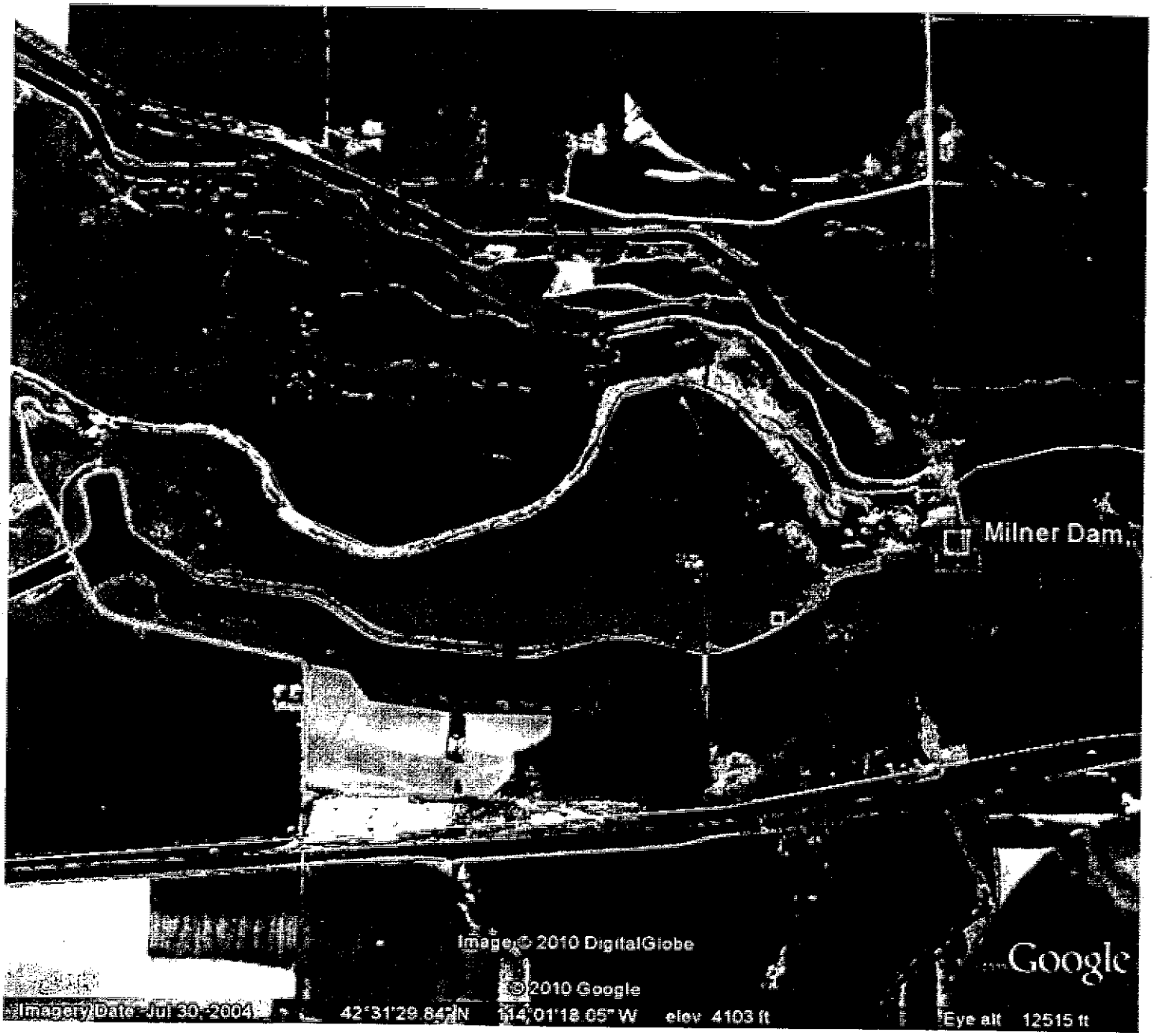
MILNER DAM
REHABILITATION PLAN

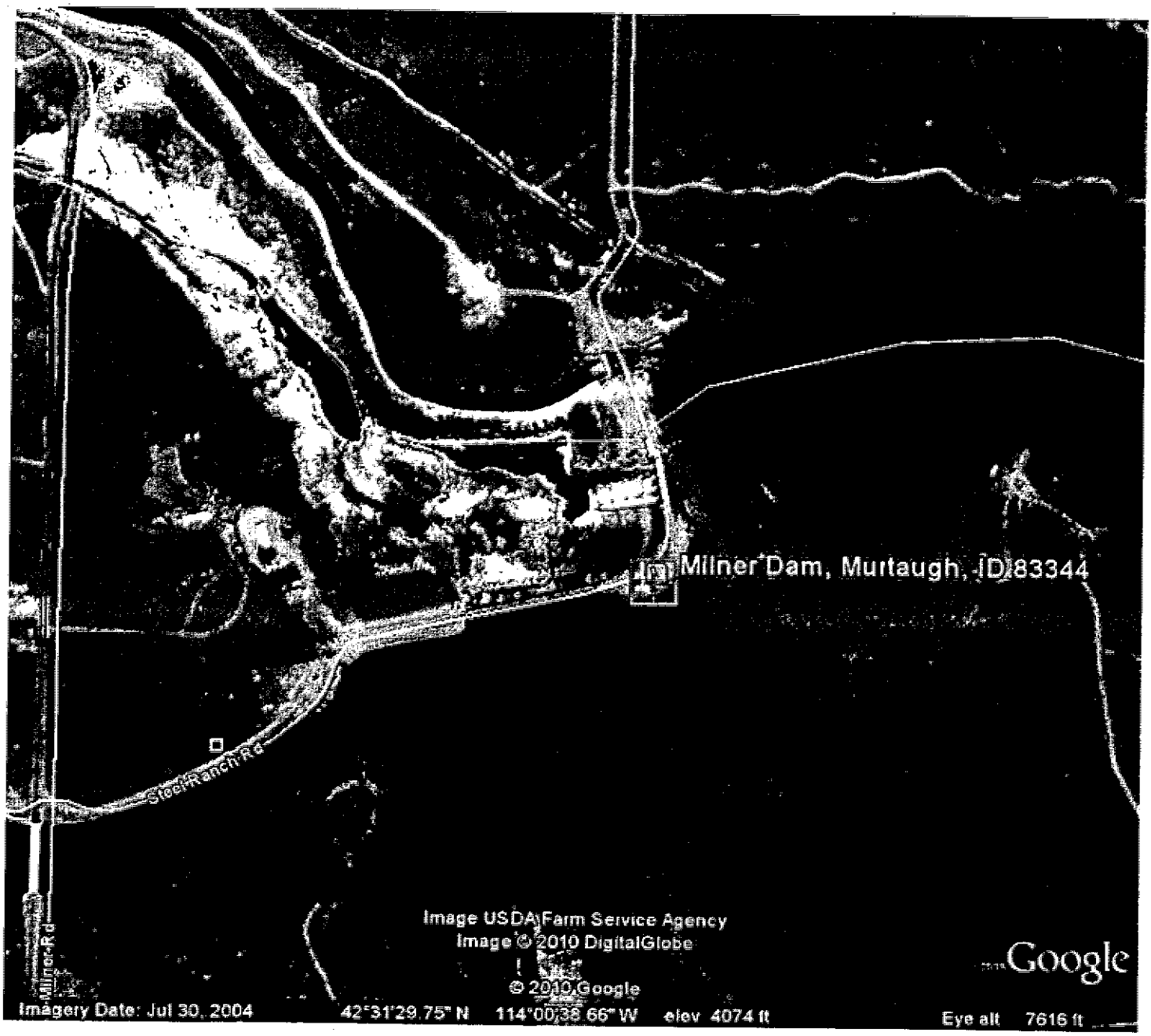
THE TWIN FALLS CANAL CO. AND
THE NORTH SIDE CANAL CO.,LTD

JULY 1964 SHEET 9 OF 12 08E-46069

Exhibit 6

Google Earth® printouts of Milner Dam and nearby areas.


Milner Dam
Image © 2010 DigitalGlobe
© 2010 Google
Google
Imagery Date: Jul 30, 2004
42°31'29.84" N
114°01'18.05" W
elev 4103 ft
Eye alt 12515 ft


Milner Dam, Murtaugh, ID 83344
Steele Ranch Rd
Miller Rd
Image USDA Farm Service Agency
Image © 2010 DigitalGlobe
© 2010 Google
Google
Imagery Date: Jul 30, 2004
42°31'29.75" N
114°00'38.66" W
elev 4074 ft
Eye alt 7616 ft

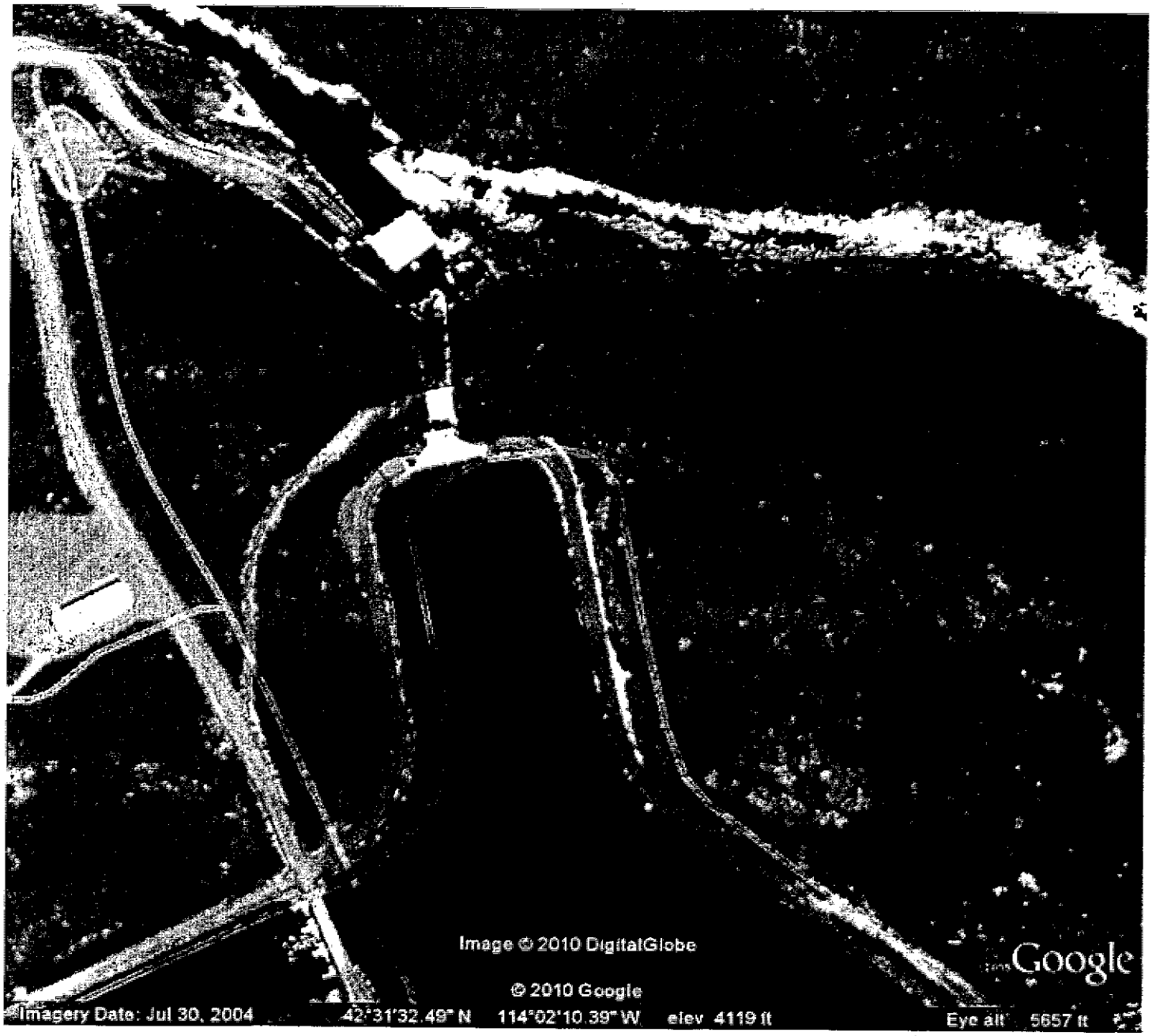

Image © 2010 DigitalGlobe
© 2010 Google
Google
Imagery Date: Jul 30, 2004 42°31'32.49" N 114°02'10.39" W elev 4119 ft Eye alt 5657 ft

Exhibit 7

2009 annual reports of Twin Falls Canal Company
and Milner Dam, Inc.
(from Idaho Secretary of State's website)

No. **C 6549**	**Due no later than Nov 30, 2009** **Annual Report Form**	2. Registered Agent and Address **(NO PO BOX)**
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 **NO FILING FEE IF RECEIVED BY DUE DATE**	**1. Mailing Address: Correct in this box if needed.** TWIN FALLS CANAL COMPANY BRIAN E OLMSTEAD P O BOX 326 TWIN FALLS ID 83303-0326 USA	BRIAN OLMSTEAD 3S7 6TH AVE W TWIN FALLS ID 83301 3. New Registered Agent Signature:*

4. Corporations: Enter Names and Business Addresses of President, Secretary, Directors and(optional) Treasurer.

Office Held	Name	Street or PO Address	City	State	Country	Postal Code
DIRECTOR	CHARLES COINER	3866 N 3800 E	HANSEN	ID	USA	83334
DIRECTOR	PHIL BLICK	3S50 N 700 E	CASTLEFORD	ID	USA	83321
TREASURER	ROGER BLASS	2178 E 4400 N	FILER	ID	USA	83328
SECRETARY	JOHN HONCIK	1403 E 4340 N	BUHL	ID	USA	83316
PRESIDENT	DAN SHEWMAKER	3S28 E 3600 N	KIMBERLY	ID	USA	83341

5. Organized Under the Laws of:	6. Annual Report must be signed.*	
ID **C 6549**	Signature: Brian Olmstead	Date: 09/08/2009
	Name (type or print): Brian Olmstead	Title: General Manager

Processed 09/08/2009

* Electronically provided signatures are accepted as original signatures.

No. **C 96431**	**Due no later than Oct 31, 2009** **Annual Report Form**	2. Registered Agent and Address **(NO PO BOX)**
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 **NO FILING FEE IF RECEIVED BY DUE DATE**	**1. Mailing Address: Correct in this box if needed.** MILNER DAM, INC. BRIAN OLMSTEAD P O BOX 326 TWIN FALLS ID 83303-0326	BRIAN OLMSTEAD 357 6TH AVE WEST TWIN FALLS ID 83301 3. New Registered Agent Signature:*

4. Corporations: Enter Names and Business Addresses of President, Secretary, Directors and(optional) Treasurer.

Office Held	Name	Street or PO Address	City	State	Country	Postal Code
TREASURER	PHIL BLICK	3550 N 700 E	CASTLEFORD	ID	USA	83321
SECRETARY	PHIL BLICK	3550 N 700 E	CASTLEFORD	ID	USA	83321
PRESIDENT	JOHN HONCIK	1403 E 4340 N	BUHL	ID	USA	83316

5. Organized Under the Laws of:	6. Annual Report must be signed.*	
ID **C 96431**	Signature: Brian Olmstead	Date: 08/13/2009
	Name (type or print): Brian Olmstead	Title: Authorized Representative

Processed 08/13/2009

* Electronically provided signatures are accepted as original signatures.

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 8

Application For Alternative Writ Of Mandate, North Side Canal Co. & Twin Falls Canal Co. v. Tuthill, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County) (Sept. 28, 2007)

COPY

DISTRICT COURT
FIFTH JUDICIAL DIST
... STATE OF IDAHO

2007 SEP 26 PM 1 19
Michelle Emerson
CLERK
BY /s/ Linda Owens
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 APPLICATION FOR ALTERNATIVE WRIT OF MANDATE

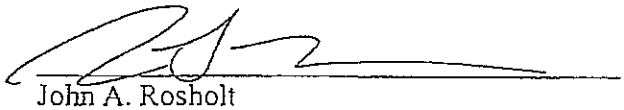
COME NOW, the Petitioners, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, (hereinafter referred to as "Petitioners") by and through their attorneys of record, Barker Rosholt & Simpson LLP, and hereby make application to the Court pursuant to Rule 74(b) of the Idaho Rules of Civil Procedure for an Alternative Writ of Mandate compelling the Respondents to void the September 5, 2007, *Notice of Intent to Issue License* and

close all protest or comment period *In the Matter of Licensing Water Right Permit No. 01-7011 in the Name of Twin Falls Canal Company and North Side Canal Company*, and to issue the Petitioners a license for their water right permit no. 01-7011, pursuant to the beneficial use examination received by Respondents on November 1, 1993, and the conditions on the existing water right permit no. 01-7011 in compliance with Idaho Code § 42-219, and to appear before the Court at a time a place certain, and show cause, in any they have, why they have not complied with the terms of the Alternative Writ of Mandate.

This Application is supported by the *Petition for Peremptory Writ of Mandate*, setting forth the facts and grounds upon which the Application is based.

DATED THIS 26th day of September, 2007.

BARKER ROSHOLT & SIMPSON LLP



John A. Rosholt
John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for North Side Canal Company and Twin Falls Canal Company

Exhibit 9

Order Denying Petition For Alternative Writ Of Mandate, North Side Canal Co. & Twin Falls Canal Co. v. Tuthill, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County) (Oct. 10, 2007)

DISTRICT COURT
FIFTH JUDICIAL DIST
JEROME COUNTY IDAHO

2007 OCT 10 PM 4 46
Michelle Emerson
CLERK
BY _____
DEPUTY CLERK

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 ORDER DENYING PETITION FOR ALTERNATIVE WRIT OF MANDATE

I.
BRIEF PROCEDURE AND FACTS

On September 27, 2007, the Petitioners filed a *Petition for Peremptory Writ of Mandate* along with an *Application for Alternative Writ of Mandate* requesting that this Court order the Respondents to void the *Notice of Intent to Issue License* issued by the Respondents and order the Respondents to issue a license for a water right according to the terms of the permit issued to the Petitioners. Specifically, the Petitioners allege that they filed an application for a permit to divert water for power production and that the Respondents published notice of the application

on May 19th and 26th, 1977. No protests to the application were filed within the statutory time limit which expired on June 6, 1977. Accordingly, Water Right Permit No. 01-07011 was issued to the Petitioners on June 29, 1977. The Permit did not include any subordination conditions pertaining to the use of water for hydropower.

The Petitioners allege that proof of beneficial use was originally due on June 1, 1982. As a result of delays in the FERC licensing process, extensions were sought and approved in 1982, 1987, 1990 and 1992. In 1987, after the execution of the Swan Falls Agreement and the enactment of Idaho Code § 42-203B, the Respondents first indicated that a further extension of time would only be granted if the hydropower right was to be junior and subordinate to all other rights, except hydropower. The Petitioners expressed concern that the proposed condition would, among other things, allow other non-consumptive uses, such as groundwater recharge, to deplete water available under the permit for power generation. Petitioners allege that to address the concern the Respondents agreed to modify the proposed subordination condition 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 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.

This language was included in the permit issued for Water Right No. 01-07011.

The Petitioners allege that the project was developed and proof of beneficial use submitted on October 29, 1993.

The Petitioners allege that the Respondents have issued permits for groundwater recharge upstream from their project without investigating whether the permits would cause injury to existing water rights and that these junior priority recharge permits have resulted in reduction in flows under their permit.

The Petitioners allege that they requested that the Respondents issue a license in 2006 and again in the spring of 2007 and that the Respondents recently issued a *Notice of Intent to Issue License* indicating that the Respondents had decided to reopen a protest period to address the content of the subordination condition. The Petitioners request that this Court issue a writ of mandate requiring the Respondents to void the newly reopened protest period and to license the project subject to the subordination conditions negotiated between the Petitioners and Respondents in 1987.

II.
STANDARD OF REVIEW

A decision to issue a writ of mandate is committed to the discretion of the court. I.R.C.P. 74(b). An alternative writ of mandate is issued without notice to the adverse party. I.C. §7-305. An alternative writ of mandate is accompanied by an order requiring the adverse party to appear and show cause why the party has not complied with the writ. Whether a party is seeking an alternative writ or a peremptory writ the standard is the same: "[T]he party seeking a writ of mandate must establish a 'clear legal right' to the relief sought. Additionally, the writ of mandate will not issue where the petitioner has 'a plain, speedy and adequate remedy in the ordinary course of law.'" *Ackerman v. Bonneville County*, 140 Idaho 307, 311, 92 P.3d 557, 561 (Ct.App.2004)(citing *Brady v. City of Homedale*, 130 Idaho 569, 571, 944 P.2d 704, 706 (1997)).

III.
DISCUSSION

Following a review of the pleadings, the Court finds that because of the existence of many unresolved issues regarding the appropriateness of the issuance of a writ of mandate, that it

is necessary to allow the Respondents to answer the allegations of the Petition and to present legal argument and /or evidence as may be appropriate prior to the Court deciding whether to issue a writ of mandate. In reaching this decision, the Court has considered the following:

1. Time does not appear to be of the essence. The issuance of the license has been pending since 1993 when proof of beneficial use was made. The Court finds no immediate injury resulting from addressing the merits in this manner.

2. There is the threshold question of whether the Petitioners have an adequate remedy at law. Specifically, if Petitioners wait until the Respondents either issue a license or an order declining to do so, do the usual administrative and judicial review processes provide an adequate remedy at law?

3. The legal question of whether the Respondents have the authority, for any reason (changes in law etc.), to modify or impose a new condition on a permit after beneficial use has been proven but prior to the issuance of a license? If so, what is the appropriate remedy for a permittee who completes the diversion works and related projects in reliance on the terms on which the permit was originally conditioned? Are there legally recognizable exceptions to the operative language of Idaho Code § 42-219?

4. What is the legal significance of the negotiated agreement on which the extension for proof of beneficial use was granted?

5. The legal question of when a water right vests--when the permit is issued or when a license is issued or at some other time—may not be entirely settled. In *River Grove Farms*, S.R.B.A. Subcase No. 36-08099, *Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge*, filed January 11, 2000, Judge B. Wood), the court decided that a water right vests upon issuance of a license. No

appeal was taken from that decision. See also *Caulfin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964)(state engineer revoked permit after completion of diversion works).

6. The question of whether it was appropriate for the Respondents to modify the permit in conjunction with granting the extension without re-opening and publishing the matter for comment in order to address the substantive changes. In particular in light of the intervening issues pertaining to hydropower which had emerged since the permit was initially issued. *See Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993)(application to amend to permit offers entire permit up to IDWR review).

By raising these issues, the Court is in no way prejudging the Petitioner's claims for relief but is only explaining the reasons for not issuing a writ of mandate without proper service of process, notice and opportunity for Respondents to respond to the pleadings and otherwise be meaningfully heard. The issue of whether a peremptory writ is an appropriate remedy will only be determined following a full hearing on the merits.

IV.
ORDER

Accordingly, it is hereby **ORDERED** as follows:

1. The *Application for Alternative Writ of Mandate* is **DENIED.**

2. The Petitioner may notice up a hearing on the *Application for Peremptory Writ of Mandate* following proper service and notice to the Respondents.

Dated October 10, 2007

John Melanson, District Judge

Exhibit 10

Motion to Dismiss,
North Side Canal Co. & Twin Falls Canal Co. v. Tuthill,
Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County)
(Nov. 8, 2007)

SCANNED
MAR 1 3 2008

DISTRICT COURT
FIFTH JUDICIAL DIST
2007 NOV 13 AM 11 35
Michelle Emerson
BY /s/ Judy Owens
DEPUTY CLERK

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
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Attorneys for Respondents

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** **MOTION TO DISMISS**

COME NOW Respondents David R. Tuthill, Jr., in his official capacity as Director of the Idaho Department of Water Resources ("the Director) and the Idaho Department of Water Resources ("IDWR" or "the Department"), and pursuant to Rules 12(b)(1) and 12(b)(6) of the Idaho Rules of Civil Procedure move the Court to dismiss

this action for lack of subject matter jurisdiction and failure to state a claim. The grounds for this motion are 1) that the Petitioners have failed to exhaust their administrative remedies; and 2) that the Petitioners have not shown that the Director is refusing to act pursuant to a clear legal duty. These grounds are discussed more fully in the supporting memorandum submitted herewith. This motion is also supported by the Affidavit of David R. Tuthill, Jr., Director, Idaho Department of Water Resources, submitted herewith.

The Respondents request an award of attorney fees, witness fees, and reasonable expenses in connection with this motion pursuant to Idaho Code § 12-117.

The Respondents request oral argument on this motion and will file an appropriate notice of hearing.

DATED this 8th day of November, 2007.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General

CHRIS M. BROMLEY
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 8th day of November 2007.

Document(s) served: MOTION TO DISMISS

Persons served:

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Idaho Department of Water Resources

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 11

Memorandum in Support of Motion to Dismiss, North Side Canal Co. & Twin Falls Canal Co. v. Tuthill, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County) (Nov. 8, 2007)

SCANNED
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DISTRICT COURT
FIFTH JUDICIAL DIST
JEROME, IDAHO
2007 NOV 13 AM 11 35
Michelle Emerson
BY /s/ Julie Owens
DEPUTY CLERK

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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** **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Respondents David R. Tuthill, Jr., in his official capacity as Director of the Idaho Department of Water Resources ("the Director) and the Idaho Department of Water Resources ("IDWR" or "the Department"), submit this memorandum in support of their

Motion to Dismiss, filed herewith. For the reasons set forth herein, Respondents respectfully urge the Court to dismiss this action.

INTRODUCTION

Dismissal is appropriate in this case because the Petitioners are prematurely seeking judicial relief in a water rights licensing matter that has not yet been concluded. Moreover, once the license is issued, the Petitioners may avail themselves of the administrative remedies provided by statute. Until the Petitioners have exhausted the available administrative remedies, they are barred from seeking judicial relief by the exhaustion doctrine. Therefore, the Court should dismiss this case for lack of subject matter jurisdiction.

Additionally, the Petitioners are seeking a writ of mandate to compel the Director to issue the license, an action he has already announced he will perform. A writ of mandate is only available if there is a clear legal duty to act, and the officer is refusing to do so. Since the Director is fulfilling his legal duty, a writ of mandate is not available in this matter. Thus, this case must be dismissed for failure to state a claim upon which relief can be granted.

STANDARD OF REVIEW

Respondents' motion to dismiss for failure to exhaust administrative remedies is brought under Idaho Rule of Civil Procedure 12(b)(1) because it implicates the subject matter jurisdiction of the court. *Owsley v. Idaho Industrial Com'n*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005). "[T]he exhaustion doctrine implicates subject matter jurisdiction because a 'district court does not acquire subject matter jurisdiction until all

the administrative remedies have been exhausted.'" *Id. quoting Fairway Development v. Bannock County*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990). The Respondents' motion to dismiss for failure to state a claim is brought under I.R.C.P. 12(b)(6). Because these motions are based upon the pleadings, "the non-moving party is entitled to have all inferences from the record viewed in his favor." *Young v. City of Ketchum*, 137 Idaho 102, 103, 44 P.3d 1157, 1158 (2002); *see also Owsley*, 141 Idaho at 133, 106 P.3d at 459.

ARGUMENT

I. SUMMARY OF ARGUMENT

The Petitioners initiated an administrative proceeding in the Department when they applied for a water right in 1977. The Director recently issued a *Notice of Intent to Issue License* for that water right (no. 01-07011). *Affidavit of Director David. R. Tuthill, Jr., Director, Idaho Department of Water Resources* ("Tuthill Affidavit") at 2. The Petitioners allege that the Director is acting unlawfully in reviewing the subordination condition in response to objections filed by other water right holders. Moreover, they speculate that the Director intends to issue a license with a broader subordination condition than that which is on the current permit. In an attempt to preclude the Director's review of the permit as authorized by Idaho Code § 42-203B(6) , the Petitioners brought this action for judicial relief to compel the Director to issue the license immediately. The Petitioners are seeking judicial relief despite the fact that the license has not yet been issued, and despite the availability of administrative remedies provided by statute.

Idaho law is clear that a person must exhaust administrative remedies before seeking judicial relief. Here, the Petitioners have not exhausted their administrative

remedies, and have prematurely sought judicial relief from a pending water licensing matter. Accordingly, this case must be dismissed.

Furthermore, the Petitioners have failed to state a claim for writ of mandate. A writ of mandate is an extraordinary remedy and is only available when there is a clear duty required by law and the officer is refusing to act. I.C. § 7-302. Since the Director has already declared his intent to issue the license, there is no basis for this Court to act. By this petition, Petitioners are not seeking to force the Director to act, but rather to force the Director to act in the fashion they desire, despite his express statutory authority to impose a subordination condition at the time of licensing. I.C. § 42-203B(6). Under the Administrative Procedures Act, Petitioners are required to pursue a challenge to such action of the Director through an administrative appeal, not through a writ of mandate action.

II. THIS CASE SHOULD BE DISMISSED BECAUSE THE PETITIONERS HAVE FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

A. The Petitioners must exhaust administrative remedies before seeking judicial relief.

The Idaho Administrative Procedure Act ("IDAPA") provides that "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter." I. C. § 67-5271. "The doctrine of exhaustion requires that where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before courts will act." *White v. Bannock County Comm'rs*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003). The exhaustion doctrine "requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered." *Regan v. Kootenai County*, 140 Idaho

721, 724, 100 P.3d 615, 618 (2004). Until administrative remedies are exhausted, a district court is without subject matter jurisdiction to consider the matter. "If a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted." *White*, 139 Idaho at 401, 80 P.3d at 337.

The Idaho Supreme Court forcefully re-emphasized this requirement in the context of water rights administration in *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, where it held that the district court erred in hearing the plaintiffs' case before the plaintiffs had exhausted their administrative remedies. 143 Idaho 862, 154 P.3d 433, 453-54 (2007). In that case, the plaintiffs initiated an administrative proceeding and when it appeared that the outcome might not be what they hoped, they attempted to circumvent the Department's procedures by prematurely seeking judicial relief. The Court in *American Falls* outlined the reasoning behind the doctrine of exhaustion:

> Important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body." Id. at 443, quoting *White v. Bannock County Comm'rs*, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003).

This case is analogous to *American Falls*. Here, too, the Petitioners are attempting to circumvent an ongoing IDWR administrative proceeding because they anticipate a less favorable outcome than they hoped. Consistent with the idea of deference, the Petitioners, rather than filing this action, should have submitted the allegations and arguments pled herein to the Director as requested in the *Notice of Intent to Issue License*. This would have permitted the Director to base his decision on all

available facts and arguments, including those presented by the Petitioners. As matters stand, the Director has taken all submitted comments into consideration and will issue a license as authorized by statute upon reaching a decision. *Tuthill Affidavit* at 2.

As a matter of comity this Court should stay its hand pending the Director's exercise of his statutory authority and with an eye to the policy considerations furthered by denying preemptive judicial review of ongoing administrative proceedings. Thus, *American Falls* is controlling and Respondents' motion to dismiss should be granted.

B. Petitioners have not exhausted their administrative remedies.

The Petitioners applied for water right no. 01-07011 in 1977 and the administrative proceeding that commenced with the application is ongoing. *Petition for Peremptory Writ of Mandate at 7* ("Petition").[1] On September 5, 2007, the Director issued a *Notice of Intent to Issue License* in which he indicated that "the Department is prepared to issue a license for the water right pursuant to Idaho Code § 42-219." *Petition* at 25. The Petitioners are concerned with the Director's indication that he would consider written comments from three entities regarding the subordination condition to be included on the license for 01-07011. *Petition* at 26. As a result, Petitioners are seeking to have this Court compel the Director to issue a license in conformance with the exiting permit.

The Petitioners have not yet been issued the license for right no. 01-07011. *Tuthill Affidavit* at 2. They cannot predict what form the subordination condition will take, as that is lawfully at the discretion of the Director as stated in I.C. § 42-203B(6). If the Director issues a license that the Petitioners find objectionable, their remedy is to

[1] Respondents are construing all facts as alleged in Petitioners' *Petition* as required under the legal standards for this motion, but reserve the right to contest these facts at a later time.

request a hearing under I. C. § 42-1701A(3). Idaho Code § 42-1701A(3) provides that "any person aggrieved by any action of the director...shall be entitled to a hearing before the director to contest the action." Finally, if the Petitioners object to the Director's final order after the hearing, they may then seek judicial relief in this Court. "Any person who is aggrieved by a final decision or order of the director is entitled to judicial review." I.C. § 42-1701A(4).

Like the plaintiffs in *American Falls*, the Petitioners are attempting to circumvent the Department's administrative procedure and preemptively force a premature judicial review of a pending administrative decision before the Director has exercised his discretion in the matter. There are clear administrative remedies available to the Petitioners if they object to the license for right no. 01-07011 once it has been issued. Because the Petitioners have not exhausted their administrative remedies, this action should be dismissed for lack of subject matter jurisdiction following the precedent set in *American Falls*.

III. THE CASE SHOULD BE DISMISSED BECAUSE THE PETITIONERS HAVE FAILED TO STATE A CLAIM FOR WRIT OF MANDATE

A. Writ of Mandate may only compel a clear legal duty and may not compel the exercise of discretion.

Idaho Code § 7-302 states that a Writ of Mandate "may be issued...to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." "[M]andamus is not a writ of right and allowance or refusal to issue writ of mandate is discretionary." *Idaho Falls Redevelopment Agency v. Countryman*, 118 Idaho 43, 44, 794 P.2d 632, 633 (1990). "[T]he decision whether to issue the writ is

within the discretion of the court." *Cole v. U.S. Dist. Court for Dist. of Idaho*, 366 F.3d 813, 817 (2004).

Idaho courts have held that "[m]andamus will lie if the officer against whom the writ is brought has a 'clear legal duty' to perform the desired act." *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994); *Idaho Falls Redevelopment Agency*, 118 Idaho at 44, 794 P.2d at 633, *quoting Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 953, 703 P.2d 714, 717 (1985). Additionally, "[t]he party seeking a writ of mandate must establish a clear legal right to the relief sought." *Ackerman v. Bonneville County*, 140 Idaho 307, 92 P.3d 557 (2004) *quoting Brady v. City of Homedale*, 130 Idaho 569, 571, 944 P.2d 704, 706 (1997).

"Public officers may, under some circumstances, be compelled by writ of mandate to perform their official duties, although the details of such performance are left to their discretion." *Moerder v. City of Moscow*, 74 Idaho 410, 415, 263 P.2d 993, 996 (1953). Here, there is no question that the Director intends to act; the only issue is what action he might take. A writ of mandate may not be used "to direct the exercise of judgment or discretion." *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 832 (2002). "A writ of mandate will not issue to compel performance of a discretionary act." *Brady*, 130 Idaho at 571, 944 P.2d at 706 *quoting McCuskey v. Canyon County*, 123 Idaho 657, 663, 851 P.2d 953, 959 (1993).

Finally, "[e]xistence of an adequate remedy in the ordinary course of law, either legal or equitable in nature, will prevent issuance of a writ, and the party seeking the writ must prove that no such remedy exists." *Idaho Falls Redevelopment Agency*, 118 Idaho at 44, 794 P.2d at 633.

B. Petitioners have not shown that the Director is refusing to perform a clear legal duty.

The Petitioners applied for a water right for power purposes. The Director is authorized to issue licenses for water rights if all requirements of the administrative process have been met. I.C. § 42-219. The Director is fulfilling that duty. He has issued a *Notice of Intent to Issue License* in which he confirms that the procedural requirements of the application have been met and indicates that a license will be forthcoming. *Tuthill Affidavit* at 2.

Idaho Code § 42-203B(6) provides that "[t]he Director shall have the authority to subordinate the rights granted in a permit or a license for power purposes to subsequent upstream beneficial depletionary uses." Emphasis added. Thus, in considering comments prior to the issuance of the license, the Director is simply exercising the authority granted to him by statute. The Petitioners may not prevent the Director from acting pursuant to I.C. § 42-203B(6) by writ of mandate. Rather, if they disagree with the Director's decision regarding the subordination condition, their remedy is to pursue an administrative appeal.

The Petitioners are speculating about how the Director will condition their water right license. The fact remains, however, that until the Director has made his decision and issued the license, there is nothing for this Court to review. The Director is fulfilling his legal duty to the Petitioners, and cannot be compelled to exercise his statutory authority in a particular way. The Petitioners have no legal right to be issued a license before the Director has reviewed, to his satisfaction, the factors relevant to a determination about subordination. There are administrative remedies available to the

Petitioners if they choose to object to the license once it is issued. This Court, therefore, should dismiss this case for failure to state a claim upon which relief can be granted.

RESPONDENTS SHOULD BE AWARDED ATTORNEY FEES AND COSTS

As a direct and proximate result of Petitioners' actions in filing this matter, the Respondents have been required to expend legal resources and have also incurred various costs. Therefore, Respondents request attorneys' fees and costs under Idaho Code § 12-117 because Plaintiff has acted without any reasonable basis in law or fact. Plaintiff's filing of this action without first exhausting their administrative remedies was unreasonable. Thus, attorneys' fees and costs should be awarded to the Respondents.

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CONCLUSION

The Court should dismiss this case for lack of subject matter jurisdiction because the Petitioners are seeking judicial relief in a licensing proceeding that is ongoing, and because Petitioners have not exhausted their administrative remedies. Dismissal is also appropriate in this case because the Director is fulfilling his legal duty to the Petitioners and therefore a writ of mandate is improper.

DATED this 8th day of November, 2007.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General

Phillip J. Rassier

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

CHRIS M. BROMLEY
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 8th day of November 2007.

Document(s) served: MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Persons served:

Clerk of the District Court
300 North Lincoln, #201
Jerome, ID 83338

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CHRIS M. BROMLEY
Deputy Attorney General
Idaho Department of Water Resources

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 12

Answer,
North Side Canal Co. & Twin Falls Canal Co. v. Tuthill,
Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County)
(Dec. 21, 2007)

DISTRICT COURT
JUDICIAL DIST
IDAHO
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Michelle Emerson
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DEPUTY CLERK

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Attorneys for Respondents

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** **ANSWER**

Respondents David R. Tuthill, Jr., in his official capacity as Director of the Idaho Department of Water Resources ("the Director") and the Idaho Department of Water Resources ("IDWR" or "the Department") (collectively referred to herein as the "State"), and as their answer to Petitioners' *Petition for Peremptory Writ of Mandate*, admit, deny, and allege as follows:

1. The State admits that the allegations in Paragraph 1 of the Petition.

2. The State admits the allegations in Paragraph 2 of the Petition.

3. The State admits that Respondent, David R. Tuthill, Jr., is the Director of the IDWR, and a resident of Ada County.

4. The State admits that Respondent, the IDWR, is the executive department existing under Idaho state law, pursuant to Idaho Code § 42-1701 *et seq.*, and that its state office is located at 322 East Front Street, Boise, Idaho 83720, in Ada County.

5. The State denies the allegations in Paragraph 5 of the Petition.

6. The State denies the allegations in Paragraph 6 of the Petition.

7. The State admits that no protests were filed to the application for permit within the statutory timeframe and affirmatively alleges that the documents in Attachments A and B speak for themselves. The State denies the remaining allegations in Paragraph 7 of the Petition.

8. The State admits the allegations in Paragraph 8 of the Petition.

9. The State admits the allegations in Paragraph 9 of the Petition.

10. The State admits that L. Glen Saxton, then Chief of the Operations Bureau, sent Petitioners the letter dated April 13, 1987, in Attachment G. The State affirmatively alleges that the letter speaks for itself and therefore denies the remaining allegations in Paragraph 10 of the Petition.

11. The State admits that counsel for the Petitioners wrote a letter to the IDWR, dated May 8, 1987, and that the letter contained the language cited in Paragraph 11. The State admits that Petitioners included with the May 8, 1987 letter a copy of a

letter from IDWR, dated April 13, 1987 with handwritten changes to the subordination condition. The State denies the remaining allegations in Paragraph 11 of the Petition.

12. The State admits that the letter in Attachment I appears to be a true and correct copy of the letter sent to Petitioners from then-Director R. Keith Higginson, dated November 18, 1987. The State affirmatively alleges that said letter speaks for itself and therefore denies the remaining allegations in Paragraph 12 of the Petition.

13. The State admits that Petitioners submitted proof of beneficial use on October 29, 1993. The State affirmatively alleges that the documents in Attachment F speak for themselves and therefore denies the remaining allegations in Paragraph 13 of the Petition.

14. The State admits that it received the beneficial use report of Dr. Charles Brockway on November 1, 1993, and that it acknowledged receipt of such report in a letter dated December 9, 1993. The State admits that in a letter dated July 27, 2006, then-Director Karl J. Dreher indicated that the issuance of a license for the water right was pending. The State lacks adequate knowledge to respond to allegations regarding the understanding of the Petitioners regarding their water right, or as to whether Petitioners have been diverting and beneficially using water in accordance with the Milner Permit and beneficial use examination, and therefore denies those allegations. The State denies the remaining allegations in Paragraph 14 of the Petition.

15. The State admits that House Bill 800 ("HB 800") was approved by the 2006 Idaho House of Representatives and forwarded to the Idaho State Senate, where it failed. The State affirmatively alleges that HB 800 speaks for itself. The State denies the remaining allegations in Paragraph 15 of the Petition.

16. The State admits that the State of Idaho and Idaho Power Company entered into a Stipulation on April 11, 2006 and affirmatively alleges that said stipulation speaks for itself. The State denies the remaining allegations in Paragraph 16.

17. The State admits that Lower Snake River Recharge District was the prior owner of water rights 37-7842 and 01-7054, that it filed proof of beneficial use on the water rights in the summer of 1992, and that it filed a revised Beneficial Use Field Report for the water rights on November 29, 1993. The State affirmatively alleges that the documents speak for themselves and that proof of beneficial use for the undeveloped portion of the rights is due in June, 2009. The State denies the remaining allegations in Paragraph 17 of the Petition.

18. The State lacks adequate knowledge as to allegations that the Attorney General's office contacted counsel for the Petitioners and as to any requests made during said discussion, and therefore denies them. The State admits that it requested the Federal Energy Regulatory Commission ("FERC") to include a different subordination condition on the hydropower license, and that FERC issued a license for the Milner project in 1988. The State affirmatively alleges that the FERC license speaks for itself. The State denies the remaining allegations in Paragraph 18 of the Petition.

19. The State denies the allegations in Paragraph 19 of the Petition.

20. The State admits that the Idaho Water Resource Board's ("Water Board") recharge permits (37-7842 and 01-7054) were placed in the water supply bank for use at diversion points on the Snake River above Milner Dam, and were subsequently leased by the Water Board in 2006. The State admits that it approved the placement in the water supply bank of 800 cfs under 37-7842 and 900 cfs under 01-7054. The State admits that

in the spring of 2006, reservoir storage space above Milner Dam was filled, including reservoir storage space that had been filled and subsequently emptied through flood control releases. The State affirmatively alleges that the Director does not in the normal course of business provide notice of how water is distributed to other water rights, including, but not limited to, water right 01-7054. The State denies the remaining allegations in Paragraph 20 of the Petition.

21. The State admits that David Blew an employee with the Idaho Department of Water Resources provided an update on recharge efforts above Milner Dam to the Idaho Legislature's Natural Resource Interim Committee on July 12, 2006, and that during that meeting, Senator Chuck Coiner asked for a report on diversions under water right 01-7054. The State denies the remaining allegations in Paragraph 21 of the Petition.

22. The State denies the allegations in Paragraph 22 of the Petition.

23. The State denies the allegations in Paragraph 23 of the Petition to the extent they imply that reductions in flows to fill permit 01-07011 were the result of diversions for ground water recharge. The State denies that there was no factual or technical verification of the Director's conclusions in his letter to Senator Coiner dated July 27, 2006. The State affirmatively alleges that said letter speaks for itself.

24. The State affirmatively alleges that the letter to Senator Coiner from then-Director Dreher, dated July 27, 2006, speaks for itself and denies the remaining allegations in Paragraph 24 of the Petition.

25. The State admits that Petitioners orally requested that IDWR issue a license for the subject water right, and that the Director issued a Notice of Intent to Issue License on September 5, 2007. The State affirmatively alleges that said Notice speaks

for itself. The State lacks adequate knowledge regarding allegations of Petitioners' recognitions, and therefore denies them. The State denies the remaining allegations in Paragraph 25 of the Petition.

26. The State admits that the letters in Attachments Q, R, and S are true and correct copies of the letters cited in the Notice of Intent to Issue License. The State affirmatively alleges that the letters speak for themselves and therefore denies the remaining allegations in Paragraph 26 of the Petition.

27. The State has inadequate knowledge regarding the allegations in Paragraph 27 of the Petition and therefore denies them.

28. The State denies the allegations in Paragraph 28 of the Petition.

29. The allegations in Paragraph 29 consist of Petitioners' legal conclusions and characterization of Chapter 2, Title 42 of the Idaho Code and IDWR's Water Appropriation Rules, which speak for themselves; all allegations and characterizations inconsistent with any portion of the code or rules are denied.

30. The allegations in Paragraph 29 consist of Petitioners' legal conclusions and characterization of Idaho Code § 42-219 and IDAPA 37.03.02, which speak for themselves; all allegations and characterizations inconsistent with any portion of the code or the rule are denied.

31. The allegations in Paragraph 29 consist of Petitioners' legal conclusions and characterization of Chapter 2, Title 42 of the Idaho Code, which speaks for itself; all allegations and characterizations inconsistent with any portion of the code are denied.

32. The allegations in Paragraph 29 consist of Petitioners' legal conclusions and characterization of Chapter 2, Title 42 of the Idaho Code, which speaks for itself; all allegations and characterizations inconsistent with any portion of the code are denied.

33. The State admits that neither IGWA nor the entities referenced in the letter sent to the Director by Robert Harris on April 13, 2007 protested the application or moved to intervene within the statutory protest period. The State affirmatively alleges that the letters sent by IGWA, dated February 5, 2007, and Mr. Harris, dated April 13, 2007, speak for themselves and therefore denies the remaining allegations in Paragraph 33 of the Petition.

34. The State admits that, since 1993, it has never informed Petitioners that their diversion or use of water failed to comply with the law. The State lacks adequate knowledge as to the remaining allegations in Paragraph 34 of the Petition and therefore denies them.

35. The State denies the allegations in Paragraph 35.

36. The State incorporates by reference and re-alleges its answers to Paragraphs 1 through 35 of the Petition.

37. The State denies the allegations in Paragraph 37 of the Petition.

38. The State denies the allegations in Paragraph 38 of the Petition.

39. The State denies the allegations in Paragraph 39 of the Petition.

40. The State denies the allegations in Paragraph 40 of the Petition.

41. The State denies the allegations in Paragraph 41 of the Petition.

42. The State incorporates by reference and re-alleges its answers to Paragraphs 1 through 41 of the Petition.

43. The State denies the allegations in Paragraph 43 of the Petition.

44. The State denies the allegations in Paragraph 44 of the Petition.

45. The State denies the allegations in Paragraph 45 of the Petition.

AFFIRMATIVE DEFENSES

Failure to Meet Statutory Requirements for Issuance of a Writ of Mandamus

The Petition should be dismissed, as the Petitioners are not entitled to relief under a Writ of Mandamus because the administrative process presently before the director provides a plain, speedy and adequate remedy in the ordinary course of law. I.C. § 7-303. The issuance of an appropriately conditioned water license by the director is a discretionary act and not subject to review by the court in an action for a writ of mandamus. I.C. §7-302. *Andrus v. Smylie, 92 Idaho 846, 452 P. 2d343 (1969).*

Failure to Exhaust Administrative Remedies
Lack of Subject Matter Jurisdiction

The Idaho Administrative Procedure Act provides that "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter." Idaho Code § 67-5271. Until administrative remedies are exhausted, a district court is without subject matter jurisdiction to consider the matter. *See American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources,* 143 Idaho 862, 154 P.3d 433, 453-54 (2007); *White v. Bannock County Comm'rs*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003). As Petitioners have not exhausted the administrative remedies provided by Idaho Code §§ 42-1701A(3) and (4), the Petition should be dismissed for lack of subject matter jurisdiction under Idaho Rule of Civil Procedure 12(b)(1).

Failure to State a Claim

Petitioners have failed to state a claim upon which relief can be granted. Idaho Rule of Civil Procedure 12(b)(6). Therefore, Petitioners' Petition should be dismissed.

REQUEST FOR ATTORNEYS FEES

The State, in order to defend against this action, which is without a reasonable basis in fact or law, have been required to incur attorneys fees, witness fees, and reasonable expenses. Therefore, the State requests attorneys fees and costs under Idaho Code § 12-117 in an amount to be later proven at trial.

PRAYER FOR RELIEF

WHEREFORE, the State prays for the following relief:

A. That the Court enter judgment against Petitioners on all their claims for relief in the Petition, dismiss all of said claims for relief, deny the Petitioners' Prayer for Relief and order that Petitioners shall take nothing;

B. That the Court grant the State attorneys fees, costs and expenses, including expert witness fees; and

C. Such further relief that this Court deems just and proper.

DATED this 21st day of December, 2007.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General

Phillip J. Rassier

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December 2007, I caused to be served a true and correct copy of the foregoing **ANSWER** to the following parties by the indicated methods:

Clerk of the District Court
300 North Lincoln, #201
Jerome, ID 83338

☒ U.S. Mail, postage prepaid

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Phillip J. Rassier

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

Exhibit 13

Petitioners' Response to Respondents' Motion to Dismiss, North Side Canal Co. & Twin Falls Canal Co. v. Tuthill, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County) (Dec. 14, 2007)

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RECEIVED
DEC 17 2007
DEPARTMENT OF WATER RESOURCES

SCANNED
MAR 13 2008

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 PETITIONERS' RESPONSE TO RESPONDENTS' MOTION TO DISMISS

COMES NOW, the Petitioners, North Side Canal Company and Twin Falls Canal Company (collectively referred to as "Canal Companies" or "Petitioners"), and submit this *Response to Motion to Dismiss*. For the foregoing reasons, this Court should deny the Respondent's motion to dismiss and should allow this matter to proceed so that the parties may

address the issues and questions identified by the Court in its October 10, 2007 *Order Denying Petition for Alternative Writ of Mandate* ("*October 10th Order*").

INTRODUCTION

In its *October 10th Order*, this Court denied the Petitioners request for immediate relief via an alternative writ of mandate. In doing so, the Court indicated that the request was denied in order to "allow the Respondents to answer the allegations of the Petition and to present legal argument and/or evidence as may be appropriate prior to the Court deciding whether to issue a writ of mandate." *October 10th Order* at 3-4. Rather than addressing the Court's questions and answering the Petition, however, the Respondents have filed a motion to dismiss under the guise of jurisdictional grounds. The Respondents would have this Court believe that the Petitioners are seeking a premature judicial review of an anticipated decision by the Director of the Idaho Department of Water Resources ("IDWR"). They assert that, since the Director issued a *Notice of Intent to Issue License*, mandate is not an appropriate remedy. The Respondents have mischaracterized the intent of the pending Petition and the law.

Moreover, the Respondents' reliance upon the Director's September 5, 2007 *Notice of Intent to Issue License* and the unlawful process initiated therein further supports the Petitioners' case before this Court. Contrary to the Respondents' claims, Petitioners are seeking "to force the Director to act", and to act in compliance with his clear legal duty to issue a license in conformance with the procedures expressly provided by state law. Reopening a long-expired protest period under the guise of a "comment period", authorizing out-of-priority diversions to the injury of the Milner Permit, and ignoring the statutory duty to issue a license by simply stating the Director intends to issue the license at some indefinite point in time, are all actions that exceed the agency's authority and are properly before the Court on a writ of mandate. As

evidenced by these facts, and the Director's continued refusal to issue a license, now over two months after this Petition was filed, any so-called administrative remedies are futile and mandamus is warranted.

Petitioners are not seeking any premature review of the Director's anticipated decision. Rather, Petitioners are seeking to prevent the further injury to water right 01-07011 (the "Milner Permit") due to out-of-priority recharge activities upstream of Milner Dam. The Milner Permit is senior in priority to certain water rights held by the Water Resource Board for groundwater recharge purposes (the "Recharge Permits"). In addition, the Milner Permit expressly states that it is not subordinated to ground water recharge activities. Notwithstanding this fact, and the agreement on the condition reached between Petitioners and Respondents nearly twenty years ago, the Respondents have unlawfully curtailed the Milner Permit at times when the Recharge Permits have been diverting and reducing the water supplies in the Snake River.

In addition, Petitioners seek to force the Director to comply with the law in issuing a license for the Milner Permit. Notwithstanding the lack of any legal authority, the Respondents, at the urging of upstream ground water users, reopened the protest period on the Milner Permit more than 30-years after the original protest period ended and more than 13-years after proof of beneficial use was filed with IDWR under a so-called "comment period" process. The Respondents rely solely on Idaho Code § 42-203B(6) to justify these actions. Such an expansive interpretation of section 42-203B is not supported by the clear language of the code and to the best of Petitioners' knowledge is an unprecedented move by IDWR in carrying out its ministerial function to issue a license. Contrary to the Respondent's arguments, neither IDWR nor the Director are immune from this mandate action. The fact the Director has failed to issue the license to date only further supports the Petitioners' case. Respondents acknowledge the clear

legal duty by noting the Director "intends to issue the license", yet they fail to address the question of "when", which leaves the Petitioners to speculate whether another 13 years will pass before the Director follows the law and issues the license.

The Court should deny the Respondents' motion to dismiss and allow this action to proceed to hearing so that the issues identified in the *October 10th Order* may be addressed by the Parties and a trial on the Petition may be heard.

STATEMENT OF FACTS

The facts relevant to these proceedings are set forth in the *Petition for Peremptory Writ of Mandate*, filed with this Court on September 28, 2007. The Petitioners adopt that statement of the facts for purposes of the briefing on this matter. However, a few important facts bear repeating.

Petitioners filed their original Application for Permit on March 30, 1977. *Petition* at ¶ 7. At that time, and in accordance with the law, the notice of the application was published, which indicated that the protest period would run until June 6, 1977. *Id.* As ***no protests were filed***, the permit was issued on June 29, 1977. *Id.*

In 1987, the Petitioners sought, and received, a second extension of the deadline to file proof of beneficial use. *Id.* at ¶ 10. Importantly, in the few years preceding this time, the Swan Falls Agreement was executed and the Legislature passed Idaho Code section 42-203B, which allowed IDWR to subordinate hydropower rights. IDWR conditioned an extension of the deadline on the Petitioners' acceptance of a subordination provision on the permit. *Id.* Following negotiations, the Petitioners and IDWR agreed on subordination language for the Milner Permit. *Id.* at ¶¶ 11-12. The language specifically provides that the Milner Permit is not subordinated to water rights for groundwater recharge. *Id.* This language remains a condition

of the Milner Permit. *Id.* Furthermore, since no protests were filed and no other water users exercised their right to participate in this proceeding, only IDWR and the Petitioners were party to these negotiations and the agreement on the condition. The Petitioners filed proof of beneficial use in 1993, *id.* at ¶ 13, and have relied upon and used water pursuant to the Milner Permit and its existing conditions, including the subordination provisions, since that time.

In 2006, the Legislature attempted to pass legislation that would potentially jeopardize the Petitioners' ability to use the Milner Permit. *Id.* at ¶ 15. Shortly thereafter, IDWR allowed groundwater recharge activities under the Water Board's Recharge Permits, upstream of the Milner Dam, even though there was insufficient water to fill the Milner Permit. *Id.* at ¶¶ 20 & 21-24. This fact has been admitted to by the Respondents. *Id.* at ¶ 23. Petitioners' concerns over these activities were met with threats to subordinate the Milner Permit to groundwater recharge. *Id.* at ¶ 19.

Recognizing that the protest period had long expired and that more than 13-years had passed since proof of beneficial use was demonstrated, the Petitioners requested, in 2006 and again in 2007, that the Department issue a license. *Id* at ¶ 25. The Respondents refused and have yet to issue the license, even three months after this case was filed. *Id.* Rather, the Director issued and is relying upon his *Notice of Intent to Issue License*, in which the Director indicated that he would accept and consider "comments", by reopening a long lapsed protest period, from any interested parties. *Id* at ¶ 28.

STANDARD OF REVIEW

When a court reviews a motion to dismiss, the "pleadings are to be liberally construed." *Argonaut Ins. Co. v. White*, 86 Idaho 374, 376, 386 P.2d 964, 964 (1963). Furthermore, "when

considering a motion to dismiss the complaint ***all facts alleged therein are to be considered as true***, it is the plaintiff's alleged right to relief that is thereby challenged." *Id.* (emphasis added).

> On a motion to dismiss, the court looks only at the pleadings, and all inferences are viewed in favor of the non-moving party. [] "[T]he question then is whether the non-movant has alleged sufficient facts in support of his claim which, if true, would entitle him to relief." [] "[E]very reasonable intendment will be made to sustain a complaint against a motion to dismiss for failure to state a claim." [] "***The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims.***"

Owsley v. Idaho Ind. Comm., 141 Idaho 129, 133, 106 P.3d 455, 459 (2005) (internal citations omitted) (emphasis added). As discussed in further detail below, the *Petition* filed in this matter sets forth sufficient facts to support a writ of mandate against the Respondents.

While a party is generally required to exhaust administrative remedies prior to judicial action, *see* I.C. § 67-5271, this rule is not, as the Respondents imply, an absolute bar to judicial action. *See Grever v. Idaho Telephone Co.*, 94 Idaho 900, 903, 499 P.2d 1256, 1259 (1972) ("While as a general rule administrative remedies should be exhausted before resort is had to the courts ... such rules is not absolute and will be departed from ... under certain circumstances"); *Bohemian Breweries v. Koehler*, 80 Idaho 438, 332 P.2d 875 (1958) (same). These well-established exceptions were recently affirmed by the Supreme Court in *AFRD#2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007) (recognizing two exceptions to the general rule of exhaustion). Indeed, the "doctrine of exhaustion of administrative remedies affords no rigid rule applicable indiscriminately in each and every situation where a party resorting to a court has failed to exhaust an available administrative remedy, but is subject to some limitations." *Bohemian Breweries*, 80 Idaho at 446, 332 P.2d at 879-80.

A number of exceptions to the rule of exhaustion are recognized in Idaho. Primary among these are "when the interests of justice so require and when an agency has acted outside

of its authority." *AFRD#2, supra.* In addition, a "preliminary, procedural, or intermediate agency action or ruling is ***immediately reviewable*** if review of the final agency action ***would not provide an adequate remedy.***" I.C. § 67-5271(2) (emphasis added). "Determining whether the exceptions should apply is a question of law." *Peterson v. Pocatello*, 117 Idaho 234, 236, 786 P.2d 1136, 1138 (App. Ct. 1990).

I. **Petitioners are Not Seeking Judicial Review of the Anticipated License**

Respondents allege that this action is nothing more than an attempt at premature judicial review and that, therefore, this action must be dismissed. *Respondents Memo* at 4-7. The Respondents are wrong. The language of the *Petition*, filed on September 28, 2007, speaks, in plain terms, to the intent of the Petitioners in this action: "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." *Petition* at ¶ 41 (emphasis added). The Petitioners are aware of their rights to appeal and a hearing pursuant to Idaho Code section 42-1701A and the Administrative Procedures Act. However, these statutory provisions do not prevent Petitioners from seeking to compel the Respondents to comply with the law when the continued actions of the Respondents cause injury to the Milner Permit and are outside of any statutory authority.

Rather than comply with section 42-219, the Respondents have delayed the issuance of the license and have now allowed additional protests to the Milner Permit. Respondents justify their packing of the record based on notions of "discretion" derived from an overly broad interpretation of Idaho Code § 42-203B. *See infra* Part III. In addition, Respondents' subordination of the Petitioners' water right to the Water Board's junior Recharge Permits has

caused and will continue to cause injury to the senior Milner Permit, and is in direct violation of the negotiated subordination provision contained in the Milner Permit. Rather than seeking judicial review of an anticipated decision, as the Respondents assert, Petitioners are merely seeking to prevent the continued unlawful actions of the Respondents and an order from the Court requiring Respondents to comply with the law and issue the long overdue license. The Petition filed in this matter makes this fact clear. As such, the Respondents' motion to dismiss for failure to exhaust administrative remedies should be denied. However, should the Court consider this mandamus action to be an attempt at judicial review, the following exceptions apply and necessitate denial of the Respondents' motion.

II. Since Any Administrative Remedy Would Be Inadequate, the Interests of Justice Require Immediate Judicial Action.

Respondents' argument that Petitioners should have to exhaust administrative remedies before seeking relief from this Court is incomplete and misleading. Respondents' ignore the well-recognized exceptions to the exhaustion doctrine which apply here. Pursuant to Idaho Code § 67-5271(2), "[a] preliminary, procedural, or intermediate agency action or ruling is *immediately reviewable* if review of the final agency action *would not provide an adequate remedy*." (Emphasis added). Under such circumstances, "the interests of justice so require" that the judiciary respond. *AFRD#2, supra.*

Immediate judicial action is warranted in this case for at least two reasons. First, the Director's arbitrary reopening of the protest period in this matter is an action which has no support in the law, and which does not afford the Petitioners an adequate administrative remedy. To that extent, the *Petition* seeks a writ of mandate voiding the Director's *Notice of Intent to Issue License* and closing any protest or comment period. *Petition* at 1-2 & ¶¶ 39 & 43; Prayer at ¶¶ 1 & 2. Requiring the Petitioners to wait while the Director creates a new record via an

unlawfully reopened protest period will prevent them from obtaining the full relief sought, namely, a writ of mandate preventing the Respondents from reopening and adding unauthorized protests or "comments" to the record in the license proceeding through an unlawful procedure, created pursuant to the *Notice of Intent to Issue License*.

Furthermore, Petitioners are subject to irreparable injury as a result of the Director's subordination of the Milner Permit to the junior priority Recharge Permits. "No court requires exhaustion when exhaustion will require irreparable injury." *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978) (citation omitted). In *Sierra*, the court rejected a claim that the petitioner failed to exhaust administrative remedies and exercised jurisdiction over an action involving proposed unlawful conduct that would allegedly cause the petitioner irreparable harm.

As alleged in the *Petition* in this case, 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 in April 2006, and were then apparently leased out of the water bank by the Water Board in the spring of 2006. *Petition* at ¶ 20. Petitioners are aware of no Department investigation or order determining whether or not such use would cause injury to other existing water rights, including the Milner Permit. *Id.* Petitioners are likewise unaware of any statutes or rules authorizing the lease of a water right permit to and from the State Water Supply Bank. Yet, as the Respondents recognize, while water was being diverted under the Recharge Permits, there was a reduction in flows to fill the Milner Permit. *Id.* at 23. During this time, water was diverted to the detriment of the Milner Permit. *Id.* Such a pattern of injury could repeat itself in Spring 2008. Accordingly, it is essential that Petitioners obtain immediate judicial relief in order to protect

their interests in the Milner Permit. Requiring Petitioners to wait for some indefinite period of time until the Director issues a license would enable such injury to continue.

Since any administrative remedy available to Petitioners would be inadequate, the interests of justice require immediate judicial action. Any exhaustion of administrative remedies, therefore, would not be required.

III. The Director Acted Outside his Scope of Authority by Issuing the *Notice of Intent to Issue License* and Reopening the Protest Period on the Milner Permit.

Respondents attempt to justify reopening the protest period for the Milner Permit based on an incorrect interpretation of section 42-203B(6). In doing so, the Respondents are hiding behind the *Notice of Intent to Issue License*, as though it were a shield – impervious to any challenge by the Petitioners. According to the Respondents, the decision whether to issue a license, along with the conditions that should be attached thereto, is a "discretionary act" and, therefore, mandate is not appropriate. To the contrary, however, issuing a license after the permit holder has complied with the law and submitted proof of beneficial use is not "discretionary", it is required by Idaho Code § 42-219. Respondents further ignore the fact that the Director is acting without any legal authority in reopening a protest or "comment" period, and failing to issue the license in conformance with Idaho Code § 42-219. Apparently, Petitioners must sit back and allow the Respondents to continue acting outside of the law and wait for some indefinite time before a license is issued even though the Respondents' actions in the interim have caused and will continue to cause injury to the Milner Permit. *See, supra*. The law does not support this theory or the reckless processing of a person's water right.

A similar argument was raised by the Respondents in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). In that case, a water user brought a mandamus action against the Director and IDWR to compel them to administer groundwater rights that were injuring his

senior surface water rights. *Id.* at 394, 871 P.2d at 811. The Director and IDWR then "moved to dismiss the [action] ... arguing that the request was moot because ... the director issued ***a notice of intent to promulgate rules*** and a notice and order for a contested case." *Id.* (emphasis added). These anticipated rules were intended to address the conjunctive administration of surface water and groundwater rights. *Id.* The trial court denied the motion, concluding "that the director owes the Mussers 'a clear legal duty to distribute water under the prior appropriation doctrine,'" and that the failure to adopt rules "was a breach of [the director's] 'mandatory ministerial duty.'" *Id.* In affirming the decision of the trial court, the Supreme Court recognized that "For more than three-quarters of a century, the Court has adhered to the following principle: '***The fact that certain details are left to the discretion of the authorities does not prevent relief by mandamus.***'" *Id.* at 395, 871 P.2d at 813 (emphasis added). Furthermore, "Although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water." *Id.*

Likewise, the Director has a duty to issue a license whenever an applicant has complied with all statutory requirements. *See* I.C. § 42-219. However, like in *Musser*, the Respondents are once again arguing that the discretion recognized in the law prohibits this action. In doing so, the Respondents are yet again ignoring their clear legal duties, this time by failing to issue a license pursuant to the express statutory procedures. The law regarding processing a water right application, proving up a permit, and issuing a license is clear. First, an application is filed. I.C. § 42-202. Next, IDWR publishes notice of the application and opens a protest period. *Id.* at § 42-203A.[1] If necessary, a hearing is held to resolve any protests to the application. *Id.* IDWR then examines the application, issues a permit and provides the applicant with up to five-years to

[1] *See Keller v. Magic Water Co.*, 92 Idaho 276, 441 P.2d 725 (1968) ("it is to be presumed that proof of publication of the notice was made as required by I.C. 42-203[A], and that in passing upon the application the state reclamation engineer complied with statutory provisions concerning filing of protests to granting of the application").

complete the diversionary works and put the water to beneficial use. *Id.* at §§ 42-204 to -205; -212; -217; -218. "***Upon receipt by the department*** ... 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.***" *Id.* at § 42-219[2] (emphasis added). Finally, "any person aggrieved" by the Director's licensing decision may seek a hearing on the matter. *Id.* at § 42-1701A(3). Nowhere in these provisions, or any others for that matter, is the Director authorized to reopen the protest period on an application following the expiration of the original protest period by way of a newly created "comment period" process.

Respondents admit the unlawful procedures to date: "As matters stand, the Director has taken all submitted comments into consideration and will issue a license as authorized by statute upon reaching a decision." *Respondents' Memo* at 6. No statute or administrative rule authorizes this procedure. Respondents' only support for such action is found in an expansive, and incorrect, interpretation of Idaho Code § 42-203B(6).[3] According to the Respondents, section 42-203B(6) allows the Director to consider "comments prior to the issuance of the license." *Respondents' Memo* 9. Respondents are wrong as a matter of law. The plain language of the statute says nothing of reopening a protest period more than 30-years after it has expired

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[2] The Milner Permit does comply fully with the law. Section 42-203B *authorizes* – but does not require – the director to subordinate hydropower rights. In light of this authority, the Respondents and Petitioners negotiated subordination language for the Milner Permit. This negotiated language remains a condition on the Milner Permit.

[3] Idaho Code § 42-203B(6) provides:

> 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.

Contrary to Respondents' assertion, this provision does not grant the Director any permission to reopen a protest period on a permit.

and 20-years after the specific subordination provision was negotiated between the Respondents and Petitioners, the only parties involved in this proceeding.

Respondents distort the intent of these proceedings – arguing that the Petitioners are attempting to use this mandamus action to force the Director to make a particular decision. The Respondents argue that the "Petitioners may not prevent the Director from acting pursuant to I.C. § 42-203B(6) by writ of mandate." *Id.* However, as indicated in the *Petition*, the Petitioners are not seeking to force the Director's discretion. Indeed, as indicated in the *Petition,* at ¶¶ 10-12, the decisions regarding subordination of the Milner Permit were already negotiated and determined by all then-involved parties, including the Respondents, after the enactment of section 42-203B. The Director has no authority to ignore his clear legal duty now, and disregard the beneficial use that has already been made and submitted to IDWR, in compliance with the law and upon reliance of the existing conditions in the permit.

Finally, Respondents even go so far to claim that "Petitioners have no legal right to be issued a license before the Director has reviewed, to his satisfaction, the factors relevant to a determination about subordination." *Respondents' Memo* at 9. Petitioners do have a legal right to a license as provided by Idaho Code § 42-219. Contrary to Respondents' argument, the only "factors" relevant to the decision are those set forth in the statute, not some undefined list of subjective considerations that are subject to the Director's "satisfaction."

In light of ongoing injury to the Milner Permit, the Respondents' violation of the law by reopening the protest period on the Milner Permit, the failure to act for thirteen-years and for almost two-years after specifically requested by Petitioners to issue the license, exhaustion of administrative remedies is not required and mandamus is appropriate. Accordingly, the Court

should deny Respondents' motion to dismiss and grant the *Petition for Peremptory Writ of Mandate.*

ATTORNEYS FEES

Under Idaho Code § 12-117, an award of attorneys' fees is appropriate only "if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law." "The purpose of I.C. § 12-117 is to serve as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made." *Canal/Norcrest/Columbus Action Committee v. City of Boise*, 136 Idaho 666, 39 P.3d 606 (2001). The award of attorneys' fees here would satisfy neither the standards nor the purpose of section 12-117, particularly at the motion to dismiss stage where the merits have not even been addressed. Since it is evident that all of the claims of the Petitioners have "a reasonable basis in fact [and] law," Respondents' claim for fees should be denied.

CONCLUSION

The Respondents' motion to dismiss seeks to greatly expand the authority of the Director provided in Idaho Code § 42-203B(6). In doing so, the Respondents wholly ignore the issues and questions identified in the Court's *October 10th Order*. Contrary to the Respondents' mischaracterization of this matter, the Petitioners are not seeking judicial review of any anticipated decision by the Director. Rather, the Petitioners have filed this mandamus action in an effort to force the Director to comply with the law in issuing a license on the Milner Permit. The actions of the Respondents have injured the Petitioners and will continue to injure them so long as the Respondents are permitted to subordinate the Milner Permit in direct violation of the negotiated subordination provisions. In addition, the Director's reliance on Idaho Code § 42-

203B to support reopening the protest period on a permit more than 30-years after it was issued is without merit. There is no support in the law for these actions and the Respondents are acting outside the scope of their statutory authority. Allowing this unlawful process to proceed does not provide an adequate administrative remedy. The Respondents' actions to date, including the Director's continued refusal to issue a license nearly three months after this case was filed, all lead to the conclusion that this Court's intervention is required. Accordingly, the Respondents' motion to dismiss should be denied.

Dated this 14th day of December, 2007.

BARKER ROSHOLT & SIMPSON, LLP

Paul L. Arrington

Attorneys for North Side Canal Company & Twin Falls Canal Company

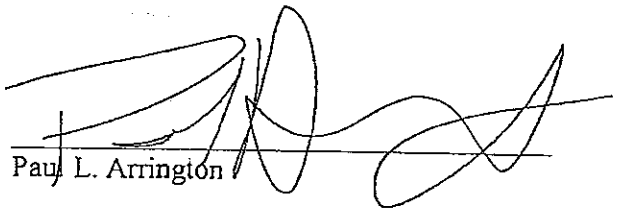
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of December, 2007, I served the foregoing CANAL COMPANIES' RESPONSE TO MOTION TO DISMISS upon the following via manner so indicated below:

Phillip J. Rassier
Chris Bromley
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

Attorneys for Idaho Department of Water Resources and David R. Tuthill, Jr.

- [x] U.S. Mail, Postage Prepaid
- [ ] Hand Delivery
- [ ] Overnight Mail
- [ ] Facsimile
- [x] Email



Paul L. Arrington

Exhibit 14

Order Granting Motion to Dismiss Petition for Writ of Mandate, North Side Canal Co. & Twin Falls Canal Co. v. Tuthill, Case No. CV 2007-1093 (Fifth Jud. Dist., Jerome County) (Jan. 25, 2008)

RECEIVED
JAN 29 2008
DEPARTMENT OF
WATER RESOURCES
Michelle Emerson

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 ORDER GRANTING MOTION TO DISMISS PETITION FOR WRIT OF MANDATE

I. PROCEDURAL HISTORY

On September 26, 2007, the North Side Canal Company and Twin Falls Canal Company (collectively as "Petitioners"), through counsel of record Barker Rosholt & Simpson LLP, filed a *Petition for Peremptory Writ of Mandate* ("*Petition*") petitioning the Court to issue a writ of mandate compelling the Idaho Department of Water Resources ("IDWR" or "Department") and its Director David R. Tuthill Jr. (collectively as "Respondents") to void the Director's September 5, 2007, Order; to close any protest or comment period; and to issue a license to the Petitioners in accordance with Respondents' statutory duties as defined by Idaho Code § 42-219. Also on September 26, 2007, the Petitioners filed an *Application for Alternative Writ of Mandate*.

On the same date, the Honorable John K. Butler filed an ***Order of Disqualification***. The case was assigned to the undersigned judge on October 1, 2007, in his capacity as District Judge for the Fifth Judicial District and not in his capacity as Presiding Judge of the Snake River Basin Adjudication.

On October 10, 2007, this Court issued an ***Order Denying Petition for Alternative Writ of Mandate.***

On November 6, 2007, the Respondent's filed a *Motion to Dismiss* pursuant to I.R.C.P. 12(b)(1) and (6), together with a *Memorandum* and *Affidavit in Support*.

On December 14, 2007, the Petitioners filed a *Response to Respondents' Motion to Dismiss.*

A hearing was held on the *Motion to Dismiss* on December 21, 2007. At the conclusion of the hearing, the Court took the matter under advisement. Also on December 21, 2007, the Respondents filed an *Answer*. Following the hearing, the Court received an *Amicus Brief*, together with a supporting affidavit, filed on behalf of Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Monteview Canal Company, Producers Canal Company, Fremont-Madison Irrigation District and Eastern Idaho Water Rights Coalition (collectively as "Amici").

II. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on December 21, 2007. The parties did not request the opportunity to submit additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or December 24, 2007.

III. FACTS

On March 30, 1977, the Petitioners filed an *Application for Permit* with IDWR to appropriate water from the Snake River for year-round hydropower production at the Milner power plant at a rate of diversion up to 12,000 cfs. Notice was published in accordance with

Idaho Code § 42-201. As no protests were filed a permit was issued to the Petitioners on June 29, 1977 ("Milner Permit").

The deadline for filing proof of beneficial use under the permit was originally June 1, 1982. As a result of delays, the Petitioners sought and received deadline extensions in 1982, 1987, 1990, and 1992. Prior to seeking an extension of the 1987 deadline, the Swan Falls Agreement was executed and the Legislature passed Idaho Code § 42-203B, which among other things authorized IDWR to subordinate hydropower rights to future upstream consumptive uses. As a result, in 1987 when the Petitioners sought the second extension, the Chief of Operations Bureau for IDWR, L. Glen Saxton, notified the Petitioners that the granting of the extension would be conditioned on the Petitioners acceptance of the following subordination provision:

> 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.

Attachment G to *Petition.*

In a letter dated May 8, 1987, counsel for Petitioners raised the following concern with the proposed condition:

> 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 the 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 to *Petition.* Counsel for Petitioners then proposed the following amendments to the condition:

> 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).

In a letter dated November 18, 1987, the Respondents notified the Petitioners that they would use the amended language proposed by counsel for Petitioners as a condition of approval on the extension request. This is the condition that appears in the Milner Permit.

On October 29, 1993, the Petitioners submitted proof of beneficial use for 5,714.7 cfs, of the 12,000 cfs for which application was originally made. Since that time the Petitioners have relied on the Milner Permit and have been beneficially using water under the permit.

In 2006 and the spring of 2007, the Petitioners verbally requested that the Respondents issue a license for the Milner Permit. On September 5, 2007, in response to the Petitioners' request, the Respondents issued a *Notice of Intent to Issue License*. Attachment P to *Petition*. The *Notice of Intent* set forth the background and status of the Milner Permit and then provided, in relevant part:

> 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 Permit Holders have orally requested that the Respondent issue a license for the water right.
>
> The Department received written requests for notice of an opportunity to be heard on the form of the subordination condition to be included in 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.

In response, the Petitioners initiated this action seeking a writ of mandate to compel the Respondents to issue a license for the Milner Permit in accordance with Idaho Code 42-219 and to prohibit the actions the Respondents were taking as provided by the September 5, 2007, *Notice of Intent to Issue License*. The Petitioners did not submit written comments to IDWR as provided by the *Notice* nor did they request a hearing before the Director.

IV. DISCUSSION

A. Arguments

The Respondents have now moved to dismiss the Petition alleging that the Petitioners have failed to exhaust available administrative remedies. The Respondents argue that Petitioners must wait until the license is issued and then pursue these remedies through the administrative process and the Idaho Administrative Procedures Act, Idaho Code § 67-5201 *et seq*.

The Petitioners argue that there are no more administrative remedies available because Idaho Code § 42-219 requires that the Petitioners perform the ministerial function of issuing the license after proof of beneficial use has been submitted. The Petitioners argue that Respondents are acting outside the scope of their authority by reopening the administrative record to comments after the protest period has closed, the permit issued, diversion works completed, and beneficial use proven. The Petitioners argue that the considerable investment in the diversion (hydropower) project was made in reliance on the issuance of the permit and the conditions ultimately negotiated and agreed upon. By permitting the record to be reopened to comments at this stage allows for protests to cloud an administrative record that was previously free of protests when the *Application for Permit* was approved and the diversion works completed in reliance on said approval.

B. Standards of Review

1. Motion to Dismiss, I.R.C.P 12(b)(1) and (6).

The Respondents'. *Motion to Dismiss* is brought pursuant to I.R.C.P. 12(b)(1) "lack of jurisdiction over subject matter" and I.R.C.P. 12(b)(6) "failure to state a claim upon which relief can be granted." The failure to exhaust administrative remedies can implicate subject matter jurisdiction because a "district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted." *Owsley v. Idaho Industrial Com'n*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005) (citing *Fairway Development v. Bannock County*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990)). The failure to exhaust administrative remedies can also be brought under I.R.C.P. 12(b)(1). *Id.* If a claimant fails to exhaust administrative remedies, then dismissal of the claim is warranted. *White v. Bannock County Comm'rs*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003) (string citations omitted). On a motion to dismiss, "the Court looks only at the pleadings and all inferences are viewed in favor of the non-moving party." *Id.* at 133, 106 P.2d at 459 (citing *Young v. City of Ketchum*, 137 Idaho 102, 1094, 44 P.3d 1157, 1159 (2002)).

The Idaho Administrative Procedures Act provides that "[a] person is not entitled to judicial review of an agency decision until that person has exhausted all administrative remedies required in this chapter." I.C. § 67-5271(1). However, "[a] preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not permit an adequate remedy." I.C. § 67-5271(2). There are two recognized exceptions to the exhaustion requirement: (1) When the interests of justice so require and (2) when an agency has acted outside its authority. *American Falls Reservoir Dist #2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (March 15, 2007). In *American Falls Reservoir Dist #2*, the Idaho Supreme Court recently held:

> Important policy considerations underlie the requirement for exhaustion of administrative procedures, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body.

Id. at 872, 154 P.3d at 443 (citing *White v. Bannock County Comm'rs*, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003)).

2. Writ of Mandate.

Idaho Code § 7-302 provides that a writ of mandate "may be issued . . . to compel the performance of an act which the law especially enjoins as a duty resulting from the office, trust or station . . . ." Idaho Code § 7-303 provides that the "writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." In *Idaho Falls Redevelopment Agency v. Countryman*, 118 Idaho 43, 794 P.2d 632 (1990), the Idaho Supreme Court stated "[m]andamus will lie if the officer against whom the suit is brought has a 'clear legal duty to perform the desired act and if the act sought to be compelled is ministerial or executive in nature.'" *Id.* at 44, 794 P.2d 633 (quoting *Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 953, 703 P.2d 714, 717 (1985). A ministerial act is:

> That which is done under the authority of a superior; opposed to *judicial.* That which involves obedience to instructions, but demands no special discretion, judgment or skill. Official's duty is 'ministerial' when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts.

Ausman v. State, 124 Idaho 839, 842, 864 P.2d 1126, 1129 (1993).

Further, the "[e]xistence of an adequate remedy in the ordinary course of law, whether legal or equitable in nature will prevent issuance of a writ . . . and the party seeking the writ must prove that such remedy exists. . . . [M]andamus is not a writ of right and the allowance or refusal to issue a writ of mandate is discretionary. *Id.* (citations omitted).

3. Discretion of Court.

A court acts within its discretion when it: 1) correctly perceives the issue as one of discretion; 2) acts within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) reaches its decision by exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993 1000 (1991).

C. Analysis

1. The Petitioners have failed to exhaust all available administrative remedies.

The Court holds that the Petitioners may not use a writ of mandate as a substitute for following the grievance process set forth in Idaho Code § 42-219(8) and Idaho Code § 42-1701A(3). Idaho Code §§ 42-219(8) and 42-1701A(3) set forth the administrative procedure for contesting IDWR's action with respect to issuing a license or failing to issue a license based on a permit. Idaho Code § 42-219(8) states:

> In the event that the department shall find applicant has not fully complied with the law and the conditions of the permit, it may issue a license for a portion of the use which is in accordance with the permit, may refuse issuance of the license and void the permit. Notice of such action shall be forwarded to the permit holder by certified mail.

I.C. § 42-219(8). The statute then provides: "The applicant may contest such action by the department pursuant to section 42-1701A." *Id.*

Idaho Code § 42-1701A(3) provides:

> Unless the right to a hearing before the director or the water resources board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director within fifteen (15) days after receipt of written notice . . . a written petition stating the grounds for contesting the action by the director and requesting a hearing.

I.C. § 42-1701A(3). Idaho Code § 42-1701A(4) then provides:

> Any person who is aggrieved by a final decision or order of the director is enabled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in Chapter 52, title 67, Idaho Code.

The Petitioners filed proof of beneficial use on October 29, 1993. On July 27, 2006, Director Dreher indicated in a letter that "the issuance of a license for the water right is pending." Petitioners then verbally requested that Respondents issue a license in 2006 and again in 2007. In response Director Tuthill, who succeeded Director Dreher issued the *Notice of Intent to Issue*

License. The *Notice* referred to the communications received from other water users regarding the subordination provision and stated that the Department would receive comments on the issuance of the license on or before October 10, 2007. The *Notice* did not reopen a protest period nor did it give those submitting comments party status. The Petitioners did not respond to the *Notice*, nor otherwise object to the Director's reopening of the record to comments, nor did they ask for a hearing before the Director on the issue. The Petitioners also could have waited until the license was issued and then request a hearing. The Petitioners argue that continuing with the administrative process will result in the administrative record becoming improperly clouded with additional facts after the protest period has already closed resulting in prejudice and ultimately precluding any adequate remedy. The Petitioners also argue that after the beneficial use examination for the permit the issuance of the license is ministerial and because IDWR is acting outside the scope of its authority all administrative remedies have been exhausted. This Court disagrees.

The Petitioners had the opportunity to raise with the Director the issue of receiving comments by submitting their own comment or by specifically requesting a hearing on the alleged irregularities in the process in accordance with Idaho Code § 42-1701A(3). The Petitioners also still have the opportunity to raise and be heard on the issue once the license is issued. Ultimately, if the Director issues the license according to the subordination condition now included in the permit, the Petitioners have no grievance. If the Director modifies the condition the petitioners can raise the issue with Director and ultimately seek judicial review in accordance with Idaho Code § 42-1701A(4). Because the issue of whether the Director can appropriately consider additional comments after the beneficial use examination presents a threshold question of law a reviewing Court would be not be bound by the Director's determination on this issue as would be the case with the Director's factual determinations. Were it ultimately determined that the Director could not appropriately consider the comments there would be no prejudice to the Petitioners as the comments would be excluded from consideration. Accordingly, the Court finds no prejudice to the petitioners by continuing with the administrative process and exhausting their administrative remedies.

2. The issuance of the license following the beneficial use examination is not a ministerial duty.

The Petitioners raise the argument that following the proof of beneficial use examination the issuance of the license is simply a ministerial act. Idaho Code § 42-219(1) requires an intermediate step prior to the issuance of the license. After all evidence is filed in relation to proof of beneficial use, IDWR is then charged with "carefully examining the same, *and if the department is satisfied that the law has been fully complied with* . . . the department shall issue . . . a license confirming such use." I.C. § 42-219(1)(emphasis added). The statute then provides that if IDWR finds that the applicant has not complied with the law or the conditions of the permit "it *may* issue a license for that portion of the use which is in accordance with the permit or *may* refuse issuance of the license and void the permit." I.C. § 42-219(8) (emphasis added). Because IDWR has some level of "discretion" in conjunction with making the compliance determination prior to issuing the license the duty of issuing the license is not a simple ministerial act. At this stage, IDWR has not made such a determination with respect to the form of the subordination language that should be included in the license despite the November 18, 1987, agreement between the Petitioner and IDWR. 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.

In *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964), the state engineer approved the applicant's permit application. Eighteen months later the applicant completed the diversion works and submitted proof of completion. The applicant then sought to file proof of application of water to beneficial use. In the meantime, the state engineer received protests regarding the issuance of the license for the water right. As a result, the state engineer issued an order denying the proof submitted by the applicant and cancelled the permit on the basis that there was no available water for appropriation. *Id.* at 182, 397 P.2d at 764. The action of the state engineer was upheld by the Idaho Supreme Court. *Id.* at 187, 397 P.2d at 769.

A similar issue also arose in the context of the SRBA. In ***Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge (Subcase 36-08099, River Grove Farms)*** **(Jan 11, 2000)(*River Grove Farms*)**, an applicant filed a permit application for a hydropower right in 1982. The permit application was approved in 1983. The permit did not include a subordination remark for hydropower.

Construction of the diversion works, the application of the water to beneficial use and the beneficial use examination were completed in 1985. The applicant received a letter from IDWR indicating that the licensing examination had been completed but that it would be awhile before the license was issued because of the pending Swan Falls dispute. Approximately six years elapsed before the license was ultimately issued in 1992. In the meantime the Idaho legislature enacted Idaho Code § 42-203B (6) authorizing IDWR to subordinate hydropower rights to future upstream consumptive uses. When the license was issued it included a subordination remark. The applicant failed to contest the inclusion of the remark after the license was issued but objected to the remark in the SRBA proceedings. One of the many arguments raised was that the water right vested at the time the water was applied to beneficial use and not upon the issuance of the license. Therefore I.C. § 42-203B (6) could not be retroactively applied to diminish the scope of the vested hydropower right. In essence the issuance of the license is more of a formality.

The Hon. R. Barry Wood, then presiding judge of the SRBA, disagreed. Judge Wood held that the water right vested at the time the license was issued. The Court relied on the holding in *Cantlin v. Carter*, the statutory scheme itself and various other cases holding that a water right is inchoate until the license is issued. [1] Judge Wood ruled:

> River Grove's assertion that a water right vests upon application to beneficial use, and not upon the issuance of the license by IDWR, may well be a correct statement of the law as to water rights made under the constitutional method (versus the permit method) and made prior to the 1971 statutory amendments making the permit process the exclusive method of appropriation. To the extent that the cases cited by River Grove correctly state the law as it existed prior to 1971, this aspect of the cases was legally altered by the legislature upon enactment of the aforementioned statutory amendments. Furthermore, the cases cited by River Grove are limited in that water right was acquired solely under the permit system . . . [I]t is clear that the legislature intended the issuance of the license to mark the point at which a water right becomes vested.

---

[1] The following cases were cited for the proposition that a right to use the waters of this state remains inchoate until a license is actually issued by IDWR. *Hardy v. Higginson*, 123 Idaho 485 (1993)(Director can properly impose conditions on request to amend water permit, because permittee only has an inchoate right, not a vested right); *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623 (1981)(Director could consider the "local public interest," even though authority to do so was not granted by legislature until after applicant had applied for permit, because vesting of applicant's right was "contingent upon future statutory adherence and issuance of a license"); *Big Wood Canal Co. v. Chapman*, 45 Idaho 380 (1927)(statutory amendments, which increased the time allowable to submit proof of application to beneficial use, were not unconstitutionally retroactive, because permittee has an inchoate right, not a complete appropriation).

. . .

> In 1971 the legislature amended I.C. §§ 42-103 and 42-201 to the effect that surface water rights could thereafter only be acquired by following the application, permit, and license procedures set forth in Title 42 of the Idaho Code. Chapter 2 of Title 42 sets forth the steps that must be completed before a water right comes into existence. Briefly, one who wishes to appropriate the unappropriated waters of this state must first make application to IDWR for a permit, and include certain information such as the source, point of diversion, purpose of use, etc. I.C. § 42-202. IDWR then publishes notice of the proposed diversion, inviting interested parties to protest the application. I.C. § 42-203A(1)-(4). IDWR then considers the application, protest or not, and makes various findings as to whether (a) the proposed diversion will reduce the quantity of water for existing water rights, (b) the water supply is sufficient for the proposed use, (c) the application is made in good faith, (d) the applicant has sufficient financial resources, (e) the proposal will not conflict with the local public interest, and (f) the proposal is not contrary to conservation of water resources. I.C. § 42-203A(5). Depending upon these findings, IDWR can approve, partially approve, approve upon conditions, or reject the application. *Id.* Upon approval, the applicant has a specified period of time to construct the proposed diversion works. I.C. § 42-204. Once the works are completed, the applicant must file proof of completion with IDWR, and IDWR will conduct a field examination thereof. I.C. § 42-217. IDWR is to then carefully examine the evidence proving beneficial use, and if satisfied, issues a license confirming the water right. I.C. § 42-219. If IDWR finds that the applicant has not fully complied with the law and the conditions of the permit, **IDWR may refuse to issue the license.** I.C. § 42-219(6). Once the license is issued, I.C. § 42-220 states that "[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right . . .." It is clear from this statutory scheme that it is the intent of the legislature that all of the steps -- **including issuance of the license** -- be completed before the water right vests, and until such time the right to the use of water remains an inchoate right. Because I.C. § 42-219(6) gives IDWR the responsibility to find the facts as to whether the permit conditions were complied with, it is untenable to assert that a water right may vest prior to this step in the permit and licensing process.

River Grove Farms at 24-25. Although the decision was never appealed from, this Court finds it to be on point and persuasive.

This Court holds that following the beneficial use examination the issuance of the license is not a ministerial act. The Department must first make a determination whether the use complies with the law and the terms of the permit. While the Court does have some concern with the length of time it takes for IDWR to complete its final determination and issue the license the statute does not provide for a time limit.

3. Mandamus is not an appropriate remedy.

Having determined that the act of issuing the license is not a ministerial act and having determined that the Petitioner's still have administrative remedies available in the ordinary course of law, this Court in the exercise of its discretion concludes that mandamus is not an appropriate remedy.

D. Conclusion.

The Court holds that Petitioners have failed to exhaust their available administrative remedies. For the reasons previously discussed the Petitioners are not giving up any rights by waiting until IDWR issues a license and then if necessary requesting a hearing before the Director and seeking judicial review. Aside from the issue of clouding the record with additional facts, which this Court addressed, the Petitioner's concern is further delay in the issuance of the license. Counsel for the Respondents stated that the license would have been issued by now but for this intervening action. Ultimately, depending on the form of the subordination remark included in the license further proceedings may not be necessary. Recent experience has shown that by issuing a writ at this stage significant delay would result while the parties litigated the propriety of the writ. For the above-stated reasons the Respondent's *Motion to Dismiss* is granted.

V. ORDER ON AMICUS PARTICIPATION

The decision on whether to limit participation to amicus curiae is discretionary with the trial court. *State v. United States (In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge)*, 134 Idaho 106, 111, 996 P.2d 806 (2000); 4 Am. Jur. 2d *Amicus Curiae* § 8. The principle role of amicus curiae is to aid the court on questions of law. 4 Am. Jur. 2d at §.6. Among other things, a court may evaluate whether the proffered information is timely, useful, or otherwise necessary to the administration of justice. Additionally, a court should look to whether the parties to the lawsuit will adequately present all relevant legal arguments. *Id.* § 8.

In the instant case, the Court's decision turns on a question of law. The Amicus brief does not raise any new issues. The legal issue has broader reaching application than just the instant case. In cases such as this a certain degree of liberality in allowing a brief to be filed is

warranted. While the Court has some concerns regarding the timeliness of the brief, on balance the Court **grants** the amicus participation and has considered the brief.

IT IS SO ORDERED

DATED: January 25, 2008

John M. Melanson
District Judge

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 28 day of January, 2008 a true and correct copy of the Order of Assignment was faxed and mailed, postage paid to the following persons.

Travis Lee Thompson
Attorney at Law
P. O. Box 485
Twin Falls, ID 83303-0485
(mailed)

Phillip Rassier
Idaho Attorney General
P. O. Box 83720
Boise, ID 83720-0098
(mailed)

By Judy Owens
Judy Owens, Deputy Clerk

CERTIFICATE OF MAILING/DELIVERY

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 15

Memorandum Decision and Order On Cross-Motions for Summary Judgment, SRBA Consolidated Subcase No. 00-92023 (Apr. 18, 2008)

RECEIVED BY
APR 2 1 2008
OFFICE OF THE
ATTORNEY GENERAL

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
APR 18 2008
By _____ Clerk
Deputy Clerk

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	**Consolidated Subcase: 00-92023 (92-23)**
Case No. 39576	**MEMORANDUM DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Holding: Granting State of Idaho's *Motion for Summary Judgment* on different grounds. Holding Idaho Power's rights exceeding the minimum flows are held in trust pursuant to the October 25, 1984, Swan Falls Agreement, which the Court finds to be unambiguous. As a term and condition of the Agreement, Idaho Power agreed to the regulatory authority of the State as is now codified at I.C. § 42-203B. The Court makes no ruling regarding the scope of the State's regulatory authority other than as agreed by Idaho Power in the October 25, 1984, Swan Falls Agreement. Holding that trust *res* contains water rights is dispositive of cause of action for mutual mistake. Denying Idaho Power's *Cross-Motion for Summary Judgment.*

I. APPEARANCES

James S. Lochhead, Michael A. Gheleta of Brownstein Hyatt Farber Schreck, PC, Denver, Colorado; John K. Simpson, Shelly M. Davis, Barker Rosholt & Simpson LLP, Boise, Idaho; James Tucker, Idaho Power Company, Boise, Idaho, Attorneys for Idaho Power Company, Boise, Idaho;

Lawrence G. Wasden, Attorney General, State of Idaho; Steven L. Olsen, Karl T. Klein, Michael C. Orr, Deputy Attorneys General of the State of Idaho, Boise, Idaho;

Dave Hensley, Counsel to the Governor, Boise, Idaho;

Josephine Beeman, Beeman & Associates, LLC, Boise, Idaho, Attorney for City of Pocatello.

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Candice M. McHugh, Randall C. Budge, Scott J. Smith, Thomas J. Budge, Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, Attorneys for Aberdeen-American Falls Ground Water District *et al.*

II. SRBA PROCEDURAL BACKGROUND

Consolidated Subcase 00-92023 (also listed on the Court's registry of actions as 92-23)[1] is a consolidation of common issues raised with respect to the meaning and application of the terms of the "Swan Falls Agreement" as applied to twenty-six water right claims filed by Idaho Power Company ("Idaho Power").[2] The claims were originally scheduled to be assigned, or were already assigned and pending, before the three different special masters. For purposes of judicial economy, the common issues were separated from the individual subcases and consolidated. ***See Order Granting In Part, Denying In Part Motion To Dismiss; Consolidating Common Issues Into Consolidated Subcase; and Permitting Discovery Pending Objection Period in Basin 02; and Notice of Scheduling Conference*** (July 24, 2007).

The *Director's Report for Basin 36, Reporting Area 3, Irrigation and Other Rights* was filed November 2, 1992, and included recommendations for hydropower claims 36-02013, 36-02018 and 36-02026. The recommendations did not contain subordination remarks. The recommendations were uncontested and the claims were decreed as recommended. ***Partial Decrees*** were issued for the three hydropower claims in the name of Idaho Power on November 11, 1997, and did not contain subordination remarks.

The *Director's Report for Irrigation and other Uses, Reporting Area 16, IDWR Basin 37, Part I (Surface Water)* was filed November 4, 2005, and included recommendations for hydropower claims 37-02128, 37-02471, 37-02472, 37-20709 and 37-20710. The claims were not initially recommended with a split in ownership showing both Idaho Power and the State of Idaho as owners. The original *Director's Reports* recommended Idaho power as the sole owner. Idaho Power objected to the

[1] Changed to accommodate forthcoming North Idaho Adjudication which includes Basin 92.

recommendations regarding the various remarks pertaining to the Swan Falls Agreement under the section "Other Provisions Necessary for the Definition or Administration of Water Right." On February 20, 2007, a *Notice of Completed Administrative Proceeding* and *Amended Director's Report* was filed, which recommended a split in the ownership of the water right claims into legal and equitable title with the State of Idaho holding legal title and Idaho Power and the State of Idaho, in and for the people of the State of Idaho, holding equitable title. The State of Idaho filed late objections to the recommendations in the *Amended Director's Report*, objecting to the equitable title holders' names being included in the name and address section as opposed to being included in a remark in order to be consistent with the holding in *U.S. v. Pioneer Irr. District et. al.*, 144 Idaho 106, 157 P.3d 600 (2007).

On May 10, 2007, Idaho Power filed a *Complaint and Petition for Declaratory and Injunctive Relief* (hereinafter "*Complaint and Petition*"), designated by the Court as Subcase 00-92023, naming the State of Idaho, the Governor, the Attorney General and the Director of the Idaho Department of Water Resources ("IDWR") as parties. Idaho Power also included the same allegations in its *Responses* filed in subcases 37-02128, 37-02472, 37-02471, 37-20709 and 37-20710 and styled them as a *Counterclaim.*

The *Director's Report for Irrigation and Other Uses, Reporting Area Basin 02* was filed December 29, 2006, and included recommendations for hydropower claims 02-00100, 02-02001A & B, 02-02032A & B, 02-02036, 02-02056, 02-02057, 02-02059, 02-02060, 02-02064, 02-02065, 02-04000A & B, 02-04001A & B, 02-10135 & 02-00034.[3] Both Idaho Power and the State of Idaho filed objections.

On July 24, 2007, this Court consolidated the common issues into Consolidated Subcase 00-92023. The *Responses* received for Idaho Power's Basin 02 claims also

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[2] These are subcases 36-02013, 36-02018, 36-02026, 37-02128, 37-02472, 37-02471, 37-20709, 37-20710, 02-00100, 02-02001A & B, 02-02032A & B, 02-02036, 02-02056, 02-02057, 02-02059, 02-02060, 02-02064, 02-02065, 02-04000A & B, 02-04001A & B, 02-10135 and 02-00034.

[3] Water right claims 02-02001A & B, 02-02032B, 02-02036, 02-02056, 02-02057, 02-02059, 02-02060, 02-02064, 02-02065, 02-04001B and 02-10135 were recommended with title being split between equitable and legal interests. Water right claims 02-00100, 02-02032A, 02-04000A, 02-04001A, 02-00034 were recommended in the name of Idaho Power only. Water right claim 02-00034 is for a commercial purpose of use.

included the additional claims 02-10135 and 02-00034, which were not included in the Court's July 24, 2007, ***Order***.

On December 14, 2007, the State of Idaho filed a *Motion for Partial Summary Judgment*. In support of its *Motion*, the State of Idaho filed the following affidavits: *Affidavit of Michael C. Orr*, with exhibits 1 through 75; *Affidavit of Kristin M. Ford*; *Affidavit of Patsy McGourty*; and the *Affidavit of Laird Noh*. The State of Idaho also filed a *Second Affidavit of Michael C. Orr* in response to Idaho Power's *Cross-Motion for Summary Judgment*.

The City of Pocatello, the Governor of the State of Idaho, the Speaker of the Idaho House of Representatives and President Pro Tempore of the Idaho State Senate filed statements in concurrence with the State's *Motion*.

On January 25, 2008, Idaho Power filed a *Cross-Motion for Summary Judgment*. In support of its *Motion* and/or in response to the State of Idaho's *Motion*, Idaho Power filed the following affidavits: *Affidavit of Shelley M. Davis*; *Supplemental Affidavit of Shelley M. Davis*, *Affidavit of Michael A. Gheleta* with exhibits A through Z and AA through KK; *Supplemental Affidavit of Michael A Gheleta*; *Affidavit of Greg Panter* and the *Affidavit of Sharon Strickland*.

Extensive briefing was lodged by both parties in support of their respective *Motions* and in opposition to the other side's *Motion*. Both parties also filed electronic versions with the Court as a courtesy and for which the Court is most appreciative given the volume of material. A hearing was held on the *Cross-Motions* on February 21, 2008. The Court also heard oral argument on the State of Idaho's *Motion to Strike Affidavit of Greg Panter* filed previously on February 15, 2008.

III. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in these matters on February 21, 2008. The parties did not request additional briefing, and the Court does not require any additional briefing on this matter. Therefore, these matters are deemed fully submitted for decision the next business day, or February 22, 2008.

IV. MOTION TO STRIKE

The State of Idaho filed a *Motion to Strike Affidavit of Greg Panter* asserting that the affidavit did not meet the criteria of I.R.C.P. 56(e) because it is not based on Mr. Panter's personal knowledge; does not set forth facts that would be admissible in evidence; and fails to show that Mr. Panter is competent to testify to the matters recited in the affidavit. At the hearing on the *Motion to Strike*, the Court ruled that there were certain portions of the affidavit that did not meet the criteria of I.R.C.P. 56(e) and certain portions which did satisfy the criteria. Accordingly, the Court ruled that the affidavit would not be struck in its entirety but that the Court would rely on only those portions of the affidavit which satisfy the I.R.C.P. 56(c) standard. The Court refers to specific portions of the affidavit on which it is relying.

V. FACTUAL BACKGROUND

The inevitable conflict between those who use the water of the Snake River for power generation and those who use it for irrigation and other consumptive uses was foreseen prior to Idaho's statehood. Delegates to the constitutional convention recognized that because power generation relies upon instream flows, an unlimited right to appropriate water for hydropower generation could result in water being unavailable for appropriation for upstream consumptive uses such as irrigation. *II Proceedings and Debates of the Constitutional Convention of Idaho 1889*, I.W. Hart, ed., 1912 at 1125-26. Nonetheless, the Idaho Constitution did not initially treat water rights for power generation differently from other uses. As enacted, Art. XV, § 3 of the Idaho Constitution began with the following sentence: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied." It was not until 1928, after the development of hydropower projects on the Snake River and its tributaries began in earnest, that the Idaho Constitution was amended to add the following provision to that sentence: "except that the state may regulate and limit the use thereof for power purposes." *See discussion* Dennis C. Colson, *Idaho's Constitution - The Tie that Binds*, p.173 (1991 University of Idaho Press). Even then, however, it was

not until the 1980's that matters came to a head. Throughout the first half of the 20th century, diversions from the Snake River for irrigation and other consumptive uses paralleled the development of hydropower projects without any apparent consequence. In the 1950's and 1960's, however, with the advent of deep well groundwater irrigation from sources hydraulically connected to the Snake River and high lift pumping from the river, along with increased demand for electric power — some of it for pumping — and new hydropower projects constructed to meet that demand, it became obvious that downstream, unsubordinated use of water for hydropower production would soon hinder development of upstream consumptive use of water or *vice versa*. A brief but comprehensive history of the conflict and some of its causes and effects are set forth in the first few pages of *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983). It was that case that set the stage for the Swan Falls Agreement which is the subject of this decision.

In 1983 ratepayers filed a petition with the Idaho Public Utilities Commission ("IPUC") claiming that Idaho Power had failed to protect its water rights at the Swan Falls facility against upstream depletions. The IPUC denied Idaho Power's motion to dismiss. Idaho Power then filed suit against IDWR and others asserting that Idaho Power's Swan Falls water rights were not subordinated to upstream appropriations. *Idaho Power Company v. Idaho Department of Water Resources, et al.*, Case no. 81375 (entered Feb. 12, 1990). The State defended, asserting that the 1928 amendment to Article XV, § 3 authorized the state to regulate and limit Idaho Power's water rights — even those predating the amendment. Granting the State's motion for summary judgment, the district court ruled that Idaho Power's Federal Energy Regulatory Commission ("FERC") license for the Hells Canyon project subordinated not only the Hells Canyon water rights but also upstream hydropower rights, including those at Swan Falls. On appeal, the Idaho Supreme Court ruled that Idaho Power's water rights for the Hells Canyon project were subordinate to consumptive upstream uses, but that such subordination only applied to the Hells Canyon water rights and not to those held by Idaho Power for the Swan Falls project. *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983). Idaho Power then filed suit against the State and thousands of water right holders claiming unsubordinated water rights at Swan Falls and other facilities

below Milner. *Idaho Power Company v. State of Idaho, et al.*, Idaho Fourth Judicial District, Case no. 62237 (entered Mar. 7, 1990). Thus, the *Idaho Power Co. v. State* decision and its aftermath brought into sharp focus the conflict predicted before statehood and the need to either limit the Swan Falls hydropower water rights or limit upstream consumptive uses of water, including irrigation.

Unsuccessful attempts were made to resolve the conflict in the 1983 and 1984 sessions of the legislature. In 1984, the parties began to discuss settlement. In a May 9, 1984 letter, in response to Idaho Power's suggestion that the parties negotiate a settlement, Governor John V. Evans proposed to Idaho Power CEO James Bruce that Idaho Power convey its water rights on the Snake River to the State in exchange for an agreed upon minimum streamflow and that the State would then agree to review future allocations of water on the Snake River against criteria which included preservation of the hydropower base. *Panter Aff.*, Exh. A. This offer was rejected. *Panter Aff.*, Exh. B. However, negotiations continued and by October 1984, the parties executed a "Framework for Final Resolution of Snake River Water Rights Controversy." *Panter Aff.*, Exh. C. This agreement (hereinafter referred to as the "Framework") was signed by Governor John V. Evans, Attorney General Jim Jones, and Idaho Power CEO and Chairman of the Board James E. Bruce on October 1, 1984. The Framework referred to the pending litigation between Idaho Power and the State:

> In order to resolve the controversy and settle the pending litigation, we have identified a series of judicial, legislative and administrative actions which we agree should be taken in the public interest, and which would resolve the outstanding legal issues to our mutual satisfaction.

Panter Aff., Exh. C at 2. The Framework called for a minimum streamflow at the Murphy gauge[4] of 3,900 c.f.s. during the irrigation season and 5,600 c.f.s. during the non-irrigation season. *Id.* The Framework referred to the "best hydrologic data" indicating that existing uses result in a potential irrigation seasonal low flow of approximately 4,500 c.f.s. at the Murphy gauge and that establishing a minimum flow of 3,900 c.f.s. during the irrigation season would allow "a significant amount of further development of water uses

[4] This is a reference to the U.S.G.S. gauging station located below Swan Falls dam on the Snake River.

(approximately 600 c.f.s.) without violating the minimum streamflow." *Id.* The Framework recognized:

> The actual amount of development that can take place without violation of these minimum streamflows will depend on the nature and location of each new development, as well as the implementation of new practices to augment streamflow.

Id. at 3. The Framework encouraged the development of new DCMI (Domestic, Commercial, Municipal, Industrial) uses "without further impediment" because of their "minimal effect on total water supply." The Framework also provided that the right to develop the remaining water resources on the Snake River system "should be allocated in a manner which will maximize long-term economic benefit to all sectors of society." Further, it provided "[p]riority should be given to projects which promote Idaho's family farming tradition and which will create jobs." The Framework also provided that future water rights allocation decisions should "weigh the benefits to be obtained from each development against the probable impact it will have on the Company's hydropower resources." *Id.* at 4.

The Framework stated that settlement of the pending litigation "should be structured in a way which will allow the State to utilize Idaho Power Company's asserted water rights to augment the State's existing and proposed legal authority to promote beneficial development and to reject proposed development which it deems to be detrimental to the public interest."[5] The Framework called for legislation to be adopted to (1) enunciate state policy regarding the types of water resources development deemed to be beneficial and recognize the benefit of hydropower generation as an element of public interest determination; (2) clarify the authority of IDWR to impose and lift moratoriums; and (3) clarify that proceeds from utility sales of hydropower water rights would benefit ratepayers. *Id.* at 5-8.

The Framework called for the commencement of a general adjudication of the entire Snake River basin in Idaho, recognizing that effective management of the river "lies in a comprehensive determination of the nature, extent and priority of all of the

[5] Under Art. XV, § 3 of the Idaho Constitution, the State may not have had such authority if the State were dealing with unappropriated water.

outstanding claims to water rights." The Framework recognized that such an adjudication would take "many years" to complete and that it should be initiated as soon as possible so that it will be completed "before an even more severe water rights crisis is upon us." [6] *Id.* at 5-6. The Framework also called for the establishment of an effective water marketing system and funding of hydrologic and economic studies. *Id.* at 7. Finally, an "implementation timetable" was set forth in the Framework providing for, among other things, a deadline for execution of a "Settlement Agreement, S.B. 1180 Contract[7] and Stipulation" and a deadline for proposed legislation and meetings with legislative committees and comments on proposed legislation. *Id.* at 9.

The Framework did not specifically mention conveyance of Idaho Power's water rights nor did it mention that the rights (or the water itself) would be held in trust. The Framework only provided for the minimum streamflows mentioned above which were significantly less than would have been provided by the water rights then asserted by Idaho Power.

The "Settlement Agreement" referred to in the Framework is what would later come to be known as the Swan Falls Agreement (hereinafter "Swan Falls Agreement" or "the Agreement"). The Swan Falls Agreement is attached hereto as Exhibit 1. Like the Framework, the Swan Falls Agreement was signed by Governor Evans, Attorney General Jones and Idaho Power CEO Bruce. The Agreement was signed on October 25, 1984. The Agreement provided for a stay of the lawsuit by Idaho Power against upstream water users and a stay of proceedings before FERC relating to subordination issues. It also provided that the parties would propose and support legislation consistent with the provisions of the Framework, including what became I.C. § 42-203B. Section 7 of the Agreement deals with Idaho Power's water rights. It provides:

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[6] In retrospect, this observation rings true given the drought of the last several years, ongoing disputes over depletion of the aquifer and conjunctive administration, and this litigation.

[7] The S.B. 1180 Contract referred to in the Framework was actually entitled Contract to Implement Chapter 259, Sess. Laws, 1983. Like the Framework, it was signed by Governor Evans, Attorney General Jones and Idaho Power CEO Bruce. It provided, among other things, for dismissal of certain defendants in the lawsuit brought by Idaho Power against numerous upstream water users (Ada County Case No. 81375) and an agreement that Idaho Power would not assert a claim for relief for depleted Snake River flows against those parties. The Contract also provided for legislation which was enacted as I.C. §§ 61-539 and 61-540.

7. Company's Water Right[8]

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 NW1/4, NE1/4 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 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 its 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.

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[8] Note that the Agreement uses the singular term "right."

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 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).

Except for paragraph 4 of the Agreement, which provides that the State shall enforce the state water plan and assert the existence of water rights held in trust, the body of the Agreement is silent as to Idaho Power's water rights. Paragraph 6 of the Agreement, however, provides for enactment or amendment of various provisions of Idaho water law. Specifically, paragraph 13(A)(vii) of the Agreement refers to and provides for enactment of subordination legislation "as set forth in Exhibits 7A and 7B attached to this agreement." Exhibit 7A and 7B were attached to the Agreement and were to be enacted as I.C. § 42-203B. Exhibit 7B, Section 1, Paragraphs 1 – 5 provides:

> 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 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 consumptive 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 in subsections 2 and 3 of this section 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 subsection 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 25, 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.

After the Agreement was signed, Exhibit 7B to the Agreement was introduced as part of Senate Bill 1008 in the 1985 Legislature. Hearings on the Bill were held before the Senate Resources and Environment Committee on January 18, 21, 25 and February 1, 1985. In the House Resources and Environment Committee, hearings were held on February 1, 11, and 13, 1985. *Orr. Aff.*, Exh. 8 – 11 and 19-21. The three attorneys who

negotiated the Agreement jointly on behalf of the signatories attended three of the Senate committee meetings and the principal House committee meeting. At the first of the Senate committee hearings, Governor Evans' counsel, Pat Costello, provided a section by section summary of S.B. 1008. He explained:

> [Exhibit] 7B is the one that would impose this new trust concept on the portion of the hydropower right that is in excess of the minimum flow, and we wanted to keep this as far from being a transfer as we could. So it's being imposed by operation of law through this rather than the power company agreeing to it by contract . . . .

Orr Aff., Exh. 33. At the hearing, Mr. Costello answered a question about the trust portion of the proposed legislation:

> [The trust] was simply a mechanism to sever, in lawyer's terms, to sever the legal and equitable title to the water immediately so there's some immediate change in position of the parties, that as soon as this agreement becomes binding and this statute takes effect, legal title will go to the state.

Orr Aff., Exh. 33. At the same hearing, the Attorney General's written testimony stated that, "[a]s drafted, the state possess[es] legal title to all waters previously claimed by the Company above 3900 c.f.s." *Orr Aff.*, Exh. 8. Idaho Power's attorney, Tom Nelson, was present at this hearing and did not voice any disagreement with Mr. Costello's or the Attorney General's characterization of the Agreement. Mr. Nelson told the committee members: "The state then takes that water and places it in trust, subject to reallocation. This does two things, it makes clear the state's control of the allocation of the water, and it left the water unsubordinated." Idaho Power's written statement in support of S.B. 1008 stated: "The state, as trustee, can protect those rights, and so can Idaho Power Company, as beneficiary of the trust and as user of the unsubordinated water right." *Orr Aff.*, Exh. 10. The statement also acknowledged that the Agreement was not a voluntary transfer of Idaho Power's water rights but was based upon the State's power to regulate and limit the use of water for hydropower purposes.[9]

[9] It was important that Idaho Power not be perceived to have voluntarily transferred its water rights because such transfer could have subjected Idaho Power to additional claims that it did not protect its water rights. *See*, I.C. § 61-539, enacted in 1983 pursuant to the S.B. 1180 contract and the Framework, discussed herein.

S.B. 1008 was passed on February 6, 1985, and I.C. § 42-203B was enacted. It has since been amended to reflect changes in administrative rules but remains essentially as it was adopted by the legislature and as provided in Exhibit 7B to the Agreement. It provides:

> **§ 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**
>
> (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.
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> (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; provided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. 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. 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, including compliance with the requirements of section 42-203C, Idaho Code.
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> (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.

(4) The user of water for power purposes as beneficiary of the trust established in subsections (2) and (3) of this section 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 under subsection (2) of this section. Such agreements shall be subject to ratification by law. The contract entered into by the governor and the Idaho Power Company on October 25, 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.

(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.

(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 policy 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 purpose;

(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.

It is undisputed that the parties have satisfied the contingencies set forth in the Agreement.

One of the provisions of Paragraph 7 of the Agreement (the same paragraph that describes Idaho Power's water right) was a provision that upon implementation of the 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)." The two decrees entered in those cases contain verbatim recitations from paragraph 7 of the Agreement. It is these two Ada County decrees which form the basis of Idaho Power's *Cross Motion for Summary Judgment* in which Idaho Power asserts that the State's claim that it owns legal title to the subordinated flows is barred by *res judicata* and judicial estoppel.

On May 10, 2007, Idaho Power filed the *Complaint and Petition* seeking the following relief:

A. A declaration that there was no "Trust Water" available when the Swan Falls Agreement was executed in 1984, and therefore no trust *res* and no valid trust established under the Swan Falls Settlement.

B. A reformation of the Swan Falls Settlement based on mutual mistake of fact regarding the existence of Trust Water, eliminating any asserted trust while retaining provisions unrelated to the purported trust.

C. A declaration that to the extent there is a valid trust, the trust *res* is water and not water rights, the State of Idaho does not hold legal title to

Idaho Power's water rights, and title to the water rights referenced in the Swan Falls Settlement is quieted in Idaho Power.

D. A declaration that the State of Idaho's claim of legal title to Idaho Power's water rights is barred by the doctrines of estoppel, waiver and laches.

E. A declaration that Idaho Power's water rights for hydropower generation are not, through the Swan Falls Settlement or otherwise, subordinate to the use of water for ground water recharge.

F. A declaration that the State of Idaho has failed in its administration of water rights priorities in the Snake River Basin to account for the multiple year impacts of ground water pumping.

G. Preliminary and permanent injunctions: (a) enjoining the State defendants from taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights; (b) ordering IDWR to re-evaluate water availability, and to take appropriate action, upon the expiration of the 20 year terms of previously granted permits for new appropriations of Trust Water; (c) ordering the Idaho Attorney General to repeal Idaho Attorney General Opinion 06-2 on the basis that it is erroneous as a matter of law and a breach of the Swan Falls Settlement; and (d) ordering IDWR to take reasonable steps in the administration of water rights in the Snake River Basin, and therefore to meet its obligation to insure and guarantee the Swan Falls Daily Minimum Flows, including taking into account the multiple year impacts of ground water pumping in the ESPA.

The State of Idaho then filed a *Motion to Strike or Alternatively to Dismiss Complaint and Petition for Declaratory and Injunctive Relief.* After a hearing on the State's *Motion* this Court entered the July 24, 2006, ***Order Granting in Part, Denying in Part Motion to Dismiss; Consolidating Common Issues into Consolidated Subcase; and Permitting Discovery Pending Objection Period in Basin 02; and Notice of Scheduling Conference.*** Pursuant to the ***Order***, this Court dismissed the claim for relief pertaining to the repeal of Idaho Attorney General Opinion 06-02. This Court ruled that the SRBA District Court has jurisdiction to preside over the declaratory relief sought by Idaho Power.

The State's *Motion for Partial Summary Judgment* followed, asserting that the State "holds legal title to any portion of the hydropower rights subject to the Swan Falls

settlement in excess of the minimum flows established at the Murphy gauge, and that the water rights held in trust are subordinate to junior water rights approved pursuant to State law."[10] Specifically, the State of Idaho asserted:

> 1. That pursuant to Idaho Code § 42-203B, legal title to any portion of the water rights subject to the Swan Falls settlement for flows in excess of the minimum flows established at the Murphy Gage under the State Water Plan is held in trust by the State of Idaho, by and through the governor, for the benefit of Idaho Power Company and for the benefit of the people of the State of Idaho;
>
> 2. That pursuant to Idaho Code § 42-203B, the water rights for power purposes held in trust by the State under Idaho Code § 42-203B are subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to State law; and
>
> 3. That the equitable doctrines of reformation, mutual mistake of fact, estoppel, waiver, and laches cannot be invoked or applied in a manner contrary to or inconsistent with Idaho Code § 42-203B.

Idaho Power then filed a *Cross Motion for Partial Summary Judgment* asserting that Idaho Power is the "sole and lawful owner of the water rights as described in Ada County cases *Idaho Power Company v. the State of Idaho, et al.*, Case No 62237, and *Idaho Power Company v. the Idaho Department of Water Resources, et al.*, Case No. 81375, and quieting title thereto in Idaho Power."[11]

VI. STANDARD OF REVIEW

Summary judgment shall be rendered when "the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). Generally, disputed facts are to be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 175 P.3d 172 (2007). However,

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[10] *Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment*, p. 3.

[11] *Idaho Power Company's Cross Motion for Summary Judgment*, p. 2.

> [I]f an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.

Loomis v. City of Hailey, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991); *Blackmon v. Zufelt*, 108 Idaho 469, 470, 700 P.2d 91, 92 (Ct.App.1985) (citing *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982)).

Here, both parties have moved for summary judgment. The State's motion seeks a ruling that the State "holds legal title to any portion of the hydropower rights subject to the Swan Falls settlement in excess of the minimum flows established at the Murphy Gauge and that the water rights held in trust are subordinate to junior water rights approved pursuant to State law." Idaho Power denies that the State owns the water rights and seeks a ruling that Idaho Power is "the sole and lawful owner of the water rights described in Ada County cases *Idaho Power Company v. the State of Idaho, et al.*, Case No. 62237, and *Idaho Power Company v. the Idaho Department of water Resources, et al.*, Case No. 81375, and quieting title in Idaho Power." It is undisputed that the water rights referred to by the State as being "subject to the Swan Falls Agreement" and those water rights referred to by Idaho Power as being described in the two Ada County cases are the same water rights. Therefore, the two motions plainly deal with the same subject matter. The parties rely upon closely related issues, and while their legal theories are different, they both ask the Court to rule that they own the water rights. The State relies upon the terms of the Swan Falls Agreement and Idaho Power relies upon two consent decrees in cases which were settled as part and parcel of the Swan Falls Agreement. Our Supreme Court has explained the legal standards to be applied when deciding cross motions for summary judgment as follows:

> In *Brown v. Perkins*, 129 Idaho 189, 923 P.2d 434 (1996), this Court held that when both parties file a motion for summary judgment relying on the same facts, issues, and theories, the parties essentially stipulate that there is no genuine issue of material fact which would preclude the district court from entering summary judgment. *Brown*, 129 Idaho at 191, 923 P.2d at 436. In *Wells v. Williamson*, 118 Idaho 37, 794 P.2d 626 (1990), this Court recognized that when opposing parties file cross motions for summary judgment, based upon different theories, the parties should not

be considered to have effectively stipulated that there is no genuine issue of material fact. *Wells,* 118 Idaho at 40, 794 P.2d at 629.

Eastern Idaho Agricultural Credit Association v. Niebaur, 130 Idaho 623, 626-627, 944 P.2d 1386, 1389-1390 (1997).

Finally, it is well established that a party opposing a motion for summary judgment cannot rely upon bare conclusory allegations:

> The burden of proving the absence of an issue of material fact rests at all times upon the moving party. *McCoy v. Lyons,* 120 Idaho 765, 769, 820 P.2d 360, 364 (1991); *G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). To meet this burden the moving party must challenge in its motion and establish through evidence that no issue of material fact exists for an element of the nonmoving party's case. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). If the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact. *Id.* at 719, 918 P.2d at 588. The non-moving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. *Coghlan v. Beta Theta Pi Fraternity,* 133 Idaho 388, 401, 987 P.2d 300, 313 (1999). A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). In a motion for summary judgment, this Court will liberally construe the facts in favor of the nonmoving party. *S. Griffin Const., Inc. v. City of Lewiston,* 135 Idaho 181, 185, 16 P.3d 278, 282 (2000).

Blickenstaff v. Clegg, 140 Idaho 572, 577, 97 P.3d 439, 444 (2004).

VII. DISCUSSION

At issue in these cross-motions for summary judgment is the title to Idaho Power's hydropower claims or portions of the claims which exceed the minimum flows set at the Murphy Gauge located below the Swan Falls dam. The State of Idaho argues that pursuant to I.C. § 42-203B, the portions of the claims exceeding the minimum flows are held in trust by the State of Idaho for the benefit of Idaho Power and the citizens of the State of Idaho. The result is that the State of Idaho holds legal title and Idaho Power

and the citizens of the State of Idaho share equitable title to rights held in trust. The State's argument in support of its *Motion* rests entirely on the State's regulatory authority over hydropower rights as defined by I.C. § 42-203B and authorized by Article 15 § 3 of the Idaho Constitution as amended in 1928. The State also notes that I.C. § 42-203B was enacted not only for the purpose of resolving the dispute with Idaho Power, but also as a means of resolving future disputes over other existing unsubordinated hydropower rights. The State's position is that the Swan Falls Agreement is not relevant to the determination of ownership; rather it is solely the application of I.C. § 42-203B that is controlling.

Idaho Power raises a number of arguments in opposition. First, it argues that I.C. § 42-203B is ambiguous as to whether the legislature intended that the corpus or *res* of the statutorily created trust consists of the water that was made available by subordinating portions of the hydropower rights, or of Idaho Power's water rights. Idaho Power argues that the Court must look at the legislative history of the statute, the entirety of the legislation surrounding the Swan Falls Agreement as well as the subsequent actions of the State in interpreting and applying the legislation. Idaho Power also argues that the legislation must be read in conjunction with the Swan Falls Agreement as the legislation was an implementation of the Agreement. Idaho Power also asserts that since the entry of the Consent Judgments in Ada County, the State has taken numerous actions which are inconsistent with its arguments that it holds legal title to Idaho Power's water rights. Finally, Idaho Power challenges the State's constitutional authority to regulate its vested rights.

Idaho Power argues in the alternative that the Consent Judgments entered in Ada County case *Idaho Power Company v. State of Idaho, et al.*, Idaho Fourth Judicial District, Case no. 62237 (entered Mar. 7, 1990), and Ada County case *Idaho Power Company v. the Idaho Department of Water Resources, et al.*, Case no. 81375 (entered Feb. 12, 1990) define Idaho Power's rights. Principles of *res judicata* and collateral estoppel prevent these issue or claims from being re-litigated or collaterally attacked in these subsequent proceedings. In opposition, the State of Idaho argues that the issue of ownership of the disputed portions of the hydropower claims was never at issue nor was it litigated in the Ada County proceedings. The State also argues that once the Snake

River Basin Adjudication was commenced in 1987, the Ada County District Court was divested of jurisdiction to adjudicate Idaho Power's claims.

A. The Court must consider the Swan Falls Agreement in Conjunction with Idaho Code § 42-203B.

The State urges the Court to decide the issue of ownership based solely on the application of I.C. § 42-203B. For the reasons discussed below, this Court holds that the issue can and should be decided based on analysis of the Swan Falls Agreement, which incorporates the provisions of I.C. § 42-203B. The Court declines to decide the issue based solely on the State's general regulatory authority. While the distinction may appear subtle, the issues involved are not.

First, Idaho Code § 42-203B was not enacted in a vacuum but was a means of settling disputes over unsubordinated hydropower claims. Senate Bill 1008, later codified as Idaho Code § 42-203B, was proposed and introduced into the legislature pursuant to and in accordance with the Swan Falls Agreement. The Swan Falls Agreement was specifically conditioned on the enactment of Senate Bill 1008. Paragraph 13 of the Swan Falls Agreement provides in relevant part:

> 13. Conditions on Effectiveness
>
> A. The provisions of paragraphs 7 [which defines Idaho Power's water right], 8 [damages waiver], and 11 [state water plan] *shall not be binding and effective until each of the following conditions have been implemented*:
> . . .
>
> 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 . . . *then this Agreement shall be void.*

(emphasis added). Exhibit 7B to the Agreement consists of the provisions of Senate Bill 1008, later codified as Idaho Code § 42-203B. Idaho Code § 42-203B also refers to and

ratifies the Swan Falls Agreement. Specifically, "[t]he contract entered into by the governor and the Idaho Power Company on October 25, 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." I.C. § 42-203B(5).

Accordingly, to the extent there is an alleged discrepancy or ambiguity between the Agreement and the legislation, the starting point is the Agreement, not the legislation. While the State may still be able to enforce the terms of the statute, to the extent its provisions are alleged to vary from the terms of the Agreement it would not be able to do so without implicating claims for breach of contract or takings. The resolution of breach of contract or takings claims would require an examination of the intent of the parties as evidenced by the underlying Agreement. Simply put, starting with the interpretation of the Agreement avoids "begging the question" of the intent of the parties which would have to be addressed even if the Court only considered the statute.

Even if this Court were to rely solely on the application of I.C. § 42-203B, it would be necessary to ascertain the intent of the parties concerning the definition of Idaho Power's rights based on the way in which the claims were recommended in the *Director's Reports*. Idaho Power's various claims were recommended in *Director's Reports* as individual water rights. However, the only claims that were recommended solely in the name of Idaho Power were the unsubordinated portions of the rights at the Swan Falls facility. The subordinated portion of the flows at the Swan Falls facility, as well as every other claim for use at a facility located upstream, was recommended in its entirety with title being split between equitable and legal title as opposed to being apportioned. In other words, no minimum flows were set for the claims at the individual facilities, only a cumulative minimum flow was set downstream at the Murphy Gauge. Idaho Code § 42-203B speaks in terms of apportioning a hydropower right between the unsubordinated and subordinated portion of the right. Paragraph 7 of the Agreement which defines Idaho Power's rights defines them cumulatively as a single right apportioning the right between the subordinated and unsubordinated portions of the right. Yet, IDWR has recommended the claims individually. Clearly, decreeing the rights consistent with the intent of the parties requires an examination of the underlying Agreement.

Finally, deciding the issues entirely based on the State's exercise of its regulatory authority over hydropower rights independent from the underlying Agreement raises a number of significant constitutional issues. Some, but not all, of these issues were raised by Idaho Power. Specifically, issues regarding the constitutional scope of the State's authority to regulate and limit vested hydropower rights and whether the provisions of I.C. § 42-203B are consistent with that authority when applied to Idaho Power's claims.[12] For example, Idaho Power's claims include priority dates both pre-dating and post-dating the 1928 amendment to Article 15 § 3 which confers the authority to the State to regulate and limit the use of water for hydropower. This raises the issue of whether the State's ability to limit and regulate hydropower rights extends to hydropower rights which vested prior to the 1928 amendment. Another issue is whether the provisions of Article 15 § 3 are self-executing or whether they must be exercised in conjunction with the licensure proceedings? In other words, can the State retroactively place new limits or regulations on a hydropower right after a license for a water right is issued without such limits or restrictions?[13] Idaho Power's licenses were issued without subordination provisions. Does the State's authority have to be exercised through the legislature or can it be exercised directly by the Idaho Department of Water Resources? Does placing ownership of a private water right in the name of the State and then "reallocating" the right to third parties with new restrictions exceed what was contemplated by regulating and limiting a hydropower right? Lastly, does placing ownership of the right in the State for purposes of maintaining the source as fully appropriated violate the first part of Article 15 § 3 of the Idaho Constitution which provides the "right to divert the unappropriated waters . . . shall never be denied"?

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[12] The constitutional authority for I.C. § 42-203B is Article 15 § 3 of the Idaho Constitution which provides in relevant 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.*

(emphasis added).

[13] If subordination was addressed in conjunction with the licensure proceedings and the license was issued deliberately without the inclusion of a subordination remark, then can the State later change its position under its regulatory authority?

The Court notes these issues because as the State points out, I.C. § 42-203B was not only enacted for the purpose of resolving the Swan Falls controversy with Idaho Power but also as a process for resolving unrelated disputes involving unsubordinated hydropower claims. *See* I.C. § 42-203B(3) (applying to water rights which are not defined by agreement). The Court also has before it a number of other unrelated hydropower claims that were licensed without subordination remarks. In those hydropower claims, subordination language was recommended by IDWR for reasons other than the State's regulatory authority. The State's position here in relying solely on the application of I.C. § 42-203B implies an unlimited constitutional authority to regulate and limit vested hydropower rights. The extrapolation of the State's interpretation of the scope of its constitutional authority to regulate vested hydropower rights essentially makes any other basis for recommending subordination of vested hydropower rights unnecessary.

In sum, the issues concerning the nature and scope of constitutional authority have implications extending beyond the instant case. In this Court's opinion, the issue over ownership can be fully decided based on the interpretation of the Swan Falls Agreement. Therefore, the Court need not decide the issue based on a determination of the scope of the State's regulatory power over Idaho Power's vested hydropower rights. A contractual agreement between parties to settle a water rights dispute does not raise the same constitutional issues. As the Supreme Court stated in *Idaho Power v. State*, 104 Idaho 575, 661 P.2d 741 (1983):

> 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 of the subordination clause inserted in the Hells Canyon licenses.

Id. at 587, 661 P.2d at 753. Even though Idaho Power maintains that it never directly agreed to voluntarily transfer its rights to the State, it could still concede to the State's authority or agree not to challenge the State's authority to "regulate" its rights in a manner that would achieve the same result. However, Idaho Power's consent to the State's authority would not necessarily be binding on unrelated hydropower claims.

Accordingly, the Court bases this decision on its interpretation of the Swan Falls Agreement, including the agreement between the parties to enact I.C. § 42-203B, as opposed to deciding the matter based solely on the State's regulatory authority.

1. The Swan Falls Agreement is Not Ambiguous Regarding the Trust Arrangement or the *Res* of the Trust.

In the past, the phrase "Swan Falls Agreement" has been used to include all of the related actions associated with implementing the October 25, 1984, Agreement, including contracts, legislation, administrative actions and consent decrees. As the State points out in its brief "the Swan Falls Agreement was not a self-executing instrument, but rather proposed a suite of legislative and administrative action that if implemented would resolve the controversy and the legal issues to the mutual satisfaction of the parties." *Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment* at 11. In the context of proceedings such as Basin-Wide Issue 13 where the Court has to determine what action, if any, is required to memorialize the "Swan Falls Agreement," the Court must consider all the various actions that were made conditions of the Swan Falls Agreement in addition to the Agreement itself.[14] However, for the purpose of deciding the issues in this case, the Court will begin with the October 24, 1985, contract (referred to in this decision as the "Swan Falls Agreement"), which authorized the suite of legislative, judicial and administrative actions and also set forth the intent of the parties. When read in its entirety, the Court finds the Swan Falls Agreement is not ambiguous as to the ownership of Idaho Power's claims or as concerns the *res* of the trust.

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[14] ***See Order Designating Basin-Wide Issue Re: To What Extent, If Any Should the Swan Falls Agreement be Addressed In the SRBA or Memorialized in a Decree.***

The issue of whether a contract is ambiguous is a question of law. *Swanson v. Beco Construction Co.*, 145 Idaho 59, 62 175 P.3d 748, 751 (2007) (quoting *Howard v.Perry*, 141 Idaho 139, 142, 106 P.3d 465, 468 (2005)). Ambiguities can be either patent or latent. Whether a contract is patently ambiguous is determined from the face of the written agreement. *Id.* (citing *Ward v. Puregro Co.*, 128 Idaho 366, 369, 913 P.2d 582, 585 (1996)). A latent ambiguity is not evident on the face of the written instrument, but becomes apparent when applying the instrument to the facts as they exist. *Id.* (citing *In re Estate of Kirk*, 127 Idaho 817, 824, 907 P.2d 794, 801 (1995)). To determine whether a contract is patently ambiguous, the court looks to the face of the document and gives the words or phrases used their established definitions in common use or settled legal meanings. *Id.* (citing *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 70 P.3d 664 (2003)). For a contract term to be ambiguous there must be at least two different reasonable interpretations of the term or the term must be nonsensical. *Id.* (citing *Armstrong v. Farmers Ins. Co. of Idaho*, 143 Idaho 135, 139 P.2d 737 (2006) and *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 65 P.3d 184 (2003)).

Paragraph 19 of the Agreement provides the following:

> 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 or written between them other than are herein set forth.

Paragraph 4 of the Agreement refers to the State's duty under the contract to "assert the existence of water rights held in trust."

> 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.

(emphasis added). This is the only reference to a trust in the body of the Agreement. Paragraph 7 then defines Idaho Power's various hydropower rights as a single cumulative right and then apportions the right between the unsubordinated and subordinated portions.

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.

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. 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).*

(emphasis added). Paragraphs 7 A through E do not refer to a trust or to a division of ownership of the subordinated portions of Idaho Power's rights into legal and equitable title. Paragraph 7A provides that Idaho Power is "entitled to an unsubordinated right" and paragraph 7B refers to Idaho Power being "entitled to use the flow of the Snake River at its facilities to the extent of beneficial use." Paragraphs 7C and D refer to the "Company's rights listed in paragraph 7(A) and (B)." Paragraph 7E also refers to the "Company's water right as provided in paragraph 7 (A) and (B)." When read in isolation from the rest of the Agreement, one interpretation of paragraph 7 is that Idaho Power is the owner of the claims. However, the way Idaho Power's rights are defined in Paragraphs 7A through E is not inconsistent with a split in ownership as established by other sections of the Agreement.

Exhibit 7B to the Agreement sets forth the language of Senate Bill 1008 which was a condition of the Agreement pursuant to paragraph 13.A.vii. *See* text of paragraph 13.A.vii, *supra*. Exhibit 7B is unambiguous regarding the trust arrangement. Section 1, paragraph 1 of Exhibit 7B provides:

> 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]

(emphasis added). Section 1, paragraph 2 of Exhibit 7B provides:

> 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.

(emphasis added). Section 1, paragraph 3 of Exhibit 7B, provides:

> 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.*

(emphasis added). Section 1, paragraph 4, provides:

> 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.

(emphasis added). Section 1, paragraph 5, provides:

> 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.

(emphasis added).

This Court holds that Exhibit 7B clearly and unambiguously provides that any portion of Idaho Power's water rights in excess of the minimum flows are held in trust by the State, by and through the Governor, for the use and benefit of Idaho Power for power purposes and of the people of the State of Idaho.[15] It is also unambiguous that the *res* of the trust consists of "water rights" as opposed to "water."

The use of the phrase "water rights" and reference to the legal term "trust" in Exhibit 7B is entirely consistent with the body of the Agreement. As stated previously, Paragraph 4 of the Agreement requires that the State "shall assert the existence of water rights held in trust by the State." Although Paragraph 7 of the Agreement (which defines Idaho Power's rights) does not mention a trust arrangement, the rights are defined so as to reconcile with the application of the terms set forth in Exhibit B.

Idaho Power argues that it would never have entered into an agreement where it assigned or transferred its water rights to the State. See *Affidavit of Greg Panter*.[16] In response, the Court makes the following findings. First, the Agreement was carefully drafted so that Idaho Power would not be directly assigning or transferring its water rights to the State. *See supra* fn 9. Rather, than transferring or assigning the rights, they were placed in trust pursuant to the State's regulatory authority. Idaho Power was simply conceding to and agreeing not to challenge the State's regulatory authority. In addition to

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[15] The Swan Falls project water rights 02-2032, 02-4000, 02-4001 were recommended being split into A and B portions. The A portions are recommended with legal title in the name of Idaho Power. The B portions were recommended with the legal owner being the State of Idaho. Water right 02-100 was recommended solely in the name of Idaho Power. The cumulative totals for the water rights for the Swan Falls project were recommended by IDWR as providing Idaho Power with 3,900 cfs from 4/01-10/31, and 5,600 cfs from 11/01-3/31. The remainder of the water rights for the Swan Falls project were recommended with legal title in the name of the State of Idaho. As to the hydro-electric projects upstream from Swan falls, the entire right was recommended with legal title in the State of Idaho.

[16] The *Affidavit of Greg Panter* states: " In my opinion, based on my knowledge of and involvement with the negotiations leading to the execution of the Agreement, had it been a requirement of the Agreement that

referring to the State's obligation to assert the existence of Idaho Power's water rights held in trust, paragraph 4 of the Agreement also provides:

> 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.
>
> . . .
>
> State and Company shall not take any position before the legislature or any court, board or agency which is inconsistent with the terms of the agreement.

This is further supported by the fact that once the initial legislation defining the rights placed in trust was passed, any subsequent changes in the law were not intended to affect the validity of the Agreement. Paragraph 17 of the Agreement provides:

> 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 the Agreement.

As such, if the status of the State's regulatory authority changed in the future, it would not affect the status of Idaho Power's rights as originally agreed. Finally, this Court finds it inconceivable that Idaho Power would enter into a contract with one of the conditions of the contract being that the State pass legislation entirely inconsistent with the body of the contract or the intent of the parties. Paragraph 13B of the Agreement is unequivocal that "in the event any of these conditions are not implemented . . . then this Agreement shall be void." Exhibit 7B clearly and unambiguously reflects the intent of the parties. The Court need not go beyond the four corners of the document to ascertain the unambiguous intent of the parties.

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the Company assign or transfer all or a portion of its water rights to the State, the Company would not have

2. Evidence Beyond the Fours Corners of the Agreement is Consistent.

Even if the Court considers matters outside the four corners of the Agreement, the result is unchanged. There were several legislative committee meetings held on Senate Bill 1008 as well as a series of public informational meetings before the Idaho Water Resource Board. These meeting explained the terms of the Swan Falls Agreement to the public. Tom Nelson, who negotiated the Swan Falls Agreement on behalf of Idaho Power, was present at these meetings and either did not object to or specifically concurred with the representations made regarding the operation of the proposed statute. At the public information meeting held in Twin Falls on October 25, 1984, the three individuals who were principally responsible for negotiating the Swan Falls Agreement (Pat Costello on behalf of the Governor's office, Pat Kole from the Attorney General's Office and Tom Nelson on behalf of Idaho Power) explained the Swan Falls Agreement. Mr. Costello explained:

> The status of the water right in the meantime while its in this transition period from becoming unsubordinated to subordinated is that legal title to the water right will be held in trust by the State of Idaho by and through the governor of the state. But the power company will retain the right to beneficially use that right for the generation of power in the meantime.

Orr Aff., Exh. 44, Tr. p. 7. At a subsequent public informational meeting held in Boise on November 1, 1984, in which all three principle negotiators were presenters, Mr. Costello again stated:

> In other words, you would use the minimum stream flow concept as the primary mechanism for protecting in-stream uses, and that any hydropower rights that exist in excess of that minimum stream flow would be held in trust by the state, legal title to that water right in excess of a minimum flow being in the state, for the benefit of the power right holder and also for the benefit of the people to allocate it to up-stream uses only which meet the public interest criteria.

Orr Aff., Exh. 46, Tr. pp. 19-20. He then explained the purpose for holding the water right in trust:

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entered into the Agreement." *Panter Aff.* at 2.

> In doing that you are using the hydropower right to say that the river has, in essence, been fully appropriated, because that right exists, and it's the right to – basically all the flow that gets down there.

Orr Aff., Exh. 46, Tr. p. 20. During that same hearing a question was asked of Pat Kole by Sheryl Chapman of the Idaho Water Users Association:

> Mr. Chairman, I've got three questions: one is for Pat [Kole], one is for Tom [Nelson], and then one for the panel, whoever wants to answer it.
>
> Pat, in a meeting that you and the attorney general and I had sometime back, the attorney general's office was adamantly opposed to the language that is now [Exhibit] 7B. They were supporting the language that said 'subordinated' but with opposed language that referred to 'water rights shall be subordinated.'
>
> My question to you is why the abrupt turnaround?
>
> Mr. Kole: Well, every time you're in negotiations, you end up having to give up on some points. And what we ended up agreeing to was to, in essence, have the water right placed in trust in the ownership of the state in exchange for which we went with the concept of the subordinateable water right.
>
> Mr. Chapman: So the attorney general's office feels that that is protected as the earlier language, the subordinated language, since the water right is in trust.
>
> Mr. Kole: Yeah. . . .

Orr Aff., Exh. 46, Tr. pp. 45-46. At a Senate Resources and Environment Committee meeting held on Senate Bill 1008 on January 18, 1985, in response to a question from Chairman Senator Laird Noh regarding the Governor's powers as trustee, Mr. Costello stated:

> So [the trust] simply was a mechanism to sever, in lawyer's terms, to sever the legal and equitable title to the water immediately so there is some immediate change in position of the parties, that as soon as the agreement becomes binding and this statute takes effect, legal title to the water will go to the state, and the company retains beneficial use of the water as long as the trust lasts.
>
> Chairman Noh: Mr. Kole and Mr. Nelson, do you concur with that interpretation?

Mr. Kole: Chairman, I do. . . .

Mr. Nelson: Mr. Chairman, members of the committee, that's correct. . . .

Orr Aff., Exh. 37, Tr. pp. 52-54. In this statement Mr. Costello refers to "water" instead of "water rights." It is unequivocal that he is referring to "water rights" because he is discussing the trust arrangement under SB 1008, which specifically refers to water rights. Moreover, for purposes of splitting ownership between equitable and legal title, Idaho Power's only interest or title was with respect to its own water rights.

On January 25, 1985, Idaho Power presented the Senate Resources and Environment Committee with a *Statement of Idaho Power in Support of Senate Bill 1008*, which provided in relevant part:

> As a preliminary explanation, the combining of certain exhibits to the Swan Falls Agreement into SB 1008 has made it somewhat awkward to define the Company's position on parts of the bill. Idaho Power Company is not required by the Swan Falls Agreement to support Section 2 of SB 1008, found on pages 2 and 3 of the printed bill, because its support of that Section could raise implications of a voluntary transfer of its water rights. In fact, the basis for Section 2 is the state's power to 'regulate and limit' the use of water for hydropower purposes.
>
> The application of Section 2 to the Idaho Power Company's rights deserves some discussion. Under the agreement of October 25, 1984, the Company's rights in excess of the seasonal minimal flows of 3900 cfs and 5600 cfs at the Murphy gage are unsubordinated but subject to reallocation pursuant to state law. The trust provisions of Section 2 do not change that status. The rights are still unsubordinated and still protectable from uses not in conformance with state law. The state, as trustee, can protect those rights, and so also can Idaho Power Company, as beneficiary of the trust and as user of the unsubordinated right.

Orr Aff., Exh.10, attachment, p.1. Nowhere did Idaho Power take a position contrary to its water rights being held in trust, albeit through the state's regulatory authority.

At a January 25, 1985, hearing before the Senate Resources and Environment Committee on SB 1008, in which all three primary negotiators were present, then Senator Mike Crapo suggested that a statement of legislative intent be drafted so as to provide guidance in the future in the event of any litigation.

> Mr. Chairman, it's my concern that, when I first read the legislation, I really didn't understand for sure what the intent was. And we've had three good hearings now. And I think that I pretty well understand the intent. . . . But I think in the future, if this ever gets to court, or if the department of water resources need guidance on how to interpret different aspects of this, that it would be very beneficial that we, as a committee, develop a statement of intent or legislative purpose that accompanied this that said what we really intend to happen. Maybe even use some examples like they do in the Federal Register. . . .

Orr Aff., Exh. 39, Tr. pp. 36-37. As a result, a Statement of Legislative Intent for SB 1008 was prepared by the Senate Resources and Environment Committee on February 1, 1985, which provided a section by section analysis. The Statement provided in relevant part:

> To accomplish the balancing of these potentially competing interests, this section establishes a trust in which title to certain specified water rights will be held. The trust pertains to water rights for power purposes which are in excess of minimum stream flows established by state action. . . . The amount of water or water rights held in trust is thus keyed to the maintenance of the established minimum stream flows rather than the estimates of how much water may be available above such minimum flows. Any portion of such water rights above the established minimum flow will be held in trust by the State of Idaho, by and through the Governor of the State of Idaho. This trust will hold these water rights for the benefit of the power user so long as they are not appropriated as provided by law by upstream beneficial users.

Orr Aff., Exh. 11, attachment, p. 3.

At a February 11, 1985, meeting before the House Resources and Conservation Committee, in which all three negotiators were present, Mr. Costello explained, "Hydropower rights in excess of such flows will be held in trust by the state and are subject to subordination and depletion by lawful beneficial uses." *Orr Aff.*, Exh. 20, p. 2. In the same meeting, Representative Little asked: "[I]f the bills are passed as written and fulfill the agreement made between the power company and then decide two years from now we don't like it and parts are repealed, will that affect the agreement between the power company and the state." Mr. Nelson responded:

> [T]here is a provision in the agreement that says the agreement remains binding even in the face of changes in law. If the legislature wants to undo this whole thing next year, that is its prerogative. The only thing the

> legislature does not have the power to do, would be to change the contractual recognition of the company's water rights at Murphy gage.

Orr Aff., Exh. 20, p. 1. All of these discussions held before the Idaho Water Resource Board and the House and Senate Committees are consistent with the plain language of Exhibit 7B to the Agreement and the language contained in SB 1008.

Greg Panter, then employed by Idaho Power as Director of Governmental Affairs, states in his affidavit that he was responsible for explaining the Swan Falls Agreement at the time SB 1008 was under consideration:

> I also worked with counsel and management, for the Company in the development of the proposed legislation appended to the final Swan Falls Agreement, and together with Mr. Nelson, was responsible for explaining the substance and intent of the Swan Falls Agreement to legislators during the 1985 legislative session.

Panter Aff., at 2. Furthermore, Mr. Panter concedes that the terms "water" and "water rights" were used interchangeably during these discussions:

> I attended most, if not all, meetings of the resource and environment committees of the House and Senate where the Swan Falls legislation was being discussed. To the best of my knowledge, I was the only representative of any of the parties to the Swan Falls Agreement and resulting legislation were discussed. Again, during these meetings with legislators and during legislative committee meetings, the terms water and water rights were generally used interchangeably and I recall no discussions to the effect that the Company was expected to or would be required to assign or transfer all or any portion of its water rights to the state in order to implement the trust component of the Swan Falls Agreement.

Panter Aff., at 6. Mr. Panter was also involved in drafting the Statement of Legislative Intent:

> I was involved with the Statement of Legislative Intent for SB 1008, which was drafted by Senator Crapo and read into the record in the Idaho Senate on February 6, 1985. . . While the Company was privy to the development of the Statement of Intent by Senator Crapo, it did not place a great deal of significance on its provisions. All of my discussions with legislators, both house and Senate, in 1985 relating to the intent of the Agreement and the legislation were in the context of that the trust component was developed for the purpose of holding and distributing the "block of water", approximately 600 c.f.s, that was presumed to be

> available over and above the minimum flows established by the Agreement. There was no discussion of the necessity to transfer or assign any portion of the Company's water rights to the state.

Panter Aff., at 6-7.

Mr. Panter's affidavit does not create a genuine issue of material fact. First, Mr. Panter's understanding is consistent with the express terms of Exhibit 7B to the Agreement and SB 1008. The operative language of Exhibit 7B and the resulting SB 1008 do not require that Idaho Power "*assign or transfer*" its rights to the State. Rather, the rights are held in trust *by operation of law*. The implementation of such law was not only a condition of the Agreement, but apparently a law which Idaho Power helped to draft. Mr. Panter states that he attended most of the committee hearings on SB 1008. Contrary to Mr. Panter's recollection, the discussions of the participants at the meetings refer to water rights being held in trust as well as a split in ownership between legal and equitable title. Mr. Panter also states that he was involved with the Statement of Legislative Intent for SB 1008 and that Idaho Power was aware of the statement but did not place any great deal of significance on its provisions. If Idaho Power's intent was that its water rights or at least portions of its rights would not be held in trust, then that intent must have been subjective. Alternatively, Idaho Power perhaps lacked an appreciation for the plain meaning of the language which it not only agreed to, but helped to draft.

The deposition testimony of Tom Nelson taken in 1990 is also consistent with the representations made at the various committee hearings and public meetings.

> Q. What was the purpose of establishing those minimum flows?
>
> A. One of the matters that had to be addressed was the general question of how to define the company's water rights at Swan Falls. And at that time the existing low flow, historical low flow was approximately, 4,500 c.f.s. The state water plan called for 3,300 c.f.s. So you had 1,200 c.f.s still in the river, if you will. The question was where in that 1,200 c.f.s. would you establish the company's water rights. . . . So the decision was made to divide the 1,200 c.f.s for purposes of the agreement. That's one of the places where IDWR came in and told the committee that if the river were reduced to 3,900 c.f.s in the summer, the same development that took it down to 3,900 in the summer, plus some winter pumping off stream in the winter, would reduce the winter flow to 5,600. So 5,600

was the counterpart wintertime flow to the 3,900 summertime flow at full development. . . .

Q. Now, you stated the historic low flow at that point in time was 4,500 c.f.s., is that correct?

A. Yes.

Q. Then you agreed to a 3,900 c.f.s. minimum flow in the Swan Falls agreement?

A. That's correct.

Q. If my calculations are correct, then that means there were 600 c.f.s. of water that was not being currently used by existing water development?

A. That's correct.

Q. How does the agreement address that 600 c.f.s?

A. The agreement basically says in shorthand that the water rights up to 3,900 and 5,600 are unsubordinated and unsubordinatable. That the Company can defend it, and the state will recognize those rights in administering the river. Above 3,900 and 5,600, the company's water rights remain intact, but they are subject to subordination to later approved uses which meet the criteria . . . .

. . .

Q. Is there a name that they use to refer to those waters now, that 600 c.f.s?

A. Yes, now they are referred to as trust water.

Q. *And why do they use the term "trust water"?*

A. *Well, the mechanism that was finally developed by the negotiators and accepted by the parties was to have the state place those rights in trust, and the beneficiaries, the power company would be a beneficiary of the trust up to the point where the state approved new uses, which met the statutory criteria, and that seemed to solve the problem of how you actually manage that block of water.*

Supplemental Affidavit of Shelly M. Davis, Exh. O., Tr. pp. 50-53 (emphasis added).

The argument that the trust contains a "block of water" instead of a water right does not make sense. First, the way in which water flows are encumbered in Idaho is through a water right, not a "block of water." Exhibit 7B to the Agreement and I.C. § 42-203B do not refer to the creation of a new or separate water right to be placed in trust. Rather, both clearly state "Any portion of the *water rights for power purposes* in excess of the level so established *shall be held in trust* . . . ."

Next, in order for the State to impose the public interest criteria restrictions on the appropriation of future water rights and avoid the risk of Article 15 § 3 challenges, the river had to be considered a fully appropriated source. Previously, the river was fully (or over) appropriated based on Idaho Power's unsubordinated water rights. By placing the portions of Idaho Power's water rights exceeding the minimum flows in trust, and making the rights "subordinatable" to future uses, the river would still maintain the status of being fully appropriated. This enabled the State to impose the public interest criteria in conjunction with issuing new rights.[17] A straight subordination of Idaho Power's

[17] Exhibit 1 to the Agreement included the proposed legislation defining the criteria for the public interest determination.

> 42-203C. PUBLIC INTEREST DETERMINATION – CRITERIA – WEIGHT – BURDEN OF PROOF
>
> (1) If any 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 determination 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, forseeability 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 resources 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 80,00 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.

rights would not accomplish the same result as the river would not have been fully appropriated. Creating a new or separate right in the name of the State for the purpose of imposing public interest criteria on future appropriations also would not resolve the Article 15 § 3 concerns.

The Agreement made Idaho Power's rights "subordinatable" to future uses. Paragraph 7B to the Agreement provides that Idaho Power has the right to use the entire flow of the river at its various facilities up to the amounts stated in the water licenses for the facilities, but the right to use the flows is subordinate to subsequent future uses as those uses are approved by the State. However, the State was required to apply the public interest criteria in conjunction with approving any new rights. Idaho Power also retained the right to contest any new appropriations. The somewhat confusing part is that the new appropriators were not receiving a transfer of an actual portion of Idaho Power's water right held in trust, but rather a portion of the water freed up and encumbered as a result of the trust arrangement. This is where the reference to "trust water" comes from and support for the argument that the *res* of the trust is water, not water rights. Nonetheless, the Court does not find the use of the term "trust water" to create an ambiguity regarding the *res* of the trust. Again, the only way the use of the water could be encumbered is via a water right. This becomes particularly apparent when taking into account the underlying purposes for which the Agreement was carefully structured to achieve. Mr. Panter acknowledges in his affidavit that "[d]uring the discussions and development of this trust water component, the terms water and water rights were used interchangeably." *Panter Aff.*, at 5.

In sum, even going outside the four corners of the Agreement, and taking into account the discussions held at the various meetings on the explanation of the Swan Falls Agreement and Senate Bill 1008, as well as the concerns the Agreement was structured to address, the result is consistent with the plain language of the Swan Falls Agreement.

(b) The burden of proof under this section shall be on the protestant.

The public interest criteria was codified at I.C. § 42-203C subject to some revisions.

3. The Subsequent Conduct of the State is not contrary to Idaho Power's Equitable Interest.

Idaho Power argues that the State's conduct and representations are inconsistent with the State having legal title to its water rights. Idaho Power points to the State's administration of the trust by granting new water rights instead of transferring portions of Idaho Power's rights with Idaho Power's priority; representations made in proceedings before FERC and Congress; the Consent Judgments entered between the State and Idaho Power; and the State's admissions in the SRBA by recommending Idaho Power's rights in Basin 36 exclusively in the name of Idaho Power.

The Court previously discussed the underlying purpose for the trust arrangement. The granting of new water rights was consistent with the mechanics of the trust as agreed by the parties. The fact that water rights were issued with new priorities as opposed to transferring Idaho Power's priority is consistent with the purpose of the trust. Pursuant to the Agreement, Idaho Power subordinated its water rights to then existing rights. The trust established a mechanism for reallocating, as opposed to transferring, portions of its water rights to future appropriations. For obvious reasons, allowing future appropriations to supersede the priorities of existing users by assuming Idaho Power's senior priority would result in injury to existing users.

In regards to the representations made in proceedings before FERC and Congress, the representations made are not inconsistent with Idaho Power holding an equitable interest. Idaho Power still holds an interest in its water rights.

The legal affect of the two Consent Judgments is discussed in the context of Idaho Power's *Cross-Motion for Summary judgment.*

The issuance of Idaho Power's partial decrees in Idaho Power's name was an oversight in uncontested subcases. The recommendations were based on former licenses and were made without addressing the Swan Falls Agreement. The claims were uncontested and were decreed as recommended. The claims should have been withheld from decree until the rest of Idaho Power's claims covered by the Swan Falls Agreement were reported. *See* I.C. § 42-1412 (7). The Swan Falls Agreement addresses the minimum flows for the claims cumulatively. The rate of flow for all claims is a

cumulative rate measured at the Murphy gauge. The Agreement did not provide for a minimum rate of flow at Idaho Power's individual upstream facilities. Accordingly, all claims should have been addressed at the same time so partial decrees could be issued in a manner which recognized the modifications to the original licenses pursuant to the Swan Falls Agreement.

B. Idaho Power's Cross-Motion for Summary Judgment

Idaho Power asserts in its *Cross-Motion for Summary Judgment* that the Consent Judgments entered in Ada County case *Idaho Power Company v. State of Idaho, et al.*, Idaho Fourth Judicial District, Case no. 62237 (entered Mar. 7, 1990), and Ada County case *Idaho Power Company v. the Idaho Department of Water Resources, et al.*, Case no. 81375 (entered Feb. 12, 1990) define its rights. The Company argues that principles of *res judicata* and collateral estoppel prevent the determination from being re-litigated or collaterally attacked in these (SRBA) subsequent proceedings. The better reasoning is that the Consent Judgments define Idaho Power's right(s) consistently with paragraphs 7A through E to the Agreement.[18] The State of Idaho argues that the Ada County District Court was divested of jurisdiction once the SRBA was commenced. This Court need not address the issue of jurisdiction because the result is the same whether or not the Ada County Court had jurisdiction.

Once the SRBA was commenced, all water users were required to re-file claims in the SRBA, whether the claims were previously adjudicated or not. The effect of a prior decree offered as evidence in the SRBA is binding on its parties and privies and constitutes *prima facie* weight of the elements of the water right. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740-41, 947 P.2d 409, 413-14 (1997). However, in adjudicating Idaho Power's hydropower rights, the Court cannot ignore the application of I.C. § 42-203B. The Consent Judgments were entered after the enactment of I.C. § 42-203B and thus were subject to its provisions. Idaho Code § 42-203B also specifically refers to the October 25, 1984, Agreement. The parties cannot stipulate

[18] Paragraph 7E of the Agreement provides that "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).

around the application of the statute. Therefore, just because the Consent Judgments do not refer to I.C. § 42-203B does not mean that Idaho Power's water rights are insulated from its application. Idaho Power did not challenge the application of I.C. § 42-203B in the Ada County proceedings. In fact, just the opposite is true. The Consent Judgments were entered based in part on the enactment of I.C. § 42-203B. The purpose of the SRBA is to accurately describe Idaho Power's water rights in a partial decree or decrees in a manner that allows the rights to be administered by IDWR and that avoids future ambiguity or uncertainty. The Court has several options in issuing these partial decrees. The Court could decree the rights solely in the name of Idaho Power and the rights would still be subject to the terms of I.C. § 42-203B. That process creates the potential for an ambiguity in the future over the application of I.C.§ 42-203B. In administering the rights, IDWR would have to take into account not only the rights as described by the Consent Judgments but also the application of I.C. § 42-203B. The Court could also issue a partial decree solely in the name of Idaho Power with a remark stating that the right is subject to the provisions of I.C. § 42-203B. Finally, the Court could issue decrees which accurately reflect the application of I.C. § 42-203B so as to avoid any uncertainty or ambiguity in the future. Under any of the three approaches, this Court would not be collaterally attacking the Consent Judgments, but simply incorporating all of the components which define Idaho Power's water right into one partial decree or decrees.

Further, both Consent Judgments contain non-merger clauses which state: "The Swan Falls Agreement, dated October 25, 1984, shall not be merged into nor integrated with this Judgment, but shall remain in full force and effect." As such, the Court can take into account the underlying Agreement on which the two Consent Judgments were based. To the extent there is an inconsistency between the Consent Judgments and the underlying Agreement, this Court can address that inconsistency. In this case, the Consent Judgments are wholly consistent with the Agreement. The Consent Judgemments define Idaho Power's water rights and the statute places the "subordinatable" portions of the rights in trust. There is no inconsistency between the two. Under the Agreement, the rights were to be put in trust pursuant to the State's

regulatory authority, not a transfer by Idaho Power. Idaho Power simply agreed to the State's regulatory authority as applied to its rights. Once the rights have been defined, the next step is to give effect to the statute. As discussed above the Court need not address any potential infirmities with the State's regulatory authority because Idaho Power previously agreed to the State's regulatory authority over its claims as part of the settlement despite its challenges to its authority in the context of these proceedings.

C. The Equitable Doctrines of Reformation, Mutual Mistake of Fact, Estoppel, Waiver, and Laches.

The State argues that the equitable doctrines of reformation, mutual mistake of fact, estoppel, waiver, and laches cannot be invoked in a manner contrary to the provisions of I.C. § 42-203B. As discussed above the State's conduct after the implementation of the Swan Falls Agreement was consistent with Idaho Power having an equitable interest for purposes of invoking the equitable doctrines of estoppel, waiver, and laches. Furthermore, I.C. § 42-203B was enacted and in force and Idaho Power was fully aware its rights were subject to its provisions despite whatever perception Idaho Power has with respect to the State's subsequent conduct or representations.

This Court ruled previously in its July 26, 2006, ***Order*** that it has jurisdiction to hear Idaho Power's claim of mutual mistake to the extent the Agreement does not accurately reflect the physical conditions on the ground, making the definition or administration of the right impossible or unclear. As discussed previously in the July 26, 2006, ***Order***, in cases where ownership of a water right turns on an underlying determination of the interpretation of a contract, probate of a will or similar action, the Court's practice has been to segregate the cause of action and transfer it to a Court of appropriate jurisdiction for a determination on the underlying issue. That being said there is a certain degree of overlap in the jurisdiction of the SRBA. The SRBA Court frequently interprets deeds and former decrees which define water rights. The very purpose of the Swan Falls Agreement is to define Idaho Power's water rights. To the extent there are issues regarding how the Agreement was intended to define Idaho Power's water rights, this Court has jurisdiction to address those issues. Furthermore,

even if there is some overlap in jurisdiction between the SRBA and another jurisdiction, this Court declines to transfer the issue to a different jurisdiction.

In these summary judgment proceedings, the basis of the State's position has been that Idaho Power's rights are defined pursuant to the State's regulatory authority as established by I.C. § 42-203B. Idaho Power's position is that its rights are defined by contract and the intent of the parties. For reasons discussed, this Court determined that the matter could be decided based on contract and the intent of the parties and holding that as a term of the contract Idaho Power agreed to the State's regulatory authority. In deciding the issue based on contract this Court determined that there was no "genuine issue of material fact" with respect to the intent of the parties, based on the four corners of the Agreement, which is consistent with evidence outside of the Agreement. Based on this determination, the Court finds it can rule on the issue of mutual mistake in the scope of these proceedings.

The State of Idaho's argument is that the remedy of reformation is unavailable to reform the provisions of I.C. § 42-203B. This Court reads Idaho Power's request for relief as a request to reform the Swan Falls Agreement to conform to the alleged erroneous assumption that there was water available for future appropriations. In other words, Idaho Power argues that there is no trust *res* and as a consequence no trust exists. "Idaho Power seeks reformation of the Swan Falls Agreement based on a mutual mistake of fact with regard to whether there is, or ever was, any water available that was subject to the trust provisions of the Agreement." *Idaho Power Company's Response to State of Idaho's Motion for Partial Summary Judgment* at 64. In *Hughes v. Fisher*, 142 Idaho 474, 129 P.3d 1223 (2006), the Idaho Supreme Court set forth the standard for mutual mistake and reformation of an instrument, as follows:

> In interpreting an [instrument], the Court's goal is to carry out the real intention of the parties. If an instrument does not reflect the true intent of the parties due to mutual mistake, then reformation of that instrument may be the proper remedy. 'A mutual mistake occurs when both parties, at the time of contracting, share a misconception regarding a basic assumption or vital fact upon which the bargain is based." The Court acts properly in reforming the instrument to reflect the agreement the parties would have made but for the mistake. What the parties actually intended is a question of fact. The party alleging the mutual mistake has the burden of proving it by clear and convincing evidence.

Id. at 482, 129 P.3d at 1231 (internal citations omitted).

Although mutual mistake is normally an issue of fact, in this case the Court holds that as a matter of law under the terms of the Agreement it does not matter whether erroneous assumptions were made regarding the availability of water for future appropriations. This Court holds that pursuant to the Agreement the *res* of the trust is the portions of Idaho Power's right(s) exceeding the agreed upon minimum flow as opposed to an undefined block of water. The trust arrangement is therefore not defeated for the want of a *res*. The trust *res* consists of water rights, not water. Whether or not sufficient water existed at the time to fulfill the water rights of subsequent appropriators is a separate issue and one that changes over time with the fluctuations in the water supply. However, there are no assurances that there will always be sufficient water available to satisfy a water right.

Further, the Agreement was structured to specifically account for uncertainty in the availability of the excess flows. No guarantees or promises were made to Idaho Power with respect to the availability of the excess flows. Rather, Idaho Power's right is defined in terms of unsubordinated minimum flows at the Murphy Gauge. Idaho Power can use the subordinated flows up to its licensed amounts at its individual facilities and the State will apply the public interest criteria in conjunction with reallocating the water available, if any, under the right(s) to future appropriators. As discussed above, based on the underlying purpose of the Agreement, Idaho Power did not have an expectation that water above the minimum flows would be available for its use for an indefinite period.

Finally, the Agreement has been in effect since October 25, 1984. Based on the trust arrangement, new water right permit applications have been processed and approved, some limited to twenty-year terms. *Complaint and Petition* at 13,¶ 35-37. The State has been meeting the minimum flow obligation at the Murphy Gauge during that time except for the allegation of one day on or about July 12, 2003. *Complaint* and *Petition* at 12, ¶ 33. To the extent the State is not meeting the minimum flows or if it is anticipated that the minimum flows will not be met, then under the terms of the Agreement, Idaho Power's water right(s) held in trust are not subordinate to subsequent appropriations. As a result, these subsequent appropriations may be subject to

curtailment in order to meet the minimum flows. However, this is an issue pertaining to the administration of Idaho Power's water rights, as well as the rights of the subsequent appropriators, and needs to be brought before IDWR in the context of an administrative proceeding.

D. Remaining Causes of Action.

Idaho Power's remaining claims not decided by the outcome of this decision include the following:

1. **Groundwater Recharge**: A declaration that Idaho Power's water rights for hydropower generation are not subordinate to the use of water for ground water recharge. This issue is properly before the SRBA Court as it defines the scope of the subject hydropower rights. The Court will hold a status conference on the remaining issues to determine how to proceed on this issue and the other remaining issues prior to certifying this decision as final. Parties should be prepared to discuss whether the issue can be decided in the context of a summary judgment proceeding.

2. **Declaration on Administration of Water Rights**: A declaration that the State of Idaho has failed in its administration of water rights priorities in the Snake River Basin to account for multiple-year impacts of groundwater pumping. This issue pertains solely to the administration of water rights. Parties should be prepared to discuss why this matter should not be addressed via an administrative action in light of this decision and the holding in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007).

3. **Injunctive Relief**:

(i) Enjoining the State defendants from taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights. It is unclear as to what particular action by the State, Idaho Power is referring. To the extent

resolution of this issue requires a preliminary determination of the scope of the subject water rights relative to the respective rights and duties of the State and Idaho Power under the trust arrangement, the SRBA Court has jurisdiction to entertain the preliminary issue.

(ii) Ordering IDWR to re-evaluate water availability, and to take appropriate action, upon the expiration of the 20-year terms of previously granted permits for new appropriations of Trust Water. This issue pertains solely to the administration of water rights. Parties should be prepared to discuss that in light of this decision and the holding in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007), why this matter should not be addressed via an administrative action.

(iii) Ordering IDWR to take reasonable steps in the administration of water rights in the Snake River Basin, and therefore to meet its obligation to insure and guarantee the Swan Falls Daily Minimum Flows, including taking into account the multiple-year impacts of ground water pumping in the ESPA. This issue also pertains solely to the administration of water rights. Parties should be prepared to discuss in light of this decision and the holding in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007), why this matter should not be addressed via an administrative action.

E. Further Proceedings and Discovery Schedule:

The Court will notice up the above-referenced hearing for the purpose of addressing remaining issues in light of the instant decision. Discovery is presently stayed pursuant to the Court's April 15, 2007, ***Order***. The Court acknowledges that the outcome of this decision may affect how the parties intend to proceed with discovery and/or result in further delays occasioned by post-decision motions. The Court will adjust the scheduling order accordingly to account for the delays which have already occurred as well as any future delays.

IT IS SO ORDERED

Dated April 15, 2008

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

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
Cathy Spaulding

EXHIBIT
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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 (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) 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 ~~lesser~~ 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, ~~feeling~~ 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 resources 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 42-1409, 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 42-211, 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 or 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.

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 4th day of January 08
Dan Salmon

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT was mailed on April 18, 2008, with sufficient first-class postage to the following:

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Represented by:
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(Certificate of mailing continued)

IDAHO POWER PETITION FOR
DECLARATORY & INJUNCTIVE
RELIEF

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

/S/ DIANA R DELANEY
Deputy Clerk

Exhibit 16

Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow,
SRBA Subcase Nos. 00-92002GP, 02-00200,
02-00201, 02-00223, and 02-00224
(Oct. 16, 2009)

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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	**MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: MILNER ZERO MINIMUM FLOW**

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INTRODUCTION

The Director's recommendations, objections and responses for water right 02-0200 and General Provision No. 4 for Basin 02 demonstrate that the principal substantive issue in subcases 02-0200 and 00-92002GP is the question of the meaning and effect of the "zero minimum flow" at Milner Dam. This question is controlled by the Idaho State Water Plan and Idaho statutes.

The Idaho State Water Plan and the 1997 Idaho Session Laws provide that "[t]he exercise of water rights above Milner Dam has and may reduce flow at the dam to zero." *Idaho State Water Plan* at 17 (Idaho Water Res. Bd., Dec. 1996) ("1996 State Water Plan");[1] 1997 Idaho Sess. Laws 71. The purpose of this provision, as Fifth District Judge John M. Melanson recently stated, is to allow for full utilization of the Snake River above Milner Dam: "In brief terms, the State Water Plan sets a 'zero flow' at Milner Dam to allow for full development of the River above Milner." *Order On Petition For Judicial Review* at 40 n.12, *Clear Springs Foods, Inc. v. Idaho Ground Water Appropriators, Inc.* (Fifth Jud. Dist., Gooding County) (Case. No. 2008-444) (Jun. 19, 2009). Further, the Idaho Code provides:

> 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). This provision ensures that, as a matter of Idaho law, uses of water below Milner shall not interfere with the use and storage of flows upstream from Milner Dam, even to the point of reducing the flow at Milner Dam to zero c.f.s.

---

[1] *See* Affidavit of Michael C. Orr ("Orr Aff."), Exhibit 1 at 11 (1996 State Water Plan at 17).

These principles are firmly embedded in the long history of water resource development and settled property rights expectations in the Snake River Basin. Because the Snake River enters a canyon at Milner and becomes inaccessible for gravity irrigation, early agricultural development had appropriated the reliable summer flow of the river above Milner shortly after the end of the nineteenth century. Thereafter, water supplies for further development and for protection against devastating droughts that periodically occur could be secured only by conserving and storing winter flows, spring runoff and flood waters above Milner. This objective has been the principal basis of water resource policy, planning and development in the Snake River Basin for the last century, and is commonly referred to as the Milner "zero minimum flow" principle or the "Two Rivers" doctrine. Under either name, the Snake River is physically, developmentally and legally divided at Milner into two different systems: all flows of the river may be fully developed above Milner Dam, and uses downstream from Milner Dam may not interfere with or prevent such upstream development.[2]

The State's Motion for Partial Summary Judgment seeks a determination that as a matter of law under the State Water Plan and controlling Idaho statutes, the zero minimum flow established at Milner Dam means that the flow of the Snake River above Milner Dam may be reduced to zero, and that 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. Granting the State's Motion is necessary for purposes of the

[2] Even when the entire flow of the river above Milner is diverted for agricultural and storage purposes, significant river flows remain available for use and development in the canyon below Milner as a result of inflows, especially from the numerous springs discharging from the canyon walls.

definition and administration of water rights in Basin 02, and will simplify the remaining issues and expedite the resolution of this subcase.

STATEMENT OF FACTS

I. The Milner "Zero Minimum Flow" Provisions Of The State Water Plan And Statutes.

In 1964, the voters of the state of Idaho approved a constitutional amendment providing for a state water resource agency authorized to develop a plan for "optimum development" of the State's water resources: "There shall be constituted a Water Resource Agency . . . [that] shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest." Idaho Const. art. XV § 7. The amendment was adopted "in response to a publicly recognized need for the state to maintain greater control over its water resources." *Idaho Power Co. v. State*, 104 Idaho 570, 571, 661 P.2d 736, 737 (1983). The following year, the Idaho Legislature implemented the amendment by establishing the Idaho Water Resource Board ("Board") and directing it to "progressively formulate an integrated, coordinated program for conservation, development and use of all unappropriated water resources of this state." 1965 Idaho Sess. Laws 905; *see also* Idaho Code § 42-1734A(1). This "comprehensive state water plan" was to be based on studies and formulated after public hearings in affected areas at which all interested parties had an opportunity to appear. *Id.*

After nearly a decade of study and public participation, the Board adopted the initial State Water Plan in two parts. The purpose of part one was "to identify and define the policies and objectives which the Idaho Water Resource Board has adopted to govern the planning, development, and conservation of the state's water and related lands." *The Objectives – State Water Plan – Part One* at v (Idaho Water Res. Bd., June 1974) ("1974

State Water Plan").[3] Part two was intended to identify and evaluate the projects and programs necessary to implement the objectives in part one. *State Water Plan – Part Two* at 4 (Idaho Water Res. Bd., Dec. 1976) ("1976 State Water Plan").[4]

The 1976 State Water Plan established "protected flows" at various points on the Snake River to be "protected against further appropriations." *Id.* at 116. The "protected flow" for Milner was defined to be "0 cfs." *Id.* The 1976 State Water Plan further stated: "Studies indicate that sufficient water exists in excess of these flows to provide for additional uses if water conserving and storage facilities are constructed." *Id.*

In 1978, the Idaho Legislature twice affirmed the "protected flow" of "0 cfs" at Milner. House Concurrent Resolution No. 48 declared the 1976 State Water Plan's "protected flows" to be an expression of "legislative intent." 1978 Idaho Sess. Laws 1011. The same resolution also provided: "it is the policy of the State of Idaho to augment, maintain, enhance and increase available, usable water by additional upstream, off stream and aquifer storage." *Id.* The Idaho Legislature again affirmed the "protected flow" of "0 cfs" at Milner in a statute recognizing House Concurrent Resolution No. 48 "as the guide for the state water plan," *id.* at 885, and providing that the "protected flows" of the 1976 State Water Plan were "minimum daily flows." *Id.* at 886.[5]

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[3] Orr Aff., Exhibit 2 at 5. The Board had also issued an "Interim State Water Plan – Preliminary Report," in July 1972. This report and all of the State Water Plans referenced herein are viewable at: http://www.idwr.idaho.gov/waterboard/WaterPlanning/StateWaterPlanning/State_Planning.htm.

[4] Orr Aff., Exhibit 3 at 14.

[5] Prior to 1983, it was believed that the Legislature had authority to amend the State Water Plan under article XV § 7 of the Idaho Constitution, but the Idaho Supreme Court held otherwise in 1983. *See Idaho Power Co.*, 104 Idaho at 573-74, 661 P.2d at 739-40. The Legislature obtained such authority under a 1984 amendment to article XV § 7: "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. In any event, the Idaho Legislature's 1978 and 1982 resolutions and enactments regarding the State Water Plan did not purport to change the zero minimum flow at Milner, but rather strongly endorsed it.

The next revision of the State Water Plan, in 1982, retained the "protected flow" provisions, including the "0 cfs" flow at Milner. *Idaho State Water Plan* at 42 (Idaho Water Res. Bd., Jan. 19, 1982).[6] The 1982 State Water Plan also provided: "Applications for future water permits shall not be approved if they are in conflict with the State Water Plan adopted by the Idaho Water Resource Board in the public interest." *Id.* at 21. The Legislature again endorsed the plan. 1982 Idaho Sess. Laws 944-46.

In 1985 the State Water Plan was amended in connection with the Swan Falls settlement. While the Swan Falls settlement called for increasing the minimum flows at Murphy, the settlement reaffirmed that "[t]he minimum daily flow at the Milner gauging station shall remain at zero c.f.s."[7] The 1985 amendments provided, in relevant part:

> 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 . . . . 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. 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.[8]

The Legislature approved these amendments. 1985 Idaho Sess. Laws 514.

Although the 1986 revision of the State Water Plan renumbered its "policies," the Milner language of the 1985 amendments was retained, *Idaho State Water Plan* at 35 (Idaho Water Res. Bd., Dec. 12, 1986) ("1986 State Water Plan") (Policy 5A),[9] and reaffirmed by the Legislature. 1987 Idaho Sess. Laws 818. Moreover, the 1986

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6 Orr Aff., Exhibit 4 at 14.

7 Orr Aff., Exhibit 5 at 27 (Swan Falls Agreement, Exhibit 6).

8 Orr Aff., Exhibit 6 at 4-5 (minutes of Senate Resources and Environment Committee, Mar. 4, 1985, attachment 1 at 1-2) ("A Resolution, *In The Matter Of Policy 32 Of The State Water Plan*) (Idaho Water Res. Bd.) (Mar. 1, 1985).

9 Orr Aff., Exhibit 7 at 12.

Legislature amended Idaho Code § 42-203B, one of the statutes enacted the year before in connection with the Swan Falls settlement, to expressly provide:

> 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.

1986 Idaho Sess. Laws 309; (codified as amended at Idaho Code § 42-203B(2)).

The 1992 revision of the State Water Plan also recognized "that the exercise of water rights above Milner Dam has and may reduce flow at the dam to zero." *Idaho State Water Plan* at 28 (Idaho Water Res. Bd., Jan. 1992) ("1992 State Water Plan") (Policy 5A).[10] The 1992 State Water Plan further stated: "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." *Id.*[11]

When the original version of the 1996 State Water Plan was presented to the Legislature for approval without the Milner zero minimum flow provision, the Legislature added it back in by direct amendment. 1997 Idaho Sess. Laws 71. Thus, the current State Water Plan (1996) expressly provides: "The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero." *Idaho State Water Plan* at 17 (Idaho Water Res. Bd., Dec. 1996) ("1996 State Water Plan").[12]

II. The Proceedings.

The Director recommended a quantity of zero c.f.s. for water right No. 02-0200:

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[10] Orr Aff., Exhibit 8 at 7 (1992 State Water Plan at 28).

[11] The 1992 State Water Plan was submitted to the Legislature for review, but the Legislature took no action on it. Therefore, the plan became effective sixty days following its submission to the Legislature. Idaho Const. art. XV § 7.

[12] Orr Aff., Exhibit 1 at 11 (1996 State Water Plan at 17).

"The quantity of this right is the average daily flow of zero (0) cfs measured by the Milner Dam gaging station at river mile 638.7 downstream."[13] The Director also recommended a zero c.f.s. minimum flow in General Provision No. 4 for Basin 02: "The minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second."[14]

Eight ground water districts jointly filed objections to the Director's recommendations for water right No. 02-0200 and General Provision No. 4 (subcase 00-92002GP), asserting that: (1) zero c.f.s. should be a "maximum" rather than a minimum;[15] (2) water right 02-0200 should be decreed and administered as part of Basin 01 "to ensure maintenance of a flow of zero (0) cfs at Milner Dam"; [16] and (3) a general provision is necessary to implement the comprehensive management plan established by the Swan Falls settlement as reflected in the 1986 State Water Plan adopted by the Board and approved by the Legislature.[17] Idaho Power Company also objected to the Director's recommendations, asserting that water right 02-0200 should not exist[18] because the Board did not follow statutory requirements for establishing a minimum instream flow water right,[19] and that General Provision No. 4 should not be included in the Director's Report or in any decree.[20]

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13 *Part I – Director's Report – Irrigation & Other Uses – Reporting Area Basin 02* at Director's Report for water right 02-00200 (Vol. One) (Dec. 29, 2006).

14 *Id.* at Basin 02 General Provisions.

15 *Standard Form 1 Objection. Subcase 02-200 and General Provisions* at 2 (Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, Fremont Madison Ground Water District, Clark Jefferson Ground Water District) (Jan. 30, 2008).

16 *Id.*

17 *Id.* at 5.

18 *Standard Form 1 Objection. Subcase No. 02-200* at 2 (Idaho Power Co.) (Jan. 30, 2008).

19 *Motion to File Late Objections and Request for Expedited Hearing* at 2 (Idaho Power Co.) (Jan. 30, 2008).

20 *Standard Form 1 Objection. General Provision #4* at 2 (Idaho Power Co.) (Dec. 5, 2007).

The City of Pocatello responded to and supported the ground water districts' objection to the Director's Report in subcase 02-0200.[21] The City of Pocatello also responded to the ground water districts' objection to General Provision No. 4, stating that the ground water districts' proposed general provision should apply to all water rights in the Snake River drainage above Murphy.[22] Pocatello also responded to Idaho Power's objection to General Provision No. 4, stating that it provides for administration of water right 02-0200 and that the City understood General Provision No. 4 as applying both above and below Milner Dam.[23] The State of Idaho, the United States Bureau of Reclamation, Idaho Power, and the Twin Falls and North Side Canal Companies also responded to the ground water districts' objections.[24] The State, the Bureau of Reclamation, the ground water districts, the Twin Falls and North Side Canal Companies, Jeff C. and Jackie Harper, Basin and Range Resource Co., LLC, and "Interested Water Users" also responded to Idaho Power's objections.[25]

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[21] *Standard Form 2 Response To Objection. Subcase No. 02-200* at 2 (City of Pocatello) (Feb. 5, 2008).

[22] *Standard Form 2 Response To Objection. Subcase No. 00-92002GP* at 2 (City of Pocatello) (Feb. 5, 2008).

[23] *Standard Form 2 Response To Objection, Subcase No. 00-92002GP* at 2 (City of Pocatello) (Feb. 5, 2008).

[24] *Standard Form 2 Response To Objection. Subcase No. 02-0200 and General Provisions* (State of Idaho) (Feb. 4, 2008); *Standard Form 2 Response To Objection. Subcase No. 02-00200 & 00-92002GP#4* (U.S. Bureau of Reclamation) (Feb. 5, 2008); *Standard Form 2 Response To Objection. Subcase No. 02-200* (Idaho Power Co.) (Feb. 4, 2008); *Standard Form 2 Response To Objection. Subcase No. 00-92002GP* (Idaho Power Co.) (Feb. 4, 2008); *Standard Form 2 Response To Objection, Subcase No. 02-200 and Basin 02-General Provision #4* (Twin Falls Canal Co., North Side Canal Co.) (Mar. 12, 2008).

[25] *Standard Form 2 Response To Objection, Subcase No. General Provision no. 4* (State of Idaho) (Feb. 1, 2008); *Standard Form 2 Response To Objection. Subcase No. 00-92002GP#4* (U.S. Bureau of Reclamation) (Feb. 5, 2008); *Standard Form 2 Response To Objection. Subcase No. General Provision #4 Basin 02 Director's Report* (Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, Fremont Madison Ground Water District, Clark Jefferson Ground Water District) (Feb. 4, 2008); *Standard Form 2 Response To Objection. Subcase No. 02-200 and Basin 02-General Provision #4* (Twin Falls Canal Co., North Side Canal Co.) (Mar. 12, 2008); *Standard Form 2 Response To Objection. Subcase No. General Provision # 4* (Jeff C. & Jackie Harper, Basin and Range Resource Co., LLC, Interested Water Users) (Feb. 5, 2008).

ARGUMENT

I. Legal Standards.

Under the Idaho Rules of Civil Procedure, a party may move for summary judgment upon "any part" of a claim or defense. I.R.C.P. 56(a), (b). "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c).

The purpose of summary judgment "is to avoid useless trials," *Bandelin v. Pietsch*, 98 Idaho 337, 340, 563 P.2d 395, 398 (1977), and "to eliminate groundless claims and paper issues in cases which would end in directed verdict or other rulings of law." *Lipe v. Javelin Tire Co., Inc.*, 97 Idaho 805, 806, 554 P.2d 1302, 1303 (1976). Summary judgment "helps to separate the real issues and facts from the spurious ones; to eliminate the chaff from the wheat." *Stewart v. Arrington Const. Co.*, 92 Idaho 526, 531, 446 P.2d 895, 900 (1968).

The interpretation of a statute is a question of law over which a court exercises free review. *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006). The objective of statutory interpretation is to give effect to legislative intent. *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). The best guide to legislative intent is the statutory language itself, therefore the interpretation of a statute must begin with the literal words of the statute. *Id.* Where the statutory language is unambiguous, the Court does not construe it but simply follows the law as written. *Id.* The statutory words must be given their plain, usual, and ordinary meaning, and the

statute must be construed as a whole. *Idaho Cardiology Assocs., P.A. v. Idaho Physicians Network, Inc.*, 141 Idaho 223, 225, 108 P.3d 370, 372 (2005).

When a statute is ambiguous, "'it must be construed to mean what the legislature intended it to mean. To determine that intent, we examine 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 Fire Prot. Dist. v. Alcorn*, 141 Idaho 388, 398-99, 111 P.3d 73, 83-84 (2005) (citation omitted). In such cases, a court should consider the "context in which language is used, the evils to be remedied and the objects in view." *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 312, 109 P.3d 161, 166 (2005).

II. The State Is Entitled To Summary Judgment As A Matter Of Law Under The Plain Language Of Chapter 38 Of The 1997 Idaho Session Laws, The State Water Plan, And Idaho Code § 42-203B(2).

The Idaho Legislature has explained the meaning of the Milner zero minimum flow in unambiguous terms. The Legislature directly amended the current version of the State Water Plan through chapter 38 of the 1997 Idaho Session Laws, to expressly provide: "The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero." 1997 Idaho Sess. Laws 71 (underlining in original); *see also* 1996 State Water Plan at 17. The purpose of this policy is to allow the Snake River to be completely developed for uses above Milner Dam, as District Judge John M. Melanson recently explained: "In brief terms, the State Water Plan sets a 'zero flow' at Milner Dam to allow for full development of the River above Milner." *Order On Petition For Judicial Review* at 40 n.12, *Clear Springs Foods, Inc. v. Idaho Ground Water Appropriators, Inc.* (Fifth

Jud. Dist., Gooding County) (Case. No. 2008-444) (Jun. 19, 2009).[26] Thus, as a matter of law under the Idaho State Water Plan and Idaho statute, the exercise of water rights upstream from Milner Dam may reduce the flow of the Snake River at Milner Dam to zero c.f.s.

The Legislature has been equally clear that water rights using water downstream from Milner Dam may not impair or interfere with the full development of the river for uses above Milner Dam:

> 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) (emphasis added). Through this language, the Legislature has unambiguously provided that uses downstream from Milner Dam have no legal entitlement to call for any of the water upstream from Milner Dam, and may not interfere with any water rights using water above Milner Dam.

Taken together, section 42-203B(2), chapter 38 of the 1997 Idaho Session Laws, and the State Water Plan leave no doubt that the entire flow of the Snake River may be diverted for uses above Milner Dam, and that water rights using water downstream from

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[26] Judge Melanson made this statement after having been fully briefed on the question of the effect of the Swan Falls Agreement's requirement that the "zero minimum flow" provision be retained in the State Water Plan, which the State of Idaho and Idaho Power Company addressed in summary judgment briefing in Consolidated Subcase 00-92023. Judge Melanson is withholding his decision on this issue pending the resolution of the State's and Idaho Power's joint motions for entry of partial decrees that contain remarks reciting the relevant language of Idaho Code § 42-203B(2), and providing that the hydropower water rights in question may not be enforced or administered against any diversions or uses of water above Milner Dam. *See* Orr Aff., Exhibit 9 at 3, 5 (Milner remarks in examples of the partial decrees proposed under *State Of Idaho's And Idaho Power Company's Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37*) (SRBA Consolidated Subcase 00-92023) (June 25, 2009).

Milner Dam have no legal standing to prevent or interfere with such diversions. The plain statutory language forecloses any other conclusion.

Further, nothing in the statutes or the State Water Plan requires the flow at Milner to be maintained at "zero." This is why the Milner zero flow is a minimum and not a maximum: the underlying policy is simply to allow for full utilization of flows above Milner. In other words, the zero minimum flow principle does not require full utilization above Milner and does not bar spills over Milner Dam: it only provides that it is permissible for the flows at Milner to be reduced to zero c.f.s., and that water rights using water downstream from Milner Dam may not call for water to be spilled over the dam.[27]

The importance of the incorporation of the Milner zero minimum flow principle in the general provisions and the 02-0200 partial decree for purposes of defining and administering Basin 02 water rights is self-evident. The modification to General Provision No. 4 proposed by the State's Motion for Partial Summary Judgment is necessary for the definition and efficient administration of Basin 02 water rights. Idaho Code § 42-1412(6). For the same reasons, a corresponding remark is necessary for the definition and administration of water right 02-0200. Idaho Code § 42-1411(2)(j).

This Court need go no further to determine the question of the meaning and effect of the Milner zero minimum flow in subcases 02-0200 and 00-92002GP. Thus, the State is entitled to summary judgment as a matter of law under chapter 38 of the 1997 Idaho Sessions Laws, the State Water Plan, and Idaho Code § 42-203B(2).

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[27] The State's Motion for Partial Summary Judgment does not address the issue of whether storage water may be released for use below Milner Dam. The use of storage water below Milner is governed by federal spaceholder contracts and other provisions of state law.

III. The Legislative History Confirms That The State Is Entitled To Summary Judgment.

If this Court determines, however, that the State Water Plan and Idaho Code § 42-203B(2) are ambiguous, it may consider "'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 Fire Prot. Dist.* 141 Idaho at 398-99, 111 P.3d at 83-84 (citation omitted). The legislative history of the State Water Plan and Idaho Code § 42-203B(2) confirm their plain meaning.

A. The State Water Plan As Formulated By The Board And Approved By The Idaho Legislature Has Consistently Provided For A Zero Minimum Flow At Milner Dam.

The Board is charged with formulating and implementing the comprehensive State Water Plan, which provides "for optimum development of water resources in the public interest." Idaho Const. art. XV § 7; Idaho Code §§ 42-1734A(1); 42-1734B(1). The State Water Plan is based upon studies and public hearings in affected areas at which all interested parties have the opportunity to appear or present written testimony. Idaho Code § 42-1734A(1). The Board has discretion to balance all factors relevant to the formulation, adoption and implementation of the State Water Plan, Idaho Code § 42-1734B(2), and the Legislature may approve, amend or reject it. Idaho Const. art. XV § 7; Idaho Code §§ 42-1734B(6), (7); 42-1736. State agencies "shall exercise their duties in a manner consistent with the comprehensive state water plan," Idaho Code § 42-1734B(4), and "[a]ll 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).

The State Water Plan has included a Milner zero minimum flow provision since it was first issued in 1976. The 1976 and 1982 State Water Plans designated the flow at Milner to be "protected against further appropriations" as "0 c.f.s." and stated that there was sufficient excess water "to provide for additional uses if water conserving and storage facilities are constructed." 1982 State Water Plan at 42; 1976 State Water Plan at 116. The 1985 amendments and the 1986 State Water Plan provided that the Snake River Basin should "be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gauging station." 1986 State Water Plan at 35. The 1992 State Water Plan provided that "the exercise of water rights above Milner Dam has and may reduce flow at the dam to zero." 1992 State Water Plant at 28. The 1992 State Water Plan also explained that "[t]he zero flow at Milner Dam is not a target or goal to be achieved . . . ." *Id.* The current State Water Plan also provides that "[t]he exercise of water rights above Milner Dam has and may reduce flow at the dam to zero." 1996 State Water Plan at 17.

The Legislature approved the current State Water Plan and its predecessors, particularly with regard to the Milner "zero minimum flow." *See* 1978 Idaho Sess. Laws 885-86, 1011;[28] 1982 Idaho Sess. Laws 944-46; 1985 Idaho Sess. Laws 514; 1987 Idaho Sess. Laws 818-19.[29] Notably, when the Milner "zero minimum flow" provision was omitted from the 1996 State Water Plan as originally forwarded to the Legislature for

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[28] *See supra* note 5.

[29] The Legislature did not pass a statute or resolution formally approving the 1992 State Water Plan, but also did not reject or amend it, and therefore the 1992 State Water Plan became effective as written sixty days after its submission to the Legislature. Idaho Const. art. XV § 7. Further, the Legislature directly amended the 1996 State Water Plan to incorporate the Milner "zero minimum flow" provision of the 1992 State Water Plan. *Compare* 1992 State Water Plan at 28 *with* 1997 Idaho Sess. Laws 71. This fact suggests that the Legislature viewed the 1992 State Water Plan's "zero minimum flow" provision favorably, even if it was not specifically endorsed through formal legislative action in 1992.

review, the Legislature directly amended it to include the zero minimum flow provision of the previous revision of the State Water Plan. 1997 Idaho Sess. Laws 71. Thus, the principle that the flows of the Snake River may be completely developed above Milner Dam, even to the point of reducing the flow at Milner to zero c.f.s., has been an element of the State's comprehensive water resource planning in the Snake River Basin since the Idaho Constitution originally called for such planning.

B. The Legislature Specifically Affirmed The Meaning And Effect Of The Milner Zero Minimum Flow Through The 1986 Amendment To Idaho Code § 42-203B(2).

In 1986 the Legislature specifically affirmed that the "zero minimum flow" principle of the State Water Plan means that water rights using water downstream from Milner may not interfere with or impair the full use and development of flows above Milner. The Legislature did so through the 1986 amendment to Idaho Code § 42-203B(2).

The 1986 amendment was a response to the need for clarification regarding the meaning and effect of the Milner zero minimum flow for purposes of implementing the 1984 Swan Falls Agreement. The Swan Falls Agreement was contingent upon, among other things, retention of the Milner zero minimum flow in the State Water Plan: the Agreement required that "[t]he minimum daily flow at the Milner gauging station shall remain at zero c.f.s."[30]

It was widely understood that retention of the zero minimum flow at Milner Dam meant that surplus flows upstream from Milner such as winter flows and flood waters

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30 Orr Aff., Exhibit 5 at 27 (Swan Falls Agreement, Exhibit 6). The Board amended the State Water Plan accordingly in 1985. *See* Orr Aff., Exhibit 6 at 4-5 (attachment 1 to minutes of Senate Resources and Environment Committee) (Mar. 4, 1985). The Legislature approved the amendments. 1985 Idaho Sess. Laws 514.

would remain available for storage and use above Milner. In a press release on the settlement, Attorney General Jim Jones (who signed the Agreement) stated, among other things, that "[t]he parties have agreed to a zero flow at Milner, which would allow for the filling of present upstream storage facilities, as well as additional new water storage projects."[31] Idaho Power's attorney Tom Nelson (who negotiated the Agreement on behalf of Idaho Power) explained in the Board's public information meeting on the day the Agreement was signed:

> The water plan target minimum flow at Milner Dam is zero, which is a condition realized in the summer all the time, and this agreement does not contemplate any change in that minimum flow. So short of a statement that before new storage is built we should fully utilize existing storage, what goes on above Milner is not affected by this agreement.[32]

The Governor's negotiator, attorney Pat Costello, also pointed out in one of the Board's public information meetings that the zero minimum flow provision allowed for future storage projects upstream of Milner Dam: "And on the up-stream storage, I guess it's in here by omission, because by maintaining the zero flow at Milner, it still provides for any future up-stream storage projects that become feasible above Milner."[33]

The Committee of Nine of Water District No. 1 passed a resolution supporting the Swan Falls Agreement only if it was clearly understood that there would continue to be no obligation to spill water over Milner Dam:

> BE IT FURTHER RESOLVED that in implementation it be clear that the following conditions prevail:

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31 Orr Aff., Exhibit 10 at 3 ("News Release" at 2) (Office of the Attorney General) (Oct. 1, 1984).

32 Orr Aff., Exhibit 11 at 9 (transcript of Idaho Water Resource Board public information meeting on Swan Falls settlement at 27) (Twin Falls) (Oct. 25, 1984).

33 Orr Aff., Exhibit 12 at 20 (transcript of Idaho Water Resource Board public information meeting on Swan Falls settlement at 66) (Boise) (Nov. 1, 1984).

1. That there is, and will continue to be, no obligation to provide surface flows for water rights established below Milner Dam and that the "zero" flow at Milner Dam be reaffirmed.[34]

In the Board's 1985 hearings on the State Water Plan amendments proposed by the Swan Falls Agreement, the Secretary of the Great Feeder Canal Company stated his understanding "that this entire policy is based on a minimum flow at Milner that anything that can develop or anything that's affected above Milner should not be affected by this agreement."[35] Board representative Frank Sherman clarified this point during the Board's 1985 hearings: "The negotiators agreed that above Milner there is a requirement for zero flow back to the dam."[36] "They're going to continue the zero flow at Milner Dam. . . . there is no requirement for the water to be dumped past Milner Dam."[37]

The understanding that winter and flood flows would remain available for storage and development above Milner was thrown into doubt when the Idaho Department of Water Resources ("IDWR") proposed administrative rules to implement the Swan Falls settlement's "trust" provisions.[38] The proposed rules defined all surface and ground

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[34] Orr Aff., Exhibit 13 at 3 ("Resolution" of Committee of Nine of Water District 1) (Jan. 17, 1985).

[35] Orr Aff., Exhibit 14 at 29 (transcript of Idaho Water Resource Board hearing on proposed State Water Plan amendments at 28) (Idaho Falls) (Jan. 28, 1985, 2:00 p.m.).

[36] Orr Aff., Exhibit 15 at 20 (transcript of Idaho Water Resource Board hearing on proposed State Water Plan amendments at 15) (Pocatello) (Jan. 29, 1985, 7:00 p.m.).

[37] Orr Aff., Exhibit 16 at 20 (transcript of Idaho Water Resource Board hearing on proposed State Water Plan amendments at 65) (Lewiston) (Feb. 6, 1985, 7:00pm).

[38] Pursuant to the Swan Falls Agreement and its implementing legislation—specifically Idaho Code § 42-203B—the State holds in trust certain hydropower water rights located below Milner Dam that formerly were claimed by Idaho Power. *See* *Memorandum Decision And Order On Cross Motions For Summary Judgment* at 31 (SRBA Consolidated Subcase 00-92023) (Apr. 18, 2008) ("This Court holds that Exhibit 7B [of the Swan Falls Agreement] clearly and unambiguously provides that any portion of Idaho Power's water rights in excess of the minimum flows are held in trust by the State . . ."); *see also* Idaho Code § 42-203B(2) (similar). The flows encumbered by the hydropower water rights held in trust by the State are often termed "trust water." *See* *Memorandum Decision And Order On Cross Motions For Summary Judgment* at 41 (stating that new appropriators received "a portion of the water freed up and encumbered as a result of the trust arrangement. This is where the reference to 'trust water' comes from . . . ."). The administrative rules proposed to implement Idaho Code § 42-203B would have defined, among other things, the geographic area in which "trust water" is found. *See* Orr Aff., Exhibit 17 at 3 (IDWR publication setting forth proposed rules) (Rule 1.5 and Figure 1).

water flows above Milner as subject to the hydropower water rights held in trust by the State below Milner, despite the retention of the zero minimum flow. While IDWR acknowledged that retaining the zero minimum flow at Milner had been interpreted "by some" to mean the hydropower water rights held in trust by the State did not have any effect on flows above Milner Dam, it nonetheless rejected this view because Idaho Code § 42-203B(2) as originally enacted contained no such limitation:

> The adopted minimum flow of zero cfs at Milner has been construed by some as exempting any water passing Milner from the trust water provisions. . . . A simple reading of S1008 (Section 42-203b(2)) indicates that all waters in excess of an established minimum flow up to the amount of the established hydropower right are to be considered trust waters. . . . I propose to draft the rules recognizing all flows tributary to Snake River above Swan Falls including water passing Milner as trust waters . . . .[39]

Thus, the proposed "rules for water allocation" provided that the entire Snake River drainage above Swan Falls, including the area upstream from Milner Dam, contained "flows subject to the trust water provisions as a result of the agreement and the legislation which implemented it."[40]

IDWR's administrative interpretation was universally rejected. In his written comments on the proposed rules, attorney John Rosholt[41] wrote "its been my understanding all along that trust water flows can only exist between the Swan Falls Dam and the Milner Dam . . . . for the reason that the minimum stream flow at Milner is

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[39] Orr Aff., Exhibit 18 at 3 (internal IDWR memorandum from Norm Young to Director Ken Dunn, "Legal Issues Associated With Senate Bill 1008") (June 14, 1985) (parentheses in original).

[40] Orr Aff., Exhibit 17 at 3 (IDWR publication setting forth proposed rules) (Rule 1.5 and Figure 1).

[41] John Rosholt represented Idaho Power, Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District in proceedings related to the Swan Falls settlement. *See* Orr Aff., Exhibit 19 at 1, 4 (letter from John A. Rosholt, as attorney for Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District, to Norman C. Young of IDWR at 1, 4) (Oct. 12, 1988); *id.* at 10 (Idaho Power's memorandum in support of motion to reconsider and amend summary judgment at 5) (*Idaho Power Co. v. State*, Case No. 62237) (Fourth Jud, Dist., Ada County) (Feb. 19, 1980) (signed by John A. Rosholt).

zero."[42] Attorney General Jim Jones stated: "the parties did not intend ground waters or surface waters tributary to the Snake River above Milner Dam to be included within the definition of trust water flows . . . . The reason for this conclusion is that the parties retained the minimum streamflow at Milner Dam at zero."[43] The United States Bureau of Reclamation also commented: "[S]ince it is further stated that the minimum flow at Milner is zero, meaning no surface flow is required past Milner for any downstream uses, it would appear to be a misinterpretation to include surface water above Milner."[44]

A water manager for several upper Snake River valley canal companies pointed out in a hearing on the proposed rules that they threatened to interfere with the established practice of reserving flood waters for uses upstream from Milner:

> I'm wishing for more of a clarification of whether flood waters is what – or relationship flood waters has with trust waters. Now, in the past, when we have been having flood waters, we use those flood waters, we could use all we could take care of in the canal system. . . . And so I'd like to make my formal protest or clarification of what flood waters is in relation to the trust waters. And if it was going to change anything that we have been doing in the past 30 or 40 years, it would be detrimental to our canal systems.[45]

The Secretary of the Great Feeder Canal Company emphasized that the settlement had been presented as reserving flows above Milner Dam for existing water rights and new development:

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[42] Orr Aff., Exhibit 20 at 2 (letter from John A. Rosholt to Kenneth Dunn, Director of Idaho Department of Water Resources, at 1) (Oct. 30, 1985). Mr. Rosholt also commented that re-evaluation of permit applications for storage projects upstream of Milner Dam "becomes totally unnecessary . . . since there can be no surface trust water above Milner Dam." *Id.* at 4-5.

[43] Orr Aff., Exhibit 21 at 3 ("News Release" at 2) (Office of the Attorney General) (Jan. 29, 1986).

[44] Orr Aff., Exhibit 22 at 2 (letter from John W. Keyes III, Assistant Regional Director, U.S. Bureau of Reclamation, to A. Kenneth Dunn, Director, Idaho Department of Water Resources, at 1) (Jan. 27, 1986).

[45] Orr Aff., Exhibit 23 at 6 (transcript of IDWR public hearing on proposed rules and regulations for water appropriation at 10-12) (Idaho Falls) (Jan. 14, 1986).

> I've been at two meetings in which I specifically asked the question of whether the Swan Falls agreement would affect the flow above Milner. And I was assured that under no circumstances would the Swan Falls agreement affect any of the diversion of water under any circumstances above Milner. . . . The water users that I have talked to feel as if they have been deceived . . . . you know, after being promised one thing and here we come and we find that all of our water rights may be in jeopardy – or some of them, at least – or that new development may be minimized because of the rules and regulations and the laws that are now made, it appears to us that it's pure deception. . . . I don't think you realize how the farmers feel, how the people feel, about that very principle.[46]

Mike Crapo, then a state senator, had played a key role in the passage of the 1985 Swan Falls legislation, including Idaho Code § 42-203B. He also emphasized the importance of the Milner minimum streamflow in a hearing on the proposed rules: "zero flow at Milner was very heavily discussed and was the basis upon which the [Swan Falls settlement] legislation was passed. And certainly with regard to surface flow, there are no trust waters above Milner, as my understanding of it goes."[47] "[I]t was the understanding of everyone last year that the flow at Milner was zero, and there was no trust water in the flow above Milner."[48]

The parties therefore proposed a clarifying amendment to Idaho Code § 42-203B(2) to confirm that flows arising above Milner Dam would not be subject to water rights using water below Milner Dam. The amendment proposed to add two sentences to the statute. The first sentence addressed the hydropower water rights held in trust by State pursuant to the Swan Falls settlement. The second sentence of the proposed amendment to Idaho Code § 42-203B(2)—the passage quoted and discussed earlier in this memorandum—clarified that for all water rights downstream from Milner dam, "no

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46 *Id.* at 7-8 (transcript at 16-18).

47 Orr Aff., Exhibit 24 at 5 (transcript of IDWR public hearing on proposed rules and regulations for water appropriation at 8) (Boise) (Jan. 16, 1986).

48 *Id.* at 6 (transcript at 11).

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" for purposes of "determination and administration." S.B. 1358, 48th Idaho Leg., 2d Reg. Sess. (1986);[49] Idaho Code § 42-203B(2).

The parties supported the amendment as a confirmation of the original intent of the Agreement.[50] The Committee of Nine of Water District No. 1 also passed a resolution endorsing the proposed amendment. The resolution recited the committee's understanding that the parties to the Swan Falls Agreement had agreed "that it was never their intent to force water arising above Milner Dam to be released to fill downstream water rights" and that "the upper Snake has always been managed separately from the lower Snake."[51] The Legislature enacted the proposed amendment to Idaho Code § 42-203B(2). 1986 Idaho Sess. Laws 309 (codified as amended at Idaho Code § 42-203B(2)).

Thus, the legislative history of the 1986 amendment to Idaho Code § 42-203B(2) demonstrates the Legislature specifically affirmed that the zero minimum flow at Milner means not only that the river may be fully developed for storage and use above Milner, but also that water rights using water downstream from Milner Dam have no legal standing to impair or interfere with such development.

IV. The Origin And Implementation Of The Milner Zero Minimum Flow.

While the State's Motion for Partial Summary Judgment can be resolved solely on the basis of the plain language of Idaho Code § 42-203B(2), the 1997 Idaho Session Laws and the State Water Plan, the State submits that the Court may consider the following

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[49] Orr Aff., Exhibit 25 at 3.

[50] *See* Orr Aff., Exhibit 26 at 2 (minutes of Senate Resources and Environment Committee, Feb. 19, 1986, at 1) (describing the 1986 amendment as "merely clarification").

[51] Orr Aff., Exhibit 27 at 6 ("Resolution 19") (Committee of Nine and the Water Users of Water District 1) (Mar. 4, 1986).

undisputed historical facts to resolve any alleged ambiguity. These undisputed facts reveal "'the public policy behind the statute.'" *Hayden Lake Fire Prot. Dist.*, 141 Idaho at 398-99, 111 P.3d at 83-84 (citation omitted)

The zero minimum flow provisions of the State Water Plan and the 1986 amendment to Idaho Code § 42-203B(2) were not created out of whole cloth. Rather, they reflected the long-established practice of conserving and storing non-irrigation season ("winter") flows and flood waters above Milner Dam for agricultural purposes. The origins of this policy and practice are inextricably intertwined with the development of the water resources of the Snake River Basin during the last century.

As discussed below, the unique geography of the Snake River Basin fostered irrigation development that resulted in the full appropriation of the summer flow of the river at Milner by the early years of the twentieth century. Thereafter, further development was possible only by conserving and storing above Milner the winter flows and flood waters that would otherwise be lost or "wasted" for irrigation purposes. This fact, plus a series of low water years and devastating droughts that resulted in shortages even for existing irrigation projects, made the conservation and storage of winter and flood flows above Milner Dam an imperative that became the primary consideration in water resources planning and development in southern Idaho. State and federal policies aimed at conserving and storing winter and flood flows above Milner Dam to the greatest extent possible were part of the bedrock of Snake River Basin water development and property rights expectations long before the first State Water Plan formally incorporated a "zero minimum flow" at Milner Dam.

A. The Physical Division Of The Snake River Basin At Milner Dam.

"From Heise to Milner, a distance of 219 river miles, the [Snake] river is not deeply entrenched. . . . At Milner, the river enters a deep canyon cut through lava and sedimentary beds and continues for 216 miles in a west and northwesterly direction."[52] Thus, geography physically divides the Snake River into two sections as it arcs across southern Idaho, and this natural bifurcation dictated the progression of early irrigation development. The section downstream from Milner offered essentially no opportunities for significant agricultural development because the river was largely inaccessible in the deep canyon.[53] Prior to the advent of high-lift pumping, the principal use contemplated below Milner was hydropower development.[54]

The river above Milner was readily accessible to irrigate the broad, fertile plains and was quickly developed for this purpose. The area above American Falls was especially well-suited to gravity irrigation diversions and by 1900 private interests had developed many irrigation systems in this area.[55] After 1900, large-scale irrigation projects were developed with government assistance in the area from American Falls to

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52 Orr Aff., Exhibit 4 at 13 (1982 Idaho State Water Plan at 5).

53 *See* Orr Aff., Exhibit 28 at 6 ("Report and Recommendations to the Federal Power Commission by W.G. Swendsen, Commissioner of Reclamation, representing the State of Idaho" at 3) (Oct. 28, 1922) ("Almost immediately below Milner Dam, Snake River enters what ultimately becomes a rather deep rock gorge, from which water can not be diverted by gravity for irrigation uses.").

54 *See* Orr Aff., Exhibit 29 at 14 ("Report of Board of Engineers to Consider Projects in Snake River Valley Which May Affect the Proposed American Falls Reservoir" at 5) (April 10, 1920) ("Board of Engineers Report") ("The waters flowing in the stream below Milner Dam are not susceptible of diversion to any considerable amount, and therefore become of primary use in connection with the production of power."); *see also* Orr Aff., Exhibit 30 at 4 (W.G. Hoyt, Hydraulic Engineer, U.S. Geological Survey, "Report Relative To Application of Idaho Power Company for Preliminary Permit to Develop Upper Salmon Falls Site on Snake River, Idaho – Permit No. 19, Federal Power Commission" at 3) (July 1921) ("in the section downstream [from Milner] the use of water for power purposes will undoubtedly predominate, since the larger portion of the land adjacent to the river is at such an elevation that it cannot feasibly be irrigated by water pumped or diverted below the Milner dam.").

55 *See generally* Orr Aff., Exhibit 31 at 3 (Leonard J. Arrington, *Irrigation In The Snake River Valley: An Historical Overview*, IDAHO YESTERDAYS, Spring/Summer Issue, 1986, Vol. 30, Numbers 1-2, at 4.)

Milner. The Twin Falls south and north side projects were constructed by the Twin Falls and North Side Canal Companies under the 1894 Carey Act, and the federal Minidoka Project was developed by the U.S. Reclamation Service (later the Bureau of Reclamation) under the 1902 Reclamation Act.[56] The Minidoka Project built dams and large reservoirs at Lake Walcott (Minidoka Dam) and Jackson Lake in Wyoming.[57] The Twin Falls companies constructed a large dam and diversion works at Milner,[58] the lowest point on the river at which large irrigation diversions were practicable.[59] As a result of this development, the reliable summer flow of the river at Milner was fully appropriated soon after the end of the nineteenth century.[60]

B. Early Recognition Of The Need To Conserve And Store Winter Flows Above Milner.

The full appropriation of irrigation season flows at Milner was a turning point in the development of the Snake River Basin. From that point on, storage reservoirs and the waters to fill them were necessary for further irrigation development. As the Director of the U.S. Reclamation Service emphasized in a 1920 letter to Idaho Power Company regarding the proposal to build a reservoir at American Falls:

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56 *See id.*; Orr Aff., Exhibit 32 at 6 (W.G. Hoyt, "Report Relative to Water Power Resources of Snake River and Status of Public Lands Between Milner and Weiser, Idaho" at 42) (U. S. Geological Survey) (Aug. 1922).

57 *See* Erik A. Stene, "Minidoka Project History" at 2, 5-10 (U.S. Bureau of Reclamation) (1997), http://www.usbr.gov/projects/ImageServer?imgName=Doc_1245093434100.pdf; (link located on webpage: http://www.usbr.gov/projects/Project.jsp?proj_Name=Minidoka%20Project&pageType=ProjectHistoryPage).

58 Orr Aff., Exhibit 33 at 5 (C.E. Tappan, "Report Covering Water Measurements and Studies of Stream Flow of Snake River Between Milner and Shoshone Falls" at 8) (Idaho Power Company 1923).

59 Orr Aff., Exhibit 29 at 6 (transmittal letter from I.W. McConnell, Chairman of the Board of Engineers, to Chief of Construction, U.S. Reclamation Service, at 2) (Apr. 10, 1920) (transmitting Board of Engineers Report).

60 *See* Orr Aff., Exhibit 34 at 5 ("State of Idaho Response to Federal Energy Regulatory Commission Request for Additional Information" at 2) (*In the Matter of Petition for Declaratory Order by Idaho Power Company*) (FERC Docket no. EL85-38-000) (Jan. 30, 1987) ("The reliable natural flow during the summer month period was fully developed by the end of the 19th century.").

> The time has already passed when the natural flow of the river was sufficient to irrigate the lands under cultivation along its shores and storage reservoirs have been recognized as a necessity for many years past. . . . without additional storage no new areas at all can be made productive and habitable and even the present projects will suffer occasional serious losses.[61]

The great drought of 1919, the driest year on record in the Snake River Valley to that point, provided the catalyst for the development of the storage facilities needed to support continued agriculture development within the basin. In a report to the Governor in June of that year, the State Commissioner of Reclamation stated that there had been an "extreme shortage of water, occasioned by a very light precipitation and snow-fall."[62] The Commissioner further reported:

> During seasons of normal flow, the Snake River is at this time at flood stage and a considerable quantity of water has heretofore, at this time of

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[61] Orr Aff., Exhibit 35 at 1 (Letter from A.P. Davis, Director of U.S. Reclamation Service, to Idaho Power Company at 1) (Nov. 2 1920). The inadequacy of natural flow for further irrigation development, and the need for additional storage, was recognized repeatedly in subsequent years. In 1934 the State Commissioner of Reclamation reported:

> The limit of the development of the irrigation resources of the State from the natural flow of streams has long since been reached, and resort has been had to storage, pumping from lakes and streams, and the development of subterranean water to supplement and augment the supply necessary to irrigate the lands under cultivation.

Orr Aff., Exhibit 36 at 2 (R.W. Faris, State Commissioner of Reclamation, "Supplementary Water For Irrigation In Idaho, With Particular Reference To Boise And Snake River Valleys" at 1) (Oct. 15, 1934) (revised). A 1935 U.S. Geological Survey water utilization report stated: "Irrigation development has reached a point in the Snake River Basin beyond which there can be no large increase in acreage without the construction and utilization of additional storage reservoirs or through the development of additional water supply by pumping." Orr Aff., Exhibit 37 at 7 (W.G. Hoyt, "Water Utilization In The Snake River Basin" at 65) (U.S. Department of the Interior, Water Supply Paper 657) (1935). The Idaho Supreme Court also took notice of the fact that natural flow had been fully appropriated: "The normal flow of our streams has been appropriated, and therefore the limit of development by irrigation from that source has been reached." *State Water Conservation Board v. Enking*, 56 Idaho 722, 738, 58 P.2d 779, 785-86 (Holden, J., concurring) (1936); *see also* Orr Aff., Exhibit 38 at 7 ("Special Report – Upper Snake River Basin (Above Powder River) – Irrigation And Associated Developments" at 63) (U.S. Dept. of the Interior, Bur. of Reclamation, Regional Office, Boise, Idaho) (February 1955) ("Large scale irrigation of new lands or providing supplemental supplies in the upper portion of Snake Basin would depend upon development of a water supply in the river above Milner Dam.").

[62] Orr Aff., Exhibit 39 at 1 (W.G. Swendsen, Idaho State Commissioner of Reclamation, "Departmental Report No. 2 from May 1 To June 1, 1919 – To His Excellency C.C. Moore, Acting Governor Of The State Of Idaho" at 1).

> the year, been wasting over the Milner Dam, whereas during this season the stream has been entirely used for irrigation purposes at this point for some weeks past.[63]

The Commissioner also issued a notice in June to the water users on the Snake River, notifying them of the run-off shortage and the unusually low storage in Jackson Lake Reservoir, and stating that it was "highly important that the greatest economy be exercised in the use of water during this season."[64] The District Counsel for the U.S. Reclamation Service, B.E. Stoutemyer, reported to the Chief Counsel of the U. S. Reclamation Service: "The water situation on Snake River is extremely critical this year . . ."[65] "There is a great shortage of water in Snake River this year, this being the lowest year in thirty years, the Snake River at this time being about 3,000 second-feet lower than ever known before at this time of the year."[66]

After the 1919 drought, "[i]t became obvious to all that additional storage facilities had to be built to provide water when short supplies occurred in the future."[67] As the State Commissioner of Reclamation reported to the Governor in 1923: "The shortage of water experienced in the Snake River valley in 1919 and the subsequent crop loss from drouth during that year acted to stimulate interest in and created a demand for additional storage on the Snake River."[68] Because the river was fully appropriated above Milner during the irrigation season, the only waters available for storage in new

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63 *Id.*

64 Orr Aff., Exhibit 40 at 2 (W.G. Swendsen, Commissioner of Reclamation, Department of Reclamation, "Re: Water District No. 36, To the Water Users on the Snake River") (June 2, 1919).

65 Orr Aff., Exhibit 41 at 2 (Letter from B.E. Stoutemyer, U.S. Reclamation Service District Counsel, to the Chief Counsel, U.S. Reclamation Service at 2) (June 26, 1919).

66 Orr Aff., Exhibit 42 at 1 (Letter from District Counsel B.E. Stoutemyer, U.S. Reclamation Service, to Chief Counsel, U.S. Reclamation Service, Washington D.C. at 1) (June 30, 1919).

67 Orr Aff., Exhibit 31 at 6 (Arrington article at 7).

68 Orr Aff., Exhibit 43 at 1 (Letter from W.G. Swendsen, State Reclamation Commissioner, to Governor C.C. Moore at 1) (July 9, 1923).

reservoirs were non-irrigation season flows and flood waters. The location most often proposed for a new reservoir to store such flows was American Falls.

In 1920, the United States Director of Reclamation A.P. Davis and Idaho Governor D.W. Davis designated a joint federal-state Board of Engineers to consider water projects in the Snake River Valley, particularly those affecting the proposed American Falls Reservoir.[69] The engineers selected to serve on the board represented governmental and private interests: the U.S. Reclamation Service, the Idaho Department of Reclamation, the Twin Falls Canal Company, and the Twin Falls North Side Land & Water Company (the predecessor to North Side Canal Company).[70]

The Board of Engineers quickly recognized that the water supply situation called for comprehensive planning and coordinated development. During the Board's first meeting, Idaho State Commissioner of Reclamation W.G. Swendsen said that State officials believed "the time had come for the formation of a definite plan for the development of the remaining resources of the Snake River water supply on a broad and comprehensive basis which would insure to the state the maximum utility of the possibilities of the stream."[71] Further, as the Board of Engineers reported: "It became apparent from preliminary consideration of the subject that no one of the principal problems involved could be properly considered without taking into account its effect upon the general problem of the conservation of the waters of Snake River."[72] Thus, the Board of Engineers considered "[t]he total water supply available in the Snake River basin for irrigation," the "quantity of storage required for the utilization of the water

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69 Orr Aff., Exhibit 29 at 10 (Board of Engineers Report at 1).
70 *Id.* at 11 (Board of Engineers Report at 2).
71 *Id.* at 11-12 (Board of Engineers Report at 2-3).
72 *Id.* at 12 (Board of Engineers Report at 3).

supply and the relation of that supply to the size of the American Falls Reservoir and other reservoirs which may be necessary," and the loss of hydropower rights at American Falls through "the appropriation of all waters available for irrigation."[73] The Board of Engineers issued a much-anticipated report in April 1920 ("Board of Engineers Report").[74]

The Board of Engineers Report concluded that "the greatest use of the water of Snake River will be found in the dedication of the entire flow of the stream to irrigation in so far as the water can be economically appropriated," and that it was possible "with the requisite storage to utilize a very large percentage of all the waters originating in the watershed above Milner dam."[75] The Report also stated that because there was an excess of irrigable land and "the amount of water available in the river is the limiting factor,"[76] that "[t]he net effect of this condition will be to dry up the river below Milner Dam during the irrigation season, also to as great an extent as possible below American Falls Reservoir, during the non-irrigation season."[77]

While high-lift pumping would eventually make large-scale irrigation possible in the section downstream from Milner Dam,[78] at the time of the Board of Engineers Report

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73 *Id.*

74 *See* Orr Aff., Exhibit 44 (letter from Barry Dibble, Minidoka Project Manager, to the Chief Engineer of the U.S. Reclamation Service) (Apr. 16, 1920) ("There is considerable demand for this report, and I believe some of the papers will be interested in printing parts of it.").

75 Orr Aff., Exhibit 29 at 14 (Board of Engineers Report at 5); *see also id.* at 6 (transmittal letter at 2) ("The board is of the opinion that all of the water of Snake River susceptible of economical diversion should be dedicated to irrigation. . . . The unappropriated water of Snake River can be made available by the development of approximately 3,900,00 acre-feet of storage capacity.").

76 *Id.* at 14 (Board of Engineers Report at 5); *see also id.* at 7 (letter of transmittal of report at 2) ("The available water supply is not sufficient for the irrigation of all the land which can be reached from the river.").

77 *Id.* at 14 (Board of Engineers Report at 5).

78 *See* Orr Aff., Exhibit 45 at 9-11 (Susan M. Stacy, Legacy of Light: A History of Idaho Power Company at 135-37) (Idaho Power Co. 1991) (discussing high-lift pumping developments in the 1960s).

hydropower was the only feasible use of any significance below Milner.[79] Thus, for purposes of considering the downstream effects of maximizing winter flow storage above Milner, the Report focused on hydropower impacts:

> The principle involved therefore is to secure as nearly as possible a total use of the waters for irrigation above Milner Dam, and to secure the greatest possible use for power below Milner Dam. To a moderate extent these interests conflict with each other but fortunately on account of the large accretions to the stream below Milner Dam the power resource is restored at Upper Salmon Falls and the injury to that resource which would be susceptible of future development is relatively not very great.[80]

Similarly, the Board of Engineers Report emphasized that the storage of winter flows that would otherwise be used for power purposes was key to sustaining irrigation development:

> It is recognized generally that the establishment of the American Falls Reservoir is essential to the further development of dependable irrigation possibilities on the Snake River, also that the development of that reservoir will shut off the winter flow at that point which will thereby to a very large extent deprive the remaining power sites of the winter water which now passes American Falls.[81]

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[79] *See* Orr Aff., Exhibit 29 at 14 (Board of Engineers Report at 5) ("The waters flowing in the stream below Milner Dam are not susceptible of diversion to any considerable amount, and therefore become of primary use in connection with the production of power.").

[80] *Id.* at 14-15 (Board of Engineers Report at 5-6). Hydraulic Engineer W.G. Hoyt, of the U.S. Geological Survey, came to the same conclusions in a report issued the following year:

> In general the river may be divided into two main sections. First, that portion upstream from Milner, and second, the portion downstream from Milner. In the portion of the river upstream from Milner the use of water for irrigation will predominate over power use, while in the section downstream the use of water for power purposes will undoubtedly predominate, since the larger portion of the land adjacent to the river is at such an elevation that it cannot feasibly be irrigated by water pumped or diverted below the Milner dam.

Orr Aff., Exhibit 30 at 4 (Hoyt report on preliminary permit application for Upper Salmon Falls at 3).

[81] Orr Aff., Exhibit 29 at 17 (Board of Engineers Report at 23); *see also id.* at 16 (Board of Engineers Report at Table 5, "Power Possibilities on the Snake River from American Falls to Swan Falls, inclusive") ("Proposed Conditions: All flow stopped at American Falls in non-irrigation season. All flow except waste waters to be diverted at Milner Dam or above in all seasons") (underlining in original).

The Board of Engineers Report also recognized that hydropower water rights for the use of winter flows might attach or perfect before irrigation development had been completed because "the complete utilization of the Snake River water supply above Milner Dam for irrigation purposes will, under normal conditions require a considerable length of time."[82] The Board of Engineers therefore advised: "In granting power rights in the future the Federal Government and the State should so far as possible provide restrictions requiring its eventual surrender when and as the waters are required for application to the land."[83] Similarly, when large reclamation projects were eventually proposed downstream from Milner, State and Federal authorities made it clear that such projects would not be permitted to interfere with the conservation and storage of winter flows above Milner Dam.[84]

C. The American Falls Reservoir And The Twin Falls Power Site.

The principles proposed in the Board of Engineers Report were soon put into effect in the negotiations and agreements for construction of the American Falls Dam and the Twin Falls power project. Idaho Power Company owned land, hydropower facilities

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82 *Id.* at 18 (Board of Engineers Report at 30).

83 *Id.* at 19 (Board of Engineers Report at 31). The Idaho State Commissioner of Reclamation made this same point in a report to the Federal Power Commission:

> it is extremely important that any power permits granted in connection with these applications shall be conditioned upon the State's present and future right to divert, use and impound as much water as may be necessary for a complete development of its agricultural resource, both for irrigation, domestic and other consuming uses.

Orr Aff., Exhibit 28 at 5 (Swendsen "Report and Recommendations" at 2).

84 *See* Orr Aff., Exhibit 46 at 2-3 (letter from Idaho Governor Robert Smylie to U.S. Secretary of Interior Stewart L. Udall at 1-2) (Dec. 7, 1966) (stating that further irrigation development above Milner was possible provided that the proposed Southwest Idaho Water Development Project did not require water to be spilled over Milner Dam); Orr Aff., Exhibit 47 at 5 ("Statement" of Evan Kackley, Idaho Water Resource Board Member from District 4, to the Idaho Water Resource Board at 5) (June 1967) (Idaho Falls) (stating that the Southwest Idaho Water Development Project would not require spills over Milner Dam).

and water rights at American Falls and also below Milner Dam,[85] and had applied for a preliminary permit to develop the Twin Falls power site just downstream from Milner.[86]

Thus, the proposed American Falls Reservoir could not be built until a resolution was reached with Idaho Power Company regarding its property interests at the American Falls site. Equally important, the American Falls and Twin Falls projects bracketed Milner and squarely presented the question of whether downstream uses would be allowed to require the spilling over Milner Dam of winter and flood flows that otherwise could be stored upstream for irrigation.

Federal and state authorities entered into negotiations with Idaho Power on these subjects and eventually an agreement was reached.[87] The resulting contract, dated June 15, 1923 (the "American Falls Contract"), recognized that "the United States contemplates the construction of a large reservoir at American Falls, Idaho, to store the flood water and winter flow of Snake River and make the same available for the reclamation of large areas" in public and private irrigation projects in the Snake River

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[85] Orr Aff., Exhibit 43 at 2-3 (Swendsen letter to Governor C.C. Moore at 2-3) ("The construction of the [American Falls] reservoir will ultimately interfere with the power rights and property of the Idaho Power Company at American Falls and at other down river points on the Snake River. For example, Shoshone Falls, Lower Salmon Falls and Swan Falls.").

[86] *See* Orr Aff., Exhibit 48 (letter from U.S. Reclamation Service Director A.P. Davis to the Executive Secretary of Federal Power Commission forwarding a copy of a report by George L. Hoffman, U.S. Reclamation Service Engineer, on Idaho Power Company's application to the Federal Power Commission regarding the Twin Falls power site) (Apr. 5, 1921); *see also* Orr Aff., Exhibit 49 at 1 (George L. Hoffman, U.S. Reclamation Service Engineer, "Report on Application Before Federal Power Commission by Idaho Power Company, Serial No. 18, For Preliminary Permit covering Twin Falls site, on Snake River") (Mar. 15, 1921); *see also* Orr Aff., Exhibit 50 at 2 (Idaho Power Company, "Project No. 18 - Application For License – Twin Falls Project – Snake River, Idaho") (Feb. 1, 1922).

[87] Orr Aff., Exhibit 43 at 3 (Swendsen letter to Governor C.C. Moore at 3) ("Negotiations were opened with the Power Company some two or three years ago, with the result that after considerable study and deliberation, involving many conferences in which the writer participated, as the representative of the State of Idaho, an agreement was finally reached . . .").

valley.[88] The American Falls Contract also recognized that "the storing by the United States of winter flow at American Falls will interfere with certain power and other rights of company at American Falls and points below."[89]

The contract limited Idaho Power Company's right "to demand the turning out of water from the reservoir for release by and use below Milner,"[90] and granted the United States "[t]he right to limit all other rights of the company on Snake River . . . insofar as and no farther than the rights allowed and granted to the United States to store and use water as herein provided may interfere with any rights of the company at any lower points on Snake River."[91] The State Commissioner of Reclamation informed the Governor that "the contract between the power company and the government provides for the regulation of Snake River in the interest of irrigation, adequate to the needs of a million and a half acre feet, reservoir capacity."[92] The contract cleared the way for the construction of the American Falls Dam, which was completed in 1927.[93]

Negotiations regarding Idaho Power Company's proposal to develop the Twin Falls power site proceeded in tandem with the American Falls negotiations because both projects raised the question of the extent to which storable winter flows would be spilled over Milner Dam. A 1921 Reclamation Service report to the Federal Power Commission ("FPC") on Idaho Power's application for a preliminary permit for the Twin Falls site stated that "from a power standpoint, the Snake River is divided into two sections, that

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88 Orr Aff., Exhibit 51 at 3 ("Contract Between the United States and the Idaho Power Company Relative to Power Rights at American Falls Reservoir, Idaho – Dated June 15, 1923") (Symbol Ilr-733) ("American Falls Contract" at 1).

89 *Id.* at 4 (American Falls Contract at 2).

90 *Id.* at 7 (American Falls Contract at 21) ("Company's Rights below Milner Dam").

91 *Id.* at 6 (American Falls Contract at 11).

92 Orr Aff., Exhibit 43 at 4 (Swendsen letter to Governor C.C. Moore at 4) (July 9, 1923).

93 Orr Aff., Exhibit 31 at 2 (Arrington article at 1).

above and that below Milner Dam. . . . During the irrigation season . . . the Snake River is turned dry at the Milner dam, all of the water being diverted into the irrigation canals . . . ."[94] The report also stated: "The further development of this site—in fact even the present development would interfere seriously with the storage of water in the American Falls reservoir, which reservoir is the key to the full development of the Snake river for irrigation purposes."[95] The report explained:

> Plans for storage reservoirs are now being made by the U.S. Reclamation Service, working in conjunction with the State of Idaho and the different water users associations along the Snake River, that will ultimately conserve all the water of Snake river susceptible of economical diversion for irrigation purposes. The lowest point on the river at which diversion is practicable in large amounts is at Milner dam.[96]

Idaho Power's license application for the Twin Falls project recognized these plans: "The effect of the Milner diversion is to completely stop the natural flow of water at Milner during a part of the irrigation season . . . . In the near future the flow will be further affected by the construction of a storage reservoir at American Falls by the U.S. Reclamation Service . . . ."[97] The application stated that upon completion of the reservoir, "the only natural flow available at the site" from the beginning of the irrigation

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94 Orr Aff., Exhibit 49 at 1 (Hoffman report at 1) (March 21, 1921). Similar comments were made in a U.S. Geological Survey report on Idaho Power's application for a preliminary permit at the Upper Salmon power site. *See* Orr Aff., Exhibit 30 at 4 (Hoyt report on preliminary permit application for Upper Salmon Falls at 3).

95 Orr Aff., Exhibit 49 at 2 (Hoffman report at 2).

96 *Id.* at 3 (Hoffman report at 3). The Director of the U.S. Reclamation Service made the same points in a letter to the Federal Power Commission regarding the Upper Salmon power project:

> [The American Falls] reservoir will completely control and utilize Snake River above Milner dam and it would manifestly be opposed to the public interest to grant to a private company rights which might enable them to handicap seriously, if not prohibit, the otherwise feasible complete development of the power and irrigation resources of the Snake River Basin.

Orr Aff., Exhibit 52 at 1 (letter from A.P. Davis, Director, U.S. Reclamation Service, to Mr. Merrill, Executive Secretary, Federal Power Commission at 1) (Mar. 26, 1921).

97 Orr Aff., Exhibit 50 at 8 (Idaho Power application for Twin Falls license at Exhibit H).

season until the reservoir began to spill, "which in an average year will be about December 1st, and in a minimum year not until March or April, will be make-up from Milner to Twin Falls."[98]

Nonetheless, in the Twin Falls negotiations (which extended several years after the signing of the American Falls Contract) Idaho Power continued to seek rights to winter flows above Milner Dam. The Reclamation Service steadfastly opposed these efforts, as Idaho Power's corporate secretary made clear in a 1931 status report to the company's vice president and general manager: "we may expect little concession from the Department of Reclamation in the way of further prior rights to the use of the waters of Snake River so far as the same may be available for irrigation use at, or at points above, Milner Dam."[99] "It was very clear to me that it is not [District Counsel Stoutemyer's] nor the Reclamation Department's intention that we shall gain, without his or their serious protest, any further prior rights to water of Snake River which may be used for irrigation purposes at or above Milner Dam."[100]

Ultimately, a stipulation confirmed that power use at the Twin Falls site was subordinate to existing and future irrigation uses and strictly limited the water supply to flows below Milner Dam, with the exception of 45,000 acre-feet of "primary storage" Idaho Power held under the American Fall Contract. The stipulation was incorporated into the FPC license for the Twin Falls site as Article 14:

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98 *Id.*

99 Orr Aff., Exhibit 53 at 1 (letter from James L. Boone to Mr. Hibbard at 1) (May 29, 1931). Mr. Hibbard and Mr. Boone were, respectively, the vice president and the corporate secretary of Idaho Power Company. *See* Orr Aff., Exhibit 54 (letter from M.L. Hibbard, Vice President and General Manager of Idaho Power Company, to E.B. Darlington, Superintendent, U.S. Reclamation Service) (Apr. 7, 1931); Orr Aff., Exhibit 55 at 3 ("Idaho Power Company Minutes of Special Meeting of Board of Directors" at 2) (May 11, 1934) (certification of corporate secretary James L. Boone).

100 Orr Aff., Exhibit 53 at 1 (Boone letter to Hibbard at 1).

> Article 14. As a condition of this license, the Licensee, for itself, its successors and assigns, hereby stipulates and agrees that all rights to the use of water for power purposes heretofore or hereafter acquired for the development of power at the site of this project shall be held and considered at all times to be subject, inferior and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation purposes, except (a) the right to use for power development at this project the water from the 45,000 acre-feet of primary storage capacity which the Licensee holds in American Falls Reservoir under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923, and the discharge of which it may control under the terms of said contract; (b) the right to use for power development at this project the seepage, percolation, drainage, spring or springs, waste, and/or other influent waters which do not flow or spill over Milner Dam but which enter in, arise in, and flow in and along the channel of Snake River between the down-stream toe of Milner Dam in Snake River, Idaho, and the site of the project covered by this license.[101]

The Article 14 stipulation also provided that it was "a covenant running with the title to the said power plant at Twin Falls, and all rights in connection therewith" and "effective to bind the Licensee and its successors and assigns."[102] Idaho Power agreed to "to execute and acknowledge under authority of a suitable resolution of its board of directors" a recordable contract or deed embodying the stipulation,[103] and the company's Board of Directors unanimously approved a corresponding resolution on the same date the license was approved.[104] In the meantime, the Snake River Basin was experiencing another devastating drought.

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101 Orr Aff., Exhibit 56 at 13 ("Federal Power Commission, License on Government Lands, Project No. 18, Idaho, Idaho Power Company" at 11) ("Article 14") (May 11, 1934).

102 *Id.*

103 *Id.*

104 *See* Orr Aff., Exhibit 55 at 2-3 ("Idaho Power Company, Minutes of Special Meeting of Board of Directors") (May 11, 1934). Two years later, in a technical journal article describing the Twin Falls project, an Idaho Power engineer confirmed that the project "may be said to be dependent for its water supply upon that water returning to, or arising within, the 22 miles of river bed between Milner Dam and that plant, with the addition of such limited amounts of water permitted under contract to flow by Milner Dam." Orr Aff., Exhibit 57 at 3 (H.L. Senger, Idaho Power Company, *Twin Falls Hydroelectric Development*, ELECTRICAL WEST – Vol. 76, No. 4 at 19) (April 1936).

D. The 1930s Drought And Renewed Efforts To Conserve Winter Flows.

The drought of the early 1930s was worse than the 1919 drought. Lynn Crandall, watermaster for Water District No. 36 (the area upstream from Milner Dam - later renumbered Water District No. 1), wrote in 1953:[105] "The drought during the early 1930's was the most severe and prolonged of any that have occurred during the 62 past years of stream-flow records on Snake River."[106] The State Commissioner of Reclamation reported in late 1934: "We have just passed through the most serious and disastrous drouth in the history of the State. . . . The situation is acute and disaster confronts many heretofore prosperous and self-sustaining communities unless supplementary and additional water can be provided to afford relief."[107]

As in 1919, the drought resulted in a clamor for new storage projects to protect against short water years. "Shortly after American Falls was built we had an unprecedented drought in the Snake River Valley which lasted over 5 years, 1931, 1932, 1933, 1934, and 1935. In two or three of those years the reservoir did not fill. . . . The settlers immediately started a request for investigations for further storage."[108] The State responded by enacting legislation providing for "the construction of a system of works, in

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[105] Mr. Crandall was watermaster during the 1930s drought, and was still watermaster in 1953 when he wrote of the drought. *See* Orr Aff., Exhibit 58 at 7 (transcript of examination of Lynn Crandall in Federal Power Commission proceedings on Idaho Power Company's proposed Hells Canyon project at 10136) (Jan. 12-13, 14-15, 1954) ("Crandall Examination").

[106] Orr Aff., Exhibit 59 at 8 (Lynn Crandall, "Future Upstream Depletion Above Hells Canyon" at 6) (Apr. 6, 1953) ("Crandall Report").

[107] Orr Aff., Exhibit 36 at 2-3 (Faris report at 1-2).

[108] Orr Aff., Exhibit 60 at 14 ("The Palisades Dam And Reservoir Project -- Hearings before a Subcommittee On Irrigation And Reclamation Of The Committee On Public Lands, House of Representatives and a Special Subcommittee Of The Committee On Interior And Insular Affairs, United States Senate -- Eighty-First Congress -- First Session on H.R. 5506" at 23) (United States Government Printing Office, Washington) (1949) (statements of Robert J. Newall, former regional director of the Bureau of Reclamation in Boise, Idaho).

the manner hereinafter provided, for the conservation, development, storage, distribution and utilization of water for irrigation purposes."[109]

Federal authorities redoubled their efforts to develop storage sites and water supplies above Milner Dam, as the State Reclamation Commissioner reported in 1934: "The United States Bureau of Reclamation, during the past two years, has made surveys and investigations in an effort to discover ways and means of relieving this situation by providing storage on the upper reaches of both the North Fork and South Fork of Snake River."[110] In 1935, the Bureau of Reclamation published a report on its upper Snake River basin storage investigations, the purpose of which was "to determine the surplus water for contemplated future storage developments."[111]

A 1935 Department of Interior water supply paper reported that there could be no significant increase in irrigation in the Snake River Basin without additional storage or pumping,[112] and that "the recurrence of years of abnormal low run-off has demonstrated

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109 1935 Idaho Session Laws 162. Although the Idaho Supreme Court subsequently declared this legislation unconstitutional because of the powers it purported to confer on the State Water Conservation Board, *see generally* State Water Conservation Board v. Enking, 56 Idaho 722, 58 P.2d 779 (1936), the Court recognized the legitimacy of the underlying legislative purpose:

> More than half the people of the state depend, either directly or indirectly, upon irrigation. The normal flow of our streams has been appropriated, and therefore the limit of development by irrigation from that source has been reached. Hence the need of providing additional water by storage or otherwise is great, and the purpose of the statute under consideration most commendable.

Id. at 738, 58 P.2d at 785-86 (Holden, J., concurring). The Idaho Supreme Court later overruled *Enking* to the extent it was inconsistent with the holdings in two subsequent decisions. Dept. of Parks v. Dept. of Water Admin., 96 Idaho 440, 443, 530 P.2d 924, 927 (1974); Idaho Water Res. Bd. v. Kramer, 97 Idaho 535, 555, 648 P.2d 35, 55 (1976).

110 Orr Aff., Exhibit 36 at 4 (Faris report at 3).

111 Orr Aff., Exhibit 61 at 7 (E.B. Debler, Hydraulic Engineer & J.R. Riter, Associate Engineer, "Report on Upper Snake River Storage Investigations – Volume I – Snake River Above Idaho Falls" at 158) (U.S. Department of the Interior, Bureau of Reclamation) (June 1935).

112 Orr Aff., Exhibit 37 at 7 (Hoyt report on "Water Utilization In The Snake River Basin" at 65). The State Commissioner of Reclamation also recognized that "[t]he limit of the development of the irrigation resources of the State from the natural flow of streams has long since been reached." Orr Aff., Exhibit 36 at 2 (Faris report at 1).

the desirability of holdover storage for irrigated areas which under normal climatic and run-off conditions have a reasonably adequate water supply."[113] In 1936 the Secretary of the Interior found that "the very serious water shortages which have occurred in large sections of the Snake River Valley during the last five years" demonstrated "the urgent importance of having every acre foot of the winter flow of Snake River which it is possible to save, and storing the water for use during the next irrigation season."[114]

The measure of potential winter water conservation and storage efforts, and their success, was the amount of water that spilled over Milner Dam. As the 1935 Department of the Interior water supply paper stated: "Present or future power rights not being taken into account, the amount of water that passes the Milner diversion dam is an index of the present utilization of the Snake River for irrigation above Milner and a measure of future possibilities."[115] Watermaster Lynn Crandall made similar points in a 1934 letter to the United States Commissioner of Reclamation:

> Inasmuch as all water passing Milner is waste as far as irrigation is concerned . . . . Only by decreasing present discharge past Milner dam can the supply for American Falls reservoir be increased . . . . Sooner or later the need for irrigation water on Snake River will require the elimination of any discharge past Milner in years of deficient runoff . . . .[116]

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[113] Orr Aff., Exhibit 37 at 7-8 (Hoyt report "Water Utilization In The Snake River Basin" at 65-66).

[114] Orr Aff., Exhibit 62 at 1-2 (T.A. Walters, Acting Secretary of the Interior, "Findings of the Secretary of the Interior as to net profits from the Black Canyon and the Minidoka Power Plants, through sales of power on the Minidoka project and towns adjacent thereto, during the year 1935" at 1-2) (United States Department of the Interior, Bureau of Reclamation) (Mar. 12, 1936).

[115] Orr Aff., Exhibit 37 at 9 (Hoyt report on "Water Utilization In The Snake River Basin" at 167); *see also* Orr Aff., Exhibit 63 at 10 (Thomas R. Newall, U.S. Geological Survey engineer, *Newell On Administrative Water Problems*, 94 TRANSACTIONS OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS 321 (1930) (Newell's comments on Baldwin, *Transmission and Delivery of Reservoir Water* in *Administrative Water Problems: A Symposium*) ("The small percentage of ultimate wastage (flow past Milner during regulation period) is a real index of the excellence and efficiency of the control system of river operation as a whole."); *see also* Orr Aff., Exhibit 61 at 8 (Debler & Riter report at 204) ("any winter use below the [American Falls] Reservoir is a total loss as far as irrigation is concerned") (quoting Lynn Crandall report).

[116] Orr Aff., Exhibit 64 at 2, 3 (Letter from Lynn Crandall to Elwood Mead, Commissioner, U.S. Bureau of Reclamation at 2-3) (Feb. 21, 1934).

In his report on water distribution and hydrometric work for Water District No. 36 during the first good water year after the drought, Lynn Crandall wrote "[i]t is a matter of regret that lack of storage facilities resulted in the waste of 620,000 acre-feet of surplus flood waters past Milner during 1936."[117] He explained that surplus water "wasted" past Milner Dam was a lost opportunity to store supplies against future shortages: "Dry years to be expected in the future will require all the water that can be made available from any source at reasonable cost if the established irrigated agriculture is to be adequately maintained in the Snake River Valley."[118]

In addition to demonstrating the need for new storage above Milner to hold the surplus flows of high water years, the 1930s drought also focused attention on the need to conserve winter flows of normal and below-average years. Winter flows routinely had been diverted for power generation at Minidoka Dam[119] and for domestic and stockwater purposes above Milner Dam. Curtailing these winter uses to allow further conservation of winter flows above Milner was seen as a means of ensuring the filling of American Falls Reservoir on a regular basis. The State Commissioner of Reclamation reported that the reservoir repeatedly failed to fill during the drought and that winter water uses, including winter power generation at the Bureau of Reclamation's Minidoka Dam and winter diversions for domestic and stockwater uses, "might be looked to to supply this

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[117] Orr Aff., Exhibit 65 at 5 (Lynn Crandall, Watermaster for Water District No. 36, "Water Distribution And Hydrometric Work – Water District No. 36 – 1936" at 9).

[118] *Id.*; *see also* Orr Aff., Exhibit 66 at 2 (Letter from District Engineer Lynn Crandall to District Counsel B.E. Stoutemyer at 2) (Sept. 8, 1939) ("there have been over 3,000,000 acre-ft. of surplus water spill to waste over Milner Dam during the past 4 years and that if the So. Fork Reservoir was in existence over a million acre-ft. of this wasted water would today be in the reservoir waiting to be used in future dry years").

[119] *See* Orr Aff., Exhibit 67 at 1 (letter from B.E. Stoutemyer to U.S. Commissioner of Reclamation at 1) (Mar. 12, 1940) (stating that the Minidoka power plant was constructed "for reclamation purposes" and "irrigation pumping requirements").

deficiency."[120] In a 1934 letter to the president of the Aberdeen-Springfield Canal Company, District Counsel Stoutemyer discussed closing down the Minidoka power plant in the non-irrigation season and reducing water users' winter diversions for domestic and stockwater purposes: "Such a saving of winter flow would assure the filling of American Falls Reservoir practically every year."[121]

A 1934 contract between the United States and Idaho Power Company paved the way for conserving the winter flows that had long been used for power generation at Minidoka Dam. Among other things, the contract provided for Idaho Power to furnish winter power to the Minidoka Project, which allowed the United States to shut down the Minidoka power plant in the non-irrigation season and thereby retain at American Falls Reservoir the winter flows that otherwise would have been sent downstream to generate power at Minidoka.[122]

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[120] Orr Aff., Exhibit 36 at 4-5 (Faris report at 3-4) ("the American Falls Reservoir has filled but twice since it was placed in operation, in 1926 . . . . The rights that might be looked to to supply this deficiency are . . . the right of the Minidoka project to divert something like 2,000 second feet, continuously, for the operation of its power plant at Minidoka dam, and that of the canals diverting water at the Milner Dam for domestic purposes during the non-irrigation season").

[121] Orr Aff., Exhibit 68 at 1 (letter from B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation, to W.H. Philbrick, President of Aberdeen-Springfield Canal Company at 1) (June 6, 1934). District Counsel Stoutemyer had also pointed out in previous years that winter flow should be used to fill the American Falls Reservoir before giving any consideration to potential power uses:

> In years like 1924 and 1926 there is little or no flood water available for storage in the spring. Whatever storage is secured must be secured out of the winter flow. . . . In the event that we have another low water year, the winter flow which can be stored in American Falls reservoir is far more valuable for irrigation than for power and we should store all the water we can and rent the Government's share to the projects which will need it. When we have stored enough water in the American Falls reservoir to take care of all the irrigation needs of Snake River valley, we can then consider dickering with the Power Company to release some water for power development, but not before that time.

Orr Aff., Exhibit 69 at 1, 2 (letter from B.E. Stoutemyer, District Counsel, U.S. Reclamation Service to the Chief Engineer at 1-2) ("Subject: Use of American Falls Storage – Minidoka Project") (Aug. 16, 1926).

[122] *See* Orr Aff., Exhibit 70 at 12 ("Contract between United States and Idaho Power Company for conservation of Snake River Water and furnishing transmission service" at 11) (Symbol IIr-801) (Oct. 1, 1934) (". . . the water conserved and made available by the terms of this agreement is for storage in the American Falls Reservoir . . .").

The Secretary of the Interior found that "the public interest requires that the water supply needed for irrigation purposes should not be sacrificed for the purpose of providing increased power profits . . . It has therefore been found necessary (in order to avoid the waste of water for irrigation purposes) to limit the operation of the Minidoka Power Plant during the non-irrigation season . . . ."[123] District Counsel Stoutemyer raised the same public interest concerns in a letter to the State Commissioner of Reclamation in 1937, when Idaho Power sought to perfect additional hydropower water rights at Twin Falls and Lower Salmon Falls. Mr. Stoutemyer's letter recited the Article 14 stipulation and explained "[w]hen the license in question was under consideration, we insisted on the above quoted stipulation for the protection of the present and future irrigators of the Snake River Valley."[124] It further explained:

> It seems to us that it would be contrary to sound public policy to allow any additional power rights to attach for use in the Snake River Canyon to such an extent as would require the waste of water over Milner Dam, since all the water available in Snake River above the Milner Dam is needed for irrigation purposes even at the present time (especially so in low water years when there have been serious water shortages even for the lands now under irrigation) and with increasing irrigation requirements, and construction of additional reservoirs to store flood water and to carry over excess water of high water years for use in low water years, the need to conserve all the available water above Milner Dam for irrigation purposes will become more and more evident as the years go on . . . . Any additional power rights which would require the waste of water over Milner Dam would conflict with both of these propositions . . . .[125]

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123 Orr Aff., Exhibit 62 at 2 (findings of the Secretary of the Interior at 2) (parentheses in original).

124 Orr Aff., Exhibit 7I at 3 (Letter from B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation, to R.W. Faris, Idaho State Commissioner of Reclamation at 2-3) (June 21, 1937).

125 *Id.* at 3, 4 (parentheses in original). Mr. Stoutemyer's letter also forwarded a copy of a letter he had received from Watermaster Lynn Crandall, which notified Mr. Stoutemyer of Idaho Power's new water right filings and stated Mr. Crandall's view that under the Article 14 stipulation,

> any water rights acquired would not be adverse to future storage rights above Milner. . . . I suppose the [Federal license] would control anyhow but it seems to me that it would be desirable to have it reaffirmed in the State water right license so that it will be clearly evident that the date of priority applies only to rights below Milner and is not adverse to subsequent developments above Milner.

The United States Court of Appeals for the District of Columbia Circuit also endorsed the United States' decision to store winter flows above Milner. In rejecting Burley Irrigation District's challenge to the Secretary of the Interior's accounting methodology for the Minidoka power plant under the winter water conservation program, the court stated: "Water passing [Minidoka Dam] in winter serves only to generate power at the plant for commercial sale, is useless for irrigation and pumping, and is lost therefore to the project, including Burley District, for its primary purposes. Winter flow is therefore highly wasteful."[126]

E. The Palisades Project And Winter Water Savings Contracts.

Further winter water conservation measures were necessary to ensure a reliable water supply for additional storage projects that were contemplated even further upstream. This need led to proposals to link new storage projects to commitments by water users to reduce or eliminate winter diversions for domestic and stockwater uses. District Counsel Stoutemyer stated in a 1939 letter to the United States Commissioner of Reclamation: "[A]s the Chief Engineer reports that such saving of winter water is essential to the feasibility of the Grand Valley project I think that we have no alternative but to insist that such contracts must be executed before the new reservoir is constructed."[127] Thus, the reduction or elimination of winter domestic and stockwater diversions became a pre-condition for acquiring storage space in the next large reservoir the Bureau proposed above Milner, the Palisades Project: "the Bureau has adopted the

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Orr Aff., Exhibit 72 (Letter from Lynn Crandall, U.S. Geological Survey District Engineer, to B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation) (June 18, 1937).

126 *Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 535 (D.C. Cir. 1940).

127 Orr Aff., Exhibit 73 (letter from B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation, to Commissioner, U.S. Bureau of Reclamation) (Sept. 5, 1939).

requirement that all companies purchasing space in the Palisade Reservoir will have to agree to cease winter water diversions within 5 years from the date that construction starts on the dam."[128]

The Palisades Project was originally authorized in 1941, placed on hold during World War II, and reauthorized in 1949. In his statement in support of the 1949 Palisades legislation, Idaho Congressman John Sanborn stated that it dealt with "the control and use of water in the entire watershed of the Snake River above Milner Dam. . . The proposed legislation will authorize the construction of units for the storage and use of nearly all of the water not now utilized in the upper Snake River Valley."[129] He also stated that the Bureau of Reclamation had been conducting studies for more than 20 years "for the purpose of developing a plan to place under beneficial use all available water in the Snake River Valley above Milner, Idaho."[130] The 1949 Palisades legislation retained the winter water savings requirement,[131] as the Assistant Reclamation Commissioner explained:

> Commissioner Page of the Bureau of Reclamation, whom many of you remember, presented the original plan for Palisades Dam in 1941, but its construction was regarded then, as now, as being dependent on the working out of assurances of a minimum water supply through the curtailment of certain wasteful winter diversions in the upper Snake River Valley. The Palisades Dam project was authorized in December 1941 upon the basis that these negotiations be worked out prior to construction. The negotiations and plan of operation, together with the plans for

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128 Orr Aff., Exhibit 74 at 1 (letter from Watermaster Lynn Crandall to E.V. Berg, Idaho State Commissioner of Reclamation at 1) (Sept. 25, 1941).

129 Orr Aff., Exhibit 60 at 5 (Palisades hearings at 4) ("Statement of Honorable John Sanborn, a Representative in Congress from the State of Idaho").

130 *Id.* at 5 (Palisades hearings at 5) ("Statement of Honorable John Sanborn, a Representative in Congress from the State of Idaho").

131 Pub. L. No. 81-864 § 4(a), 64 Stat. 1083-84 (1950) ("The continuation of construction of Palisades Dam beyond December 31, 1951 . . . is hereby made contingent on there being a finding by the Secretary by the controlling date that contracts have been entered with various water users' organizations of the Upper Snake River Valley in Idaho that, in his opinion, will provide for an average annual savings of one hundred and thirty-five thousand acre-feet of winter water.").

> facilities to accomplish the desired operation, have now been completed.[132]

Because the practice of diverting winter flows for stockwater and domestic uses was "deep rooted and difficult to alter," the Palisades winter water savings agreements embodied a compromise.[133] The compromise included a number of important elements, including, among others: conservation of water for storage above Milner through elimination of winter diversions for stockwater and domestic uses and curtailment of winter power generation; coordination of reservoir operations for maximum storage; exchanges of storage rights between certain reservoirs; and clarification of diversion and storage rights and holdover storage privileges.[134] The Bureau of Reclamation concluded that the Palisades contracts "resulted in better distribution and utilization of the waters of the Snake River":

> The elimination of winter water runs for stock and domestic use, the establishing of uniform storage water holdover privileges, the coordinated system-wide operation of reservoirs, the subordination of winter power production to conserve storage, and the exchange of storage space to effectuate its use closer to points of diversion, all have resulted in better distribution and utilization of the waters of the Snake River.[135]

F. The Hells Canyon Project.

The need to conserve winter and flood flows above Milner for irrigation purposes was also recognized in the FPC proceedings on Idaho Power's Hells Canyon project in the 1950s. In his report analyzing future depletions above Hells Canyon, which Idaho

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132 Orr Aff., Exhibit 60 at 8 (Palisades hearings at 11) ("Statement of Wesley R. Nelson, Assistant Commissioner, Bureau of Reclamation").

133 Orr Aff., Exhibit 75 at 3 ("Status Report – Workings of Palisades Water Savings Agreement" at 2) (U.S. Bureau of Reclamation) (Boise, Idaho) (Aug. 5, 1968).

134 *See generally id.* at 3-6 (status report at 2-5).

135 *Id.* at 9 (status report at 8).

Power offered in support of its FPC application,[136] watermaster Lynn Crandall stated that "flood waters in years of ample runoff will be stored in new reservoirs such as Palisades and will be fed out onto the lands in dry years."[137] His report stated that future development would probably eliminate spills past Milner: "Except in years of well above normal runoff it is quite likely that future years will see the flow of upper Snake River controlled so as to practically eliminate spills past Milner except for storage rights owned by the Idaho Power Company . . . ."[138]

Mr. Crandall's report also pointed out the possibility of diverting "surplus flows that would otherwise spill past Milner" for purposes of recharging "the ground-water reservoir."[139] When examined on this point during the FPC proceedings, Mr. Crandall testified that it would be possible "to provide greater storage and offset to some extent depletions arising out of ground water pumping"[140] by recharging the ground water using "waters that would otherwise spill down past Milner into the Columbia."[141]

Subsequent analyses also recognized ground water recharge as a means of conserving winter and flood flows above Milner Dam. A 1955 report by the Bureau of Reclamation referred to "the possibility of using the lavas under this plain as a ground-water storage reservoir which would outlet into the Snake River."[142] In discussing opportunities for obtaining new irrigation water supplies above Milner Dam, a joint report in 1960 by the Bureau of Reclamation and the Army Corps of Engineers pointed

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136 *See* Orr Aff., Exhibit 58 at 17 (Crandall Examination at 10146) ("This report, which is his direct testimony, was offered by the applicant . . .").

137 Orr Aff., Exhibit 59 at 7 (Crandall Report at 5).

138 *Id.* at 8 (Crandall Report at 6).

139 *Id.*

140 Orr Aff., Exhibit 58 at 34 (Crandall Examination at 10317).

141 *Id.* at 35 (Crandall Examination at 10318).

142 Orr Aff., Exhibit 38 at 6 (special report on upper Snake River basin at 16).

out: "In a sense, the ground water is storage. In considering future development it could be used much as a conventional storage reservoir."[143] The joint report pointed out "the possibility of artificially recharging [the underground reservoir] by diverting surplus flows, beyond requirements of existing and future developments, from the Snake River during the flood season into highly permeable areas of raw volcanics."[144] Governor Smylie also pointed out in a 1966 letter to the Secretary of the Interior the potential to use flows above Milner Dam for "ground water recharge."[145] In a 1967 letter to the Board, the Assistant Regional Director of the Bureau of Reclamation stated: "Artificial recharge would consist of diverting surplus surface flows of wet years from Snake River or Henrys Fork to infiltration areas where this water would enter the porous materials of the Snake Plain aquifer," and thereby "[p]ut underground in an evaporation-free reservoir, surplus flows of Henrys Fork and Snake River that would otherwise spill past Milner unused."[146] In a 1972 Board meeting, Board Director Dr. Robert Lee stated that recharge "really represents an alternative to capture waste water that is now spilling down the Snake . . . . It is an alternative to future dams in the area."[147]

G. The 1960s.

The need to conserve surplus water above Milner was reaffirmed a number of times in the years following the approval of the Palisades and Hells Canyon projects. In

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143 Orr Aff., Exhibit 76 at 7 ("Information Bulletin On A Study Of Water Resource Development Possibilities – Upper Snake River Basin" at 5) (U.S. Army Corps of Engineers & U.S. Department of the Interior, Bureau of Reclamation) (Sept. 29, 1960).

144 *Id.* at 11 (information bulletin at 9).

145 Orr Aff., Exhibit 46 at 2 (Governor Smylie letter to U.S. Secretary of Interior at 1).

146 Orr Aff., Exhibit 77 at 3 (letter from Norman H. Moore, Assistant Regional Director, U.S. Department of the Interior, Bureau of Reclamation, to Dr. Robert E. Lee, Director, Idaho Water Resource Board at 2) (Oct. 27, 1967).

147 Orr Aff., Exhibit 78 at 3 ("Minutes of Meeting No. 4-72" at 7) (Idaho Water Res. Bd., Jun. 13, 1972).

a December 1960 meeting between the Committee of Nine of Water District No. 1 and representatives of the Bureau of Reclamation, R.P. "Pat" Parry, counsel for Idaho Power as well as several irrigation entities such as the Twin Falls and North Side Canal Companies,[148] presented two criteria for river operations: "1. Have water at the beginning of the irrigation season in those reservoirs where the best use can be made of it. 2. Spill no water to waste past Milner."[149]

In a 1962 letter to the FPC commenting on Idaho Power's application for a single FPC license to cover its previously constructed facilities at American Falls, Upper Salmon Falls and Shoshone Falls, the Assistant Secretary of the Interior pointed out that the Department "has constructed upstream from Milner a reservoir system in excess of 4,500,000 acre-feet, all of which is operated with the objective of conserving the water to minimize spills past Milner Dam," and emphasized the "long history of the obvious need for the conservation of water above Milner Dam."[150] In a 1968 letter to Idaho Senator Len Jordan regarding the proposed enlargement of American Falls Reservoir, Bureau of Reclamation Commissioner Floyd Dominy discussed the need "[t]o utilize fully the water resource in the upper Snake River above Milner Dam."[151] He stated that if it was

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148 *See, e.g.* Orr Aff., Exhibit 58 at 12 (Crandall Examination at 10141) (Mr. Parry speaking on behalf of Idaho Power); *see also* 1955 WL 60750 at *2 (syllabus page of Federal Power Commission order issuing Hells Canyon license) (listing R.P. Parry as counsel for Idaho Power Company); Orr Aff., Exhibit 79 at 2 (Minutes of the Meeting on Snake River Flood Control Problems at 8) (Dec. 16, 1957) ("Mr. R.P. Parry then spoke as representative of the water users in the lower Snake River Valley below American Falls Reservoir.").

149 Orr Aff., Exhibit 80 at 2 ("Minutes of Meeting, Bureau of Reclamation and Advisory Committee" at 1) (Dec. 29, 1960).

150 Orr Aff., Exhibit 81 at 5 (letter from Assistant Secretary of the Interior Kenneth Holum to Joseph C. Swidler, Chairman, Federal Power Commission at 4) (Aug. 30, 1962).

151 Orr Aff., Exhibit 82 at 2 (letter from U.S. Bureau of Reclamation Commissioner Floyd Dominy to Senator Len Jordan at 2) (January 5, 1968).

determined that American Falls Dam should not be enlarged, then "alternatives should be investigated to control and utilize uncommitted flows passing Milner Dam."[152]

The policy of conserving winter flows and flood waters for irrigation use above Milner applied even when irrigation developments were proposed downstream from Milner. In his 1966 comments to the Secretary of the Interior regarding the proposed Southwest Idaho Water Development Project, which would have relied on diversions below Milner Dam, Governor Robert Smylie discussed a number of proposed projects that were intended to realize the "tremendous potential for irrigation development" in the Snake River Basin above Milner Dam.[153] The Governor pointed out that these projects were feasible only if the water supply for Southwest Idaho Water Development Project "is not dependent upon spills past Milner Dam," and stated: "We are assured by Region 1, Bureau of Reclamation that inflows below Milner are sufficient to meet Southwest Idaho Project requirements."[154] Idaho Water Resource Board member Evan Kackley reported to the Board the next year that he was "glad to note" that according to the Department of the Interior's report to the Governor, "the Southwest Idaho Water Development would not require the spills of Milner."[155]

H. The Rebuilding Of American Falls Dam.

The primary objective of reserving flows above Milner for irrigation use was again reaffirmed in the 1970s with the replacement of American Falls Dam. By 1972 an alkali-aggregate reaction and deteriorating concrete had compromised it to the point that the Bureau of Reclamation restricted the reservoir to no more than two-thirds of its 1.7

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152 *Id.*

153 Orr Aff., Exhibit 46 at 2 (Governor Smylie letter to U.S. Secretary of Interior at 1). The Governor's list of irrigation development projects included "ground water recharge."

154 *Id.* at 2-3 (Governor Smylie letter to U.S. Secretary of Interior at I-2).

155 Orr Aff., Exhibit 47 at 4-5 ("Statement" of Evan Kackley at 4-5).

million acre-foot storage capacity.[156] Legislation authorized the American Falls Reservoir District ("Reservoir District") to reconstruct the dam in lieu of waiting for a federal appropriation that would have enabled the Bureau of Reclamation to do so.[157] The Reservoir District was authorized to contract with an electrical utility for hydroelectric use of the falling water at the new dam, which would help defray the cost of reconstruction, and Idaho Power Company expressed interest in such a falling water contract.[158]

Under the Internal Revenue Service's interpretation of then-existing law, Idaho Power's use of falling water from the new dam for commercial power generation meant that any bonds the Reservoir District issued would not be tax-exempt,[159] which presented a significant financing obstacle. Thus, federal legislation was proposed to provide tax-exempt status for bonds issued to support the construction of "a dam which furnishes waters for irrigation purposes which has a subordinate use in connection with the generation of electrical energy," where the "subordinate use of water for generating electric energy means that less than 10 percent of the normal supply of stored water may contractually be scheduled for release by the power company and used for generating electric energy."[160]

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156 Orr Aff., Exhibit 83 at 2-3 (H.R. Rep. No. 94-531, at 2-3) (1975) (House Ways And Means Committee) ("Tax Exempt Status Of Obligations Used To Provide Certain Irrigation Facilities").

157 *Id.* at 3 (H.R. Rep. No. 94-531 at 3).

158 *Id.*

159 *See id.* ("If it were not for the use of the water by the Idaho Power Company for hydroelectric power generation, any bonds issued by the Reservoir District would presently qualify for tax-exempt status").

160 *Id.* at 4 (H.R. Rep. No. 94-531 at 4); *see also* Orr Aff., Exhibit 84 at 3-4 (Sen. Rep. No. 94-570, at 3-4) (1975) (Senate Finance Committee) ("Tax Exempt Status Of Obligations Used To Provide Certain Irrigation Facilities") (same).

With the new federal legislation making tax-exempt bonds available, the United States, the Reservoir District and Idaho Power executed the contracts necessary for reconstruction of the American Falls Dam: the "Government Contract" between the Reservoir District and the United States, the "Falling Water Contract" between the Reservoir District and Idaho Power, and the "Spaceholder Contract" among all three parties. All three contracts were dated March 31, 1976.

The "Government Contract" and the "Falling Water Contract" established that power generation was to be subordinate to irrigation purposes. The Government Contract provided that the United States would operate and maintain the new dam "as a part of the Minidoka Project for the beneficial use of the water on the land within the service areas of the Spaceholders pursuant to Section 8 of the Reclamation Act of June 17, 1902."[161] Article 16 of the Government Contract further provided that "the primary irrigation purpose and the incidental purposes of the Minidoka Project shall not be impaired by the subordinate utilization for power generation,"[162] and that the United States "is not obligated to operate the Replacement Dam in a manner to have water in the Replacement Dam at elevations for power generation or to operate to increase the head in the Replacement Dam for power generation."[163] Article 18 of the Government Contract provided that "less than 10 percent of the water accruing to the active storage capacity in the Replacement Dam may be contractually scheduled for release by the Idaho Power

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161 Orr Aff., Exhibit 85 at 6 ("Contract between The United States Of America and The American Falls Reservoir District for Construction And Operation And Maintenance Of The American Falls Replacement Dam Program Dated as of March 31, 1976" at 10) ("Government Contract").

162 *Id.*

163 *Id.*

Company."[164] Idaho Power acknowledged and agreed to these provisions in the Falling Water Contract.[165]

Thus, the Milner "zero minimum flow" principle reflects the long-established objective of maximizing the conservation and storage of non-irrigation season flows and flood waters above Milner Dam for use above Milner. This objective has been an integral part of water resources development policy, planning and practice in the Snake River Basin since long before the first Idaho State Water Plan. Then, as now, the underlying policy and principle is to allow for complete storage and utilization of winter flows and flood waters for irrigation purposes above Milner Dam.

CONCLUSION

The Idaho Legislature codified the Milner zero flow principle in chapter 38 of the 1997 Idaho Session Laws and in Idaho Code § 42-203B(2). The Board and the Legislature memorialized the zero minimum flow at Milner in every revision of the Idaho State Water Plan. Thus, as a matter of law, the State is entitled to summary judgment that General Provision No. 4 should provide that the flow of the Snake River above Milner Dam may be reduced to zero, and that 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 groundwater tributary to the Snake River upstream from Milner Dam. A corresponding remark should be inserted in water right 02-0200 for the same reasons.

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164 *Id.* at 7 (Government Contract at 14).

165 *See* Orr Aff., Exhibit 86 at 10 ("Falling Water Contract Dated as of March 31, 1976 by and between American Falls Reservoir District and Idaho Power Company" at 19) ("Falling Water Contract") ("The Idaho Power Company agrees to the provisions of the Government Contract governing operation and maintenance of the Replacement Dam.").

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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

Exhibit 17

Reporter's Transcript,
Hearing on State of Idaho's Motion for Partial Summary Judgment
Re: Milner Zero Minimum Flow, SRBA Subcase Nos.
00-92002GP, 02-00200, 02-00201, 02-00223, and 02-00224
(Nov. 19, 2009)

IN THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF MINIDOKA

* * * * *

IN RE SRBA)
)
) REPORTER'S TRANSCRIPT
Case No. 39576)
) Sub case Nos. 00-92002GP
) 02-00200, 02-00201,
) 02-00223 & 02-00224

HEARING
BEFORE SPECIAL MASTER TERRENCE DOLAN
Telephone Conference Call

DATE: November 19, 2009

TIME: 10:05 a.m.

PLACE: COURTROOM OF THE DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
BUILDING - 253 3RD AVE. NORTH
TWIN FALLS, IDAHO

Transcribed by:
Maureen Newton, C.S.R. No. 321
P.O. Box 368
Rupert, ID 83350
(208) 436-9041

MAIL 108359

TRANSCRIPT OF PROCEEDINGS
November 19, 2009, 10:05 a.m.

SPECIAL MASTER DOLAN: Good morning, folks. We're now on the record. It's November 19, 2009, it's about 10:05. We're running a little bit late this morning, but we're here in two matters in five sub cases in Basin 02: The rights are 200, 201, 223 and 224, plus 00-92002GP, as general provision. And we've got two different matters here this morning. First of all we have the State's motion for partial summary judgment re: Milner zero minimum flow. They filed that October 19th, 2009.

But we also have a petition to appear amicus curiae filed by the Fremont-Madison Irrigation District.

For the record let's start with who's on the phone this morning.

MS. BEEMAN: Your Honor, this is Jo Beeman for the City of Pocatello.

SPECIAL MASTER DOLAN: Good morning.

MR. LOCKHEAD: Your Honor, this is Jim Lockhead on behalf of Idaho Power. I'll just be listening in.

SPECIAL MASTER DOLAN: Good morning, sir.

MS. DAVIS: Your Honor, this is Shelley Davis for the Twin Falls Canal Company, and I'll just be listening in

this morning.

SPECIAL MASTER DOLAN: Good morning.

MR. HARRIS: Your Honor, this is Rob Harris. I'm the attorney that filed the amicus curiae.

SPECIAL MASTER DOLAN: Let's see, Rob: As I understand we can go ahead and hear your motion to file amicus today, or was there sufficient notice to everyone?

MR. HARRIS: Your Honor, it was sent to everyone about a week ago. I believe there was. Your Honor, I don't intend to present much argument. As I said in my brief, we just wanted to chime in and support the State of Idaho's brief and provide some additional information and do not intend to participate in oral argument. Simply to provide that brief and to listen in today.

SPECIAL MASTER DOLAN: Okay. Well, just as a matter of paperwork, does anyone oppose the motion to file amicus today?

MR. ORR: No, Special Master, the State does not oppose.

SPECIAL MASTER DOLAN: I guess that mike is not close enough.

MR. ORR: The State does not oppose the petition, Your Honor.

SPECIAL MASTER DOLAN: For those on the phone, that's Michael Orr for the State. It looks like there's no

opposition to that, so I'll enter an order granting that motion. That's kind of a paperwork-sort-of thing.

So, Rob Harris, welcome to the case.

MR. HARRIS: Well, thanks.

SPECIAL MASTER DOLAN: Always good to have your interest in here.

MR. GEHLERT: Your Honor, this is David Gehlert. I just wanted to let you know I'm on the phone on behalf of Reclamation.

SPECIAL MASTER DOLAN: Welcome, sir.

MR. GEHLERT: We support the State's position in this case and I will not be presenting oral argument.

SPECIAL MASTER DOLAN: Okay. Is there anyone else on the phone we've missed?

MR. SCHWARZKOPF: I just walked in, Your Honor. This is Mike Schwarzkopf appearing for Dana Hofstetter. I'm sorry I'm late to proceeding. I think the notice of hearing had the wrong number of digits or the wrong number and I had to straighten that out, so --

SPECIAL MASTER DOLAN: Sorry about that.

MR. SCHWARZKOPF: Not a problem. I'm just glad to be here.

SPECIAL MASTER DOLAN: Was it the phone number where we have had the problem?

MR. SCHWARZKOPF: I think a zero was left out of

the notice of hearing.

SPECIAL MASTER DOLAN: Well, our apologies for that. And you're with Jo Beeman, you said?

MR. SCHWARZKOPF: No, I'm with Dana Hofstetter.

SPECIAL MASTER DOLAN: Okay. And whom is Dana representing?

MR. SCHWARZKOPF: She has the resource and rangeland folks and also I believe the Harpers. Jeff Harper.

SPECIAL MASTER DOLAN: Okay. Okay, we've got that taken care of.

Did we have anyone else on the phone?

Okay, we've got everybody covered.

Now let's figure out who's here in court.

Mr. Strong, do you want to start?

MR. STRONG: Your Honor, Clive Strong with the attorney general, State of Idaho.

MR. ORR: Michael Orr, Special Master, State of Idaho.

MR. THOMPSON: Travis Thompson for Twin Falls Northside Canal Companies.

MR. TUCKER: Jim Tucker for Idaho Power Company.

MR. BUDGE: T.J. Budge for the ground water districts.

SPECIAL MASTER DOLAN: Welcome to all of you.

Let's see . . . So you're not representing the coalition?
MR. BUDGE: No, sir, just the two canal companies are respondents in this case.
SPECIAL MASTER DOLAN: Okay. For those of you who may not know, the Surface Water Coalition as a group had filed a number of other things, and sometimes I get thinking that Travis Thompson is representing the coalition all the time.
And one other matter here: Deputy Attorney General Clive Strong called Staff Attorney Eric Wildman here at the SRBA the other day and had a general inquiry about the authority of the Special Master to consider matters in 00-92002 general provision issue.
So Mr. Wildman prepared a supplement -- it's called supplemental order of reference (inaudible) to preside over recommended general provision 00-92002GP and all related matters pertaining to the general provision minimum flows at Milner Dam. I've been given a copy of a two-page order to hand counsel here at the hearing this morning. Those on the phone, of course, you don't have a chance to look at this yet. This was prepared yesterday afternoon and we haven't had a chance to mail it out to everybody, but it's simply a way to supplement a current order of reference in case a question comes up later on.
Have counsel here in court had a chance to look

at it and what are your thoughts?
Mr. Strong, do you want to give a little background here of what your thought was?
MR. STRONG: Your Honor, the reason I made the inquiry of the court was, as we were preparing for argument in this particular matter, we were looking as to the authority in the general provision and specifically how this general provision might apply in other basins, and when we looked back to the authority that was issued by the court it referred only to basins 02, 03, 47, 73 and 75. And what was in our mind was a concern as to whether you had the appropriate authority to address a provision that on its face would apply to all water rights below Milner Dam in the 02 area. And that was the purpose of our inquiry.
And from the State's perspective we're concerned and we want to make sure that as we proceed forward that appropriate notice has been given to all parties so that we don't need to go through this matter again.
SPECIAL MASTER DOLAN: Do you think we can go ahead and ask Judge Melanson to enter the order in the way it's presented this morning?
MR. STRONG: Your Honor, the question we really need to address, and I wanted to have other counsel also address the issue from their perspective as well, is this

is one of the first times we've dealt with general provisions in the adjudication, you know, to have broader applications to a particular basin. And so from a notice perspective we want to make sure that appropriate notice has been given.
In our mind we believe that appropriate notice has been given to the entire basin because those general provisions that was recommended by the Department referenced zero flow at Milner, which by definition means no flow goes past Milner, and therefore anybody below Milner would be affected by it. So we don't see a notice problem in terms of the general adjudication under the statutory provisions that set up the adjudication.
The requirement was made that we serve notice by docket sheet procedure and by service of the Director's Report, and all those matters have been performed, so we don't see a notice problem from that perspective. What we were concerned about was the jurisdictional authority question here, given the limitations of your original reference. So that's the question we were raising for your consideration.
SPECIAL MASTER DOLAN: What do you recommend as far as this order? Should we post this on our website and wait for comment or can we ask the judge to sign it now?
MR. STRONG: Well, Your Honor, I guess it really

turns on two issues here. I think the first issue -- from my perspective I think the notice provision has been adequately addressed. Given that, it's only a question of whether you have jurisdiction. If it's simply a jurisdictional issue dealing with your -- having the court approve the order would then give you that authority to rule on all matters related to the general provision. And from that perspective we don't see that there's a notice question and proceeding with the order.
SPECIAL MASTER DOLAN: Thank you, sir.
Any other comments from counsel here in court?
Mr. Tucker?
MR. TUCKER: Thank you, Your Honor. Jim Tucker for Idaho Power Company. I haven't had a chance to look at this order. I don't have any problem with it conceptually. I guess just for background, Mr. Strong and I had a conversation, I guess it was late Tuesday, and there was a misperception on Idaho Power's position with respect to this particular general provision and what position we were taking with regard to the applicability of Idaho Code 42-203B.
I think there was some perception from our bnef that we were taking the position that 203B may only apply in Basin 02. That was not what we were saying. Unfortunately it was misinterpreted. Perhaps we didn't

state it quite clearly enough.

But our concern was whether or not there had been adequate notice, and since we were dealing with a general provision in Basin 02, whether or not applicability of that general provision applied only to Basin 02, or whether it should apply to other basins. Certainly 203B in our view says what it says and does apply below Milner Dam. So it was just a question of whether or not we were dealing with a piece of the river or we were dealing with the entire river below. And that was the clarification that Mr. Strong and I talked about on Tuesday afternoon.

I suspect this is just a mechanism to try to kind of connect the dots and get things so everything -- if there has been appropriate notice -- and we didn't look into the notice issue -- Mr. Strong, I think his people have, I haven't again had a chance to look at this, but conceptually I don't have an objection to this court's jurisdiction over the other basins certainly.

SPECIAL MASTER DOLAN: Thank you. Any other comments?

MR. BUDGE: Special Master, the Ground Water Districts think it would be appropriate to enter the supplemental order.

SPECIAL MASTER DOLAN: That was T.J. Budge and you're speaking on behalf of the Ground Water Districts?

MR. BUDGE: That's correct.

SPECIAL MASTER DOLAN: Okay. Thank you, sir. Let's see . . . Mr. Wildman is sitting in court today. I guess we ought to leave it up to him, whether he wants to present that to Judge Melanson for a signature at this point, or whether (inaudible).

MS. BEEMAN: Special Master Dolan, this is Jo Beeman. I listened to the presentation, but it's difficult to respond, not actually seeing the order itself.

SPECIAL MASTER DOLAN: You think we need to send a copy of the order to everybody? If we put it on the website, would that be enough?

MS. BEEMAN: We can certainly get it from there. That would be fine.

SPECIAL MASTER DOLAN: Okay.

Mr. Wildman?

MR. WILDMAN: Yeah, this is Eric Wildman, Staff Attorney for the SRBA. The purpose of the order was just to eliminate any ambiguity that might arise over the scope over Special Master Dolan's authority to preside over the Basin 02 general provision. The order of reference that was issued for the four or five basins was a standard order of reference that included essentially boiler plate language that conferred the authority to preside over the general provisions within the basins.

I think the concern was that because there are issues -- or potential issues regarding the application of the general provision, or the effect of the general provision outside of Basin 02, that there may be an issue or an ambiguity regarding the Special Master's authority. So in an effort to resolve that issue and not have to deal with a jurisdictional issue down the road it was determined that this may be the best way to resolve any future ambiguity.

I did speak with Judge Melanson on it. He's apprised of the issue. He just informed me to go ahead and have the parties have the opportunity to address it. He has no problem entering the order and will enter the order provided there are no objections. But as far as affecting any substantive issues or rights of the parties with respect to this particular issue, it has nothing to do with that. It's strictly just providing the jurisdiction of the Special Master to preside over the issue.

SPECIAL MASTER DOLAN: Thank you, sir.

Does anybody have any questions of Mr. Wildman? I suspect this is the one chance you'll have to examine the judge's staff attorney. Very good. Thank you, Mr. Wildman. Appreciate it.

Now, before we get to the substance of the motion, I wish we had everybody here, because it looked

like counsel were meeting in earnest discussion. What I was worried about is you'd settle this case before you'd get a chance to argue it, instead of having press announcements. Did anything come of those discussions or shall we go ahead and hear the motion?

MR. ORR: Michael Orr, Your Honor. I think the State's perspective was we'd go ahead briefly, go over our argument, and we can give you an update on what was discussed prior to the hearing as well.

SPECIAL MASTER DOLAN: Okay. Good. By the way, let me compliment the State or whoever it was -- Mr. Orr I think it was -- preparing the history. It was an absolutely fabulous presentation of this extensive background. It's almost like reading a novel. Well done.

MR. ORR: Thank you, Special Master.

SPECIAL MASTER DOLAN: Mr. Orr, do you want to go ahead and present or --

MR. ORR: May it please the court, Michael Orr for the State of Idaho.

Special Master, the State's motion for partial summary judgment regarding the Milner zero minimum flow, to briefly go over it, it seeks language regarding general provision four in basin two and in water right claim 02-0200, which I'll refer to as simply water right 200 hereafter. Seeks language in both. It's regarding the

Milner zero minimum flow provision.

And I thought it might be good to just briefly go over the director's recommendations in that regard. General provision four, the relevant portion of the director's recommendation, provides that the minimum daily flows at the Milner gauging station shall remain at zero cubic feet per second. And if we go over to water right 200, the director recommended that the quantity of this right is the average daily flow of zero cfs measured by the Milner Dam gauging station at river mile 638.7 downstream.

And then further in the recommendation there are remarks referring to this minimum stream flow water right and the minimum stream flow at Milner. So the recommendations are based on the Milner zero minimum flow principle, and I think all parties were in agreement in that on their briefing.

The legislature has addressed and defined the legal meaning and effect of the Milner zero minimum flow through the State Water Plan, as approved and amended by the legislature and through Idaho Code Section 42-203B(2), as amended by the legislature in 1986. And the State's motion is explicitly based on these provisions.

So the State's motion presents a question of statutory interpretation, which under Idaho Supreme Court

precedent means that the State's motion presents a pure question of law, which we covered in our briefing a little.

So the question presented is whether the State's proposal is for general provision four in water right 200. The proposed language is consistent with the Milner zero minimum flow provision that the legislature has given us in the State Water Plan and in section 42-203B. So to facilitate that, looking at the plain language of those provisions, what we did here in court, we have a couple of foam boards across from you that -- there's two of them. The one on the left has two quotations in it: They're the provision of the State Water Plan to which I referred, and the relative provision of Idaho Code Section 42-203B. I've also distributed to counsel copies on 8 by 11 paper of what these two boards say.

The second board recites the language that the State's proposed in our motion for partial summary judgment. We believe this really is the issue right here, just on these two boards. So when we look at the State Water Plan, the State Water Plan plan provides, quote: "The exercise of water rights above Milner Dam has in May reduced flow at the dam to zero." And that's from the 1996 Idaho State Water Plan, page 71, as amended by 1997 Idaho session laws, page 71 -- I think I have a number transposed, it might be page 17.

The second provision there is from section 203B and it provides, quote: "For the purposes of the determination 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." So that's what the legislature has given us.

Over on the right, on the second board, you'll see what the State's proposed language is in our motion for summary judgment, and that provides, quote: "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 or ground water tributary to the Snake River upstream from Milner Dam."

What our motion has done here is -- what we're attempting to do is translate statutory language to decreed language, and we believe the proposed provision gives affirmative effect to the State Water Plan and section 42-203B(2) and therefore defines water rights below Milner as having no entitlement to call for flows above Milner, so our uses below Milner have that limitation, and then the water rights above Milner are authorized to reduce the flow at the dam to zero.

So that was our -- how we understood the statutory provisions to provide, and we've attempted to translate that into decreed language. We believe our proposed language is fully consistent with what the legislature has given us and really the court need go no further. That's the end of the inquiry under the standards for statutory interpretation the Idaho Supreme Court has given us.

Now, prior to hearing here we had a brief discussion with counsel in the room and we talked about the various concerns each party had with the various proposals, and we discussed the possibility of taking the language on the board on your left, which is the straight quotation from the State Water Plan and the quotation from 203B, and just using that language as it stands. So as you see on the board we have citations in there. The citations would drop out, the sentence above that's from the State Water Plan would be pushed together with the paragraph below from 203B and that would be the proposed general provision and remark. That's what we discussed prior to the hearing, and there seemed to be general agreement among counsel in the room here that that would be acceptable.

So I originally prepared to go a little bit further into argument, perhaps address some of the objections raised in the company's briefs. At this point I

don't think that's necessary and maybe we just want to proceed from where we are here.

We do recognize that Idaho Power has told the court that their intention was not to limit the effect of these provisions to basin two. And there was a misunderstanding, I guess: That's is what we understood their briefing to be, but I think that's been cleared up and our understanding now is there's no intent to try to limit the effect of these provisions to basin two. So with that understanding, unless you have any questions, I think that should do for our opening on this.

SPECIAL MASTER DOLAN: Well, Mr. Orr, your history -- I think you said that Idaho Power still has water rights in American Falls Reservoir, and how would that be affected? They have storage or water rights in American Falls and I think they have a right to require that water above Milner Dam be delivered over the dam down to their power plants -- or to their power plants somewhere below American Falls Reservoir.

MR. ORR: Well, Special Master, I think -- well, to start with, of course the American Falls water rights have not been -- the issue of Idaho Power's American Falls water rights is before the court and it's not been decided and so we don't know exactly what they are. But I believe it's footnote 27 in our opening brief, I think addresses

this -- I may have the footnote number wrong -- but the footnote says that this provision, what the State's proposed here, is not intended to addresses releases of storage water over Milner. That those are governed by different provisions of state and federal law and other contracts. So these provisions are not intended to address that question. For instance, storage water that Idaho Power may have in American Falls, whether it can be released over Milner, this would not affect any of that.

Did I address your concern?

SPECIAL MASTER DOLAN: Sure. Okay. The other thing -- and this goes to I think Joe Beeman's issue she raised about the description of the point of -- was it the point of diversion of 0200 water right?

Jo Beeman, is that right? You're concerned about exactly where that point of diversion is described, whether it's the foot of the dam or if it's spillway or -- and then whether that applies to the Basin 01?

MS. BEEMAN: Your Honor, that's like an issue apart from the general provision issue in Basin 02, but goes to 2-200 and the administration of it. It's located at Milner Dam, and water rights at Milner Dam are generally designated for the Upper Snake, Basin 01. And I assume that Mr. Orr is going to discuss that because the State's reply brief dealt with the general provision separately

from more intrinsic issues as to the zero flow right, 2-200.

SPECIAL MASTER DOLAN: Well, your issue was whether the zero flow right was going to be enforced at or above Milner Dam in Water District 01; is that right?

MS. BEEMAN: Yes. And whether you need to have the water right with a one rather than a two, or whether there would need to be conditions on the water right to clarify that the zero flow operates at and above Milner Dam and is administered within Water District 01, which is the water district for Basin 01.

SPECIAL MASTER DOLAN: Well, Mr. Orr, I know we're kind of jumping the gun here and taking things out of order, but that issue kind of intrigued me. I'm trying to put it in perspective of where that fits into your motion.

MR. ORR: Special Master, I think Ms. Beeman mentioned that it's a separate issue, or an issue apart, or something along those lines, and I think that sums up how we see it. Our motion is one by definition for partial summary judgment. So we're not really trying to resolve all the issues. And there are a number of them that have arisen in the various sub cases that have been grouped together here.

Now there are objections that have been raised by other parties to whether the board's water right claim

02-200 even supports a valid water right. So Ms. Beeman's point about point of diversion issues or which basin it's decreed in, that's not the only concern that's been raised about the final decree of that water right. That's really down the road from what we're trying to resolve here.

All we're seeking to do is get the clarifying language for the general provision. And as I understand the briefing, there's agreement, there's no dispute, that a comparable remark would be appropriate in the water right 200 if it is decreed.

But the question of whether it would be decreed we're not trying to resolve here. We really think that that's beyond the scope of the questions presented by our motion. And to the extent there's a question of whether the language we're proposing is appropriate for a remark, we have to address that question right now anyway, because the general provision is postured for resolution. There wouldn't be any point to revisiting the question of the remark later -- at some point later in time. The outcome of whether the water right will be decreed, it's obviously going to be in the future, but we can at least get these issues resolved now.

SPECIAL MASTER DOLAN: From your viewpoint we could take the language you have on your foam board and plug it under "remark" for the water right 02-200 in case

that is adjudicated?

MICHAEL ORR: I'm not sure I heard your question correctly, Special Master.

SPECIAL MASTER DOLAN: Well, for instance, in the remark you have proposed here, would you just take that and plug it into the "remark" section for water right 02-200 when it comes up, if it is adjudicated as a valid water right?

MICHAEL ORR: Special Master, yes, that's how the State saw it. Envisioned it. I'm not trying to predetermine here if the water right would be decreed in Water Basin Two or if it's decreed at all. It's just that if it is decreed, whichever basin it's in, we envisioned this remark being plugged in presumably in the section of the decree that's called "other provisions necessary for definition or administration".

I note the director has in his recommendation put some remarks higher up in different elements of the water right, I think under "quantity and source". Perhaps it would be appropriate there, too, but that's an issue that we can resolve later. I don't think we really are trying to define what the decree would look like, so much as just what the Milner zero minimum flow means with respect to the general provision and any water right that is -- that may be decreed along those lines.

SPECIAL MASTER DOLAN: Do you know if I need to be (inaudible) amending the director report.

MR. ORR: I do not know, Special Master.

SPECIAL MASTER DOLAN: Okay. That's all I have, Mr. Orr. Thank you.

Does anyone else want to speak in support of the State's motion?

MR. BUDGE: Yes, Your Honor. Special Master, TJ Budge on behalf of the Ground Water Districts.

As explained in our briefing, the Ground Water Districts are fully supportive of the language that the State proposed in their brief. That being said, we are also in agreement with the proposal that's been discussed this morning whereby the language from the State Water Plan and the language from 42-203B is combined verbatim and that will also be an acceptable solution. So either of those are fine with us. We think they're both consistent with the language of the State Water Plan and 42-203B and consistent with the policy behind the Milner zero flow.

SPECIAL MASTER DOLAN: Thank you, sir. Do we have any other ones speaking in support of the State's motion?

Okay. Well, let's move to -- Mr. Tucker, do you want to start off?

MR. TUCKER: Thank you, Special Master. Again,

James Tucker for Idaho Power Company.

We raised three things as I recall in our brief. One was kind of a timing issue relative to whether or not it was appropriate to enter a general provision in this particular case when we have particular provisions in our water rights at Swan Falls and the Swan Falls case that we've referenced in our brief. We're still a little concerned about that. Frankly, I didn't speak of that with the State this morning, but we do have pending before Judge Melanson a joint motion by the State and Idaho Power Company to have certain water rights decreed for Idaho Power Company under the Swan Falls Agreement. And within those water rights there is specific language that parrots, or in this case is very similar to, the language that's being proposed here.

And we just don't want to put the cart before the horse here and think it's appropriate to allow Judge Melanson to rule on that motion, which I believe he's probably very close to doing, before this kind of provision is implemented. But I don't want to raise that as a contested issue. I just raise it as a kind of procedural issue. If we need to discuss that, we certainly can. We're not trying to undermine the State's position with respect to their motion here today on that basis.

The other thing we raised in our brief was a

matter of consistency which we think we've resolved here this morning in the discussions with counsel. We were concerned that the provisions that were in our particular water rights under the Swan Falls cases were slightly different. Even though they had the same intent, were slightly different than the general provision in this case, and as a consequence we were concerned that someplace down the road, whether it be five years, ten years, or whatever, that there might be different levels of interpretation given to those two provisions.

Not to say that our water right obviously would be governed by the one in our particular -- in those particular water rights, but just that there might be a difference of opinion as to why this court would enter general provisions that would be slightly different, using essentially as a baseline the same authorities, which would be 203 and the State Water Plan.

We think we've resolved that this morning with the State and with the Ground Water Districts by the language that's been proposed by the State here, using the language directly out of the State Water Plan and the language out of 203B, which we think is consistent not only with the legislature's intent, but also with the language that is in our water rights that Judge Melanson is now considering.

The other issue we raised was the appropriateness of putting a remark into the water right before it's decreed. I think Mr. Orr's clarified that: That they are simply saying that this water right -- if the water right is decreed, that this would be an appropriate general provision to put in that -- appropriate remark, excuse me, to put in that water right. We have no problem with that premise.

We would suggest, though, and for counsel to consider as well as the court, that I don't think we want to put a remark into a water right that we don't know what the water right yet is going to say and block that remark in stone. In other words, it should be considered again at the time that that water right is decreed, and if it's still an appropriate remark then obviously it can be continued with respect to that water right.

But for today's purposes with regard to the language that's been suggested by the State here before the court, we certainly are in concurrence. We think that's an appropriate modification to the provision that's been proposed by the State.

Thank you, Your Honor.

SPECIAL MASTER DOLAN: Mr. Tucker, you read the language on the foam board in front of us. You don't have any problem with that language at all?

MR. TUCKER: Yeah, this is the language on the left side -- and I'll read it -- the first part would be: The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero. And it would then read after that: For purposes of the determination of 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. Those two provisions are taken, first, out of the State Water Plan, the current State Water Plan, and, second, the last part, out of 203B, and we think those are appropriate.

SPECIAL MASTER DOLAN: So the description on the provision on the right foam board, that's not the language you're agreeing with?

MR. TUCKER: I understand the State is essentially agreeing to withdraw that language and substitute the language on the left foam board, Your Honor.

SPECIAL MASTER DOLAN: Oh, I see. Okay.

MR. TUCKER: That's my understanding.

SPECIAL MASTER DOLAN: Mr. Orr, is that your understanding of what you're proposing?

MR. ORR: Special Master, yes, I think that was the gist of the discussions. Everyone seemed to be on

board with the idea of using the State Water Plan provision and the 203B provision together, in place of the language proposed in the State's motion.

SPECIAL MASTER DOLAN: Okay. Thanks.

Mr. Tucker, that's all I have for you. Thank you.

MR. TUCKER: Thank you, Your Honor.

SPECIAL MASTER DOLAN: Jo Beeman, you'll be proud of the use of the foam boards here. They're taking a cue from your background, using a lot of demonstration cards. Now, does anyone else want to speak in opposition to the State's motion?

Travis Thompson?

MR. THOMPSON: Yes, Your Honor, Travis Thompson for the two canal companies. I'm a little confused, I guess, where we sit right now. If there's a different proposal on the board which we've discussed today, which we don't oppose either, how do we get there procedurally? And I'm wondering whether or not to present my argument to oppose the motion today. If the motion's not going to be considered then I don't need to go through what I have prepared. But I guess I'd pose that as a question for the court and the parties.

SPECIAL MASTER DOLAN: If the parties are in agreement -- well, of course we've got a number of people

who are not here today that are probably still scratching their heads about what this exact language is, but assuming that everybody's in agreement then the opposition of the motion goes away?

MR. THOMPSON: Yes. There will be a fundamental change in what the State is proposing for the water rights. I guess not fundamental, but the language is obviously different than what they've argued before the court with their motion and what I've prepared a response to. So if that's not on the table anymore, I just need to know that, before I spend the next half hour opposing it.

SPECIAL MASTER DOLAN: Arguing with something you agree with now.

MR. THOMPSON: Correct.

SPECIAL MASTER DOLAN: Mr. Orr, where are we in the posture at this point? Where do we -- you can use the microphone at the table.

MR. ORR: Special Master, again, this is Michael Orr for the State.

I'd just like to say, what we talked about before this hearing and what I tried to communicate earlier was that should -- the State would not oppose using the language on the left foam board. And I'm going to read it in its entirety, just so we're clear what this is. The State would not oppose the following language for general

provision and remark for water right 200, should it be decreed. Quote: "The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero. 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", end quote. The State would not object to that language for general provision and a proposed remark for water right 200 should it be decreed.

I'd also like to add that from the State's point of view, and as I understood Idaho Power's discussion, this is not a fundamental change, as Mr. Thompson characterized it, from what we proposed. We see no substantive difference whatsoever. We view this as merely a language issue that has no substantive impact. But we would accept the proposal -- we would not object to the proposal I just -- the proposed language I just gave you. I just quoted to you.

SPECIAL MASTER DOLAN: So for the record purpose, on the record now you are amending your motion to be the language you just recited? Or is that simply a proposal?

MR. ORR: No, Your Honor, we're not withdrawing our motion, we're not amending it. But we are stating for

the record we would not oppose this language for purposes of the general provision and remark.

SPECIAL MASTER DOLAN: Mr. Thompson, do you have enough here to go on?

MR. THOMPSON: Well, I think I understand where everyone stands today. We do have other parties in this case that haven't weighed in yet, but if everyone's in agreement with this proposed language we're talking about now, we don't object to that. I might point out for the record that if a general provision is decreed that's agreed to by the parties that we suggested this morning, then the necessity for a remark on that water right I think is redundant. Because you'll have the exact same language, general provision, that will apply to the water right, what's the need for the remark to be repeated in the water right itself if it is decreed at some point in time?

SPECIAL MASTER DOLAN: Well, what would be the harm of including it?

MR. THOMPSON: Well, I think it's just redundant. I mean, that's my point of view. I don't think it's necessary. If you're trying to clarify a water right then define the elements succinctly. If the general provision already is an umbrella over that water right, why go to the effort to further define it?

MR. SCHWARZKOPF: Your Honor, if I may, this is

Mike Schwarzkopf for Dana Hofstetter. Can you hear me?

SPECIAL MASTER DOLAN: Yes, sir, just fine.

MR. SCHWARZKOPF: Thank you for hearing me briefly. You know, I was given strict instructions not to lay in on behalf of -- in any this particular substantive area. I always get a little bit concerned when I hear attorneys saying that these language changes are not intended to mean anything, since that's kind of the realm in which we all operate, the use of language and its meaning. I guess to then back up and support the concern of the canal companies as I understand it about how do we get from point A to point B procedurally, I wonder as a matter of notice -- and not understanding your particular jurisdictional powers and powers to accept this compromise, Your Honor -- but admittedly not understanding that, I wonder whether there is then sufficient notice if what Idaho Power and/or what the State is now asking is essentially you to rule on a different summarily judged statement than the one they have given notice about. So that's the red flag that I question. But I do it as somebody who doesn't know a hell of a lot, so I apologize if it's out of order.

SPECIAL MASTER DOLAN: Thank you, sir.

Mr. Strong, it looks like you're ready to say something.

MR. STRONG: I was just talking with counsel.

SPECIAL MASTER DOLAN: Well, we're back to you Mr. Thompson. I guess what I have in mind, in light of what Mr. Schwarzkopf's comments are, first of all I've got to enter an order granting the amicus motion.

But then I suppose we could post the -- this is the second matter -- post a amended order reference from Judge Melanson for comment. But maybe, third, ask for written comments on the State's proposed settlement here, combining the language from the Water Plan with the statute and give everybody "X" days to comment. But what I don't intend to do is to set this for another hearing on a summary judgment motion. That's what we're here for today.

MR. THOMPSON: Yeah. And as we're talking, Your Honor, I'm thinking about a consent-decree-like approach, if that's proposed by the court, that the parties have stipulated to. If anyone objects to that, let them have notice and come in at that time. Which I agree with the comments made, that the State -- their opinion that their language is not different than the statutes in the State Water Plan, you know, we were coming here today prepared to explain why it is different. And if they're now agreeing to go back to the language that's written in the law, we're fine with that.

MR. STRONG: Your Honor, if I might. It's always

difficult in getting these kind of awkward situations going forward, but basically the State's motion here sought one thing, which was basically that the court adopt a remark that we represented to the court was based upon the State Water Plan and Idaho Code Section 42-203B(2). Both of those provisions are statutory provisions. The question is a matter of law. It's not a matter of fact or anything else. So as a matter of law what we're asking the court to do is to find that the remark we proposed is consistent with those provisions.

So from a notice perspective, people were put on notice that what we were trying to achieve was a statutory and State Water Plan language. And basically where we're at in this proceeding today is we're representing to the court the reason we see no substantive difference is because what we're agreeing to is to simply use the statutory language. That doesn't mean that somebody can't come in and have other interpretations of what that language means down the road. So from that perspective it's within your authority to make the decision that after reviewing the pleadings you think the most accurate statement of law is what's in the law. And I don't see a notice problem with that.

I think the only issue that from my perspective needs to be made a part of the record here is an issue's

been raised with regard to the adequacy of notice to other parties in the SRBA. From my perspective I don't see a notice problem there. The process that we use of providing docket sheet notice and then service on individuals has been held as constitutional, as adequate and appropriate notice. This general provision provided by the Department recommended a zero flow at Milner. All we are doing is recognizing that same provision. Everybody was on notice and had a duty to respond and participate.

So we think it's fully within the court's authority right now to enter an order that interprets a provision of law and we don't need to have further hearings on the matter.

SPECIAL MASTER DOLAN: Okay. And you would agree that we don't need to solicit additional comments on anything we've done here today?

MR. STRONG: No, I don't believe so, Your Honor. Because at that point in time you'll be entering a proposed recommendation to the judge, and anybody that has exception to that will have an opportunity to file exceptions to it.

SPECIAL MASTER DOLAN: Sure.

Mr. Thompson, we're back to you.

MR. THOMPSON: Just one final comment. If the State is proposing today that you will not enter the remark that they have laid out in their motion, then I won't

respond any further. And if they believe what the language that we've all agreed to is consistent with what's expressed in their motion, then I have nothing further to add.

What I don't want to leave here today is you going out and granting their motion without me presenting my argument. I can do that, but --

SPECIAL MASTER DOLAN: Sure. So in other words, if I grant their motion as it was filed, that you would disagree with?

MR. THOMPSON: Correct.

SPECIAL MASTER DOLAN: But you would agree with their proposal of combining that language. In that case you don't have any opposition at all?

MR. THOMPSON: Correct.

SPECIAL MASTER DOLAN: Thank you.

Mr. Budge, does that change your position at all?

MR. BUDGE: No. Thank you, Your Honor.

SPECIAL MASTER DOLAN: Mr. Tucker?

MR. TUCKER: No, Your Honor. Thank you.

SPECIAL MASTER DOLAN: Okay. Well, I guess we've heard everybody. What I'll do is just -- and this is a matter of cleaning up the record -- granting the motion on the amicus filing, because we do have a pending motion there.

And on the order of reference from Judge Melanson, we'll post that and ask for comments within ten days.

And I think I agree with Mr. Strong, that we've had plenty of opportunity to notify everybody and they had the opportunity to appear here today and discuss the matter in person. The fact that they didn't have a chance to look at the foam boards doesn't make any difference. There's plenty of opportunity. In light of what we've done I think we're pretty much ready to do a report and recommendation, recommending the language be included.

Mr. Orr?

MR. ORR: Special Master, I'd just like to note that although parties participating telephonically haven't seen the foam boards, the very same language on those foam boards is abundant in our briefing. We've quoted all those passages. So they have that language.

SPECIAL MASTER DOLAN: Sure. And I think that was clear in Mr. Strong's argument, that everybody knows what the State Water Plan says and everybody knows what the statute says. How much more notice do you have to give people?

MS. BEEMAN: Special Master, this is Jo Beeman for the City of Pocatello.

SPECIAL MASTER DOLAN: Yes, ma'am.

MS. BEEMAN: With respect to your reference to a report and recommendation being prepared, we do have two matters here: One is the general provision four for Basin 02, and then we have water right 2-200. And the report and recommendation on 2-200 would not occur at this time because of the status of other outstanding objections on 2-200. And then would there be a report and recommendation in short order, though, with respect to general provision four?

SPECIAL MASTER DOLAN: Well, of course general provision four isn't before me today. The only thing we're talking about is that 92002GP, unless I'm missing something here.

MR. ORR: Michael Orr, Your Honor. I believe that is the sub case number for the general provisions.

SPECIAL MASTER DOLAN: It's sub case number for general provision four?

MR. ORR: I believe so.

SPECIAL MASTER DOLAN: Okay. Well, I understood that there was, like, a 92004GP. If I'm mistaken there then --

MS. BEEMAN: If I may, this is Jo Beeman again. 92-2GP is in reference to not just general provision four, but also the request from the ground water users that there be a Swan Falls general provision. So there isn't just one

issue under the general provision matter, unless I'm mistaken. And that's why I'm making my comments.

SPECIAL MASTER DOLAN: Mr. Thompson?

MR. THOMPSON: I believe that's correct, Special Master.

MS. BEEMAN: So, again, my concern is would we be having a report and recommendation at this time or would it be later? Because we have more than one issue under the general provision matter in basin two and then we have the status of 2-200 in its entirety, unless the court is planning on doing a report and recommendation for some portion of the general provisions in Basin 02 and some portion of 2-200.

SPECIAL MASTER DOLAN: Well, Ms. Beeman, I guess what I had in mind, as far as the water right or claim number 02-200, I probably would word that cautiously by saying that if the water right is decreed to be valid then the provision we talked about this morning would be included in that. But that's with that cautionary language.

And then the fact that the language has been agreed on today, in effect, I won't be granting a motion for summary judgment, as much as by agreement of the parties or by mutual agreement -- Mr. Thompson, I think your used the word consent decree -- I don't know if we

could call it that, but I don't want to confuse consent decree with a partial decree -- but say it was by agreement of the parties, or lack of opposition in court this morning to it, that we could include that language into the general provision.

Now, of course, when I do a report of recommendation, I'll do that in writing here. To answer your question more directly, I'll be doing that here in short order so this isn't simply on the record. You'll be getting a copy of my report and recommendation in writing. And then if there's a challenge to that, then of course a motion to alter or amend or then a notice of challenge to Judge Melanson, I think we're going to be able to cover all the due process issues here, giving everybody more than sufficient opportunity to comment or suggest changes.

Ms. Beeman, does that satisfy your concerns?

MS. BEEMAN: I have a lingering question as to the nature of the report and recommendation, because generally a report and recommendation isn't for just part of a water right. And perhaps IDWR's representative could speak to that.

Do we have a representative from IDWR on the phone?

I just know that I've had cases in the SRBA where we had to wait until all of the issues were resolved before

we could have a report and recommendation to the SRBA judge. And if we're going to have a little different procedure here, I just think it's wise to discuss that. So would you be doing a report and -- two different reports and recommendations: One on the general provision, and another on 2-200 in the event it's ultimately decreed?

SPECIAL MASTER DOLAN: I could certainly do that if that will help ease the procedural matters. But, Ms. Beeman, in the past I've done reports and recommendations on issues short of all of the issues, where there's no sense going ahead with any further matters until you get that one business taken care of. So I've done that in the past and that's worked out pretty well. I think I included language in there saying "I designate this as a critical issue that should be decided at this point or is better decided at this point rather than waiting to the end of the thing". So you're not going to be precluded in filing a motion to alter or amend until after the entire water right is addressed.

MS. BEEMAN: And the reason I state that is, from the comments by Idaho Power and then the comments by me today for Pocatello and Pocatello's response about what issues are still remaining with respect to 02-200, and there's at least one other general provision matter in Basin 02.

SPECIAL MASTER DOLAN: I expect we're not going to be able to solve all the world's problems today. We're just kind of peeling the onion one layer at a time and hopefully we can get to the end in reasonable due course.

Anything else from anyone?

Okay. In that case I'll take the matter under advisement and try to get a report and recommendation on this one out sooner than later, because it looks like it's pretty straightforward at this point and we need to get notice to everybody so we can move on. We will go off the record. Thank you, everybody.

REPORTER'S CERTIFICATE

STATE OF IDAHO)
)
COUNTY OF MINIDOKA)

I, MAUREEN NEWTON, Official Court Reporter and Notary Public, in and for the Fifth Judicial District of Minidoka County, Idaho, do hereby certify that the above and foregoing typewritten pages contain a true and correct transcription of my shorthand notes taken upon the occasion set forth in the caption hereof, as reduced by means of computer-aided transcription by me or under my direction.

Witness my hand, this the 17th day of December, 2009.

MAUREEN NEWTON, CSR #321
Court Reporter and Notary Public
For the State of Idaho
My commission expires 9-10-2012.

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Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 18

Excerpted pages of *Canal Companies' Memorandum in Opposition to State of Idaho's Motion for Partial Summary Judgment re: Milner Zero Minimum Flow,* SRBA Subcase Nos. 00-92002GP, 02-00200, 02-00201, 02-00223, and 02-00224 (Nov. 5, 2009)

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DISTRICT COURT - SRBA
TWIN FALLS CO. IDAHO
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Attorneys for North Side Canal Company and Twin Falls Canal Company

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA Case No. 39576	Subcase Nos. 00-92002GP, 02-200, 02-201, 02-223 and 02-224 **CANAL COMPANIES' MEMORANDUM IN OPPOSITION TO STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: MILNER ZERO MINIMUM FLOW**

INTRODUCTION

COMES NOW, the North Side Canal Company and Twin Falls Canal Company, (hereinafter collectively referred to as the "Canal Companies"), by and through their counsel the law firm Barker Rosholt & Simpson, LLP, and submit this Memorandum in Opposition to the State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow. The Canal Companies oppose this Motion for the reason that the State has proposed multiple remarks

concerning the recognition of the Milner Zero Minimum Flow in multiple scenarios that create a question of fact preventing this Court from granting the relief sought at this time. Additionally, water right no. 02-200 should not exist because the State has not followed the requirements under state law to appropriate a valid water right, and until this Court has resolved the issue of whether water right no. 02-200 should be decreed or not, it is premature to declare that the State's proposed remark should be included in any such decree in order to "clarify, further define," or do anything else to a non-existent water right. Lastly, modification of the Director's proposed general provision, or inclusion of a remark in a water right decree which is premised upon concepts that have substantially changed over time, and that will continue to change, is an inappropriate limitation on individual water rights which has the potential to create ambiguity in both the administration of the right, but also the purpose and function of the policies and law that it is allegedly based upon.

STATEMENT OF PERTINENT FACTS

The Canal Companies largely agree with the representations made by the State concerning the historical treatment of the Snake River at Milner divide. There is little doubt that the concept of "two rivers" has long been understood among the agricultural and hydropower users on the Snake River above and below the Milner Dam. The Canal Companies also agree that Idaho Code § 42-203B(2) in its present state expresses the concept of the Milner divide as it relates to hydropower water rights in Basin 02, on the Snake River downstream of the Milner Dam to the end of Basin 02 at approximately Big Bend Irrigation District.

The State Water Plan, in its many incarnations, has always recognized the two rivers concept, but over time it has used different language and a changing sentiment to express this recognition. In fact, the State Water Plan has always expressly represented that it is a "dynamic

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 19

Letters from Idaho Attorney General Jim Jones to Idaho Governor John V. Evans and James Bruce of Idaho Power Company (Aug. 16, 1984)

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

August 16, 1984

The Honorable John V. Evans
Governor of Idaho
STATEHOUSE MAIL

Dear Governor Evans:

As you know, the Environmental Protection Agency is presently considering whether to designate the Snake River Plains Aquifer as the "sole source" of drinking water for the Idaho citizens residing in the aquifer area. Such designation would result in substantially increased federal involvement with and control over the use and management of the aquifer.

It seems to me that such designation is premature in light of the scanty information which presently exists with regard to the workings of the aquifer. Further, such designation would certainly hamper and possibly preclude some of the water management alternatives which have been discussed by you, Idaho Power, and myself as a means of helping to resolve the Snake River water rights dispute. Idaho's water management policy can be improved in the future for the benefit of all Idahoans but new concepts will have to be explored, such as utilizing the aquifer as an additional upstream storage area for excess and surplus waters. Such utilization would be available for the benefit of consumptive uses as well as hydropower production. With a sole source designation the possibility of utilizating such management methods would be seriously hampered. We might find ourselves in a position of having to secure Federal approval in order to carry out policies for water management and utilization developed at the state level.

Since the state and Idaho Power Company are involved in an even larger controversy and are currently negotiating together to try to resolve that controversy, it seems appropriate for the parties to the negotiations to express concern to the EPA as to the timeliness and wisdom of such designation. I believe the participants in the negotiations have a large stake in insuring that EPA action does not insert an additional stumbling block toward more effective and beneficial water management practices which could be utilized to help settle the present water rights disputes involving the Snake River and the Snake River Plains Aquifer. I would suggest that the participants in the negotiations work together to prepare a joint statement to the Environmental Protection Agency expressing our concern over the sole source designation being made at the present time. The wording of the Federal statute is troublesome, but I believe it would be worthwhile to make our position known.

Comments to the EPA should be submitted before August 24. I have directed Clive Strong of my staff to contact your Swan Falls negotiation representative and the director of the Department of Water Resources to immediately begin working on a joint statement. I hope that you will be able to lend your support to a joint statement because I believe that precipitous action by the EPA could hamper or preclude certain water management alternatives which would be beneficial to all Idahoans and which could be employed in helping to resolve the Southern Idaho water allocation problems.

With best wishes, I am,

Sincerely,

JIM JONES
ATTORNEY GENERAL

JTJ/tg

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

August 16, 1984

Mr. James Bruce
Idaho Power Company
1520 West State
Boise, ID 83701

Dear Jim:

As you know, the Environmental Protection Agency is presently considering whether to designate the Snake River Plains Aquifer as the "sole source" of drinking water for the Idaho citizens residing in the aquifer area. Such designation would result in substantially increased federal involvement with and control over the use and management of the aquifer.

It seems to me that such designation is premature in light of the scanty information which presently exists with regard to the workings of the aquifer. Further, such designation would certainly hamper and possibly preclude some of the water management alternatives which have been discussed by the Governor, Idaho Power, and myself as a means of helping to resolve the Snake River water rights dispute. Idaho's water management policy can be improved in the future for the benefit of all Idahoans but new concepts will have to be explored, such as utilizing the aquifer as an additional upstream storage area for excess and surplus waters. Such utilization would be available for the benefit of consumptive uses as well as hydropower pro- duction. With a sole source designation the possibility of utilizating such management methods would be seriously hampered. We might find ourselves in a position of having to secure Federal approval in order to carry out policies for water management and utilization developed at the state level.

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With best wishes, I am,

Sincerely,

JIM JONES
ATTORNEY GENERAL

JTJ/tg

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 20

Memorandum Decision, Idaho Power Co. v. State,
Case No. 62237 (Fourth Jud. Dist., Ada County Court)
(May 16, 1980)

FILED

A.M. _____ P.M. _____

MAY 1 6 1980

JOHN BASTIDA, CLERK

BY _____ DEPUTY

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 original 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 Ingrum, Harold Huyser, Mary Mech, Gerald Tews, John Bryngelson, Clive Schell, David Nickelsen, 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. McAndrews, Pilgram Irriagation 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

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 Giede, Otto Tiede, Melvin Funk, Jim Pahl, and Lenard Schritter,

Mud Flat Canal Company,

Defendants.

APPEARANCES:

For Idaho Power:	THOMAS G. NELSON Nelson, Rosholt, Robertson, Walker, Tolman & Tucker
For the Public Utilities Commission:	MICHAEL GILMORE Deputy Attorney General
For the Department of Water Resources:	JOSEPHINE BEEMAN Deputy Attorney General
For Mud Flat Canal Company:	JEFFREY R. CHRISTENSEN Anderson, Kaufman, Anderson & Ringert
For the Paragraph XX Defendants:	MATTHEW MULLANEY Attorney at Law

* * *

IDAHO CODE TITLE 61 ISSUES

More or less by stipulation, the parties have agreed that the Court should reconsider addressing the issues relating to the applicability of I.C. 61-327, 61-328, and 61-329 to this case. The court had earlier

deferred interpretation and application of those provisions to the Public Utilities Commission under the doctrine of primary jurisdiction. (Memorandum Decision and Order, December 10, 1979, pg. 40-51.) Because the Commission is a direct party to this litigation, if the matters were transferred over or back to the Commission for resolution, then the Commission would be placed in the unenviable and discomforting position of being both advocate and adjudicator of its premise in regard to the application of the pertinent code sections. This would be patently unfair and unjust to the opposing parties.

Further, referral of the Title 61 issues to that body would obviously result in rerouting part of this case in its ultimate journey to the Supreme Court. It would therefor appear appropriate that this Court enter a determination of the applicability of those statutes in this matter.

It is the judgment of this Court that the provisions of I.C. 61-327, 61-328 and 61-329 have no application to this case, for the reasons set forth in the Memorandum Decision and Order filed in this matter on December 10, 1979, commencing at line 6, page 40 thereof, through line 24, page 44, and line 5, page 47 through line 25, page 51. Specifically, the Court finds that the Commission did not have standing to question the insertion of the subordination clauses in the federally issued licenses; and if the Commission did have standing to question those insertions it is now estopped by laches and res judicata from raising the issue at this time.

The Court further finds that the interests of the Company in upstream energy generation facilities which were subordinated by acceptance of the Federal licenses were not an "interest in property" as was intended by I.C. 61-327 through 61-329 and that the subordination was not a "transfer" of property as was intended to be covered by said statutes.

Acceptance of the subordination provisions was obviously mandatory for issuance of the licenses from the Federal government. To this extent, the "transfer" of property interests, (if such occured) was a result of Federal supremacy action, and by demand from the State of Idaho, (Plaintiff's Exhibits J-10, J-11 and J-12) and virtually involuntary on the part of the Company, for which it should not be held to blame.

Further, if the imposition of the subordination clauses affected a "transfer" of property interests, the public interest in increasing electrical power and energy production as a result of the issuance of the Federal licenses far outweighed any violation of I.C. 61-327 through 61-329 which might have occured when the Company accepted the licenses.

Counsel for Idaho Power may prepare an appropriate form of declaratory judgment reflecting the foregoing.

OFF-STREAM STORAGE

Counsel now raise an issue that was not presented or specifically addressed previously in these proceedings, and request that a determination be made by this court. It is represented to the Court that plans are being developed by the Idaho Water Resource Board to divert water from the Snake River at Milner Dam during non-irrigation winter months, and stored for use during irrigation months. Other plans appear imminent to form re-charge districts in accordance with recent legislative authority, I.C. 42-232 and 42-234 which will also likely result in diversion of water from the river.

It is represented that these proposals would reduce or interfere with flows of water that otherwise would be available to Idaho Power Company for power generation. The Company therefor urges that this Court determine that such non-irrigation season offstream storage diversions

are not within or contemplated by the subordination clauses to which the Company is subject; in other words, the Company seeks a declaration that its power generation rights are not subordinated to the storage activities.

The subordination clauses in the Hells Canyon licenses require that the Company not

> "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." Memorandum Decision, December 10, 1979, pg. 18-19.

It is the opinion of this Court that diversion to offstream storage, albeit occuring during non-irrigation seasons, if done for the purpose of providing waters for irrigation during the summer months, clearly falls within the subordination provisions. Those clauses solely address the key point that, in fact, diversions will be allowed for irrigation purposes, without limitation as to when or how such diversions may be made.

Counsel for the Canal Companies raises a very logical response to the Company's position. He states:

> "Finally, it must be pointed out that to the extent that diversion to off-stream storage of wintertime flows diminishes the flow of the Snake River to Brownlee, it also presumably reduces the need for summer-time pumping directly from the Snake River, thereby increasing summertime flows for storage at Brownlee."

It is difficult to find fault with such logic. Be that as it may, the Court concludes that the rights of the Company are subordinated to the offstream storages for irrigation use.

IT IS SO ORDERED.

Dated this 16 day of May, 1980.

Jose R. Walters
District Judge

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now of record in my office.
WITNESS my hand and the Seal of this Court 10/1

STEPHEN W. KENYON
Clerk

By: Kimberly Greene Deputy

Exhibit 21

Plaintiff's Memorandum in Support of Motion to Re-Consider and Amend Summary Judgment, Idaho Power Co. v. State,
Case No. 62237 (Fourth Jud. Dist., Ada County Court)
(Feb. 19, 1980)

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Twin Falls, Idaho 83301
Telephone: (208) 734-0700

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. STATE OF IDAHO, acting by and through the Department of Water Resources, et al., Defendants.	Case No. 62237 PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO RE-CONSIDER AND AMEND SUMMARY JUDGMENT

* * * * * * * * * * *

I. THE COURT SHOULD DECIDE THE ISSUES PRESENTED RELATIVE TO CHAPTER 3 of TITLE 61, IDAHO CODE.

The Court has declined to rule on issues relating to the applicability of §§ 61-327, 61-328 and 61-329 to this case, deferring to the Public Utilities Commission under the doctrine of primary jurisdiction. Plaintiff respectfully suggests that the primary jurisdiction doctrine is inapplicable for the following reasons:

A. The Administrative Agency Involved Seeks The Declaratory Judgment.

In this case, the Public Utilities Commission itself seeks the decision of the Court on a matter of statutory interpretation. The PUC here seeks judicial guidance on a matter of first impression. The request of the agency effected for a ruling would seem to fulfill the basic purpose

IPC014947

of the primary jurisdiction doctrine, to determine whether the courts or the agency should take the initial action. The PUC has here requested that the court take initial jurisdiction of the issue.

B. The Doctrine of Primary Jurisdiction Has No Application Where The Issue Is A Wholly Legal One.

The rule is thus stated in 2 Am.Jur.2d Administrative Law §793, pages 696-697.

> "The primary jurisdiction doctrine has no application where only a question of law is involved. That is, the doctrine does not apply in relation to a question which, while properly determinable by an administrative tribunal, does not involve a question of fact, but one of pure law, is determinable apart from the exercise of administrative discretion, and the requisite uniformity of determination is attainable otherwise than by confining determination of the question to the administrative tribunal."

The issue presented by the PUC falls squarely within this statement. Only a legal question is involved, no administrative expertise or discretion is required, and there is no risk of non-uniformity since the agency itself seeks the ruling.

C. The Court Should Decide The Issue, Since the PUC Has Already Taken A Position.

The Court quoted from Grever v. Idaho Telephone Company, 94 Idaho 900, 499 P.2d 1256 at page 45 of the Memorandum Decision. As noted in that case, the doctrine "is not an inflexible mandate but rather is predicated on an attitude of judicial self-restraint..." In this case, Plaintiff believes that deferring the decision to the PUC will put both Plaintiff and the PUC in an awkward, if not untenable, position. The PUC has stated its position on the interpretation to be given the statute in question. If the Court defers the interpretation to the PUC, it seems obvious how the PUC would be inclined to rule, and just as obvious that an appeal would be taken by Plaintiff. The Court's decision in this case is

clearly destined for the Supreme Court. Since the case is going there anyway, considerations of basic fairness and judicial economy would seem to dictate that Plaintiff get a decision from a tribunal which has not taken an adversary position on the matter, and that the PUC not be put in the position of having to try to decide an issue on which it has taken a position. Bifurcation of the issue brought forward by the PUC also presents a potential for an incomplete resolution of the appeal by the Supreme Court, or a delay while a PUC decision can be obtained, appealed and consolidated with the appeal of this case.

The Court has everything before it which it needs to decide the issue concerning the applicability of §§ 61-327 through 329 to this case. Plaintiff strongly urges the Court to decide that issue and believes, on the basis of conversations with counsel for the PUC, that the PUC agrees that the Court should decide the issue.

This issue was briefed by Plaintiff at pages 26-37 of the August 30, 1979 Response Brief.

II. THE SUBORDINATION ISSUE SET OUT IN PARAGRAPH 3 OF THE SUMMARY JUDGMENT ORDER DOES NOT SUBORDINATE IDAHO POWER COMPANY TO NON-IRRIGATION DIVERSIONS TO OFFSTREAM STORAGE FOR IRRIGATION PURPOSES.

Since this action was instituted, several proposals have surfaced in Idaho for the irrigation season diversion to offstream storage for irrigation season use of water that otherwise flows down Snake River in the winter time. Most recent of these proposals is that of the Idaho Water Resource Board which filed an application on behalf of the Bruneau Plateau project for diversion at Milner Dam in the nonirrigation season. The project contemplates the offstream storage of 1,738,000 acre feet. Although the application for permit does not designate a facility for conveyance of the water in the off season, it does state that up to 1,738,000 acre feet

IPC014949

can be stored between January 1st and December 31st of each year and used between March 15th and November 15th. See Exhibit "A" hereto.

Proposals for other than irrigation exist to skim waters as available from Snake River and deprive Plaintiff of wintertime power generation. Other than for late spring flood flows, the river is generally dry at Milner Dam during the irrigation season. Proposals now exist to form re-charge districts in accordance with stetutory authority given by the 1978 Idaho Legislature through Idaho Code §42-232 and §42-234. Those sections would enable the diversion of flows that would otherwise be available for power generation. The water would be spilled onto the Snake plain and presumably would percolate to re-charge the aquifer. While the purpose is to continue to ennance the groundwater table throughout all of the Snake plain as well as enhance the spring flows in Hagerman Valley, much is unknown about the immediate effects of such a re-charge proposal. It is possible and likely that re-charge in some areas would take years to be felt in the spring flows in Hagerman which constitute the primary water supply for the hydro plants of Idaho Power located between Upper Salmon and Hells Canyon on the Snake River.

Hydrologic records would show that on the average an excess of a million acre feet goes past Milner Dam. That winter water supply is critical to winter power generation within Idaho Power's service area and for storage at the Hells Canyon project for meeting peak summer demands. The loss of this water, or other wintertime diversions below Milner Dam to offstream storage were not comtemplated at the time of the subordination provisions. While the subordination provisions suggest that Plaintiff may not object to diversions for consumptive uses in the Snake River watershed,

IPC014950

it is likely that Idaho Power's position would have been different in the Hells Canyon proceedings had winter diversion for summer irrigation purposes been then contemplated. The practical fact was then that all the surface water above Milner Dam was essentially appropriated during the irrigation season and there was no flow below that point. The practical fact also was that in the early 1950s there were but two remaining feasible reservoir storage sites in the Upper Snake basin that could be constructed "on stream" to further deprive Idaho Power of wintertime flows.

Because of these recent events and the likelihood that future conflicts will develop in regard to nonirrigation season diversions to off-stream storage, we ask this Court to limit its decision herein, so as to leave open for specific decision in an adversary proceeding involving the parties proposing an off-stream storage project, the question of the applicability of the subordination to that project.

DATED this 19 day of Feb, 1980.

NELSON, ROSHOLT, ROBERTSON,
WALKER, TOLMAN & TUCKER

By: John A. Rosholt
John A. Rosholt

IPC014951

CERTIFICATE OF MAILING

I hereby certify that on the 19 day of Feb., 1980, I served a copy of the foregoing PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER AND AMEND SUMMARY JUDGMENT, by depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

Jeffrey R. Christenson
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& Ringert
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Boise, Idaho 83702

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Josephine P. Beeman
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Statehouse
Boise, Idaho 83720

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Route 4, Box 318
Jerome, Idaho 83338

John A. Rosholt

IPC014952

Form 202
3/78

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Ident. No. 01-

APPLICATION FOR PERMIT

To appropriate the public waters of the State of Idaho

1. Name of applicant Idaho Water Resource Board Phone 384-2215

Post office address STatehouse, Boise, ID

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

3. Location of point of diversion is SW ¼ of NW ¼ of Section 28 Township 10S

Range 21E B.M. Twin Falls County, additional points of diversion if any: _____

NW¼SW¼, Sec. 28, T10S, R21E (Milner Dam)

4. Water will be used for the following purposes:

Amount 1,738,000 (cfs or acre-feet per annum) for Irrigation Storage for purposes from Mar. 15 to Nov. 15 (both dates inclusive)

Amount _____ (cfs or acre-feet per annum) for Irrigation purposes from Jan. 1 to Dec. 31 (both dates inclusive)

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

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

5. Total quantity to be appropriated:

a. _____ cubic feet per second and/or b. 1,738,000 acre-feet per annum.

6. Proposed diverting works:

a. Description of ditches, flumes, pumps, headgates, etc. existing Milner Dam, with gravity flow canals to off stream storage sites.

b. Height of storage dam _____ feet, active reservoir capacity _____ acre-feet; total reservoir capacity _____ acre-feet, materials used in storage dam: _____

Period of year when water will be diverted to storage Nov. 15 (Month/Day) to June 15 (Month/Day) inclusive.

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

7. Time required for the completion of the works and application of the water to the proposed beneficial use is 5 years *(minimum 1 year – maximum 5 years)*.

8. Description of proposed uses: N/A

a. If water is not for irrigation:

(1) Give the place of use of water: _____ ¼ of _____ ¼ of Section _____ Township _____

Range _____ B.M.

(2) Amount of power to be generated: _____ horsepower under _____ feet 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 _____

(5) If water is to be used for other purposes describe: _____

EXHIBIT "A"

IPC014953

SEE ATTACHED LAND LISTS

b. If water is for irrigation, indicate acreage for 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	
					see attached land lists														

Total number of acres to be irrigated 327,140

c. Describe any other water rights used for the same purposes as described above. None for the new land. The land presently irrigated is with Snake River and Salmon Falls Creek source.

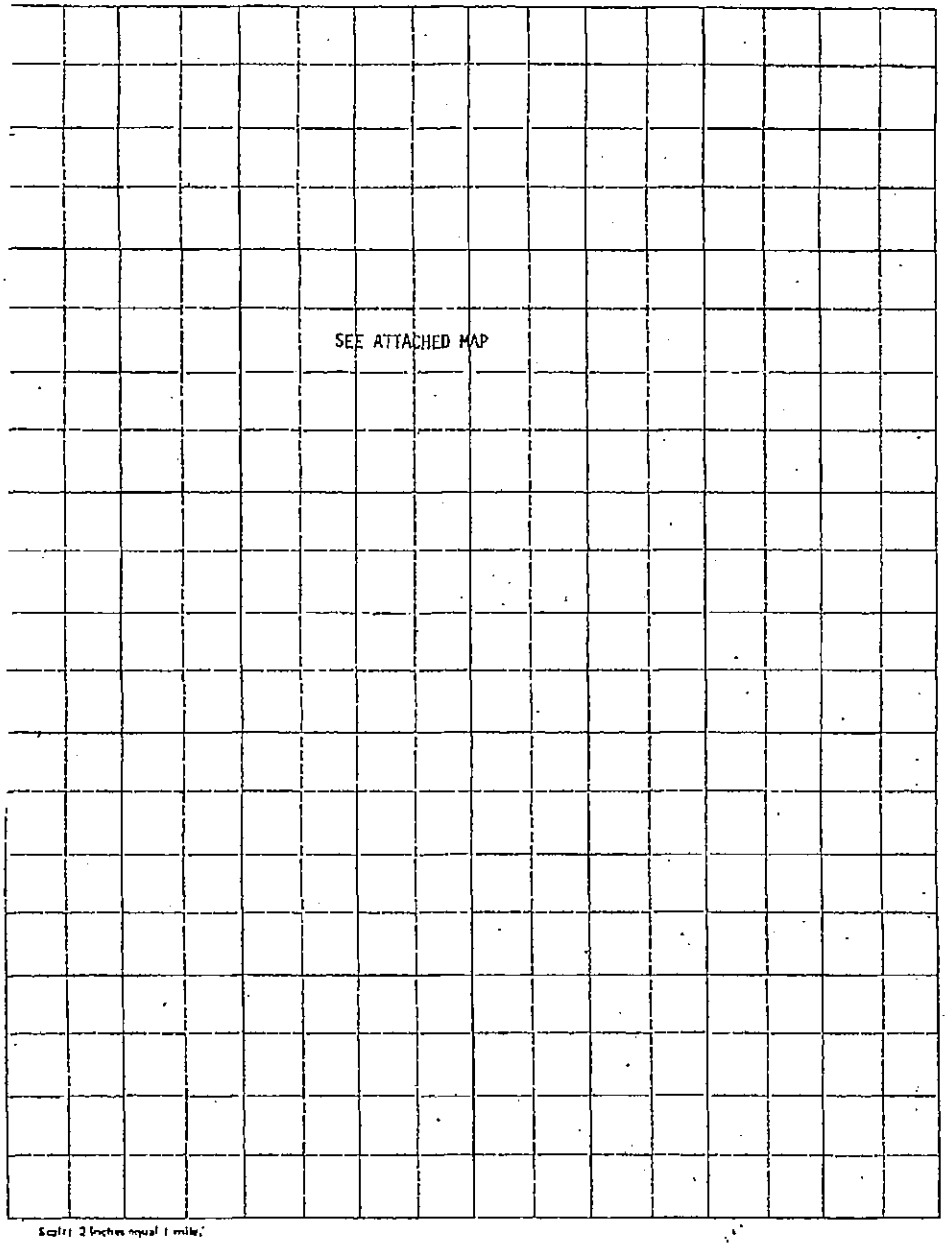
9. a. Who owns the property at the point of diversion U.S. Bureau of Reclamation

b. Who owns the land to be irrigated or place of use public land and private land

c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing

10. Remarks Off stream storage sites include Grindstone Butte site also known as Deadman Reservoir in Sec. 36, T7S, R10E, Sailor Creek site in Sec. 7, T8S, R10E, Rosevear Gulch Site in Sec. 8, 9, 15 & 16, T6S, R10E, and Blue Butte site in Sec. 32, T8S, R9E, and Sec. 5 & 6, T9S, R9E. (Estimated total storage capacity is approximately 2,198,000 acre feet).

11. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.



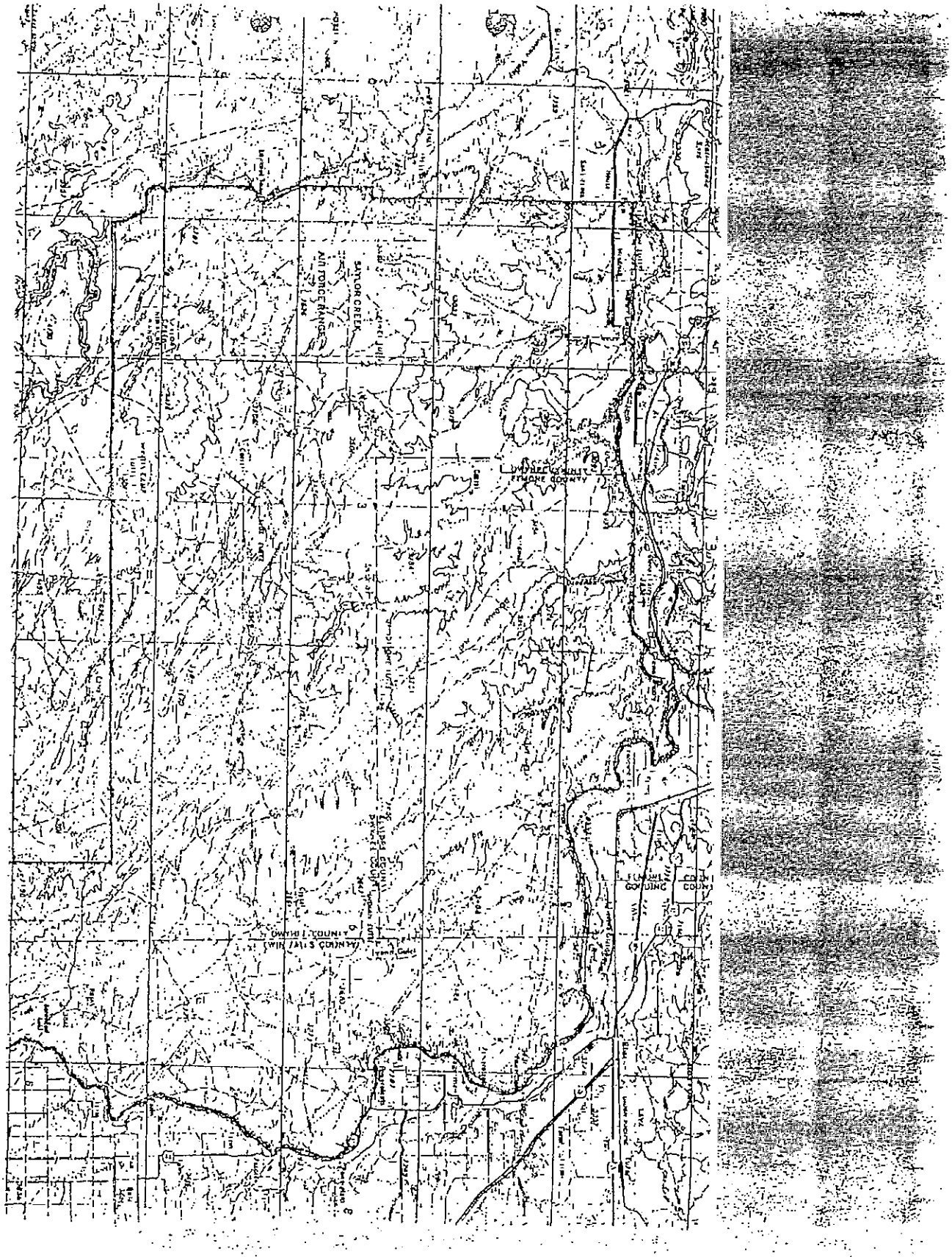
Scale: 2 inches equal 1 mile.

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.

Idaho Water Resource Board

By George L. Yost (Applicant) Chairman

IPC014955


AIR FORCE RANGE
TAYLOR CREEK
LIVESTOCK UNIT
PYMORE COUNTY
TWIN FALLS COUNTY

IPC014956

Exhibit 22

Excerpted pages of Court Reporter's transcript of Department of Water Resources public information meeting, Twin Falls, Idaho (May 23, 1859)

RECORDING ENTITLED

"TWIN FALLS-1"

Public Information Meeting
Thursday, May 23, 1985
Twin Falls, Idaho

* * * * *

TRANSCRIPT OF PROCEEDINGS

* * * * *

Transcribed by
Dianne E. Cromwell
CSR No. 21

P.O. Box 1625
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RECORDING ENTITLED
"TWIN FALLS-1"

Public Information Meeting
Thursday, May 23, 1985
Twin Falls, Idaho

* * * * *

TRANSCRIPT OF PROCEEDINGS

* * * * *

Transcribed by
Dianne E. Cromwell
CSR No. 21

MALE SPEAKER: Viewing global public interest of the board of directors of the corporation felt should be whatever this be, I'll read it to you.

MR. YOUNG: Good. And will you submit us a copy of it too?

MALE SPEAKER: Yes.

MR. YOUNG: Very good.

MALE SPEAKER: I'm here now representing the Hagerman Valley Citizens work. Our group might well be defined as a citizenship group whose main concern is the public interest.

We are usually, if not always, supporting positions that will benefit the public at large. As a group we are mainly concerned with maintaining the healthful and attractive community in which to live.

Our own articles of incorporation, our purpose is stated: To secure and enhance the city from social welfare, the residents and visitors of Hagerman Valley.

Our purpose on being here tonight is to state our position regarding the definition of local public interest. The word "public" is defined in Websters as that remaining to and

offering all the people -- pardon me, and affecting all the people.

We have such expressions as public good, public welfare, public health, public trust, all of which referred to the public at large. The concept of the public interest stands in contrast to private interest for particular individual's benefit from some action or policy.

Ideally, all actions of the policy could serve both the public interest and the private interest. There should be an equitable balance between the two. However, when we come into conflict, public interest should prevail, consistent to that document's greatest good to the greatest number of people.

The concept of public interest is very old and can be traced back to English common law and even to Roman law. It certainly goes back to our own Constitution. In the Preamble of the Constitution appears the phrase "To promote the general welfare," and this is interpreted to mean promote the welfare of the public at large.

The term "public good" appears in the Declaration of Independence. The term "public trust" appears also in the Constitution. So the

idea of government being concerned with protecting the public's interest is well established in our history and traditions.

The concept of public welfare and public interest is based on the government's relationship with its citizens. One of the principal duties of the government is to look out for the interest of all its citizens. We think that it is in the public interest to protect and preserve our habitat, the places we live and the places our children and grandchildren will live.

We believe that it is in the public interest to take the long view and the broad view when it comes to taking care of our natural resources.

We have no problem in defining local public interest for Hagerman Valley. We are concerned with the quality of the water coming from the springs, flowing in our rivers, and the natural beauty it surrounds. We certainly hope that the Department of Water Resources will take such concern into consideration when writing new rules for issuing water permits.

Thank you.

MR. YOUNG: Thank you. The department's

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thing we have talked about is perhaps if a project of that type were offstream storage and were approved, that would be written in as a condition of the permit, that on low flow periods in cold weather, if the power company really needs the hydro generation, the diversion would be suspended. Is that sufficient?

They're talking here about not just having to mitigate for the 30 to 40 minimum flow impact, if you took the flow at the Murphy Gauge below 3900 or 5600, I should say. We're talking here about making up for the impact for taking trust water. So this is unique.

MALE SPEAKER: How does this affect any proposed offstream artificial recharge of the aquifer. It appears to me that that would be a conflict. Does that affect it? We have a project over here, the north of here, doing that now; in fact, putting water into the aquifer. How is that going to work?

MODERATOR: Well, again, would there be a recharge project proposing to take water out of the main stem of the Snake River below Milner --

MALE SPEAKER: Oh, below Milner.

MODERATOR: And above Swan Falls. If you

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did and it was going to pump through or take it out during the nonirrigation season, I think it would probably apply in that case. But when you're above Milner, you're probably taking trust water, you're probably going to have to look at the five criteria, whether the trust criteria empty significantly reduce the flow of the hydro power line, but you wouldn't be subject to this mitigation.

MALE SPEAKER: But then you're coming right again in conflict. It seems to me that they're after the groundwater pumpers, and it appears that that type of project would enhance that rather than diminish it if their criteria for pumping it out is correct.

MODERATOR: And if you went back to the five public interest criteria, if it indeed was in the public interest to take the water away from hydro generation during that winter period and put it into the groundwater for recharge, then it should be approved [unintelligible] -- public interest criteria.

Elaine?

MS. MARTIN: Just maybe for interest of those people that were thinking about doing some

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of this [unintelligible], one of the gentlemen at last night's meeting felt that this mitigation was just not far enough or wide enough and suggested that the law changed so that the fish could be mitigated in the April or May/June flows also.

And so you're going to have to put in your suggestions for the mitigation if you want to balance out some of it because they really are suggesting very, very strongly that the mitigation hearings is much too narrow and needs to be spread to fish flows in June also.

MODERATOR: The Northwest Power Planning Council's fish watch, which probably would occur on dry years in the April to June period. And the suggestion would be made as to projects, in order to be in the public interest, might have to be envisioned to make up water for that fish watch. That was how broad that person viewed the public interest criteria.

Again, that's what we're asking for.

Tom?

MR. NELSON: One thing, Norm, on this gentleman's example. I don't think that the surface water diversions for recharge above Milner are part of the trust waters. To be part of the

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trust waters, the water has to be made available by reason of the subordination provision, and there's no water right at Milner. That's a zero flow under the state water plan. So the surface water diversion above Milner would not be subject to those criteria.

Now, the EPA may have something to say about it, but I don't think this is the problem under the agreement.

MR. YOUNG: Good. I'm glad it's on tape. That makes it easy.

MS. MARTIN: Norm, we had one lawyer in the audience last night. We've got another one tonight. Could we ask him how he would use the first-come, first-serve doctrine?

MODERATOR: Will you yield?

MALE SPEAKER: Sure.

MS. MARTIN: It has really helped. A lot of us would like to say, there are some small projects [unintelligible] that are in the emergency situation, that we're talking of 10, 20, 30 acres, that really need to be processed. But that if a larger project earlier says, well, that's all right, go ahead and process them first, then they're speculative. And they lose their

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 23

Excerpted pages of the 1985 Journal of the Idaho State Senate.

JOURNAL

of the

STATE SENATE

ORGANIZATIONAL SESSION

and

FIRST REGULAR SESSION

of the

FORTY-EIGHTH LEGISLATURE

of the

STATE OF IDAHO

1985

PROPERTY OF THE LEGISLATIVE COUNCIL
BOISE, IDAHO

PESTICIDES; AMENDING TITLE 45, IDAHO CODE, BY THE ADDITION OF A NEW CHAPTER 17, TITLE 45, IDAHO CODE, TO PROVIDE DEFINITIONS; TO PROVIDE FOR THE CREATION OF A LIEN ON CROPS FOR PROVIDERS OR APPLICATORS OF FERTILIZERS OR PESTICIDES ON, OR FOR THE GROWING OF SUCH CROPS TO SECURE PAYMENT FOR SUCH FERTILIZERS OR PESTICIDES; TO PROVIDE FOR THE PRIORITY OF SUCH LIEN; TO PROVIDE FOR FILING A NOTICE OF CLAIM OF LIEN; TO PROVIDE FOR CONTENTS OF THE LIEN CLAIM; TO PROVIDE FOR THE DURATION OF THE LIEN, TO PROVIDE A LIMITATION ON ACTIONS TO FORECLOSE SUCH A LIEN, AND TO PROVIDE FOR THE AWARD OF COSTS AND ATTORNEY'S FEES; AND TO PROVIDE FOR THE RELEASE OF A LIEN CLAIM.

S 1004 was introduced, read the first time at length, and referred to the Judiciary and Rules Committee for printing.

H 1, by Ways and Means Committee, was introduced, read the first time at length, and referred to the State Affairs Committee.

On request by Senator Ricks, granted by unanimous consent, the Senate advanced to the Fifteenth Order of Business.

Miscellaneous Business

On motion by Senator Ricks, seconded by Senator Kieberl, the Senate adjourned until 11:30 a.m., Monday, January 14, 1985.

DAVID H. LEROY, President

Attest: DOROTHEA BAXTER, Secretary

EIGHTH LEGISLATIVE DAY
MONDAY, JANUARY 14, 1985

Senate Chamber

President Leroy called the Senate to order at 11:30 a.m.

Roll call showed all members present except Senator Peavey, absent and excused.

Prayer was offered by Senator Lacy.

Reading and Correction of the Journal

The JUDICIARY AND RULES Committee reports that the Senate Journals of the proceedings of January 10 and 11, 1985, were read and approved as corrected.

FAIRCHILD, Chairman

Report adopted.

On request by Senator Ricks, granted by unanimous consent, the Senate advanced to the Sixth Order of Business.

Reports of Standing Committees

January 14, 1985

The JUDICIARY AND RULES Committee reports that S 1004 has been correctly printed.

FAIRCHILD, Chairman

S 1004 was referred to the Agricultural Affairs Committee.

On request by Senator Ricks, granted by unanimous consent, the Senate advanced to the Eleventh Order of Business.

Introduction, First Reading and Reference of Bills, House Petitions, Resolutions and Memorials

S 1005
BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT
RELATING TO THE PUBLIC UTILITIES COMMISSION AND ITS JURISDICTION TO REVIEW REVENUE REQUIREMENTS AND OTHER REGULATORY IMPLICATIONS OF THE SWAN FALLS COMPROMISE.

S 1006
BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT
RELATING TO THE DEPARTMENT OF WATER RESOURCES; AMENDING SECTION 42-1805, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER TO PROMULGATE RULES AND REGULATIONS.

S 1007
BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT
RELATING TO WATER RIGHTS; AMENDING CHAPTER 5, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-502B, IDAHO CODE, TO PROVIDE THAT GAIN UPON SALE OF A PUBLIC UTILITY'S WATER RIGHT SHALL ACCRUE TO THE BENEFIT OF THE RATEPAYERS.

S 1008
BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT
RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING SECTION 42-203, IDAHO CODE, TO REDESIGNATE THE SECTION, TO MAKE CERTAIN ORGANIZATIONAL CHANGES AND TO PROVIDE FOR THE MAILING OF NOTICES TO PAID SUBSCRIBERS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203B, IDAHO CODE, 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; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203C, IDAHO CODE, TO PROVIDE THAT THE DEPARTMENT SHALL CONSIDER CRITERIA WHEN AN APPLICANT'S APPROPRIATION WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF WATER AVAILABLE FOR A SUBORDINATED POWER USE; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203D, IDAHO CODE, TO PROVIDE THAT THE DEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THE EFFECTIVE DATE OF THIS ACT; PROVIDING THAT THE PROVISIONS OF THIS ACT SHALL NOT AFFECT ANY INTERSTATE COMPACT; AND PROVIDING SEVERABILITY.

S 1005, S 1006, S 1007, and S 1008 were introduced, read the first time at length, and referred to the Judiciary and Rules Committee for printing.

FOR WHICH THE DIRECTOR MAY REFUSE TO ISSUE OR REFUSE TO RENEW A CERTIFICATE OF REGISTRATION.

S 1095
BY TRANSPORTATION COMMITTEE

AN ACT

RELATING TO IMPLEMENTS OF HUSBANDRY; AMENDING SECTION 49-101, IDAHO CODE, TO INCLUDE MINT TUBS AND MINT WAGONS UNDER THE DEFINITION OF "IMPLEMENTS OF HUSBANDRY"; AND DECLARING AN EMERGENCY.

S 1096
BY TRANSPORTATION COMMITTEE

AN ACT

RELATING TO THE DISTRIBUTION OF FEES FROM SNOWMOBILE FEES; AMENDING SECTION 49-2606, IDAHO CODE, TO PROVIDE FOR THE DISTRIBUTION OF MONEYS, TO CREATE THE SEARCH AND RESCUE ACCOUNT, TO PROVIDE FOR USES OF MONEYS IN THE SEARCH AND RESCUE ACCOUNT; TRANSFERRING MONEYS FROM A CERTAIN ACCOUNT IN THE DEDICATED FUND TO THE SEARCH AND RESCUE ACCOUNT, AND PROVIDING FOR THE USES OF SUCH MONEYS; AND DECLARING AN EMERGENCY.

S 1097
BY TRANSPORTATION COMMITTEE

AN ACT

RELATING TO THE TRANSPORTATION OF ALCOHOLIC BEVERAGES, WINE AND BEER; AMENDING SECTION 23-505, IDAHO CODE, TO PROHIBIT THE TRANSPORTATION OF OPEN CONTAINERS OF ALCOHOLIC LIQUOR, WINE AND BEER.

S 1098
BY TRANSPORTATION COMMITTEE

AN ACT

RELATING TO MOTOR VEHICLE LIENS AND ENCUMBRANCES; AMENDING SECTION 49-442, IDAHO CODE, TO PROVIDE THAT IF A TITLE APPLICATION IS RETURNED FOR CORRECTION AND IS NOT RETURNED WITHIN A SPECIFIED TIME THE ORIGINAL DATE AND HOUR OF RECEIPT SHALL BE VOID.

S 1090, S 1091, S 1092, S 1093, S 1094, S 1095, S 1096, S 1097, and S 1098 were introduced, read the first time at length, and referred to the Judiciary and Rules Committee for printing.

H 19, by Education Committee, was introduced, read the first time at length, and referred to the Education Committee.

Second Reading of Bills

S 1054, by Local Government and Taxation Committee, was read the second time at length and filed for third reading.

H 28, by Resources and Conservation Committee, was read the second time at length and filed for third reading.

S 1052, by State Affairs Committee, was read the second time at length and filed for third reading.

S 1044, by Judiciary and Rules Committee, was read the second time at length and filed for third reading.

S 1066, by Education Committee, was read the second time at length and filed for third reading.

Third Reading of Bills

On request by Senator Ricks, granted by unanimous consent, S 1088, S 1007, S 1008, and S 1005 were placed at the head of the calendar.

S 1088 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Anderson, Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Darrington, Dobler, Fairchild, Gilbert, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Parry, Peavey, Rakozy, Reed, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Tominaga, Twiggs, Watkins, Yarbrough. Total - 34.

NAYS—Batt, Carlson, Crystal, Ricks, Ringert, Rydalch. Total - 6.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared S 1088 passed, title was approved, and the bill ordered transmitted to the House.

On request by Senator Noh, granted by unanimous consent, the President ordered the Statement of Legislative Intent relating to S 1088 spread upon the pages of the Journal.

STATEMENT OF LEGISLATIVE INTENT
S 1088

Prepared by Senator Michael D. Crapo
of the Senate Resources and Environment Committee
February 1, 1985

I. INTRODUCTORY STATEMENT.

Beginning in approximately 1977, a significant controversy arose between Idaho Power Company and certain other water users in the State of Idaho over the extent of Idaho Power Company's water rights at the Swan Falls Dam. Ultimately litigation was instituted against numerous water users by Idaho Power Company to clarify the status of the disputed water rights. Both the Governor and the Attorney General of the State of Idaho became extensively involved in attempts to resolve this dispute. In 1983 and 1984, in two separate legislative sessions, the Idaho Legislature also grappled with the controversy unsuccessfully. At issue was whether the water rights of Idaho Power Company 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.

Ultimately, in October, 1984, an Agreement was reached between the Governor of the State of Idaho, the Attorney General of the State of Idaho and Idaho Power Company which resolved the controversy. The agreement required legislative action and was made contingent upon passage by the Idaho State Legislature of certain legislation which was

referenced in the agreement. This bill, Senate Bill 1008, is the centerpiece of the legislation which is contemplated by the agreement.

II. STATEMENT OF PURPOSE.

This legislation is intended to resolve conflicts over whether an existing water right for power is subordinated. The legislation resolves these conflicts by defining the nature of such water rights. It is also intended to assure that water is available for development in Idaho and to provide a basis for reallocation of water for future development. It recognizes that Idaho's population and commercial and industrial expansion as well as Idaho's agricultural needs will require an assured amount of water.

The legislation also clarifies the authority of the Idaho Department of Water Resources to subordinate future hydropower water rights. Finally, the legislation is an assertion by the Legislature of the State of Idaho of its authority to limit and regulate the use of water for power purposes.

III. SECTION BY SECTION ANALYSIS.

A. SECTION 1. (AMENDING SECTION 42-203 OF THE IDAHO CODE.)

Section 1 amends Section 42-203 of the Idaho Code by renumbering the section to be Section 42-203A and adding new notice requirements for applications to divert in excess of ten (10) c.f.s. or one thousand (1,000) acre feet of water. Notice of such applications must be published statewide, once per week for two consecutive weeks. Section 1 also provides a mechanism by which persons interested in being notified of any proposed diversions may request in writing to be notified by the Department of Water Resources. Such requests may specify any class of notices of application. Persons making such requests must pay annual mailing fees to be established by the Department of Water Resources.

B. SECTION 2. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

Section 2 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203B, Idaho Code. This legislation is an exercise of the State's authority under the 1928 Amendment to Article XV, Section 3 of the Idaho Constitution to limit and regulate the use of water for power purposes. The section represents a specific legislative finding that it is in the public interest of the State of Idaho to assure that the State has the power to regulate and limit the use of water for power purposes to assure an adequate supply of water for future beneficial upstream uses. It also represents a legislative protection of the rights of a user of water for power purposes (1) against depletion to the extent of a minimum flow established by State action; and (2) to the continued use of water available above the minimum flow subject to reallocation to future uses acquired pursuant to State law. The water right for power purposes shall not be subject to depletion up to the amount of the minimum flow as defined by any applicable contract with the State. As applied to the Swan Falls Agreement, the existing minimum stream flow at the Murphy U.S.G.S. gauging station is recommended for change to seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. The Agreement recognizes Idaho Power Company's rights as unsubordinated up to the amount of those flows. While the State may later change the minimum flows, the recognition of the nature of the company's rights will not change. Valid subordination conditions governing any existing hydropower rights are not modified or removed by this legislation.

To accomplish the balancing of these potentially competing interests, this section establishes a trust in which title to certain specified water rights will be held. The trust pertains to water rights for power purposes which are in excess of minimum stream flows established by state action. The term "state action" refers only to action by the Idaho Department of Water Resources in compliance with all applicable law, and/or the establishment of minimum stream flows in the State Water Plan by the Idaho Water Resource Board, both of which actions are subject to ratification, modification or rejection by the Idaho State Legislature. To the extent of the established minimum flows and any right recognized by contract, such water rights for power purposes remain unsubordinated to all uses. The amount of water or water rights held in the trust is thus keyed to the maintenance of the established minimum stream flows rather than any estimates of how much water may be available above such minimum flows. Any portion of such water rights above the established minimum flows will be held in trust by the State of Idaho, by and through the Governor of the State of Idaho. This trust will hold these water rights for the benefit of the power user so long as they are not appropriated as provided by law by future upstream beneficial users. The trust also operates, however, for the use and benefit of the people of the State of Idaho, to assure that water is made available for appropriation by future upstream users who satisfy the criteria of Idaho law for reallocation of the water rights held in the trust. No person to whom trust waters are reallocated shall be required to pay compensation to any party, other than appropriate administrative fees established by the director for processing of the reallocation.

The governor is given specific authority to enter into agreements with power users to define applicable minimum stream flows in accord with the terms of this section. These contracts must be ratified by the Idaho State Legislature.

Thus, existing hydropower rights which have not been effectively subordinated shall not be subject to depletion below any applicable minimum flows established by the State. Hydropower rights in excess of such flows will be held in trust by the State and are subject to subordination to, and to depletion by lawful beneficial uses. In addition, if the holder of

such a hydropower right enters into an agreement with the State defining the extent of its hydropower right, the right will remain unsubordinated to the extent provided by the Agreement. Such agreements must be ratified by law, and ratification of one such agreement is conferred by this section.

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 assure the availability of water for such uses. The director also shall have the authority to limit permits or licenses for power purposes to a specific term.

As applied to the agreement between Idaho Power Company, the Governor and the Attorney General, this trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream flows and Idaho Power Company holds equitable title to those water rights subject to the trust. The Idaho Department of Water Resources is the entity which makes the determination of whether water is to be reallocated from the trust under the criteria of Section 42-203C and in compliance with the State Water Plan. The Company's rights may be asserted by the state, as trustee, and by Idaho Power Company, as beneficiary of the trust and as the user of the water right. Idaho Power Company is not the sole beneficiary of the trust, however. Future appropriators, as persons on whose behalf the trust waters are held, may seek to appropriate the trust waters in conformance with State law. The State acts as trustee in their behalf as well. At such time as a future appropriator is granted a water right in the trust waters, Idaho Power Company's rights in such appropriated water become subordinated.

C. SECTION 3. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

1. Section 3 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203C, Idaho Code. This section specifies the criteria which must be met to appropriate waters which are subject to the trust established in Section 2. This section contemplates a three-step analysis as to appropriations of water from the trust established in Section 2:

First, the proposed use must be evaluated under the criteria presently existing in Section 42-203A, including local public interest. (Senate Bill 1008 does not adversely affect the use of existing local public interest criteria. Review of these factors is separate from the new factors added by the bill in Section 42-203C.)

Second, if the proposed use meets these criteria, there must be a determination of whether the proposed use would "significantly reduce" the amount of water available to the power user whose rights are owned by the trust. If a significant reduction is not found, then the application should be granted.

Third, if a significant reduction is found, then the proposed use must be evaluated in terms of the criteria stated in Subsection 42-203C(2). The finding of a significant reduction does not infer that any portion of the trust waters should not be developed. Such a finding simply results in the necessity of evaluating the proposed use according to the terms of the criteria stated in Subsection 42-203C(2). These criteria focus on the benefits of the proposed use to the state and local economy, the impact on electric utility rates, the promotion of the family farming tradition, and the promotion of full economic and multiple use development of Idaho's water resources. The fifth criteria sets a cap on agricultural development above the Murphy Gauge.

Subsection 42-203C(2) (b) clarifies that the burden of proof in establishing that any of these criteria would prevent granting of the application is upon the protestant. This subsection was included to implement the specific legislative intent that the administrative burdens of meeting the new criteria would not block future development.

None of the factors in Subsection 42-203C(2) are to be given greater weight than any other by the director in determining whether to allow future beneficial use of the trust waters. This provision represents legislative intent that the consideration of the family farming tradition, hydropower use, domestic, commercial, municipal and industrial uses, or other multiple use developments are each to be given equal consideration in the reallocation process. It is the intent that otherwise qualified water uses which promote the family farming tradition or create jobs should be recognized as essential to the economy of the State of Idaho.

The criteria identified in Subsection 42-203C(2) are intended solely to guide the director of the Idaho Department of Water Resources in determining whether a proposed use has greater net benefits to the State than the existing hydropower use. The criteria identify those factors to be considered in making this determination. Proposed uses for domestic, commercial, municipal or industrial purposes and the like are not intended to receive less weight in the evaluation process simply because they are not mentioned specifically in the criteria. Nor is it intended that these uses be subject to the family farming standard contained in Subsection 42-203C(2) (ii), or the agricultural cap contained in Subsection 42-203C(2) (v). In such circumstances only the criteria relevant to the proposed use and its impact on hydropower would be pertinent.

The legislation also specifically ties the appropriation of water from the trust to conformance with "state law" and not to the new public interest criteria. This provides flexibility to the state in the future to change

the law if it becomes necessary, without modifying the operation of the trust provisions. Thus, State water policy is not frozen by this legislation.

D. SECTION 4. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

Section 4 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203D, Idaho Code. This section provides that the Idaho Department of Water Resources shall review all water permits issued by it prior to the effective date of this act; provided, however, that permits having been put to beneficial use prior to July 1, 1985 are exempt. These permits are to be reviewed to assure that they comply with the requirements of this act. The director is authorized to either cancel the permits or subject them to new conditions.

E. SECTION 5.

Section 5 clarifies that this act does not modify, amend or repeal any existing interstate compact.

F. SECTION 6.

Section 6 declares the provisions of this act to be severable in the event that any portion thereof is declared to be invalid or unenforceable.

S 1007 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Anderson, Batt, Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Crystal, Darrington, Dobler, Fairchild, Gilbert, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Parry, Peavey, Rakozy, Reed, Ringert, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Twiggs, Watkins, Yarbrough. Total - 36.

NAYS—Carlson, Ricks, Rydalch, Tominaga. Total - 4.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared S 1007 passed, title was approved, and the bill ordered transmitted to the House.

S 1006 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Darrington, Dobler, Fairchild, Gilbert, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Peavey, Rakozy, Reed, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Twiggs, Watkins. Total - 30.

NAYS—Anderson, Batt, Carlson, Crystal, Parry, Ricks, Ringert, Rydalch, Tominaga, Yarbrough. Total - 10.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared S 1006 passed, title was approved, and the bill ordered transmitted to the House.

S 1005 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Anderson, Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Darrington, Dobler, Fairchild, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Parry, Peavey, Rakozy, Reed, Ringert, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Twiggs, Watkins, Yarbrough. Total - 33.

NAYS—Batt, Carlson, Crystal, Gilbert, Ricks, Rydalch, Tominaga. Total - 7.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared S 1005 passed, title was approved, and the bill ordered transmitted to the House.

S 1015, having been held, was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

On request by Senator Darrington, granted by unanimous consent, S 1015 was referred to the Fourteenth Order of Business, General Calendar.

S 1016, having been held, was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Moved by Senator Anderson, seconded by Senator Beck, that S 1016 be referred to the Fourteenth Order of Business for amendment.

An amended motion was made by Senator Ricks, seconded by Senator Kiebert, that the Senate recess until 1:30 p.m. of this day.

The question being, "Shall the amended motion pass?"

The amended motion passed by voice vote, and the Senate recessed until 1:30 p.m. of this day.

RECESS
AFTERNOON SESSION

The Senate reconvened at 1:30 p.m., pursuant to recess, President Leroy presiding.

Roll call showed all members present except Senators Bilyeu, Kiebert, Lannen, Peavey, and Tominaga, absent and excused; and Senators Lacy and Little, absent and formally excused by the Chair.

Prior to recess the Senate was at the Thirteenth Order of Business, Third Reading of Bills.

Senator Peavey was recorded present at this order of business.

The President announced that the motion to refer S 1016 to the Fourteenth Order of Business, General Calendar, was before the Senate for consideration, the question being, "Shall the motion pass?"

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 24

Excerpted pages of Transcript of Deposition of Patrick Jerome Kole, *In re SRBA, Case no. 39576* (Fifth Jud. Dist. ,Twin Falls County Court) (Nov. 14, 1990)

COPY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System,

The State of Idaho, ex rel. R. Keith Higginson in his official capacity as Director of the Idaho Department of Water Resources,

Plaintiff,

vs.

The United States; The State of Idaho; and all the claimants to the use of water from the Snake River Basin Water System,

Defendants.

Case No. 39576



Boise, Idaho
November 14, 1990
1:39 p.m.

DEPOSITION OF PATRICK JEROME KOLE

Reported by:
KIM I. TANNER

Prepared for:

STEVEN W. STRACK
(Copy)

CAPITOL REPORTERS
Certified Shorthand Reporters
3350 Americana Terrace
Suite 245
Boise, Idaho 83706
(208) 344-8880

DEPOSITION OF PATRICK JEROME KOLE, taken at the instance of the defendants at the Federal Building, 550 Fort Street, Room 530, in the City of Boise, State of Idaho, commencing at 1:39 p.m., on Wednesday, November 14, 1990, before KIM I. TANNER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, pursuant to Notice, and in accordance with the Idaho Rules of Civil Procedure.

A P P E A R A N C E S

For the Plaintiff:	Attorney General's Office By: Steven W. Strack, Esq. Statehouse, Room 210 Boise, Idaho 83702
For the Defendant (United States of America):	Peter C. Monson, Esq. Indian Resources Section Environment and Natural Resources Division U.S. Department of Justice P.O. Box 44378 Washington, D.C. 20026-4378
For the Defendants (Boise-Kuna, Nampa and Meridian, New York, Wilder, and Big Bend Irrigation Districts):	HAWLEY, TROXELL, ENNIS & HAWLEY By: Albert Barker, Esq. First Interstate Center Suite 1000 877 Main Street Boise, Idaho 83702

I N D E X

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BOISE, IDAHO, WEDNESDAY, NOVEMBER 14, 1990, 1:39 P.M.

PATRICK JEROME KOLE,

a witness produced at the instance of the defendants, having been first duly sworn upon oath, was deposed as follows:

MR. MONSON: This is the deposition of Patrick Kole -- Patrick James Kole, I believe.

THE WITNESS: Jerome.

MR. MONSON: Jerome. Did I get that wrong in the notice?

THE WITNESS: Yes, that's okay.

MR. MONSON: Kole is spelled with a "K"; correct?

THE WITNESS: Correct.

MR. MONSON: This deposition is being taken in In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System, also known as the State of Idaho versus the United States, Case Number 39576 pending before the District Court, of the State of Idaho, Fifth Judicial District in and for the County of Twin Falls. This deposition is being taken in Room 530 of the Federal Building, 550 West Fort Street, Boise, Idaho.

Today's date is November 14th. Present in addition -- excuse me, the time is approximately 1:39 by my watch. Present in addition to Mr. Kole and myself, Peter C. Monson, attorney for defendant United States of America, is Steven J. Strack, attorney for the State of Idaho.

MR. STRACK: W. Strack.

MR. MONSON: W. Strack. I'm sorry, it's been a long week.

EXAMINATION

BY MR. MONSON:

Q Could you -- you've already stated your full name. Could you state your home address for the record?

A 3221 Raindrop Drive, Boise, Idaho 83706-5253.

Q And how about your business address?

A P.O. Box 829, Boise, Idaho 83701.

Q Do you anticipate changing your address between now and the date of trial, which is now set for December 3rd?

A No.

Q Mr. Kole, have you ever attended a deposition before?

A Yes.

Q Several times, I suspect?

A Many times.

negotiations is based upon the book, Getting to Yes; we try to create win-win situations. The first thing you would do is you identify the different goals and objectives of each party. And after you've identified those goals and objectives, you separate out the ones that appear to be in conflict and then you try to design ways so that both sides meet their goals and objectives. And it became clear to me very early on in the negotiations that the problems that were identified by the parties in the way that they had approached the issue were not inconsistent, not contradictory; they just needed to be expanded so they could see where they met. I think within a very short period of time, by September, perhaps even August, it was clear to me that we would be able to come up with an agreement.

Q What was the principal element of the negotiation? Was it the quantity of water that Idaho Power Company was entitled to?

A The principal issue was who would run the river, whether it would be a private utility or whether it would be public ownership. And the State had always wanted to make it clear that this was their job to be the water master and not a private utility. And once both sides agreed that the State should be in charge, that it just then became a question of protecting everybody's

water rights throughout the system and making sure that everybody was treated fairly and equitable.

Q Why did Idaho Power Company or did Idaho Power Company want to run the river?

A Well, whether they wanted to or not, they were as a result of the court decision de facto in charge of the river because of the way they could assert their water right or not assert their water right against different uses that would give them the ability to manage the resource. From the State's point of view that was untenable.

Q What other issues were involved in trying to "get to yes" in the Swan Falls dispute?

A I think the other issues were if the State's going to manage the river, how is it going to be done? If we're going to try to come up with a comprehensive plan for managing the river, what interests are going to be balanced? If we're going to prevent the exportation of Idaho's water from this state to other states, what legal steps and practical steps need to be undertaken to achieve that goal? It was just frankly the end of an era, an era that had been predicated upon a belief that you take the water out of the river all the time, you dry up the river. And it was a recognition on the part of not only the State, but Idaho Power and the people of Idaho that this

Q Did the press ever attend your negotiations?

A No, I don't recall them ever coming. I remember walking out of a meeting and staring into TV cameras one day, but that's about it.

Q Did you ever have any differences of opinions with Pat Costello during the negotiations?

A Oh, I think that we -- I'm sure we did. I'm sure we did. There would be times when Mr. Costello and I would be of one mind. There would be times when Mr. Nelson and I would be of one mind. There would be times when Mr. Nelson and Mr. Costello would be of one mind.

Q Were there any particular disagreements that you particularly remember as being important or significant?

A Probably the biggest area of controversy would have been the difference between a subordinated water right and subordinatable water right. Idaho Power Company flat out took the position that they were not going to subordinate their water right, but they would create a subordinatable water right. I guess I'm just a little bit of a stubborn individual; I really felt like they ought to subordinate their water right. But eventually I became convinced that given the history and the other constraints that we put in, trust water and trust concept, that we would be as well protected with the

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 25

Minutes of the Senate Resources and Environment Committee (Jan. 18, 1985)

MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

JANUARY 18, 1985 RM 433, 1:30 p.m.

PRESENT: Chairman Noh, Senators Beitelspacher, Budge, Carlson, Chapman, Crapo, Horsch, Peavey, Ringert and Sverdsten. Senators Little and Kiebert were absent.

SB 1008 WATER RIGHTS FOR HYDROPOWER PURPOSES

Pat Costello Mr. Costello, representing the Governor's office, was the first to discuss SB 1008. He explained the Attorney General's office has provided a written outline of the two pieces of legislation (which is attached to the minutes). He briefly went through the sections and explained how SB 1008 fitted into the overall agreement.

SB 1006 TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER TO PROMULGATE RULES AND REGULATION.

This legislation will provide statutory authority to the Director of the Department of Water Resources to suspend issuance of water rights permits or other action on permits or permit applications when necessary. It would also give the Director the authority to promulgate rules and regulations. This authority is necessary in order for the Department to carry out new State Water Plan and statutory mandates contemplated by the Swan Falls agreement. These include public interest review, imposition of mitigation conditions on certain new uses, water marketing, and general adjudication of the Snake River. He pointed out the only addition to this bill was the "so-called moritorium authority." Since the Swan Fall's lawsuit the Director has been imposing a moritorium and this law would merely confirm the authority. It would also give him authority to promulgate rules and regulations.

Pat Kole Mr. Kole, from the Attorney General's office, briefly went through SB 1008 by sections further explaining the legislation. He brought out the negotiators had two choices in Section 1; to redraft the Section or just make some additions, which they choose to do. Addition was made for a procedure to notify interested groups of new applications when it was in excess of 10 cfs acre feet. 42-303B does not change the public interest standard but is to put it in balance. Section 4 would meet the criteria for reviewing outstanding permits without creating liability to the state.

Tom Nelson Mr. Nelson, the attorney for Idaho Power, gave a status report on the various components of the agreement. Certain things were required as a condition of the agreement. The filing with the Idaho PUC has been done. PUC will await legislative action. The FERC filing has been made and the time for intervention has been run. One intervention by the National Marine Fishing Services, an

agency of the Department of Commerce has been filed. This seems to relate to the water budget under the NW Power Act. The bill on adjudication and related funding is in the House Resource Committee. The Bill on PUC jurisdiction is printed and is in the Senate State Affairs Committee. The Company made the decision no filing was needed with the PUC of Oregon so it was not done. It was filed with no formal request for action. The proposed amendments to the State Water Plan have been made and the Water Resource Board will begin hearings on January 28 in Idaho Falls. Mr. Nelson feels there are alot of elements to the plan and did not want to give the impression the only important one was the minimum stream flow. Equally important part in view of the Company is the public interest criteria. The Company feels it is critical hydropower be recognized as an element in consideration of new water uses that affect the river above Murphy. It is important that the statute and the contract do not prohibit development. The new public interest criteria, for the first time, recognize that impacts upon hydro generation must be considered by the Director of Water Resources when evaluating applications for diversion of water from those placed in trust.

Senator Noh — Asked if someone would explain where we are in settling problems with the cost of adjudication for the city of Idaho Falls.

Pat Costello — This question was brought up in the House Resource meeting when it was pointed out by several legislators from Idaho Falls as well as the Mayor of that city that the $25 per cfs would cause a disapportinate amount of the fee on the city of Idaho Falls because they have roughly 20,000 cfs of hydropower rights there, which would result in them paying roughly 10% of the power adjudication when they generate only 1% of the power. We are looking at changing the formula to the "rated capacity" as being the measure to charge for hydropower. The overall amount to be generated for the adjudication from hydropower would remain constant at about 7.4 million overall for hydropower which is roughly what agricultural users would pay, but it will be based on number of cents per rated capacity.

Senator Noh — Senator Noh said he understood the original formula had been reviewed by the city of Idaho Falls and approved but they subsequently discovered they had made mistakes. The error shouldn't be blamed on the people who developed the fee structure.

Senator Crapo — Asked if the rate schedules had been broken down.

Pat Costello — Said he had that available and handed out copies. (Attached)

Senator Ringert — What is the public interest that has been referred to? How is it defined?

Pat Kole — The public interest determination required pursuant to 203C is defined in 42-203C, 1-5. Those are the only factors the Director

will be considering in this particular determination. It is actually a two tier process. The Director initially considers all of the factors listed on page 2, par. 5, line 21. After that determination has been made, the Director then goes over to 203C and if the water is available because of a subordination condition, he then is required to make additional public interest determination as specifically defined in 203C-2A.

Senator Ringert — Are you saying then the Director will not have authority to expand public interest beyond what is stated in this legislation in 2A?

Pat Kole — As I understand it, he would have the ability to more closely define what those factors are. He would not be able to adopt a rule and regulation that is in conflict with the specific criteria established here. If this bill did not pass, he would have to develop criteria on a case by case basis as each individual application came before him.

Senator Ringert — Would someone explain why is it necessary to establish a trust for the 600 cfs water above the minimum stream flow available for appropriation.

Tom Nelson — In the course of the negotiations, in the final stages, we were "laugerheaded" on the question of whether the Company's water rights above the minimum flow, would be immediately subordinated by implementation of the agreement or remain in place unsubordinated until such time as the state permitted that water to someone elses use. It was the Company's position then and still is, that you have an additional argument that the River is fully appropriated if you leave that hydro right in place until such time as it is reallocated pursuant to the statute. It became somewhat of a political problem. The trust concept was adopted to get around it so that water was placed in trust. The agreement clearly says it is unsubordinated, so as far as the agreement goes, it is an unsubordinated block of water. The state then takes that water and places it in the trust, subject to reallocation. This does two things: it makes clear the state's control of the allocation of the water and it left the water unsubordinated. So the Company retains its right to urge the state-or force in the proper case- to use that argument, and that is all it is, under Article 15, Section 3 of the Constitution. The state then does not have to allow the water to go to the first guy who comes down the pike. The trust got around that problem and I think tied it together to a point where it is a little more effective mechanism to accomplish the purchase of the agreement.

Senator Ringert — Do you feel this is an effective end run on Article 15, Section 3?

Tom Nelson — I don't know. I can't obviously predict it will carry the day, but our position is the argument is worth preserving. I am certain as I stand here, some person with an undeveloped permit who will be adversely affected by this way of doing business, is going to challenge it and think it is an argument worth having.

Senator Noh — Asked if this would be an effective way to protect the minimum flow from appropriation.

Tom Nelson — That is correct. The minimum flow itself is subject to challenge by those people as being effectively a newly recognized instream use with a priority date and someone with a prior permit could take that water in spite of your minimum flow.

Senator Ringert — Does the state have any obligation to the people who took those permits out years and years ago and have been waiting for the problems to be solved.

Pat Costello — Certainly. To the extent that they have detrimentally relied and developed, then they can argue that it is a taking if you extinguish their rights. We are talking primarily about remassaging these undeveloped permits that have not been developed.

Senator Ringert — So, I take it the state feels no obligation unless they have spent money directly on the construction and development.

Pat Costello — We owe them the obligation to treat them fairly, but treated fairly under the new regime of the public interest criteria rather than under the old straight appropriation method.

Pat Kole — A couple additional points. The Hidden Valley Springs case shows the state does have the authority to recall the permits without creating liability, but in this case we have applied "grandfathering in" of anyone who has applied water to the land since the last irrigation season. If you will look at 203D on page 4, each one of those persons prior to having any property right taken from them will have an opportunity for a hearing and explain why their particular project should go forward. So there is procedural due process being applied.

Senator Crapo — As I review this legislation, it could be argued there is a bias against non-agricultural uses. How would a request for water from a non-agricultural use be dealt with, like INEL, particularly under 42-203C,2, (v)?

Tom Nelson — The criteria as written and as we have understood them and as you asked, would effect no application beyond the first two. In other words, if INEL came in and had a major application, first you would have to determine if there was a significant impact on hydropower production. Given the limited consumption of most industrial uses this is pretty difficult. Let's say they had a major use. You would look at (i) on the potential benefits and then (ii) for effect on the utility rates. In industrial settings, that analysis, at least the ones I have seen, would compel you to grant it. Obviously, you would have no impact on the family farming tradition. You might argue that it comes under the full and economical use of the water resources and would have no effect on the 20,000 acres. In that case, you would ignore the agricultural related factors. That was our intent, that the Director would only apply the ones that obviously make sense.

Senator Crapo: If I understand you, under (v) of 42-203C, this could not be used as to industrial uses to argue that the amount allowed could not exceed that which would fit this state's plan for agriculture.

Tom Nelson: That is correct. You also have the policy statements that have come out of the proposed Water Plan amendments which allocate 150 cfs to industrial uses. With that public policy statement in the Water Plan you have probably come a long ways toward approval of this standard in any event.

Senator Crapo: With regard to the 150 cfs that is being allocated for industrial use, is that 150 cfs out of the 600 cfs that is available?

Tom Nelson: That is correct.

Senator Crapo: Would that then be determined as a limit or is that a specified limit or is it a specified minimum or what exactly is intended by this specification of 150 cfs?

Tom Nelson: Senator, as I understand it, it is essentially a reservation of that much water for those purposes and subject always to change by the Water Board as it finds out if it is too high or too low. The race is not to the swift for industry as to that 150 cfs. It is there and when they need it, it will be available.

Senator Beitelspacher: In the same line of questioning as Senator Crapo, line 27 and 28 of same section: "no single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination." Does that not in itself preclude some further development of industrial development because of lines 23-25 of (v)?

Tom Nelson: As I say, that is not the intent and to me if you have a solely agricultural factor, such as (b), you couldn't apply it to industrial use. So when the Director got to that one, he would have to ignore it or otherwise the system doesn't make sense. You would only be entitled to develop agricultural uses which wasn't the intent.

Pat Costello: To follow up on (v). The policy referred to the staged development is more fully spelled out in the water plan amendment as drafted and its clear from that, that we are not saying there is a mandate to go out and develop any number of acres. All we are saying is that there is a cap at 20,000. I think what I am hearing is you are afraid this would prevent us from developing up to 20,000 or 80,000 in a four year period; that it would somehow conflict with (v) and that is not the case.

Senator Crapo: Let us suppose that industrial uses came along and used up 50 cfs in a year and enough agricultural applications were made to develop 20,000 acres, would both of those be able to be done in a single year?

Pat Costello: Yes, there would be no conflict.

Senator Peavey: Was there any room for consideration of fish and wildlife values in arriving at these criteria?

Pat Costello: The original reason they were left out is because there were two versions. (1) The plan of the old local public interest that had a comprehensive public interest determination similar to what was in the bill promoted last year by the Governor and Attorney General, which would have subordinated everything and put it through a new public interest review. We found there was resistance even from among some of the conservationist who felt that they did not want the old local public interest wiped out because they felt that did give them a useful tool. We had option 2 which was to leave the local public interest as is and simply add the new criteria that relates to the balance with hydropower, and felt that we certainly did not intend to make the ability to take fish and wildlife into account any less available but that was a separate issue since we are dealing here with protecting hydropower or water for hydropower because after all that was what was at issue in the lawsuit. Having said that, I would further say, it certainly is not the Governor's intention to imply that by leaving fish and wildlife off this list that somehow it is not in the public interest and if it needs to be stated more clearly in 42-203A that fish and wildlife can be considered under the local public interest we would support doing that. However, we are bound, and do support the existing 42-203C as written.

Tom Nelson: I agree with Mr. Costello. I think that the parties are not committed to preservation of 203A in its present form as a part of these preceedings. However, if there is going to be an attempt to change that, I think it should be in the form of a separate bill. We are tied to this program and are committed to it and if we start amending it, we will be in a real mess.

Pat Kole: I would agree with the comments of the other two negotiators. It was our thought that this was not really an issue directly involved in the lawsuit. While there may be concerns on that score, that should be addressed separately by the legislature.

Senator Peavey: In other words, any of us can propose additional criteria outside of this package and it will go on its own merit and that won't change things one way or another I guess. One of the things I thought we should look at is critical livestock range. It is real easy for the BLM to go out and give that range away but the state doesn't have to give the water away. I guess in a separate bill would be the place to address that.

Senator Ringert: Regarding 1006 bill, the second page, line 5 regarding the existing vested water rights. In making this determination, is the Director going to be able to consider the entire gamut or is he just going to look at adjudicated rights? The rights at Swan Falls, whatever they might be that precipitated the present situation, as I recall, they had been adjudicated between two parties back in 1907 or 1909 or something like that and far as

I can tell that is the only final judgement of adjudication that we have in respect to any of those water rights. The whole process was shut down because there was a determination of some sort made in a pending lawsuit that has not reached final judgement. So, what is the standard we are looking at when we use the term "existing vested water rights?"

Tom Nelson — The language was chosen in order to include a Constitutional right not represented by an adjudication, statutatory right represented by license, or in my judgement, you can get into a vesting question at a proper stage in a permit process. So my understanding why we selected vested was to pick up water rights that fell into those catagories. As far as Swan Falls is concerned, as an example, there are I think 3 water licenses at Swan Falls. In my judgement that is clearly a vested water right. There may be the adjudication as you point out. Probably, as we understand adjudication now it is probably too narrow to be much more than a statement of a constitutional right that is contemporaneous with the use. I think all of those water rights would be considered vested as I understand how that term is used here. Also, since this is broader than Swan Falls, the Director may be entitled to protect a well permit if the well were drilled and the water in use, I think that is vested to the point that the Director could try to protect it by putting a moritorium in an area while say, he looked at a critical ground water designation.

Senator Ringert — To pursue this further. It seems to me this procedure, in effect, will force the applicant to go through the administrative appeal or perhaps take it on up to the court. It further seems, it sort of puts the state in a position of saying, we are no longer going to have free wheeling appropriation. We are going to put the front end burden at least on the intending appropriator more so than in the past.

Tom Nelson — I think it has that potential in a given factual setting. Among my clients one of the things they like least about the present system is the fact that if there is a senior appropriator they have the burden of holding off the junior. They say, "why do I have to do that, I was here before he was--why is it my problem?"

Senator Noh — Under this agreement, what is to preclude a utility from buying up or leasing whatever water they can get their hands on and in effect take up all those remaining waters. As I read this, they are pretty well home free on all purchased and leased water.

Pat Costello — That is correct. They can acquire through purchase upstream stored water which they can run down the river, They are entitled to that and it can't be appropriated between the storage site and the hydro site. They would be free to do that.

Senator Noh — What about water that is lost for instance because someone fails to file a claim by the cut off date. Is that water in a situation where another party would have to file on the Water? Can you lease water that is lost for failure to file a claim?

Pat Costello — No, there would be no property right to acquire in that case. They would have difficulty establishing a right anywhere upstream from their facility because they would not be able to apply it to a beneficial use down below. It is difficult really for me to conceive of them acquiring any right other than a right to a certain amount of storage water in storage in the stream itself.

Senator Budge — Isn't that presently true?

Pat Costello — Yes.

Senator Noh — Where are we with the Spokane River system? If the Governor goes to Washington Water Power and says we want to negotiate a minimum flow so we can have further development and Washington Water Power says no, we won't negotiate. Then where are we?

Pat Kole — First off, I think it is probably not well known, but we have already opened up discussions with Washington Water Power and they have indicated that they do want to negotiate. So I would think the possibility of them absolutely refusing to negotiate is small. If they did, we would of course be in the same type of situation as we were with Idaho Power. We would be in a law suit. They have indicated that if this program passes and if they have the authority to negotiate with the Governor, they intend to do so.

Senator Noh — Looking at future hydro development, say for example on the Salmon River, is it possible for the Director to subordinate those future hydro rights without officially establishing a minimum flow on the stream?

Pat Costello — Yes. Subparagraph 6, under Sec. 2 of the main bill authorizes the Director to impose the subordination condition on new permits and licenses for power purposes. That is not anyway tied to the preceeding five paragraphs so it would be just a straight subordination condition. I think the real question you raised though, if he does that in the absence of a minimum flow, where is that right in terms of the regime established in the preceding paragraph, which talks about the rights below the minimum flow being unsubordinated, and the ones above it being held in trust. Clearly, that regime contemplates there would be a minimum flow there, and that we really did not intend that it would apply across the board if there were no minimum flows in place at that time.

Senator Ringert — Why is the provision in there that authorizes the Director to limit a permit or license for power purposes? Why is this any part of the Swan Falls settlement?

Pat Kole — Basically, there has always been a question as to what the state's authority is pursuant to the 1928 Constitutional amendment. In taking a look at that issue, while there is good authority for the proposition, that amendment was self executed as part of the settlement negotiations as the Attorney General felt there should be some specific authority given to the Director to subordinate hydropower water rights and that is what paragraph 6 does.

Senator Ringert: This agreement I feel is being promoted very heavily. The local newspaper is telling us through editorials that the Legislature should not mess around with the settlement in any way shape or form and I don't see any reason at all for that particular provision which will affect a great deal of small hydrop permits and applications and this tagging along on the emphasis that has been raised to settle the Swan Falls issue. The last one I saw like this was a rider on an 1888 appropriation bill in the U.S. Congress that tied up all the water in the western U.S. and lands for the next three years until they got to the 1891 amendment of the present land law. Will someone tell me why this has to be in the Swan Falls settlement?

Pat Kole: Basically all paragraph 6 does is grant authority and does not require the Director to subordinate hydropower rights nor does it make it mandatory. In certain situations where there is productive upstream land that could be developed, the Director will have to sit down and take a look at whether or not he should subordinate the hydropower right. Obviously the Director's determination cannot be arbitrary or capricious or contrary to the policy set down by the Legislature, then his decision could be appealed in court. I think the reason it is here, it was felt that the Swan Falls situation would not have arisen had the Legislature enacted similar laws back in 1928. The effort here was to make sure that as best we can foresee we do not get ourselves into another Swan Falls situation in the future. That is the reason why it is in the agreement and why we think it is necessary.

Senator Noh: In other words, we might head off a court case and legal costs sometime in the future by acting now.

Pat Kole: That is correct.

Senator Ringert: I think I know why it is here in this bill but nobody has yet said that it is essential to the settlement of the Swan Falls controversey.

Ken Dunn: The primary reason I see it there is to avoid Swan Falls re-occurring again. Without that if Idaho Power decides to build one of the dams they have proposed on the Snake River, we are back in the Swan Falls situation if there isn't clear subordination authority. The same is true on other rivers. It isn't just the small hydro. Virtually all the small hydros are high enough up in the basin that there is no development occurring above them.

Senator Noh: I would like to ask one of the PUC Commissioners to speak as to how they are viewing this agreement and particularly I have heard the question raised that the legislation as drafted to protect Idaho Power from claims for failure to defend their water rights would apply to all waters rather than just those placed in trust. Do you gentlemen feel you will have sufficient authority under the legislation to assure that the Company doesn't dispose of or sell its water rights other than those properly dealt with by this legislation?

Mr. High PUC — I think the crucial issue with respect to your question is in bill 1007. This legislation I feel is extremely essential because in effect it clarifies the legal status of gains of sales and dedicates the benefits of these sales to the customers of the company rather than the shareholders of the company. It in fact, sets the title of the water in the ratepayers rather than the shareholders. Whatever happens to the other bills, that one should pass.

Senator Noh — How about the other bill that protects Idaho Power from claims by ratepayers. I've heard it argued the bill is too broad and would free Idaho Power from even protecting its unsubordinated water right included within the minimum flow and wouldn't just protect them from ratepayers for that water which in effect is subordinated through the agreement.

Mr. High — Speaking of that water below the 3900 minimum flow, I would think the power company would have no incentive to deal with that water if all the benefits went to the ratepayers. In other words, I can see where the water would be depleted down to 3900 cfs. This figure has been established by negotiation process, taking into account historic flows, updated current projected conditions and there is nothing more uncertain than stream flows and that uncertainty, perhaps the committee would like to take into effect and set aside 150 cfs for industrial future uses as a protection against that uncertainty factor.

Senator Crapo — Are you suggesting then we as a committee in the Legislature specify that certain amounts be set aside as dedicated to industrial uses and specifically subordinate other uses in that amount?

Mr. High — Yes. I think Mr. Nelson indicated that minimum flow has to be tied to the public interest criteria and if you take the minimum flow as something in the public interest, it is rather meaningless if the process gets you down to 3900 cfs and suddenly the long term climatic conditions change and you need to supply new municipal and other needs. A factor in your deliberations on public interest, I would suggest a paragraph be put in recognizing uncertainities and perhaps reserving something more than the 3900 cfs to recognize that.

Mr. Swisher PUC — As for Senator Crapo's concern, historically water development has been based on the ability to assess the charges to those who gain from a project. Having watched three successive years of surplus run down the river, it seems some state policy, statewide not just Snake River basin, needs to be put in place for water retention other than pure diversion for beneficial use.

Ward Conley PUC — Regarding 1005. It seems there is probably no question of the defense provided in SB 1005 being used for anything other than the matters specifically touched on in the contract. It is what lawyers call an affirmative defense. It would deprive the PUC of jurisdiction but first must pertain to something relating to the contract. Looks fine to me.

Senator Beitelspacher — Go to page 3, of SB 1008, between 5 and 6, we have the Governor to enter an agreement defining that portion of a water right being unsubordinated and then on 6, you have the Director having the authority to subordinate rights. As I recall, the Director works for the Water Board which the Constitution and the Supreme Court case we touched on the last few years set up as another entity , so to speak. Do we have a conflict there? Is there another constitutional body in a sense that is outside of the reach of the Governor that has the authority to subordinate water and another constitutional entity that has the authority ....

Pat Costello — The authority granted under paragraph 5 is to enter into contracts which are not self executing. All this does is really authorize the Governor to go out and negotiate contracts to bring to the Legislature for ratification. None of them take affect unless they are ratified by law and because of that, in my view at least, I don't think this would raise any constitutional issues of separation of powers, either vis-a-vis the legislature or the water Board, particularly given the passage of the contract.

Senator Noh — Along those same lines, would you care to outline briefly, just exactly what are the limits and extent of the Governor's power to grant water rights through the trust agreement? This trust agreement has sometimes been interpretated as granting the Governor an inordinate amount of authority in determining who gets water and who doesn't.

Pat Costello — Yes, as I was glancing through the Attorney General's testimony I was a little troubled by a statement here that the Governor would be impowered under this to approve of waters to be allocated under the trust. That is not really what is contemplated here at all. This is strictly a passive trust over which the Governor will not exert any active discretions. It is modeled after trusts that are set up to reserve water in certain lakes around the state. There are half a dozen of these trusts set up by Idaho law. The Governor is named as trustee just because you need an individual to be sued in the eventof some scrabble over the trust assets. Beyond that it is automatic that water rights flow out of the trust into private hands if they are granted in accordance with state law. So, it simply was a mechanism to cut the legal and equitable title to the water immediately so there is some immediate change in position of the parties. Soon as this agreement becomes binding this statute takes effect. Legal title to the water will go to the state and the Company maintains the beneficial use of the water as long as the trusts last. It is a passive trust.

Senator Noh — Mr. Kole and Mr. Nelson, do you concur with that interpretation?

Pat Kole — Yes. In looking at page 3 I think that is slightly inaccurate. The Governor of course is a passive trustee. The intent here was that the Director would be the individual who would make the reallocation determination. Basically, that last paragraph of the Attorney General's testimony, should read the "Director" will be

impowered and not the "Governor" to release water.

Tom Nelson — Yes, I think it is clear on page 3 the Senator referred to lines 16 through 19, the rights have to be acquired purusant to state law and unless you change it, the Governor plays no part in that process.

Pat Kole — On that trust provision, it should be noted that the ultimate control over those trusts does rest with the Legislature. They created those trusts and of course they can alter them or take whatever steps are necessary.

Senator Crapo — My question is primarily one of procedure here in committee. Surely everyone knows the answer but me because I am a freshman. But it seems to me we need to leave a very good track of legislative history on this legislation. As I study it it needs clarification in my mind and I am sure there will be alot more testimony and evidence presented. Is it already set up by some mechanism that the testimony which is recorded here today and the prepared testimony presented here today to become part of a prepared record that is maintained so that in the future there can be reference made to it to ensure the intent of the legislation is followed?

Senator Noh — Senator Crapo, my understanding is we have no financial provisions or procedures in precedent to do that. I personally have in mind ensuring that there is more than one copy of the tapes and they are placed in the records of the Department of Water Resources and the Law Library to create as good a record as we can.

Senator Ringert — There is a problem even with the tapes because that is merely a record of the committee proceedings and does not necessarily reflect the intent of the other 30 senators on the floor. It is a very nebulous job in Idaho to determine what is the intent.

Senator Crapo — I am aware of that. As an attorney I do alot of searching through legislative history where its available to figure out what the laws mean. It definitely in my opinion would be beneficial to have as much preserved as possible. For example, the written statement by Attorney General Jones and perhaps encourage those who appear before the committee in the future to be sure that their understanding of the bill is at least represented in the legislative history as something considered and that we make an avenue available for that to be done.

Senator Budge — I think the nature of the legislation itself justifies very accurate records to be available.

Senator Horsch — In the House by majority vote, we spread upon the pages of the Journal a letter of intent. You can make that as long as you want.

Senator Noh — That is correct.

Senator Beitelspacher: Back to number 6 of 42-203B, where the Director shall have the authority ....where are we with compensation for the holder of a hydropower right at a later date? In the event I invest a substantial amount of money in a small hydro right and have it producing and PUC and FERC in their wisdom determine I should receive some compensation from a power company for that and Senator Peavey buys a sheep allotment and decides to water the grass up there. Where am I going to be with my investment once he starts pulling the water out of the creek for his sheep?

Tom Nelson: If as is the practice now, your permit was subordinated when issued, you would be subject to Senator Peavey's watering his sheep. If your permit had been subordinated you would be subject to this depletion. If it were not subordinated and the Director decided in his wisdom you should have a chance to get your project paid out before the subordination took effect, then you might be compensated in that situation.

Senator Beitelspacher: Is it all up to the Director whether I received compesnation or not and is there anything in here that sets up criteria by which he shall determine how much I shall be compensated or is that promulgated by rule and regulation?

Tom Nelson: The compensation issue would follow the subordination issue initially. If you were subordinated you would have no right to compensation and it is solely the Director's discretion as this is written to implement that constitutional provision. So if he has no guidance, it is my guess that hen's teeth and unsubordinated power rights from now on are going to be about on a parity.

Ken Dunn: One of the things we are trying to do on small hydros, as defined in rules and regulations, is that if just a small amount of water makes a drastic change in economic effect of it, we will issue the permit for a definite period of time. We look at the payout period on the project and at that time look at subordination and where it is necessary, we protect that project for a time so there isn't a danger of economic disaster.

The Chairman thanked all for their attendance and there being no further business before the committee, the meeting adjourned.

Tapes of this meeting will be on file at Water Resource and the Law Library.

Laird Noh, Chairman

Bev Millins, Secretary

Prepared Testimony of Jim Jones,

Idaho Attorney General

on

Senate Bills 1006 and 1008

Senate Bills 1006 and 1008 are part of the Swan Falls legislative package. Both bills must be passed if the Swan Falls Agreement is to be implemented.

SB 1006

Senate Bill 1006 gives the director of the Idaho Department of Water Resources the authority to suspend the issuance of permits in certain instances and to promulgate all necessary rules and regulations regarding the agency's legislative mandates.

Presently, the director does not have express authority to suspend the issuance of permits. The Swan Falls conflict has made it abundantly clear that this authority is necessary to avoid exacerbating conflicts over the use of water. Though the department suspended issuance of permits and licenses pending resolution of the Swan Falls controversy, if challenged, it may have been required to issue permits and licenses, which would have subjected the department to increased financial liability.

The authority to promulgate rules and regulations is necessary to implement an effective system for the allocation of any water made available pursuant to the Argument. Further, rules and regulations will inform the general public about the

director of the department intends to exercise his legislative duties.

SB 1008

Senate Bill 1008 is the centerpiece of the Swan Falls Agreement. The bill represents a very delicate balance between the interests of hydropower producers and the interests of other water users and the State of Idaho.

Proposed section 42-203 addresses two problems. First, the section provides a method for resolving conflicts over whether an existing hydropower water right is subordinated and, if so, on what basis the water may reallocated. Second, the section provides that the director shall have the authority to subordinate all future hydropower water rights.

Subsections (1) through (5) of section 42-203B specifically address the Swan Falls controversy. The trust approach embodied in these subsections is an outgrowth of the difficulty the parties encountered in defining Idaho Power Company's Swan Falls water rights. From the outset of the negotiations with Idaho Power Company, the State insisted that it have ownership over those waters made available for future users as part of any settlement. Idaho Power Company, however, insisted that it retain control over any water made available until such time as the water was put to beneficial use.

The State's position that it must have ownership of water allocated to future use was based on the premise that if the Company retained ownership, it would be required to protest

every application for the water, thus frustrating the objective of making additional Snake River water available for appropriation. Further, the State was concerned that a subordinatable water right would be viewed as a sham transaction by the courts and struck down as a violation of Article XV, § 3 of the Idaho Constitution. Finally, the State felt that leaving ownership in the Company did not provide adequate protection for the citizens of Idaho.

Idaho Power Company contended that the State's insistence on complete subordination prevented the State from balancing hydropower benefits against the benefits of proposed uses. The Company wanted the State to use its right as a shield against possible constitutional challenges to the State's denial of certain uses as not being in the public interest.

As drafted, the State possess legal title to all waters previously claimed by the Company above 3,900 c.f.s. As trustee of the waters, the ~~Governor~~ Director By committee Dec. per Pat Kole, Aff will be empowered to release water to any user that complies with existing state law and the new criteria for reallocation set forth in section 3 of this bill. The trust concept, thus, permits the state to assert that the stream is fully appropriated beause of an existing claim while at the same time making water available to those uses that create a net benefit to the State.

Though, as is apparent from the previous discussion, the definition of the Company's right was very difficult, a major benefit from the negotiations is the establishment of a framework for resolving similar conflicts on other rivers in the State of Idaho. In order to avoid litigation regarding the State's power to subordinate an existing water right that is claimed to be unsubordinated, holder of a hydropower water right define a minimum flow for its facilities while at the same time receiving assurances that the balance of its claimed rights will not be appropriated unless the State determines that there is a higher and better uses for the water.

As briefly noted above, the State proposes to treat water that is placed in trust by an agreement negotiated pursuant to the authority of proposed subsection (5) of § 42-203B differently from other waters. In addition to meeting existing statutory criteria, a person contemplating the appropriation of trust waters must also satisfy the criteria of proposed section 42-203C.

The criteria set forth in proposed section 42-203C are supplemental to existing criteria. Though the section refers to public interest, it in no way limits the existing local public interest standard of Idaho Code § 42-203. In fact, the use of the term public interest could be misunderstood unless the history of this section is explained. During the early part of the negotiations, a total rewrite of I.C. § 42-203 was envisioned, with the local public interest standard being

incorporated into new public interest criteria. This concept wa abandoned when the parties realized that a total rewrite was practically impossible, technically difficult, and tactically unwise. The criteria as written do not and are not intended to remove any existing protection for other in-stream values currently existing under Idaho law. Rather, the criteria are designed solely to guide the director in making reallocation decisions. Section 42-203C is intended solely for the purpose of determining whether a proposed use has greater net benefits to the State than the existing hydropower use. This section will not come into play unless the director determines that existing criteria are satisfied.

The criteria in 42-203(c)(2)(a) identify those factors that are critical to the determination of whether the proposed use is preferable to the continued allocation of the trust water to hydropower. Since the premise is that some future uses are desirable, the negotiators believed that the burden of proof should be placed on the protestant. Only if the protestant establishes a basis for its claim of adverse impact on hydropower needs will the applicant be required present evidence of public benefits flowing from the proposed use. It is very important to note that the water held in trust by the State subject to reallocation is tied to state law and not the public interest criteria. This is very important because it gives the State flexibility into the future. If the public interest criteria is not, after trial and error, precisely what the

legislature desires, the standards can be changed without affecting this agreement, state legal ownership of the water rights involved and the trust arrangement established.

Aside from providing a mechanism for resolving the subordination issue with regard to existing hydropower water rights, proposed section 42-203B(6) declares that the director may subordinate any future applications for hydropower use. This subsection is an express implementation of Article XV, § 3 of the Idaho Constitution. Clarification of the director's authority to subordinate hydropower use will ensure that future uses of the unappropriated waters of the state will not de precluded by future hydropower projects.

RECOMMENDED ADJUDICATION COST SHARING
For Snake River Above Lewiston

ADJUDICATION COST	$ 27,369,000
(Discounted at 10% to July 1, 1986)	19,035,000
CLAIM FEES	
$50 per claim X 61,694 water rights	$ 3,084,700
$25 per claim X 52,332 domestic & stockwatering rights	1,308,300
VARIABLE WATER USE FEES*	
Irrigation: $1.00 per acre X 3,700,000 acres	$ 3,700,000
Hydropower:	
$25/CFS x 259,441 CFS Private or Municipal	6,486,000
$25/CFS X 29,815 CFS USBR or COE	745,400**
Aquaculture: $10 per CFS X 13,631 CFS water rights	136,300
Municipal: $100 per CFS X 1,161 CFS water rights	116,100
Industrial: $100 per CFS X 6,493, CFS water rights	649,300
Miscellaneous: filing fee only	0
Public: $100 per CFS X 20,315.6 CFS water rights	2,261,600***
	$ 18,487,700
STATE SEED MONEY	1,000,000
	$ 19,487,700

* Claimants are allowed to spread variable water use fees exceeding $1,000 over as many as as many as five annual payments with 10% interest accruing on the unpaid balance. Monies in the Adjudication Account would be invested by the Treasurer, with interest accruing to the Account.

** This revenue is based upon the power plant capacities of the federal facilities.

***$2,131,300 of this is a state obligation. This figure includes $230,000 for raising the minimum flow at Murphy gauge from 3,300 CFS to 5,600 CFS in the winter. It does not include a $1,300,000 fee that would result from setting a new minimum flow of 13,000 CFS at Lime Point.

CAUTIONS:

1) Water use numbers may be overestimated due to doublecounting, thus lowering revenues. The amount of water use on unrecorded rights is unknown.
2) The number of actual water rights is similarly unknown.
3) If all parties are not assessed within one year, revenues will be lower.
4) While domestic and stockwatering rights have been included in the adjudication, the cost of processing these claims has not been included and is unknown.

furstat/dgprop
1.16.85

NUMBERS OF IDAHO WATER RIGHTS

USE	ABOVE SWAN FALLS	%	LEWISTON & ABOVE	%	ENTIRE STATE	%
Irrigation	32,137	88.4%	51,968	84.2%	61,441	83.3%
Hydropower	651	1.8%	1,267	2.1%	1,620	2.2%
Aquaculture	722	2.0%	1,063	1.7%	1,141	1.5%
Municipal	390	1.1%	773	1.3%	964	1.3%
Industrial	977	2.7%	2,745	4.4%	3,638	4.9%
Miscellaneous	742	2.0%	1,631	2.6%	2,202	3.0%
Public	747	2.1%	2,247	3.6%	2,743	3.7%
TOTAL	36,366		61,694		73,749	
Stockwater	8,601		19,836			
Domestic	10,026		32,496			
Subtotal	18,627		52,332			
GRAND TOTAL	54,993		114,026			

NOTES:

1) These numbers have been enlarged from the number of water rights actually on record by a factor of 1.74, which reflects the number of unrecorded water rights that past adjudications have turned up. Thus, these estimates may be high for some uses, particularly those with smaller numbers. In addition, some rights may be doublecounted under more than one use, when, in fact, one use is primary.

2) The number of water rights holders varies considerably from the number of water users. A single water right held by a municipality or irrigation district may serve hundreds of users.

3) Industrial uses include: industrial, mining, commercial.

4) Miscellaneous uses include: recreation, private fire protection, individual heating or cooling, aesthetics.

5) Public uses include: wildlife (mostly held by Forest Service and BLM), water quality improvement, minimum instream flows.

Division of Financial Managment
8.29.84
fmstat/DGH2ORTS

MAXIMUM ENTITLEMENT OF WATER RIGHTS

	ABOVE SWAN FALLS		LEWISTON & ABOVE	
	CFS	1000 AF	CFS	1000 AF
Irrigation	140,930.0	101,850	184,770.0	133,533
Hydropower	163,062.0	117,845	289,256.0	209,045
Aquaculture	13,404.0	9,687	13,631.0	9,851
Municipal	723.0	523	1,161.0	839
Industrial	2,268.0	1,639	6,493.0	4,693
Miscellaneous	14,170.0	10,241	15,247.0	11,019
Public	5,802.6	4,194	20,315.6	14,682
TOTAL	340,359.6	245,979	530,873.6	383,662

Notes:

1) Water use may be doublecounted, particularly for miscellaneous and public uses. The same water right often lists several beneficial uses, of which one is primary. Thus, these numbers probably represent upper limits for the more minor uses. In addition, these figures include applications not as yet approved for all uses besides hydropower. Hydropower includes only permits, licenses, claims, and decrees.

2) Industrial uses include: industrial, mining, commercial.

3) Miscellaneous uses include: recreation, private fire protection, individual heating or cooling, aesthetics.

4) Public uses include: wildlife (mostly held by Forest Service and BLM), water quality improvement, minimum instream flows.

5) Domestic, stock watering, and groundwater recharge uses have been dropped. These rights are not normally disputed, but need to be quantified.

Division of Financial Management
1.17.85
fmstat/dgmax

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 26

Affidavit of Michael C. Orr, SRBA Subcase Nos. 00-92002GP, 02-00200, 02-00201, 02-00223, and 02-00224 (Nov. 19, 2009)

COPY

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
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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	)	**AFFIDAVIT OF MICHAEL C. ORR**

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

MICHAEL C. ORR, being first duly sworn upon his oath, deposes and states that:

1. I am a Deputy Attorney General in the Idaho Office of the Attorney General and one of the attorneys of record for the State of Idaho in the above-entitled proceedings.

2. The following is based upon my own personal knowledge.

3. Attached hereto as **Exhibit 1** are true and correct copies of excerpted pages of the 1996 *Idaho State Water Plan* (Idaho Water Res. Bd., Dec. 1996).

4. Attached hereto as **Exhibit 2** are true and correct copies of excerpted pages of *The Objectives – State Water Plan – Part One* (Idaho Water Res. Bd., June 1974).

5. Attached hereto as **Exhibit 3** are true and correct copies of excerpted pages of the *State Water Plan – Part Two* (Idaho Water Res. Bd., Dec. 1976).

6. Attached hereto as **Exhibit 4** are true and correct copies of excerpted pages of the 1982 *Idaho State Water Plan* (Idaho Water Res. Bd., Jan. 19, 1982).

7. Attached hereto as **Exhibit 5** is a true and correct copy of Exhibit 30 of the "Affidavit of Michael C. Orr In Support of State of Idaho's Motion for Partial Summary Judgment," filed in SRBA Consolidated Subcase 00-92023 on January 9, 2008 (hereinafter, "the First Orr Affidavit in Subcase 00-92023").

8. Attached hereto as **Exhibit 6** is a true and correct copy of Exhibit 15 of the First Orr Affidavit in Subcase 00-92023.

9. Attached hereto as **Exhibit 7** are true and correct copies of excerpted pages of the 1986 *Idaho State Water Plan* (Idaho Water Res. Bd., Dec. 12, 1986).

10. Attached hereto as **Exhibit 8** are true and correct copies of excerpted pages of the 1992 *Idaho State Water Plan* (Idaho Water Res. Bd., Jan. 1992).

11. Attached hereto as **Exhibit 9** are true and correct copies of partial decrees proposed under *State Of Idaho's And Idaho Power Company's Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37*, filed in SRBA Consolidated Subcase 00-92023 on June 25, 2009.

12. Attached hereto as **Exhibit 10** is a true and correct copy of Exhibit 19 of the "Third Affidavit of Michael C. Orr," filed in SRBA Consolidated Subcase 00-92023 on July 1, 2008 (hereinafter, "the Third Orr Affidavit in Subcase 00-92023").

13. Attached hereto as **Exhibit 11** is a true and correct copy of Exhibit 44 of the First Orr Affidavit in Subcase 00-92023.

14. Attached hereto as **Exhibit 12** is a true and correct copy of Exhibit 46 of the First Orr Affidavit in Subcase 00-92023.

15. Attached hereto as **Exhibit 13** is a true and correct copy of Exhibit 60 of the "Fourth Affidavit of Michael C. Orr," filed in SRBA Consolidated Subcase 00-92023 on October 16, 2008 (hereinafter, "the Fourth Orr Affidavit in Subcase 00-92023").

16. Attached hereto as **Exhibit 14** is a true and correct copy of Exhibit 23 of the Third Orr Affidavit in Subcase 00-92023.

17. Attached hereto as **Exhibit 15** is a true and correct copy of Exhibit 24 of the Third Orr Affidavit in Subcase 00-92023.

18. Attached hereto as **Exhibit 16** is a true and correct copy of Exhibit 28 of the Third Orr Affidavit in Subcase 00-92023.

19. Attached hereto as **Exhibit 17** is a true and correct copy of Exhibit 52 of the First Orr Affidavit in Subcase 00-92023.

20. Attached hereto as **Exhibit 18** is a true and correct copy of Exhibit 91 of the Fourth Orr Affidavit in Subcase 00-92023.

21. Attached hereto as **Exhibit 19** is a true and correct copy of a letter from attorney John A. Rosholt to Norman C. Young, Administrator of the Resource Administration Division of the Idaho Department of Water Resources, dated Oct. 12,

1988; and a true and correct copy of Exhibit 24 of the Fourth Orr Affidavit in Subcase 00-92023.

22. Attached hereto as **Exhibit 20** is a true and correct copy of Exhibit 69 of the Fourth Orr Affidavit in Subcase 00-92023.

23. Attached hereto as **Exhibit 21** is a true and correct copy of Exhibit 41 of the Third Orr Affidavit in Subcase 00-92023.

24. Attached hereto as **Exhibit 22** is a true and correct copy of Exhibit 74 of the Fourth Orr Affidavit in Subcase 00-92023.

25. Attached hereto as **Exhibit 23** is a true and correct copy of Exhibit 55 of the Fourth Orr Affidavit in Subcase 00-92023.

26. Attached hereto as **Exhibit 24** is a true and correct copy of Exhibit 58 of the Fourth Orr Affidavit in Subcase 00-92023.

27. Attached hereto as **Exhibit 25** is a true and correct copy of Exhibit 60 of the First Orr Affidavit in Subcase 00-92023.

28. Attached hereto as **Exhibit 26** is a true and correct copy of Exhibit 62 of the First Orr Affidavit in Subcase 00-92023.

29. Attached hereto as **Exhibit 27** is a true and correct copy of Resolution 19 of the Committee of Nine and the water users of Water District 1, approved on March 4, 1986.

30. Attached hereto as **Exhibit 28** is a true and correct copy of Exhibit 6 of the Fourth Orr Affidavit.

31. Attached hereto as **Exhibit 29** are true and correct copies of excerpted pages of the "Report Of Board Of Engineers To Consider Projects In Snake River Valley

Which May Affect The Proposed American Falls Reservoir," dated April 10, 1920.

32. Attached hereto as **Exhibit 30** are true and correct copies of excerpted pages of "Report Relative To Application of Idaho Power Company for Preliminary Permit to Develop Upper Salmon Falls Site on Snake River, Idaho – Permit No. 19, Federal Power Commission," by U.S. Geological Survey Hydraulic Engineer W.G. Hoyt, dated July 1921.

33. Attached hereto as **Exhibit 31** is a true and correct copy of *Irrigation In The Snake River Valley: An Historical Overview*, by Leonard J. Arrington, published in IDAHO YESTERDAYS, Spring/Summer Issue, 1986, Vol. 30, Numbers 1-2.

34. Attached hereto as **Exhibit 32** are true and correct copies of excerpted pages of "Report Relative to Water Power Resources of Snake River and Status of Public Lands Between Milner and Weiser, Idaho," by W.G. Hoyt of the U. S. Geological Survey (August 1922).

35. Attached hereto as **Exhibit 33** are true and correct copies of excerpted pages of "Report Covering Water Measurements and Studies of Stream Flow of Snake River Between Milner and Shoshone Falls," by C.E. Tappan (Idaho Power Company 1923).

36. Attached hereto as **Exhibit 34** is a true and correct copy of Exhibit 2 of the Fourth Orr Affidavit in Subcase 00-92023.

37. Attached hereto as **Exhibit 35** is a true and correct copy of a letter from A.P. Davis, Director of the U.S. Reclamation Service, to Idaho Power Company, dated November 2, 1920.

38. Attached hereto as **Exhibit 36** are true and correct copies of excerpted

pages of "Supplementary Water For Irrigation In Idaho, With Particular Reference To Boise And Snake River Valleys," by R.W. Faris, Idaho State Commissioner of Reclamation, dated October 15, 1934.

39. Attached hereto as **Exhibit 37** are true and correct copies of excerpted pages of U.S. Department of the Interior Water Supply Paper 657, "Water Utilization In The Snake River Basin," by W.G. Hoyt, dated 1935.

40. Attached hereto as **Exhibit 38** are true and correct copies of excerpted pages of the "Special Report – Upper Snake River Basin (Above Powder River) – Irrigation And Associated Developments," by the U.S. Department of the Interior, Bureau of Reclamation, Regional Office, Boise, dated February 1955.

41. Attached hereto as **Exhibit 39** is a true and correct copy of "Departmental Report No. 2 from May 1 To June 1, 1919 – To His Excellency C.C. Moore, Acting Governor Of The State Of Idaho," by W.G. Swendsen, Idaho State Commissioner of Reclamation.

42. Attached hereto as **Exhibit 40** is a true and correct copy of a notice by W.G. Swendsen, Idaho State Commissioner of Reclamation, entitled "Re: Water District No. 36, To the Water Users on the Snake River," dated June 2, 1919.

43. Attached hereto as **Exhibit 41** is a true and correct copy of a letter from B.E. Stoutemyer, District Counsel, U.S. Reclamation Service, to the Chief Counsel, U.S. Reclamation Service, dated June 26, 1919.

44. Attached hereto as **Exhibit 42** is a true and correct copy of a letter from B.E. Stoutemyer, District Counsel, U.S. Reclamation Service, to the Chief Counsel, U.S. Reclamation Service, dated June 30, 1919.

45. Attached hereto as **Exhibit 43** is a true and correct copy of a letter from W.G. Swendsen, Idaho State Reclamation Commissioner, to Governor C.C. Moore, dated July 9, 1923.

46. Attached hereto as **Exhibit 44** is a true and correct copy of a letter from Barry Dibble, Minidoka Project Manager, to the Chief Engineer of the U.S. Reclamation Service, dated April 16, 1920.

47. Attached hereto as **Exhibit 45** are true and correct copies of excerpted pages of Legacy of Light: A History of Idaho Power Company, by Susan M. Stacy (Idaho Power Co. 1991).

48. Attached hereto as **Exhibit 46** is a true and correct copy of Exhibit 16 of the Fourth Orr Affidavit in Subcase 00-92023.

49. Attached hereto as **Exhibit 47** is a true and correct copy of the "Statement" of Evan Kackley, Idaho Water Resource Board Member from District 4, to the Idaho Water Resource Board, June 1967.

50. Attached hereto as **Exhibit 48** is a true and correct copy of a letter from U.S. Reclamation Service Director A.P. Davis to the Executive Secretary of Federal Power Commission forwarding a copy of a report by George L. Hoffman, U.S. Reclamation Service Engineer, on Idaho Power Company's application to the Federal Power Commission regarding the Twin Falls power site, dated April 5, 1921.

51. Attached hereto as **Exhibit 49** is a true and correct copy of "Report on Application Before Federal Power Commission by Idaho Power Company, Serial No. 18, For Preliminary Permit covering Twin Falls site, on Snake River," by George L. Hoffman, U.S. Reclamation Service Engineer, dated Mar. 15, 1921.

52. Attached hereto as **Exhibit 50** is a true and correct copy of Exhibit 4 of the Third Orr Affidavit in Subcase 00-92023.

53. Attached hereto as **Exhibit 51** are true and correct copies of excerpted pages of the Contract Between the United States and the Idaho Power Company Relative to Power Rights at American Falls Reservoir, Idaho, dated June 15, 1923.

54. Attached hereto as **Exhibit 52** is a true and correct copy of a letter from A.P. Davis, Director of the U.S. Reclamation Service, to Mr. Merrill, Executive Secretary of the Federal Power Commission, dated March 26, 1921.

55. Attached hereto as **Exhibit 53** is a true and correct copy of a letter from James L. Boone, Secretary of Idaho Power Company, to Mr. Hibbard, Vice President of Idaho Power Company, dated May 29, 1931.

56. Attached hereto as **Exhibit 54** is a true and correct copy of a letter from M.L. Hibbard, Vice President and General Manager of Idaho Power Company, to E.B. Darlington, Superintendent, U.S. Reclamation Service, dated April 7, 1931.

57. Attached hereto as **Exhibit 55** is a true and correct copy of Exhibit 10 of the Third Orr Affidavit in Subcase 00-92023.

58. Attached hereto as **Exhibit 56** is a true and correct copy of Exhibit 9 of the Third Orr Affidavit in Subcase 00-92023.

59. Attached hereto as **Exhibit 57** is a true and correct copy of Exhibit 7 of the Third Orr Affidavit in Subcase 00-92023.

60. Attached hereto as **Exhibit 58** is a true and correct copy of Exhibit 8 of the Fourth Orr Affidavit in Subcase 00-92023.

61. Attached hereto as **Exhibit 59** is a true and correct copy of Exhibit 7 of

the Fourth Orr Affidavit in Subcase 00-92023.

62. Attached hereto as **Exhibit 60** are true and correct copies of excerpted pages of "The Palisades Dam And Reservoir Project – Hearings before a Subcommittee On Irrigation And Reclamation Of The Committee On Public Lands, House of Representatives and a Special Subcommittee Of The Committee On Interior And Insular Affairs, United States Senate – Eighty-First Congress – First Session on H.R. 5506," printed by the U.S. Government Printing Office, 1949.

63. Attached hereto as **Exhibit 61** are true and correct copies of excerpted pages of "Report on Upper Snake River Storage Investigations – Volume I – Snake River Above Idaho Falls," by E.B. Debler, Hydraulic Engineer & J.R. Riter, Associate Engineer of the U.S. Department of the Interior, Bureau of Reclamation, dated June 1935.

64. Attached hereto as **Exhibit 62** is a true and correct copy of "Findings of the Secretary of the Interior as to net profits from the Black Canyon and the Minidoka Power Plants, through sales of power on the Minidoka project and towns adjacent thereto, during the year 1935," by T.A. Walters, Acting Secretary of the Interior (United States Department of the Interior, Bureau of Reclamation), dated March 12, 1936.

65. Attached hereto as **Exhibit 63** is a true and correct copy of the comments of Thomas R. Newell, U.S. Geological Survey engineer, on Baldwin, *Transmission and Delivery of Reservoir Water* in *Administrative Water Problems: A Symposium*, 94 TRANSACTIONS OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS 321 (1930).

66. Attached hereto as **Exhibit 64** is a true and correct copy of a letter from Lynn Crandall to Elwood Mead, Commissioner, U.S. Bureau of Reclamation, dated February 21, 1934.

67. Attached hereto as **Exhibit 65** are true and correct copies of excerpted pages of "Water Distribution And Hydrometric Work – Water District No. 36 – 1936," by Lynn Crandall, Watermaster for Water District No. 36.

68. Attached hereto as **Exhibit 66** is a true and correct copy of a letter from District Engineer Lynn Crandall to B.E. Stoutemyer, District Counsel , U.S Reclamation Service, dated September 8, 1939.

69. Attached hereto as **Exhibit 67** are true and correct copies of excerpted pages of the letter of B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation, to the Commissioner, U. S. Bureau of Reclamation, dated March 12, 1940.

70. Attached hereto as **Exhibit 68** is a true and correct copy of a letter from B.E. Stoutemyer, District Counsel, U.S. Reclamation Service, to W.H. Philbrick, President of Aberdeen-Springfield Canal Company, dated June 6, 1934.

71. Attached hereto as **Exhibit 69** is a true and correct copy of a letter from B.E. Stoutemyer, District Counsel, U.S. Reclamation Service, to the Chief Engineer, U.S. Reclamation Service, dated August 16, 1926.

72. Attached hereto as **Exhibit 70** is a true and correct copy of the contract between the United States and the Idaho Power Company for conservation of Snake River water and furnishing transmission service, dated October 1, 1934.

73. Attached hereto as **Exhibit 71** is a true and correct copy of Exhibit 13 of the Third Orr Affidavit in Subcase 00-92023.

74. Attached hereto as **Exhibit 72** is a true and correct copy of Exhibit 12 of the Third Orr Affidavit in Subcase 00-92023.

75. Attached hereto as **Exhibit 73** is a true and correct copy of a letter from

B.E. Stoutemyer, District Counsel, U.S. Reclamation Service, to Commissioner, U. S. Bureau of Reclamation, dated September 5, 1939.

76. Attached hereto as **Exhibit 74** is a true and correct copy of a letter from Watermaster Lynn Crandall to E.V. Berg, Idaho State Commissioner of Reclamation, dated September 25, 1941.

77. Attached hereto as **Exhibit 75** is a true and correct copy of "Status Report – Workings of Palisades Water Savings Agreement," by the U.S. Bureau of Reclamation, Boise, Idaho, dated August 5, 1968.

78. Attached hereto as **Exhibit 76** is a true and correct copy of Exhibit 13 of the Fourth Orr Affidavit in Subcase 00-92023.

79. Attached hereto as **Exhibit 77** is a true and correct copy of Exhibit 17 of the Fourth Orr Affidavit in Subcase 00-92023.

80. Attached hereto as **Exhibit 78** are true and correct copies of excerpted pages of the "Minutes of Meeting No. 4-72" of the Idaho Water Resource Board, dated June 13, 1972.

81. Attached hereto as **Exhibit 79** are true and correct copies of excerpted pages of the Minutes of the Meeting on Snake River Flood Control Problems, dated Dec. 16, 1957.

82. Attached hereto as **Exhibit 80** is a true and correct copy of Exhibit 10 of the Fourth Orr Affidavit in Subcase 00-92023.

83. Attached hereto as **Exhibit 81** is a true and correct copy of Exhibit 15 of the Fourth Orr Affidavit in Subcase 00-92023.

84. Attached hereto as **Exhibit 82** is a true and correct copy of a letter from

U.S. Bureau of Reclamation Commissioner Floyd Dominy to Senator Len Jordan, dated January 5, 1968.

85. Attached hereto as **Exhibit 83** is a true and correct copy of House of Representatives Report No. 94-531, entitled "Tax Exempt Status Of Obligations Used To Provide Certain Irrigation Facilities," by the House Ways And Means Committee, dated October. 3, 1975 (94th Congress, 1st Session).

86. Attached hereto as **Exhibit 84** is a true and correct copy of Senate Report No. 94-570, entitled "Tax Exempt Status Of Obligations Used To Provide Certain Irrigation Facilities," by the Senate Finance Committee, dated December 16, 1975 (94th Congress, 1st Session).

87. Attached hereto as **Exhibit 85** are true and correct copies of excerpted pages of the "Contract between The United States Of America and The American Falls Reservoir District for Construction And Operation And Maintenance Of The American Falls Replacement Dam Program, Dated as of March 31, 1976."

88. Attached hereto as **Exhibit 86** are true and correct copies of excerpted pages of the "Falling Water Contract Dated as of March 31, 1976 by and between American Falls Reservoir District and Idaho Power Company."

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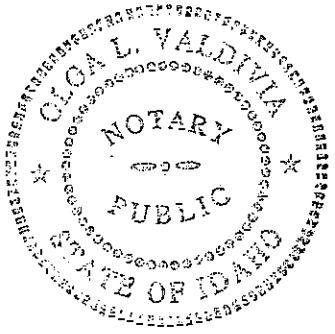
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Further your affiant sayeth naught.

DATED this 16TH day of OCTOBER 2009.

Michael C Orr
MICHAEL C. ORR

SUBSCRIBED AND SWORN to before me this 16th day of October 2009.



Notary Public for Idaho
Residing at: Boise, ID
My commission expires: 2/5/2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16TH day of OCTOBER 2009, I caused a true and correct copy of the foregoing AFFIDAVIT OF MICHAEL C. ORR 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

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☐ 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

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☒ E-mail: JamesTucker@idahopower.com
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Idaho Power Company
Represented by:
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Shelley M. Davis
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☒ E-mail: smd@idahowaters.com
(e-mail service included affidavit only, without exhibits)

Idaho Power Company
Represented by:
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Michael A. Gheleta
Brownstein Farber Hyatt Shrek, P.C.
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- ☒ E-mail: jar@idahowaters.com
- ☒ E-mail: tlt@idahowaters.com

(e-mail service included affidavit only, without exhibits)

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

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ Statehouse Mail

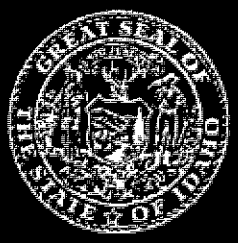
Michael C. Orr

Orr Affidavit

Exhibit 1

Excerpted pages of the 1996 *Idaho State Water Plan* (Idaho Water Res. Bd., Dec. 1996)

IDAHO STATE WATER PLAN



ADOPTED BY

THE
IDAHO
WATER RESOURCE
BOARD

DECEMBER 1996

"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, Article XV. Section 7

State of Idaho

THE STATE WATER PLAN

Philip E. Batt, Governor

Idaho Water Resource Board

Clarence Parr
Chairman

F. Dave Rydalch
Vice-Chairman

J. David Erickson
Secretary

Robert Graham
Joseph L. Jordan
Erval Rainey
Jerry R. Rigby
Terry T. Uhling

Adopted December 1996
Ratified by the Idaho Legislature March 1997
Statehouse
Boise, Idaho 83720

Former Members of the Idaho Water Resource Board

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John F. Streiff, Lewiston
Richard W. Wagner, Lewiston
J.D. Williams, Preston
George L. Yost, Emmett

To the Citizens of Idaho:

This is the fourth time the Idaho Water Resource Board has reviewed, reevaluated, and updated the Idaho State Water Plan. Idaho has seen many changes since the plan was first adopted in 1976. These changes point out the need for periodic update of all state plans.

Central to all the Water Board's planning activities is the recognition that many of the streams and aquifers in the state are highly developed and utilized. This simple fact complicates the task of planning for future water use immeasurably. New users will have to rely on legal changes in nature of use, rentals from recognized water banks, or other innovative approaches to the water supply question.

The Idaho Water Resource Board is placing great emphasis on developing comprehensive plans for basins, waterways, or other geographic areas. Comprehensive planning has been a State Water Plan policy since 1976. In 1988 the Idaho Legislature provided direction and authority for this detailed planning effort. Comprehensive basin and waterway plans approved by the legislature are identified in this State Water Plan.

Public input is an important factor in all Idaho Water Resource Board activity. The Board has appreciated the interest and concern shown by you, the citizens, in the past. We hope your active participation in our activities will continue.

Sincerely,

Clarence Parr

Clarence Parr
Chairman

BEFORE THE WATER RESOURCE BOARD
OF THE STATE OF IDAHO

IN THE MATTER OF THE)
STATE WATER PLAN)

A RESOLUTION

WHEREAS, the Idaho Water Resource Board (the Board) conducted scoping meetings to gather public input concerning policies contained in the State Water Plan; and

WHEREAS, the Board, based on input from the scoping meetings, has proposed changes to existing policies and suggested new policies; and

WHEREAS, the Board has circulated these proposed changes; and

WHEREAS, the Board has provided a 60-day public comment period and has conducted public meetings and hearings providing opportunities for public input; and

WHEREAS, the Board has reviewed the public record consisting of oral testimony and written comments, and has modified their proposed changes accordingly.

NOW, THEREFORE, BE IT RESOLVED that, having considered the draft amended Plan and the public record, the Board hereby adopts the changes to the State Water Plan specified in Attachments A and B, and directs that these changes be provided to the Idaho State Legislature for their consideration.

PASSED AND APPROVED this 13th day of December, 1996.

CLARENCE PARR, Chairman

ATTEST:

DAVID ERICKSON, Secretary

ATTACHMENT NO. 7 MEETING 8-96
IDAHO WATER RESOURCE BOARD
December 13, 1996

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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

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.

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

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 flow at the dam to zero.

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.

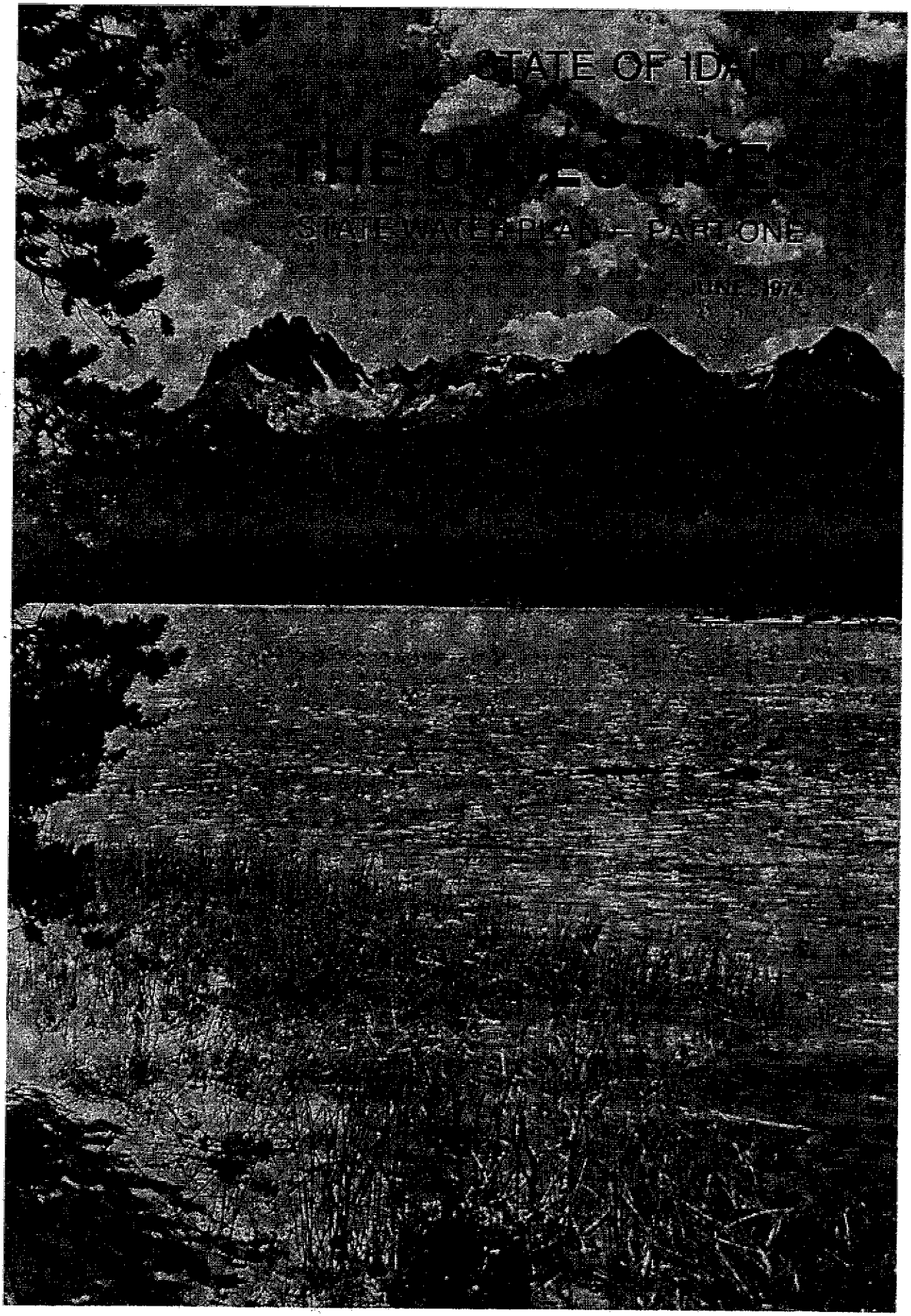
The minimum flows established for Johnson's Bar and Lime Point are contained in the original Federal Power Commission (now FERC) license for the Hells Canyon hydropower complex. By adopting these flows, the Idaho Water Resource Board recognizes the importance of minimum flows to downstream uses and makes 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.

Orr Affidavit

Exhibit 2

Excerpted pages of
The Objectives – State Water Plan – Part One
(Idaho Water Res. Bd., June 1974)


STATE OF IDA
STATE WATER PLA
PART ONE

STATE OF IDAHO

CECIL D. ANDRUS
Governor

"There shall be constituted a State 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 . . ." **Constitutional Amendment**

IDAHO WATER RESOURCE BOARD

C. Stephen Allred, *Director*

BOARD MEMBERS

John F. Streiff, *Chairman*
George L. Yost, *Vice Chairman*

Ferris M. Kunz
Joseph H. Nettleton
Scott W. Reed
Donald R. Kramer
Franklin Jones
Edwin C. Schlender

R. Keith Higginson

THE OBJECTIVES

Part I
of the
STATE WATER PLAN

JUNE 1974
Third Printing – April 1975
IDAHO WATER RESOURCE BOARD
STATEHOUSE
BOISE, IDAHO

RESOLUTION TO ADOPT

MARCH 8, 1974

WHEREAS, the Idaho Water Resource Board is charged with the task of formulating a coordinated, integrated, multiple-use water resource policy, and

WHEREAS, the Board did approve on August 17, 1973, a planning procedure for the preparation of an Objectives Report and Basins Reports to implement this policy, and

WHEREAS, the Board endorses the statements of planning objectives as contained in this report and desires to make these expressions available to guide the public, other governmental agencies, and the Board staff in formulating a state water resource plan,

NOW, THEREFORE, BE IT RESOLVED, that this report entitled *The Objectives, Part I of the State Water Plan* be adopted as expressing the water resource policy to be followed in preparation of the State Water Plan.

BE IT FURTHER RESOLVED, that the Board, in recognition of constantly changing economic and environmental conditions which must be considered in establishing a state water resource policy, will review these planning objectives annually or upon formal request to determine if revisions in the state water resource policy are warranted.

John F. Streiff, Chairman

George L. Yost, Vice-Chairman

Franklin Jones

Donald R. Kramer, Secretary

Kerris M. Kunz

Joseph H. Nettleton

Scott W. Reed

Edwin C. Schlender

FOREWORD

The Objectives is the first of a series of documents which will comprise the State Water Plan. The purpose of the report is to identify and define the policies and objectives which the Idaho Water Resource Board has adopted to govern the planning, development, and conservation of the state's water and related lands.

The projects and programs necessary to implement the objectives will be identified and evaluated for each major river basin and presented in separate basin reports. Basin reports will be prepared for the Panhandle basins, Snake River basins, and Bear River basins. These three major reports, to be completed by 1977, and *The Objectives*, will constitute the Idaho State Water Plan.

The objectives presented in this report are responsive to public input obtained through public information meetings, public hearings, and public opinion surveys which had been conducted after the Interim State Water Plan report was published. Board members, in adopting these objectives, have considered the complex inter-relationship of economic, social, and environmental factors. Legal and institutional restraints were also considered.

The State Water Plan will serve as a valuable guide to Idaho citizens and public officials. It will help to insure that decisions made regarding the state's water and related land resources are compatible and will be designed to help meet present and future water needs.

Orr Affidavit

Exhibit 3

Excerpted pages of the *State Water Plan – Part Two* (Idaho Water Res. Bd., Dec. 1976)

State of Idaho

The State Water Plan — Part Two

Idaho Water Resource Board:

John F. Streiff
Chairman

George L. Yost
Vice-Chairman

Donald R. Kramer
Secretary

Joseph H. Nettleton

Franklin Jones

Scott W. Reed

Edwin C. Schlender

M. Reed Hansen

December 1976

Idaho Water Resource Board, Statehouse, Boise, Idaho 83720

STATE OF IDAHO

JOHN V. EVANS
Governor

"There shall be constituted a State 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 . . ."
Constitutional Amendment

First printing December 1976
1,000 Copies

Second Printing February 1977
500 Copies

Third Printing July 1977
500 Copies

Fourth Printing January 1978
500 Copies

Fifth Printing February 1978
500 Copies

Sixth Printing June 1980
500 Copies

STATE OF IDAHO

IDAHO WATER RESOURCE BOARD

STATEHOUSE
BOISE, IDAHO 83720

December 29, 1976

To the Citizens of Idaho:

It is our pleasure to present to you *The State Water Plan - Part Two*. Valuable time and effort has been expended by many citizens around the state in helping us develop this plan, and we gratefully acknowledge this assistance. We realize that the contents of this document will not meet the desires and expectations of every citizen, but we feel that *Part II* represents the best approach for the greatest number of Idahoans.

The success of this plan depends on how actively we all work toward its implementation. The Board looks forward to working closely with individual citizens, the legislature, and local, state and federal government to make our recommendations in this report a reality.

The State Water Plan will serve Idaho only as long as it continues to reflect the needs of Idaho. We urge every citizen to monitor the plan as it is put to practical use and to suggest changes to the Board when necessary. The plan will be subject to public and formal review at least once every five years.

We seek the assistance and support of the people of Idaho so that together we may work towards providing for the future economic growth and protection of our natural resources that are so important to Idaho.

Sincerely,

John F. Streiff

JOHN STREIFF, Chairman
Idaho Water Resource Board

RESOLUTION TO ADOPT

December 29, 1976

WHEREAS, the Idaho Water Resource Board is charged with the task of formulating a coordinated, integrated, multiple-use water resource policy, and

WHEREAS, draft documents for the State Water Plan - Part Two have been published and distributed to the public for the Panhandle, the Snake River, and the Bear River Basins, and

WHEREAS, public meetings and hearings have been held throughout Idaho to gain input as to the content of those draft plans, and such input has been taken into full consideration by this Board,

NOW THEREFORE, BE IT RESOLVED, that pursuant to Article XV, Section 7 of the Constitution of the State of Idaho, and pursuant to the powers granted to us by statute, we hereby adopt the attached document as Part Two of the State Water Plan to guide the future use and conservation of Idaho's water resources.

BE IT FURTHER RESOLVED, that the Board, in recognition of constantly changing economic and environmental conditions which must be considered in establishing a state water resource plan will formally review this document and provide opportunity for public input annually upon request, but at least once every five years from the date of adoption of this order.

John F. Streiff, Chairman

George L. Yost, Vice-Chairman

Franklin Jones

Donald R. Kramer, Secretary

M. Reed Hansen

Joseph H. Nettleton

Scott W. Reed

Edwin C. Schlender

FOREWORD

The State Water Plan - Part Two is the result of ten years of thought, study and research by the Idaho Water Resource Board to fulfill its constitutional mandate "to formulate and implement a State Water Plan. . ." Many studies and reports were published during that time, numerous public meetings and hearings have been held and thousands of pages of testimony and public comment have gone into making up the policies contained herein.

Prior to creation of the Idaho Water Resource Board in 1965, water use had developed through custom and legislation since Lewis and Clark traveled through the northwest from 1804 to 1806. On June 27, 1855, settlers in Lemhi County first put water to use by irrigating land to raise the family garden and feed for their livestock. By 1896, the Office of the State Engineer had been established to oversee the development of new land and the construction of water works. The State Engineer in 1896 reported to the Governor that 315,000 acres had been cultivated, the majority of which required irrigation. Since that time, approximately six million more new acres have been put under cultivation (four million are irrigated), technology has enabled Idaho farmers to participate in a worldwide marketplace, and the state's once seemingly plentiful supply of a valuable natural resource — water — now has more demands on it than it is capable of satisfying.

The State Water Plan - Part Two, a guide to future water resource management in Idaho, is the most recent in a series of documents that comprise the State Water Plan. In July 1972, the *Interim State Water Plan* was published which catalogued the resources of the state and presented the various alternatives for future water policy to the public. *The State Water Plan - Part One, The Objectives*, was published in June 1974 to guide the direction of later efforts to formulate the final water plan. Finally in March, 1976, a draft version of *The State Water Plan - Part Two* was distributed to the public and various private and governmental agencies for review and comment. These previous efforts are now culminated in this document.

Water policy for the three planning basins – the Snake River, Panhandle and Bear River basins — is set forth within this document. Chapter 4 contains the goals and recommendations of the Board to be used in guiding future water resource management in Idaho. Some of the policy statements pertain only to a single basin or vary in their application to each basin, and these are discussed separately.

Implementation of the policies contained in Chapter 4 will require several changes in Idaho law and public attitudes. The Board will work closely with the legislature to secure changes in the law where necessary.

Public understanding and compromise will be required by those with special interests to assure the plan's full implementation. Unless the plan is implemented quickly, there may not be sufficient water supplies left in many areas to maintain Idaho's quality of life. The Idaho Water Resource Board has found great support among the citizens of Idaho for a state water plan and feels confident that this document will be accepted as a beginning process for continuing Idaho's economic growth while protecting a quality environment.

Because public priorities and economic and social conditions change, the Board has provided a procedure whereby the plan will be updated at least once every five years to insure that the State Water Plan continues to be dynamic, responsive plan for developing, protecting and preserving Idaho's water resources for generations to come.

ACKNOWLEDGEMENTS

Formulation of *The State Water Plan - Part Two* has involved a great number of Idahoans from all walks of life. Their involvement may have been at information meetings, public hearings or merely taking the time to let the Idaho Water Resource Board know their views and opinions on the water resource issues confronting Idaho. Without this citizen response and testimony the State Water Plan would not have been possible.

The Board gratefully acknowledges the efforts and contributions of state, federal and local agencies who have cooperated in this endeavor. Their assistance insures a broad view of public interest to be considered in future water resource decisions.

The private sector, from small businesses to large corporations to special interest associations and organizations, are an equal voice in Idaho and many have contributed to this State Water Plan. Their response and reaction brings new dimensions to the decision making process.

The Board sincerely appreciates the assistance given by the staff of the Department of Water Resources. Many, many times they have given extra time to accomodate various Board actions. The staff of the Department of Water Resources has demonstrated the highest standards of professionalism in the gathering of basic resource data, conducting extensive evaluations and assembling that data into an orderly form. Their efforts will stand as a bench mark in water resources planning regionally and nationwide.

Former Members
Idaho Water Resource Board

George L. Crookham, Jr., Caldwell	7-16-65 to 1- 1-69
Leonard E. Graham, Rigby	7-16-65 to 1- 1-67
Evan M. Kackley, Wayan	7 16-65 to 12- 8-67
Arlie L. Parkins, Marsing	7-16-65 to 1- 1-69
Edward Reichert, Filer	7-16-65 to 1- 1-67
Charles J. Marshall, Jerome	7-16-65 to 1 1-73
LeRoy Stanger, Idaho Falls	1- 1-67 to 1- 1-71
Robert M. Bandy, Priest River	1- 1-67 to 1- 1-71
Ferris M. Kunz, Montpelier	1- 9-68 to 5-22-74
Thomas Olmstead, Twin Falls	1- 1-69 to 1- 1-73
Carl Tappen, Boise, Ex-officio member	7-16-65 to 6- 1-66
R. Keith Higginson, Boise, Ex-officio member	6- 1-66 to 6-30-74

Former Directors
Idaho Water Resource Board

Carl Tappen	6-1-66 to 1-31-67
Robert R. Lee	2-1-67 to 12-31-72
Wayne T. Haas	1-1-73 to 4-30-73
C. Stephen Allred	5-1-73 to 6-30-74

R. Keith Higginson, Director
Idaho Department of Water Resources

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In 1974, as a result of a statewide referendum, state agencies were reorganized and the Water Resource Board staff was combined with the Department of Water Administration to form a Department of Water Resources. The director of the Department of Water Resources is no longer appointed by the Board, but is directed by law to assist the Board in carrying out its planning activities.

The Water Resource Board remains as the water policy making body for the state. The Board of which no more than four members can be from the same political party consists of four members who are appointed at-large and four members appointed from each of the four districts in Idaho.

By law, the Board meets at least once each quarter, but the press of items for consideration often requires more frequent meetings. Although Boise is often chosen as the site for meetings because of its central location, meetings are also held in other Idaho cities to provide exposure to regional needs and problems.

Formulation of the State Water Plan

Approach

Formulation of the State Water Plan is a three-phase process. The first phase was completed with publication of the July 1974 report entitled, *The State Water Plan - Part One, The Objectives*. In that report, objectives were adopted by the Board to guide future water planning efforts. In *The State Water Plan - Part Two* actions and methods are presented which have been adopted by the Board as water policy to meet the objectives outlined in *Part One*. Implementing the policies in *Part Two* will require the combined efforts of the government agencies, the legislature, private concerns and the public. Consequently, the report delineates those areas where legislative action is required, identifies the programs the Board will pursue, and describes the areas where cooperation of public and private interests is necessary. The third and final phase will involve a continuing planning process which will be directed toward the completion of a series of feasibility reports on specific projects and programs.

Planning Process

Planning for the Snake River Basins was accomplished by a state-federal multi-disciplinary study team led by a representative of the Department of Water Resources. Planning in the Panhandle and Bear River basins was essentially an effort of the Department of Water Resources. The planning concepts promulgated by the U.S. Water Resources Council in the *Principles and Standards*, and adopted by the Board in the *Objectives Report* were adhered to. Specific methods to formulate the plan were developed to fit the resource conditions and needs of the state. The methodology was compatible with that used by federal members of the U.S. Water Resources Council.

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.

Water available in excess of the designated flows for development above an average annual flow basis are:

Gaging Station	Water Presently Available for Appropriation (Average Year)
Milner	1,437,000 acre-feet
Murphy	4,218,700 acre-feet
Weiser	7,821,000 acre-feet

The above average daily flows will allow the flow requirements contained in the Federal Power Commission License issued for the Hells Canyon hydropower complex to be met without signficantly affecting hydropower production. Article 43 of the license provides the management criteria,

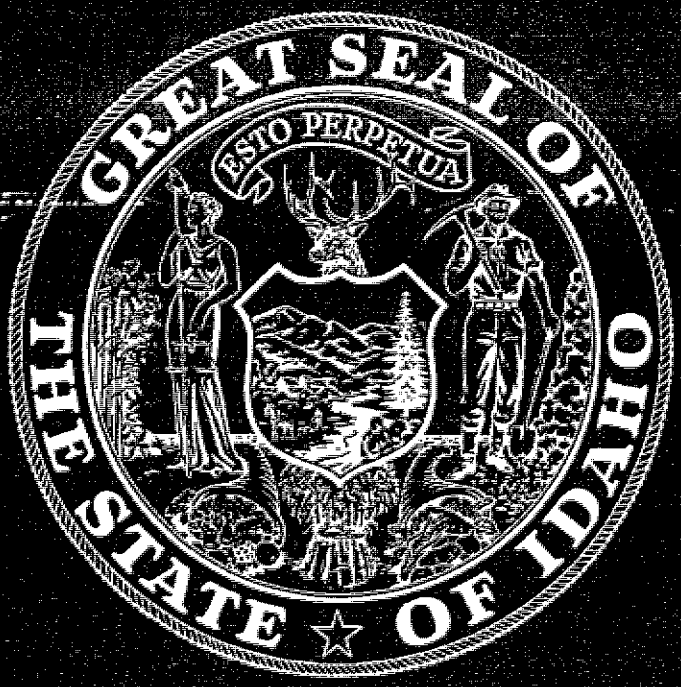
> "The project shall be operated in the interest of navigation to maintain 13,000 cfs flow into the Snake River at Lime Point (river mile 172) a minimum of 95 percent of the time, when determined by the Chief of Engineers to be

Orr Affidavit

Exhibit 4

Excerpted pages of the 1982 *Idaho State Water Plan* (Idaho Water Res. Bd., Jan. 19, 1982)

Idaho State Water Plan



Adopted by the

Idaho Water Resource Board

January 19, 1982

STATE OF IDAHO

JOHN V. EVANS
Governor

"There shall be constituted a State 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 . . ."

— Constitutional Amendment

State of Idaho

THE STATE WATER PLAN

Idaho Water Resource Board:

M. Reed Hansen
Chairman

James Shawver
Vice-Chairman

Donald R. Kramer
Secretary

Richard W. Wagner

Franklin Jones

Scott W. Reed

Herman J. McDevitt

Gene M. Gray

January 1982

A. KENNETH DUNN
DIRECTOR
IDAHO DEPARTMENT OF WATER RESOURCES
STATEHOUSE
BOISE, IDAHO 83720

STATE OF IDAHO

IDAHO WATER RESOURCE BOARD

STATEHOUSE
BOISE, IDAHO 83720

January 19, 1982

To the Citizens of Idaho:

It is our pleasure to present to you The State Water Plan. Valuable time and effort has been expended by many citizens around the state in helping us develop this plan, and we gratefully acknowledge this assistance. We realize that the contents of this document may not meet the desires and expectations of every citizen, but we feel that it represents the best approach for the greatest number of Idahoans.

The success of this plan depends on how actively we all work toward its implementation. The Board looks forward to working closely with individual citizens, the legislature, and local, state and federal government to make these policies a reality.

The State Water Plan will serve Idaho only as long as it continues to reflect the needs of Idaho. The plan is subject to public and formal review at least once every five years, and this document is the result of the first formal review. We urge every citizen to monitor the plan as it is put to practical use and to suggest changes to the Board when necessary.

We seek the assistance and support of the people of Idaho so that together we may work toward providing for the future economic growth and protection of our natural resources that are so important to Idaho.

Sincerely,

M. Reed Hansen

M. REED HANSEN, Chairman
Idaho Water Resource Board

RESOLUTION TO ADOPT

January 19, 1982

The Idaho Water Resource Board is charged with the task of formulating water resource policy, and the State Water Plan has been published and distributed to the public, and public meetings and hearings have been held.

IT IS RESOLVED that the Idaho Water Resource Board hereby adopts the attached document as the State Water Plan to guide the future use and conservation of Idaho's water resources.

M. Reed Hansen, *Chairman*

James Shawver, *Vice-Chairman*

Franklin Jones

Donald R. Kramer, *Secretary*

Gene M. Gray

Richard W. Wagner

Scott W. Reed

Herman J. McDevitt

FOREWORD

The State Water Plan is the result of much thought, study and research by the Idaho Water Resource Board to fulfill the constitutional mandate "to formulate and implement a State Water Plan . . . ."

The State Water Plan is a guide to future water resource management in Idaho and results from a series of documents. In July 1972, the *Interim State Water Plan* was published. It catalogued the resources of the state and presented various alternatives for future water policy to the public. *The State Water Plan - Part One, The Objectives,* was published in June 1974 to guide the direction of later efforts to formulate the water plan. In December 1976, *The State Water Plan - Part Two* was adopted wherein several state water policies were advanced. This document is the result of the first formal review of the objectives and policies presented in parts one and two of the *State Water Plan* as previously adopted. It contains both the objectives and the policies and replaces the earlier two-part approach.

Water policy for the Snake River, Panhandle and Bear River basins is set forth within this document. *The State Water Plan* is a series of goals and recommendations to be used to guide Idaho's future water resource management. Some of these policies may pertain only to a single basin or be applicable to each basin.

Implementation of the *State Water Plan* will require changes in Idaho law and public attitudes. The Idaho Water Resource Board will work closely with the legislature to secure changes in the law where necessary. Public understanding and compromise will be required by all interests to assure the plan's full implementation. Unless the plan is implemented, there may not be sufficient water supplies left in many areas to maintain Idaho's quality of life. The Idaho Water Resource Board has found great support among the citizens of Idaho for a state water plan and is confident that it will be accepted as a process for continuing Idaho's economic growth while protecting a quality environment.

Because public priorities in economic and social conditions change, this plan will be reviewed and updated on a continuing basis, according to statute this review must take place at least once every five years. Future reviews will re-examine the need for water allocations, evaluate groundwater and water quality policies, and address other issues on the basis of opportunities to better use, protect and preserve the state's water resources for generations to come.

Former Members
Idaho Water Resource Board

Carl Tappen, Ex-officio member
Leonard E. Graham, Rigby
Evan M. Kackley, Wayan
George L. Crookham, Jr., Caldwell
Arlie L. Parkins, Marsing
LeRoy Stanger, Idaho Falls
Robert M. Bandy, Priest River
Edward Reichert, Filer
Charles J. Marshall, Jerome
Thomas Olmstead, Twin Falls
R. Keith Higginson, Boise, Ex-officio member
Ferris M. Kunz, Montpelier
John F. Streiff, Lewiston
George L. Yost, Emmett
Edwin C. Schlender, Malta
Joseph H. Nettleton, Murphy

Former Directors
Idaho Water Resource Board

Carl Tappen
Robert R. Lee
Wayne T. Haas
C. Stephen Allred

Former Directors
Idaho Department of Water Resources

R. Keith Higginson
C. Stephen Allred

ACKNOWLEDGEMENTS

Formulation of *the State Water Plan* as adopted involved a great number of Idahoans from all walks of life. Citizen input was received through public opinion surveys, at information meetings, and public hearings. The contributions of the private sector as well as state, federal, and local agencies assured that a broad view of public interest will be considered in future water resource decisions. Without this citizen and agency response, a State Water Plan would not be possible.

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IDAHO'S WATER RESOURCES

There are five major systems in Idaho. They are the Snake, Bear, Spokane, Clark Fork-Pend Oreille, and Kootenai rivers. In this summary, the Spokane, Kootenai, and Clark Fork-Pend Oreille rivers are grouped under the heading Panhandle basins.

Snake River Basin

The Snake River is the largest river system in Idaho with a drainage area of approximately 87 percent of the state. The Snake River headwaters are in Wyoming on the western slope of the Continental Divide. Crossing Idaho's eastern border, it flows northwestward 59 miles through a canyon to Heise where it opens onto the Snake River Plain. From Heise to Milner, a distance of 219 river miles, the river is not deeply entrenched. It is in this reach that numerous diversions for irrigation are made.

At Milner, the river enters a deep canyon cut through lava and sedimentary beds and continues for 216 miles in a west and northwesterly direction. Near the Oregon border, the river emerges from the canyon and flows through a broad valley to Weiser, a distance of about 75 miles. Downstream from Weiser the river enters Hells Canyon and flows a distance of about 190 miles to Lewiston. It leaves Idaho at Lewiston, turning westward for 139 miles to its junction with the Columbia River near Pasco, Washington.

The largest tributaries of the Snake are the Salmon and the Clearwater rivers. Other important tributaries are the Henrys Fork, Wood, Boise, and Payette rivers. Basin areas outside of Idaho which contribute substantially to the river's flow include the upper basin in Wyoming, the Owyhee, Malheur, Burnt, Powder, and Imnaha rivers in Oregon and the Grande Ronde River in Washington. Small portions of the Snake River basin also lie in Utah and Nevada. Most of the streamflows of the Snake River basin are derived from snowmelt in the mountainous areas. The average runoff in the Snake River below the Clearwater River where it leaves Idaho is about 36 million acre-feet per year. Approximately one-third of the flow leaving Idaho is derived from the basin above Weiser. Another third comes from the Clearwater River basin. The Salmon River produces about one-fourth, with the remaining amount of approximately 10 percent coming from tributaries in Oregon and Washington and small streams in Idaho below Weiser. Average annual runoff under present conditions at principal gaging stations in the Snake River basin is shown in Table 1. Location of these gages is shown on Figure 1. Losses from river flow between pairs of gages (Snake River, Neeley to Milner, and the Boise and Payette River gages) are due to major

Policies

The Idaho Water Resource Board adopted the State Water Plan as the basis for future water resource management. The following policies were adopted by the Idaho Water Resource Board and are in conformance with the constitutional and legislative directives given the Board:

POLICY 1
Public Interest

Applications for future water permits shall not be approved if they are in conflict with the State Water Plan adopted by the Idaho Water Resource Board in the public interest. Section 42-203, Idaho Code, should be amended to provide the following: (1) protection for all existing water rights. Nothing in this plan shall adversely affect water rights established and vested under the Constitution and laws of Idaho; (2) all new water uses both consumptive and non-consumptive such as irrigation, municipal, industrial, power, mining, fish and wildlife, recreation, aquatic life, and water quality will be judged to have equal desirability as beneficial uses subject to Article XV, Section 3, of the state Constitution; (3) if conflicts occur between meeting new water uses, the approval or denial of the application shall consider the public interest including an evaluation of the beneficial and adverse economic, environmental and social impacts as identified in the State Water Plan as adopted by the Idaho Water Resource Board.

Presently there are four criteria that must be considered by the director of the Department of Water Resources in approving or denying an application. The present criteria are:

1. Is there a water supply available?
2. Does the proposed use interfere with existing rights?
3. Does the applicant have sufficient financial resources with which to complete the work involved?
4. Is the application made for delay or speculative purposes?

This policy proposes a fifth criteria: will the proposed use conflict with the State Water Plan adopted by the Idaho Water Resource Board in the public interest?

Since statehood, questions have been raised as to whether it is in the public interest to issue water rights without considering their effect upon those not directly affected by the proposed diversion. In disputes, the question of an application being in the public interest has been raised. In the recent Malad Canyon Case, the Idaho Supreme Court decision contains langnage suggesting that decisions be made on a case-by-case basis as to whether a proposed appropriation of water is a beneficial use. That language seems to indicate that the question of whether the proposed use is beneficial in the public interest should be addressed. Decisions

Permits previously issued by the department, if fully developed, would reduce summertime flows in dry years to about 3300 cfs near Murphy. Sequences of consecutive years of flows of this magnitude would have occurred in the early 1930's and again in the latc 1950's and early 1960's if present developments, plus the already issued permits, had been fully developed at that time. These flows were computed in a study of major outstanding permits from the Snake River in southwestern Idaho (Technical Studies Report No. 3) and a preliminary estimate of effects of full development of outstanding groundwater permits in the Upper Snake.

A flow of 3300 cfs at Swan Falls is about one-third of the flow necessary to meet the entitlement of hydro-generation of that power plant if the recorded water filings are valid. It is also less than the amount identifed 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 dctermine that remaining water supplies cannot fulfill all identified needs.

The Idaho Water Resource Board concludcd, 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 stent 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.

Water available in excess of the designated flows for development above an average annual flow basis arc:

Gaging Station	Water Presently Available for Appropriation (Average Year)
Milner	1,473,000 acre-feet
Murphy	4,218,700 acre-feet
Weiser	7,821,000 acre-feet

The above average daily flows will allow the flow requirements contained in the Federal Power Commission License issued for the Hells Canyon hydropower complex to be met without significantly affecting hydropower production. Article 43 of the license provides the management criteria,

Orr Affidavit

Exhibit 5

"Agreement" Between the State of Idaho And Idaho Power Company dated October 25, 1984 ("Swan Falls Agreement")

ORR AFFIDAVIT EXHIBIT 30

Swan Falls Agreement

EXHIBIT 30

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
JAN 2 9 2007

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:

(Seal of the State of Idaho)

PETE T. CENARRUSA
Secretary of State

(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/ 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, f@@l1n@ 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 resources 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 Tthe department of water resources shall accept no notice of claim required under the provisions of section 42-1409, 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.

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 26 day of January 20 06

Orr Affidavit

Exhibit 6

Minutes of the Senate Resources and Environment Committee, March 4, 1985

ORR AFFIDAVIT EXHIBIT 15

Senate Resources & Environment Committee Minutes 3/4/85

EXHIBIT 15

MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

MARCH 4, 1985 — Room 433, 1:30 P.M.

PRESENT — Chairman Noh, Senators Beitelspacher, Budge, Carlson, Crapo, Horsch, Little, Peavey, Ringert and Sverdsten. Senator Chapman was excused and Senator Kiebert was absent.

The meeting was called to order by Chairman Noh.

Wayne Haas — Mr. Haas, Department of Water Resources, explained Policy 32 of the State Water Plan, section by section, pointing out the various changes and the reasonsing behind them. (See resolution attached)

In Policy 32A, Water Held in Trust by the State, Senator Ringert asked what "deemed appropriated" meant. Pat Costello, Governor's office, believed it referred to the state recognizing Idaho Power had a valid water right up to 8400 cfs. Other parties could still pursue legal arguments that Idaho Power does not have a valid water right.

In response to Senator Ringert's question, Mr. Kole, Attorney General's office, said the wording in effect would give the state a shield through the trust system to deny water permits that the state does not feel are valid--to get around a problem of appropriating unappropriated water. Senator Ringert wanted to know if this was to get around other parties using as an argument the abandonment and forfeiture, etc. and Mr. Kole said no.

Senator Crapo questioned Mr. Haas if Policy 32B would include thermal cooling and he said yes. He also asked if there was a policy decision being made here to restrict the amount to less than in the past. Mr. Haas explained in looking at the needs for the near future, it is felt the 150 cfs is adequate and the Board could look at the amount five years down the road if conditions change. Mr. Haas could see nothing in the policy to discourage development at INEL.

Senator Crapo had further questions regarding surface storage with regard to rebuilding the Teton Dam. As he understood the policy, that dam would not be subject to the policy if it was to be rebuilt. Mr. Kole said their understanding in looking at an "approved project," is that it is approved if the state permit is cancelled or not. Mr. Nelson was in agreement.

Senator Ringert expressed concern about protecting the water at the source of diversion, mentioning the fish hatcheries along the Snake. Mr. Haas believes the water right is protected but the user may have to "chase the water." The language does not represent a policy change.

Senator Crapo commented he wasn't sure why the state should get involved in acquiring water for storage. Mr. Haas said by having this cushion it would make it easier for the state to manage the minimum flow and give the state some flexibility in management.

Sherl Chapman — Mr. Chapman, from the Water Users, said they did have some concerns over the modifications of the Water Plan Policy but they are minor compared to the problems there would be if the agreement fails. He believes the Board has been fair and that the Water Users can work with the Board to solve any problems. He urged the committee to pass the legislation.

MOTION — Senator Budge moved and Senator Peavey seconded the bill go out with a "do pass" recommendation. Motion carried.

HB 142 — RELATING TO THE DISTRIBUTION OF FUNDS COLLECTED BY THE STATE DEPARTMENT OF FISH AND GAME: TO INCREASE THE MONEYS DISTRIBUTED TO THE PREDATORY ANIMALS ACCOUNT FROM TWELVE THOUSAND DOLLARS TO FIFTY THOUSAND DOLLARS.

The proposed legislation would change the amount of the distribution of funds collected by the Department of Fish and Game alloted to the predatory animals account from $12,000 to $50,000.

There was no discussion on the bill.

MOTION — Senator Peavey moved and Senator Little seconded the bill go out with a "do pass" recommendation.

The time for the meeting having run out, the committee was adjourned.

Laird Noh, Chairman

Bev Mullins, Secretary

For Monday - Res.

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.

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

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.

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.

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.

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 5th day of MARCH, 19 85

Orr Affidavit

Exhibit 7

Excerpted pages of the 1986 *Idaho State Water Plan* (Idaho Water Res. Bd., Dec. 12, 1986)

IDAHO STATE WATER PLAN

ADOPTED BY THE

IDAHO WATER RESOURCE BOARD

DECEMBER 12, 1986

"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
July 1, 1987

Gene M. Gray
Chairman

Richard W. Wagner
Vice-Chairman

F. Dave Rydalch
Secretary

Mary T. Brooks
Kenneth E. Hungerford
Wm. J. Lanting
Clarence Parr
J.D. Williams

Adopted
December, 1986

Approved by the Idaho State Legislature
March, 1987

R. Keith Higginson
Director
Idaho Department of Water Resources
Statehouse
Boise, Idaho 83720

STATE OF IDAHO

IDAHO WATER RESOURCE BOARD

STATEHOUSE
BOISE, IDAHO 83720

To the Citizens of Idaho:

The Idaho Water Resource Board is pleased to provide you with this new version of your State Water Plan. We gratefully acknowledge the time and effort expended by citizens around the state in providing input to the Board for this most recent revision.

The State Water Plan is a dynamic document in that it is continually being reviewed and evaluated by the Water Resource Board. It can be, and has been, changed to reflect social and economic conditions. It is, however, directed towards the future in that the policies contained in the plan are meant to guide the use of the water resources of the state for the benefit of all its citizens for years to come.

The success of this plan depends on how actively the citizens of the state work towards its implementation. The Board looks forward to working with individual citizens, organizations, the legislature, and local, state, and federal governments to make these policies a reality.

Sincerely,

Gene M. Gray, Chairman
Idaho Water Resource Board

GMG:IR

BEFORE THE WATER RESOURCE BOARD OF THE

STATE OF IDAHO

IN THE MATTER OF REVISIONS)
TO THE STATE WATER PLAN) RESOLUTION
_____)

WHEREAS, Article XV, Section 7 of the Constitution of the State of Idaho empowers the Idaho Water Resource Board to formulate and implement a State Water Plan for optimum development of water resources in the public interest; and

WHEREAS, the State Water Plan was originally adopted in 1976 and revised in 1982, pursuant to Section 42-1734, Idaho Code, which requires the Plan to be reviewed at least every five years with amendments to be adopted in the same manner as the original Plan; and

WHEREAS, the Board held public meetings and hearings throughout the State to obtain suggestions and comments regarding the present revisions to the State Water Plan; and

WHEREAS, Article XV, Section 7 of the Constitution of the State of Idaho requires changes in the State Water Plan to be submitted to the Legislature upon the first day of a regular session following the change, and provides that the change shall become effective unless amended or rejected by law within sixty days of its admission to the Legislature.

NOW, THEREFORE, BE IT RESOLVED, that pursuant to Article XV, Section 7 of the Constitution of the State of Idaho, and pursuant to powers granted by statute, the Idaho Water Resource Board hereby adopts the attached revised State Water Plan as the policy of the state of Idaho for the future use and conservation of Idaho's water resources.

PASSED AND APPROVED This 12 day of December , 1986.

ATTEST:

GENE M. GRAY, Chairman

JAMES SHAWVER, Secretary

FOREWORD

The State Water Plan is the result of much thought, study and research by the Idaho Water Resource Board to fulfill its constitutional mandate "to formulate and implement a State Water Plan..."

The State Water Plan consists of a series of objectives and policies that are to be used to guide water resource management in Idaho. A continuation of ideas first presented in the Interim State Water Plan of July 1972, this version is substantially reorganized from earlier versions and contains a number of amendments and deletions.

Implementation of the water plan will require changes in Idaho law and public attitudes. The Idaho Water Resource Board will continue to work with the Idaho Legislature to implement the plan. Public understanding is the key to full implementation of the plan. The Idaho Water Resource Board has always found support among the citizens of Idaho for a state water plan, and believe that this plan will provide for economic growth while protecting a quality environment.

Because public priorities change in response to economic and social conditions, the Idaho State Water Plan is reviewed and updated on a continuing basis. In addition to the effort made by the Water Resource Board to involve the public in the planning process, since November of 1984 all changes to the Idaho State Water Plan are reviewed by the Idaho Legislature. According to statute, the plan is reviewed and reevaluated in its entirety at least once every five years. This version is the result of a five-year review.

Former Members
Idaho Water Resource Board

Carl Tappen, Boise, Ex-officio member
Leonard E. Graham, Rigby
Evan M. Kackley, Wayan
George L. Crookham, Jr., Caldwell
Arlie L. Parkins, Marsing
LeRoy Stanger, Idaho Falls
Robert M. Bandy, Priest River
Edward Reichert, Filer
Charles J. Marshall, Jerome
Thomas Olmstead, Twin Falls
R. Keith Higginson, Boise, Ex-officio member
Ferris M. Kunz, Montpelier
John F. Streiff, Lewiston
George L. Yost, Emmett
Edwin C. Schlender, Malta
Joseph H. Nettleton, Murphy
Herman J. McDevitt, Pocatello
Scott W. Reed, Coeur d'Alene
M. Reed Hansen, Idaho Falls
Donald R. Kramer, Castleford
Sally L. Cupan, Sandpoint
Robert M. Hammes, St. Maries
Franklin Jones, Boise
James Shawver, Eden

Former Directors
Idaho Water Resource Board

Carl Tappen
Robert R. Lee
Wayne T. Haas
C. Stephen Allred

Former Directors
Idaho Department of Water Resources

C. Stephen Allred
A. Kenneth Dunn

ACKNOWLEDGMENTS

Formulation of the State Water Plan as adopted involved a great number of Idahoans from all walks of life. Citizen input was received through public opinion surveys, at information meetings and public hearings. The contributions of the private sector as well as state, federal and local agencies assured that a broad view of public interest will be considered in future water resource decisions. Without this citizen and agency response, a State Water Plan would not be possible.

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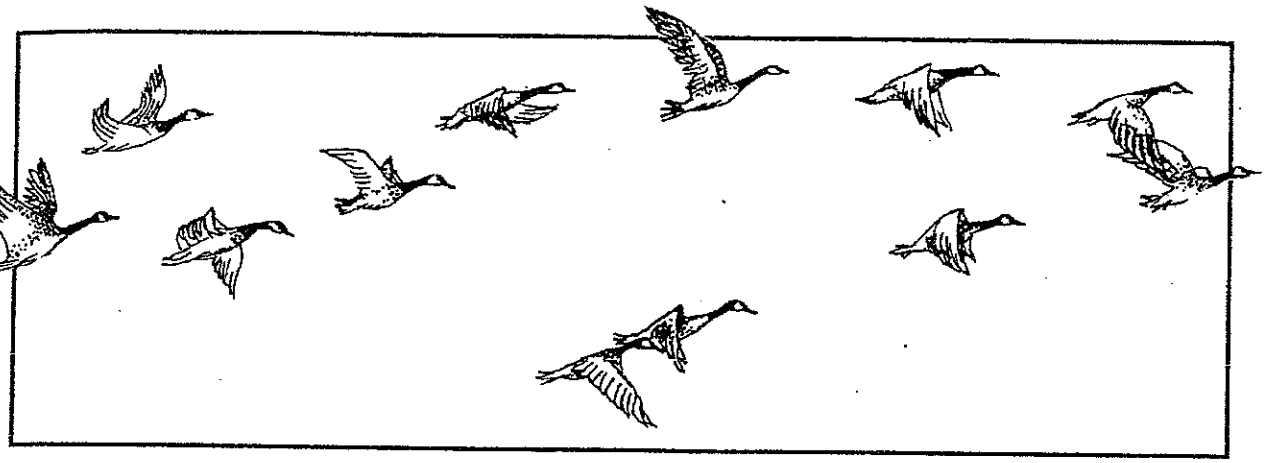
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River Basins Group

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,

Orr Affidavit

Exhibit 8

Excerpted pages of the 1992 *Idaho State Water Plan* (Idaho Water Res. Bd., Jan. 1992)

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

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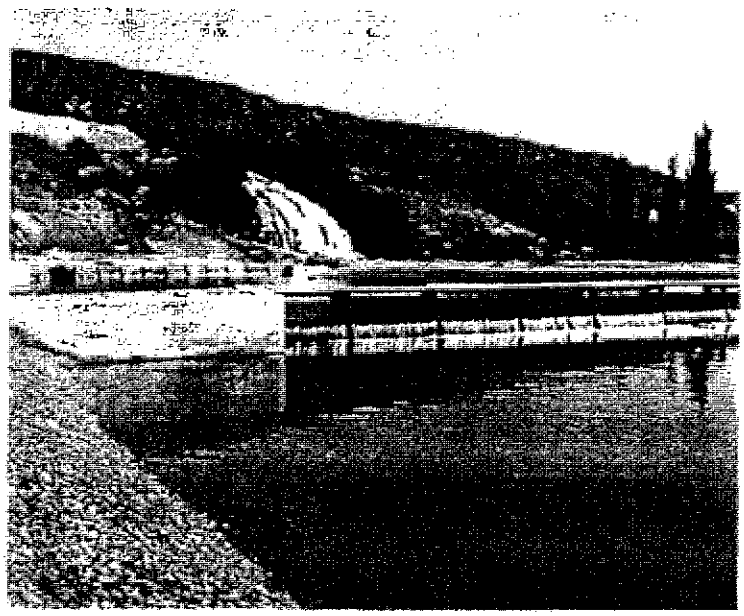
- *River Basins Group*

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 on 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.



Aquaculture facility along the Snake River near Buhl, Idaho.

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-

Orr Affidavit

Exhibit 9

Examples of partial decrees proposed under *State Of Idaho's And Idaho Power Company's Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37*, filed in SRBA Consolidated Subcase 00-92023 (June 25, 2009)

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 02-00100

NAME & ADDRESS:
IDAHO POWER COMPANY
PO BOX 83720
BOISE ID 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 DATE: 01-17-1900

POINTS OF DIVERSION:

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 Dam)
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 PERIOD OF USE:

PURPOSE OF USE	PERIOD 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, Opper 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 OSE:

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 OR ADMINISTRATION OF THIS WATER RIGHT:

1. Water right nos. 02-00100, 02-02032A, 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 by the lawful exercise of those 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 below. 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 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. 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 USE	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 Idabo. 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, sball 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 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 tbe water available at the facility identified herein to the extent of its actual beneficial use but not to exceed the "QDANTITY" set fortb above, and to protect its rights to such use of the water as provided by state law against depletions or claims not in accordance witb 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 Idabo, 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

Orr Affidavit

Exhibit 10

"News Release"
Office of the Attorney General
(Oct. 1, 1984)

Third Orr Affidavit

EXHIBIT 19

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

NEWS RELEASE

FOR IMMEDIATE RELEASE OCTOBER 1, 1984

BOISE. . ."THE STATE OF IDAHO AND IDAHO POWER COMPANY HAVE NEGOTIATED A FRAMEWORK WHICH CAN BE USED AS A BASIS FOR THE STATE TO AGAIN BEGIN MANAGING THE SNAKE RIVER FOR THE BENEFIT OF ALL IDAHOANS," ATTORNEY GENERAL JIM JONES SAID TODAY. "THE FRAMEWORK LAYS THE BASIS FOR ALLOCATING OUR PRECIOUS SNAKE RIVER WATER IN A BALANCED, MULTIPLE-USE MANNER. I BELIEVE THE FRAMEWORK STRIKES A PROPER BALANCE WHICH WILL ALLOW FUTURE GROWTH AND DEVELOPMENT BY INSURING ADDITIONAL SUPPLIES OF WATER FOR CONSUMPTIVE USES, WHILE PROTECTING OUR LOW-COST POWER SUPPLIES. MOST IMPORTANTLY, THE FRAMEWORK PLACES THE STATE BACK IN THE POSITION OF MAKING VITALLY IMPORTANT WATER ALLOCATION DECISIONS."

JONES, GOVERNOR JOHN EVANS, AND IDAHO POWER COMPANY CHIEF EXECUTIVE JAMES BRUCE ANNOUNCED TODAY THAT THEY HAD REACHED AGREEMENT ON A NEGOTIATED PACKAGE OF MEASURES TO SOLVE THE

SNAKE RIVER WATER RIGHTS CONTROVERSY. THE PACKAGE CALLS FOR SETTING AN INCREASED MINIMUM STREAMFLOW ON THE SNAKE RIVER WHILE FREEING ADDITIONAL WATER FOR UPSTREAM GROWTH AND DEVELOPMENT. THE FRAMEWORK CALLS FOR NEW WATER ALLOCATION CRITERIA, AS WELL AS COURT ADJUDICATION OF THE SNAKE RIVER.

"UNDER THE NEGOTIATED FRAMEWORK IDAHO POWER WOULD RELINQUISH A LARGE PORTION OF ITS ASSERTED SWAN FALLS WATER RIGHT SO THAT SOUTHERN IDAHO RESIDENTS WILL HAVE THE ASSURANCE OF FUTURE GROWTH AND DEVELOPMENT. AT THE PRESENT TIME IDAHO POWER COMPANY HAS A COURT-SANCTIONED CLAIM TO 8400 CUBIC FEET PER SECOND OF WATER AT ITS SWAN FALLS DAM. THIS HAS EFFECTIVELY STYMIED STATE MANAGEMENT OF THE SNAKE RIVER AND SNAKE RIVER PLAINS AQUIFER, WHILE BRINGING UPSTREAM GROWTH TO A VIRTUAL STANDSTILL. UNDER THE FRAMEWORK, THE COMPANY'S WATER RIGHT WOULD BE REDUCED TO 3900 CFS DURING THE IRRIGATION SEASON FROM APRIL THROUGH OCTOBER. DURING THE REMAINING FIVE MONTHS OF THE YEAR IDAHO POWER WOULD BE ENTITLED TO A FLOW OF 5600 CFS, WHICH WILL RESULT FROM INFLOWS BETWEEN MILNER AND MURPHY. THE PARTIES HAVE AGREED TO A ZERO FLOW AT MILNER, WHICH WOULD ALLOW FOR THE FILLING OF PRESENT UPSTREAM STORAGE FACILITIES, AS WELL AS ADDITIONAL NEW WATER STORAGE PROJECTS."

"SINCE THE HISTORIC SUMMER LOW FLOW IN THE SNAKE RIVER HAS BEEN APPROXIMATELY 4500 CFS, THE NEGOTIATED FRAMEWORK WILL FREE UP A SIGNIFICANT AMOUNT OF ADDITIONAL WATER FOR UPSTREAM GROWTH AND DEVELOPMENT DURING THE IRRIGATION SEASON. THE LEVELS AGREED ON FOR THE MINIMUM FLOWS DURING THE SUMMER AND WINTER

WILL SAFEGUARD AND PROTECT IDAHO POWER COMPANY'S RATE BASE SO THAT IDAHO CITIZENS CAN CONTINUE TO ENJOY THE BENEFITS OF LOW-COST HYDROELECTRIC POWER."

"NEW WATER WILL BE ALLOCATED UNDER CRITERIA WHICH INSURE THAT SOUND, FAMILY-FARM TYPE PROJECTS CAN GO FORWARD. THE FRAMEWORK FREES UP WATER FOR GROWTH OF UPSTREAM COMMUNITIES BOTH BY PROVIDING THE NECESSARY DOMESTIC WATER AND BY MAKING WATER AVAILABLE FOR INDUSTRIAL AND COMMERCIAL ENTERPRISES WHICH WILL PROVIDE ECONOMIC GROWTH, JOBS AND INCREASED TAX BASE."

"ONE OF THE MOST IMPORTANT FEATURES IS THAT WATER ALLOCATION DECISIONS WILL BE PLACED BACK IN THE HANDS OF THE STATE. THAT IS WHERE THESE IMPORTANT DECISIONS SHOULD BE MADE SINCE STATE OFFICIALS ARE MORE RESPONSIVE TO PUBLIC DEMAND THAN ANY PRIVATE COMPANY WOULD BE."

"THE SWAN FALLS DECISION IN 1982 PLACED SOUTHERN IDAHO'S GROWTH IN A STATE OF LIMBO AND I AM HOPING THAT THIS NEGOTIATED FRAMEWORK CAN RESOLVE THAT DEADLOCK. THERE ARE STILL A NUMBER OF MECHANICAL MATTERS WHICH WILL HAVE TO BE WORKED OUT IN ORDER TO PLACE THE FRAMEWORK INTO EFFECT AND THE GENERAL PUBLIC AND INTERESTED PARTIES WILL HAVE THE OPPORTUNITY TO HAVE THEIR INPUT INTO THAT PROCESS. IF THE PROCESS CAN BE COMPLETED, WE CAN GET BACK ABOUT THE BUSINESS OF MANAGING THE SNAKE RIVER AND SOUTHERN IDAHO'S FUTURE WITHOUT THE NECESSITY OF MORE YEARS OF STRUGGLING THROUGH THE COURTS."

"NOT EVERYTHING IN THE NEGOTIATED PACKAGE IS TO MY LIKING BUT THERE WERE MANY AREAS OF GIVE AND TAKE DURING THE NEGOTIATION PROCESS. SOME OF THE MORE IMPORTANT CONSIDERATIONS

WERE BRINGING ABOUT AN EARLY SETTLEMENT TO THE CONTROVERSY WHICH WOULD ALLOW FOR ADDITIONAL CONSUMPTIVE USES UPSTREAM, WHICH WOULD PUT THE STATE BACK INTO THE WATER ALLOCATION BUSINESS, AND WHICH WOULD PROTECT THE HYDROPOWER RATE BASE. ADDITIONALLY, EACH PARTY HAD TO ASSESS THE RISKS WHICH MIGHT BE INVOLVED IN FUTURE LITIGATION AND I BELIEVE THAT FROM THAT STANDPOINT THE FRAMEWORK IS A REASONABLE MANNER OF RESOLVING THE CONTROVERSY."

JONES NOTED THAT MUCH ADDITIONAL WORK REMAINED TO BE DONE IN ORDER TO PLACE THE "FRAMEWORK" INTO OPERATION. "IT WILL NECESSITATE ACTIONS BY THE LEGISLATURE, THE STATE WATER RESOURCES BOARD, APPROVAL BY THE FEDERAL ENERGY REGULATORY COMMISSION, AS WELL AS ADDITIONAL NEGOTIATION ON SPECIFIC SETTLEMENT LANGUAGE. IN ADDITION, THERE ARE A NUMBER OF CONTINGENCIES WHICH COULD YET NEGATE THE ENTIRE PROCESS SO WE SHOULD CONTINUE TO VIEW THE NEGOTIATED FRAMEWORK WITH CAUTIOUS OPTIMISM."

E N D

Orr Affidavit

Exhibit 11

Transcript of Idaho Water Resource Board public information meeting on Swan Falls settlement (Oct. 25, 1984)

ORR AFFIDAVIT EXHIBIT 44

Transcript - 10/25/84

EXHIBIT 44

IDAHO WATER RESOURCES BOARD

* * * * *

Public Information Meeting on
the Swan Falls Agreement
Twin Falls, Idaho

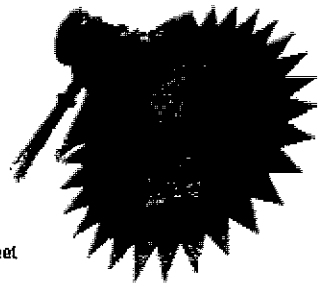
TRANSCRIPT OF PROCEEDINGS

Held on October 25, 1984

before Chairman Kramer

* * * * *

Transcribed by
Patricia J. Terry, CSR, RPR, CRR
CSR No. 653



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IDAHO WATER RESOURCES BOARD

* * * * *

Public Information Meeting on
the Swan Falls Agreement
Twin Falls, Idaho

TRANSCRIPT OF PROCEEDINGS

Held on October 25, 1984
before Chairman Kramer

* * * * *

Transcribed by
Patricia J. Terry, CSR, RPR, CRR
CSR No. 653

CHAIRMAN: The candidates that have come in since we started, if you would like to stand and introduce yourself, we'd sure like to see who you are. Anyone who hasn't?

MR. COWEN: I had a heck of a time finding this building.

CHAIRMAN: So you weren't alone.

MR. COWEN: I'm Jerry Cowen from Jerome, and I'm running in the legislative district 25. (Tape inaudible.)

MR. SILVER: I'm Jeff Silver and I'm running in the same district.

CHAIRMAN: We're glad to have all of you people here. On my left is the negotiating team who's been working for a month putting this together. Far end Tom Nelson, Idaho Power. In the middle Pat Costello. And on the right-hand side Pat Kole.

Pat Costello from the governor's office will be the first speaker.

MR. COSTELLO: Thank you, Chairman Kramer, members of the board, legislators, and members of the public. As Tom pointed out, the governor did request the board to hold these meetings around the state. And he very much appreciate s your

interest in coming out to listen to what we have to say about the agreement that the attorney general, the governor, and the power company have reached.

We did negotiate this pretty much just between the three individual principals, and so now that we have arrived at a consensus at that level, we are anxious to get the word out to the public so they can evaluate what I've been referring to as a road map that we can use to get to a resolution of this whole controversy.

The governor's perspective on this problem -- I should begin about two years ago. I think most of you are aware that following the Supreme Court decision which recognized a claimed water right, unsubordinated water right at Swan Falls for the Idaho Power Company, the governor began leading a charge with the help of Senator Negg, who's here with us tonight, to legislatively subordinate those rights. And we fought that battle over two years in the Idaho legislature and fought it to a bloody standstill and weren't able to get that accomplished.

The governor never had the desire when he was seeking subordination to pursue a course

that would lead to development with reckless abandon. In fact, he felt a little bit offended that the power company didn't feel like they could trust the state to protect their rights and wanted to put the state back in the driver's seat but to protect hydropower rights.

But as I say, we weren't able to accomplish it through the legislative group, and following the last session, the power company approached the governor again with an offer to enter into an agreement for partial settlement of the water rights lawsuits under the legislation passed in the 1983 session called Senate Bill 1180. The governor's response to that offer was a counteroffer to enter into negotiations for a total settlement of all the lawsuits and of all the surrounding issues involved in the Swan Falls controversy. The power company took us up on the offer, and the governor and the attorney general and the Idaho Power Company chief executive officer Jim Bruce sat down for the first time in July and just had a general discussion to kind of explore the things they could agree about and the general areas of disagreement.

And as I say, there wasn't really any

Page 5

objection on the part of the state to the notion that hydropower rights ought to be taken into account in future management decisions on the Snake River. And if we got away from the loaded word "subordination" and so forth that we could possibly arrive at some consensus as to how much water ought to be in the river, how we can manage the amount of water we feel can yet be developed.

And they designated the three of us to work together to flesh out the ideas at that meeting and to come back to them with additional ideas to explore further. And we went on that way for oh, probably six, eight, ten meetings of the three principals and countless meetings of the three of us in between.

And that finally culminated this morning in the signing by the three principals of two contracts, the first one being the main contract that I think most of you got copies of tonight, which is the one that would resolve all of the outstanding issues in the liligation, and a second contract that was the old Senate Bill 1180 contract under which we identified several classes of use, current users who the power company had agreed from the start ought to be protected and

Page 6

who they were willing to subordinate to. And some 3,040 some of those, Tom has the exact figure, were dismissed this morning or at least the motion to dismiss then was filed.

I think I can illustrate with a little diagram what this agreement is, the guts of the agreement is about as to what we decided as far as the legal status of the rights in this case. Where we are today, we figure with current development, we've got an actual minimum flow of around 4500. The power company through this contract and actually in effect by what we did in the 1180 contract subordinated the rights above that line. Down here at the level of 3900 cfs in the summer, 5600 cfs in the winter is unsubordinated rights. That was fairly easy to get to through the process of (tape inaudible). What we've been haggling over for the past three weeks since we signed that framework that was handed out to you has been this water in the middle that we both or all sides have agreed should be available for future development.

This water right is currenly under this scheme unsubordinated, but it will become subordinated in the future, possibly 25-30 years,

Page 7

who knows, say the year 2020, sometime in the indefinite future. The status of that right while it's in this transition period -- and by the way it gets there through development approved under public interest criteria that we're going to ask the Idaho legislature to adopt.

The status of that water right in the meantime while it's in this transition period from becoming unsubordinated to becoming subordinated is that legal title to the water right will be held in trust by the State of Idaho by and through the governor of the state. But the power company will retain the right to beneficially use that right for the generation of power in the meantime.

So ullimately when we get to the future, unless the minimum streamflow is changed by the time we get to this level, everything above minimum streamflow is subordinated. Everything below is unsubordinated. So that is where we are moving.

And the approach that would accomplish this is a statute that would create this system in carrying out the legislature's authority to regulate hydro power under a 1928 constitutional amendment. The system was designed to solve a

Page 8

lawsuit, but it would apply by its terms generally across the state. That's because we felt that this was not only an agreement that was appropriate for settling the lawsuits but also was based on sound public policy principles. And that is your role now as members of the public to evaluate that on that basis.

So the final point I would like to make is as I pointed out the governor started out pushing for total subordination. He ultimately after two long, hard years concluded that even if we were to get a total victory in the sense of getting total subordination, it would likely be short lived. If there were no restrictions and no more advanced management systems put into place and there was too rapid development, the pressure from the rate payers would be so great that the legislature would probably step back in and correct the balance. On the other hand, if the power company had achieved a total victory, pressure from the other direction probably would have come in and also given back some of the water for development.

So my view is that ultimately even if we pursued the litigation to its full course, the

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result of the litigation would not have been determinative for all times. There's going to be a political solution to this problem. There's going to be a balance found and struck at some point. It's the governor's firm belief that now is the time to strike that balance, and he believes that the approach that we've taken to striking that balance is a sound reasonable approach. And we commit it to you on that basis. And once again, thank you very much for your interest.

CHAIRMAN: Thank you, Pat Costello. Now we will hear from Pat Kole from the attorney general's office.

MR. KOLE: Thank you, Chairman Kramer, members of the board, legislators, members of the public. My comments tonight will be brief. I think the document that you have in front of you speaks for itself.

What we have tried to do here throughout the negotiation process -- and I might say it's not been always a road without a few rocks and pitfalls in it as we've gone through the process -- is to do what has not been done in the past. And that is to put the issue of Idaho's

Page 10

battle over its water behind us. If you look at the history of Idaho in 1926, 1945, 1952, 1973, and 1976 and 1982, Idaho's water wars erupted continuously and more vigorously.

We thought it was time to try and come up with a solution that we could recommend to you that would put into place a system of responsible management that would guide us into the 21st century. In doing so, we wanted to create a system where there would not be any loopholes and to the best of our abilities put something that you can rely upon and that in 50 years you will still be able to rely upon to guide Idaho's water management.

In order to do that, we focused on the interests to be protected. The interests to be protected we saw were primarily these: First, all current users of water had to be protected. And I can tell you under this agreement all current water users will be protected in perpetuity. They will have a vested water right which is superior in nature to that of the power company even if, even if the calculations that we have made in arriving at the figures we have used are wrong. So the people that are currently using water as of

Page 11

this irrigation season will be protected.

Secondly, we had to make sure that future development proceeded in the most responsible fashion that it could so that we could get the most utilization of a scarce resource. I say that because in looking at the department's records, you cannot clearly see that Idaho's water resource is finite and it cannot last forever. So in managing that resource, you have to get the most bang for the buck. And the system that we have in place in this agreement achieves that result.

Third, in order to handle this approach, we have to bring Idaho's water law into the 21st century. Now the code has served us well in the past, but it needs some updating now. We're at that point in time when we have to take a hard look at it, and we think we have done so in the legislative package that you have before you.

Finally, we thought it was time for the state to take responsible management actions to assure an adequate supply for multiple use of developers. And I think the agreement that you have before you achieves that result also. There is water to be allocate d for various competing

Page 12

uses so that there will be a chance for all sectors of Idaho's economy to grow in the future.

In conclusion, I would like to say that litigation has benefits and it has its drawbacks. One of the drawbacks is that primarily lawyers tend to get a lot of money going into court, and that might not always be the best way that you could spend your money, because in the final analysis when you look at the money that you're going to eventually have to spend, it may make more sense to spend that money positively in trying to get something accomplished and in place as opposed to spending that money in court.

And on that subject, I'd like to point out that one of the things that we have indicated to you as being necessary is the Snake River adjudication. And there's going to be a lot of controversy about how to finance that adjudication. That's something that the legislature is going to have to address. I can tell you, though, as a lawyer that it is absolutely essential that that Snake River adjudication begin in the very near future. We have received notifications that the federal government will begin pursuing their reserved

Page 13

rights. We know that is a fact.

Now, there's going to be one of two forums within which that litigation can occur. It can occur in federal court or it can occur in state court. I have not yet talked to a water user who wants that litigation to proceed in federal court. So our option is to proceed immediately as quickly as possible to adequately finance an adjudication in state court. And I think it's incumbent upon the legislature to address that issue in this session.

I think those conclude my remarks, and I'll be happy to answer questions.

CHAIRMAN: Thank you, Pat Kole. At this time I'd like to introduce Tom Nelson, Idaho Power. About the time I start to introduce Idaho Power, the lights start turning off. Is that part of your doing?

MR. NELSON: Thank you, Chairman Kramer. That's a service the company gives me when I try to tell everybody how important it is that we preserve the hydro base with the government. They used to do that in from of the PUC all the time.

You know, being last here, I guess I'm going to spend the entirety of my life living on

Page 14

the end of the ditch. But I would like to say as a preliminary before we get to the questions that when the governor countered our offer to negotiate 1180 with an offer to negotiate the entirety of the dispute, we were delighted. It had taken a couple years to get everybody in a posture where that could happen. And I guess you have to go to war for a while before you appreciate some peace. Although I heard a man describe peace as a period of cheating between two periods of fighting. I don't know if that's right or not.

But in any event we were delighted because it's the company's business to make kilowatts, not to make water law for the world, nor to get in pitched battles with the executive branch of state government. Nor has it ever been the company's business to allocate water or be a water master. It never has been, and it doesn't want to be.

So what the company wanted to get out of this was a system where it was a water user, its rights as such were recognized, and the state was placed in a position to actually act as an allocator and manager of the state's water resources. You can't just write those words in a

Page 15

code and have a water management allocation system actually work.

So when you read this agreement, hopefully the intent is not too much buried in the legalese. I would ask that you remember that we approached the resolution of the litigation in this agreement, and we approached the resolution of the entirety of the controversy. So this agreement is presented as a whole. It's obviously not presented take it or leave it because the governor, the attorney general, and the Idaho Power Company cannot make this agreement work. It takes the Water Resource Board, the legislature, the Federal Energy Regulatory Commission to make it work.

But when you look at it, I do ask that you look at it as a whole and not pick at pieces of it, because it is a whole. The question is not how we got to a particular provision, who gave up what to get there, or who gained what to get there. The question is as a whole does this do what it should do? It is I think a responsible suggestion for a way to resolve the controversy.

I think if you look at the potential results of the litigation, on one hand you have

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the power company effectively won about as clean a victory as you could postulate it would win. You'd have probably the result that people in place would remain in place. There would be no further development. Had the power company lost entirely and had no water rights at all, you would have the downside of a 3300 minimum flow year-round at Murphy.

So within those two constraints, this agreement puts us somewhat in the middle. The people who have developed will develop. Other people can still develop but under a different set of ground rules. But you don't run the risk that the river goes to 3300.

So regardless of your perspective, it's not so important that you look at what you think was given up from your side but to look at the question of what was retained. Because I think whether you look at it from the standpoint of too much development is permitted or from the standpoint that too much development was taken away, there is still a substantial benefit to the point of view that you represent.

And so if you look at it in that standpoint, I think that we have a situation where

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development can continue, but it's not compelled. And it will continue only if it meets the standards which we recommend. They're not impossible. There has been some criticism that they're too loose. And I will leave that to later discussion. They're the best we could do remembering the interests that we represent and remembering also that in the back of our mind we had to present a package which we thought would sell.

And so if you keep those things in mind, it might give you a little better idea how we got where we did. But I do commend it to you as an entirety and ask that you look at it in its entirety, and it should pass or fail on that basis. Thank you.

CHAIRMAN: Thank you, Tom Nelson. Now it's up to you as the public to ask questions. Be sure to speak loud and clear because we like to get it on tape. Also state your name.

Before I go to the public, first I'd like to ask any members of the Water Resource Board, do you have any questions? Greg.

Oh, Mr. Jones.

MR. JONES: When the question is asked,

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sometimes the audience doesn't hear it. Will you make sure that the question is understood before the answer is given.

CHAIRMAN: Thank you, Mr. Jones.

Greg.

GREG: Mr. Chairman, I have three questions that I would ask, some of them probably by the state hydrologist that need answers, the others by the three principals.

Frank, you mentioned that the adjudication of the Snake system, which I think everyone realizes from the headwaters to its juncture with the Columbia River is approximately 900 miles. If I understood you right, did you say that maybe not all of the system would be adjudicated?

My concern is the federal reserve rights because the Clearwater system, the Lochsa, Selway, et cetera, has a lot of federal lands within it. So if we're going to adjudicate the system, wouldn't we adjudicate the entire stream system and not just say from the Murphy gauging station up over in Lewiston up on the main stem?

CHAIRMAN: Mr. Sherman, would you like to answer that?

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MR. SHERMAN: Certainly. The intent is to adjudicate as much as is necessary to bring in the federal reserve rights. Without the federal reserve rights, the adjudication above Murphy gauge, for example, becomes meaningless because of the national forest, park, indian reservation. We need to bring the federal people in. If they were doing the adjudication from Lewiston up, then that's what we'll do. If they will agree that they may only have to do it above Murphy, then perhaps at this time that certainly would be cheaper to do it just above Murphy. Whatever it takes to bring them in is what the state proposes to do.

GREG: Okay. My second question will be to you, too, Frank. Is the 4500 cfs the historical low flow?

MR. SHERMAN: Yes, sir.

GREG: Okay. Then my next part of this question will be to the negotiators. You're at 3900 cfs in the summer. You're at 5600 cfs in the winter. Now, as human beings in areas possible and whoever thought the great salt lakes would have gone to an elevation of 4208, but we do know the elevation of the great salt lakes is 15 feet

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higher than that. And I'm assuming that the flows here are artificial in nature because of the irrigation that has gone on in the Upper Snake. In other words, we're getting a larger recharge to the aquifer now than we were historically.

So why did you arrive at the 39/56 instead of going to the historic figure?

MR. COSTELLO: Well, if we'd gone to the historic figure, then by definition there wouldn't be any more development. I mean, if current development already takes you to X and you set the minimum streamflow at X, then you are saying there will be no more development. We're going to protect the flow. Do I understand the question correctly?

Our aim was to provide something between where we're at now and the existing minimum flow so that there would be a block of water identified as available for free appropriation and at the same time to raise the level of protection somewhat that already exists for in-stream uses.

GREG: All right then, in other words, if on a very dry year the minimum summer flow dropped to 3700 second feet, then that's just the way it is

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for the utility. No recourse on anyone?
MR. COSTELLO: To the extent that it's caused by users who are currently in place or who are grandfathered in here, they have no recourse. To the extent that it is because of new users, ones that come in after October 1st of this year, they would have recourse and in fact can take action to shut off upstream uses.
CHAIRMAN: I assume you mean appropriators.
GREG: My third question will be to the principals. You're going to ask the legislature to adopt public interest. In the western states public interest is starting to be recognized as public trust. Public trust then pushes itself into the public trust doctrine.
Are you asking the legislature to adopt a public trust doctrine? And if you are not, then please define the two for me.
MR. COSTELLO: I think I'll defer to Tom on that. The answer is no, but I don't know the definition.
MR. KOLE: The answer is no end no and very strong emphatic explicative deleted no.
GREG: That's not part of my question.
MR. KOLE: Well, first off, you know the

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buzz word "public trust doctrine" I think is something that concerns all water users because by its very nature it implies a reallocation of a vested appropriated water right. And what we are doing here is absolutely the opposite. We are in this system using the Constitution of the State of Idaho which says that the right to appropriate the quote, unappropriated, unquote waters of the state shall never be denied by in effect saying that the Snake River is an appropriated river and because it is an appropriated river we can now begin to use the water rights of the power company as a shield to pick and choose which developments we want to go forward. So the idea is to avoid and in fact to head off the infiltration of the public trust doctrine into the State of Idaho by going to a responsible system that is clearly recognized by the Idaho Constitution.
GREG: Thank you. Do you concur, Mr. Nelson?
MR. NELSON: I concur that this agreement does not rest on the public trust doctrine, and I think it would be irresponsible in the extreme to introduce a public trust concept to the water law of the State of Idaho. There was an answer filed

Page 23

on behalf of some of the state defendants in one of the lawsuits which raised that doctrine. I think that's one of the benefits of this agreement is that perhaps we get the state to deter from doing that.
But no, this agreement does not rest on the public trust doctrine, and the results it seeks can be obtained without reference to that doctrine.
CHAIRMAN: Question from the audience.
AUDIENCE MEMBER: I was just wondering in the legislative process how far could the legislature go in tinkering with the different items before you guys meet on May 15th and say well, it's no go or go? And how do you warn the legislature if they're going over the line and tinkering with it so then you don't get to make a tink and look at the packaging and say well, then you're almost negotiating all over again?
MR. COSTELLO: If they mess with it too much, it will destroy the bargain. We'll have to renegotiate the whole deal. But we've got three tiers to the specificity here. If you'll look on pages two and three, items A, B, C, D, E, F, and G, item A for example says "as set forth in

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Exhibit 1." That means we don't -- this was an item that was the heart of the bargain and we don't want to encourage any adjustments there because it really is in the area that a shift one direction or the other could destroy the mutuality of the bargain.
The next one item B says "generally as set forth." That means it's a little less specific, and they can have a little more latitude to add to it or clarify it.
The next item doesn't even refer to an exhibit, so there's pretty much a free hand on legislation there.
That's where we were getting at with that. There are some things here that are more sacred to the principles that hold up in the agreement as a whole than others, and that's the way we designated them. I think there's a couple more, if you look back at the contingencies on pages seven and eight. Item 3 is an "as set forth." Item 4 is an "as set forth." But that's the way we attempted to flag those for the other entities that are going to be dealing with this.
CHAIRMAN: Any questions from the audience? Please state your name.

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MR. MARCATONI: Oh, okay. I'm with (tape inaudible) Jerry Marcatoni. As far as arriving at the 3900 of flow during the summer, was any other factor considered aside from power generation?
UNKNOWN SPEAKER: Can we have you stand. We can't hear you.
MR. MARCATONI: Aside from power generation concerns, were any other factors considered in arriving at 3900 cfs?
MR. KOLE: Yeah, the framework spelled out those considerations. At the time the state water plan was adopted, it was recognized that there was perhaps inadequate supplies of water for other uses. So we tried to incorporate those other uses as identified in policy 32 of the state water plan.
MR. MARCATONI: Other uses such as?
MR. KOLE: Environmental considerations, fish propagation, aesthetics, a whole myriad of other uses that are recognized in the state water plan as being beneficial.
CHAIRMAN: Next question. Sir? State your name, please.
MR. FERGUSON: Paul Ferguson, Shoshone. Will this run counter with the state Constitution

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all your plans? Will the state constitutional water rights bring all this out? (Tape inaudible.)
MR. COSTELLO: Are you referring to the appropriation doctrine?
MR. FERGUSON: Yes.
MR. COSTELLO: Okay. The question was whether this new scheme runs counter to the state constitutional provision saying the right to appropriate the unappropriated water so the state should never be denied. The key there is the right to appropriate the unappropriated waters. What we're doing here is saying all the waters in the Snake have been appropriated. All the water that's left to be appropriated from this point on is only available because it was previously appropriated by the power company, and the state has gotten control of it through an agreement which allows us to funnel it through a more rigorous set of public interest criteria than the state's ever used before, not only to protect and take into account hydropower benefits but also so that we can encourage those types of development that will get us the most development with the least amount of impact on the river so we make

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that water last as long as we can and go as far as we can.
MR. FERGUSON: The one stipulation you have on now (tape inaudible) on this water right zone?
MR. NELSON: The water plan target minimum flow at Milner Dam is zero, which is a condition realized in the summer all the time, and this agreement does not contemplate any change in that minimum flow. So short of a statement that before new storage is built we should fully utilize existing storage, what goes on above Milner is not affected by this agreement.
And I might explain while we're touching on the full utilization, what we were trying to do there was simply get people to ask some questions about the way we use water in the Snake River basin. And full utilization is probably as much a federal question as it is a state question giving federal policies the use of its reservoirs. So the way we look at full utilization is you ask the questions and say is there any way we can free the water up for other uses, for different uses, for more intensive uses, and if the answer comes back no, within existing law and policy we're doing the best we can, then

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that's full utilization. We simply think those questions ought to be asked before we go too much further with our water planning. But we were not intending by that phrase to block any development. Simply to force some questions to be asked.
CHAIRMAN: Sir.
MR. COWEN: Yes. Jerry Cowen. What bothers me on this subordinated water during that period of time and 20 years before it's used up, does the US Congress have to consider basic transfer and goes off and recognize that as water being used or does California have to?
MR. NELSON: Go ahead.
MR. KOLE: I think that's the major benefit that we have with the system that we've adopted. What we're telling the world and very firmly telling the world is that that water has been appropriated, and it can't be subject to appropriation by any other entity except those approved by the state.
And in addition to that, Exhibit 4 on here talks about if any of that water were to be sold by the power company at any time, any gain on that sale would go to the benefit of the rate payers. So what we're trying to do is send a

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message there that under any circumstance, any attempt to take that water out of the Snake River basin is going to be met by a united front of both the power company and the State of Idaho and of course all the water users in the state.

MR. COWEN: We only have two senators against 48 -- or 98. I just wondered if you can prove beneficial use.

MR. KOLE: Well, yeah, the water's being used beneficially. It's being used to generate electricity. So that's I think the argument there.

MR. COWEN: Just so if you can prove beneficial use (tape inaudible).

UNKNOWN SPEAKER: If Washington comes up can Idaho Power use that water that's sitting there that's laying there? Are they going to give us some of that (tape inaudible).

MR. COSTELLO: Well, under this arrangement the governor acts as trustee for the state, and we're going to try and nick them for a mill per kilowatt for administering the trust.

MR. NELSON: All of which will be passed through to the rate payers.

CHAIRMAN: You had your hand up. Yes, you.

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MR. STEWART: Yes, Fred Stewart. And it goes along the same line as Jerry Cowen. I've always been concerned about the water coming from California recognized in many hearings. Legislatively we have a lot of sincere people wanting fire generation, a lot of sincere people want to develop. My big concern is do we lose it to California from Idaho Power 1,058 cubic feet per second in addition to what they have so a minimum streamflow. Anything I've seen as yet all you've addressed is minimum streamflow at Murphy. The minimum streamflow as adopted by the state water plan was 3300 at Murphy, and then you have different figures at Weiser and on down.

Now, as you increase this minimum streamflow at Murphy, are you going to also increase at Weiser and others on down? Is that the deal? Are you going to leave a gap between Murphy and Weiser so that the thousand cubic feet per second can head on down to California down through the Death pipe?

MR. NELSON: Well, Mr. Chairman, I might try. Fred, this agreement does not propose any change in any minimum flow except the one at the Murphy gauge. Now, it's my understanding that the

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4750 minimum flow at Weiser has been violated at least once already. So I don't think that the changes at Murphy have that much relationship to what goes on at Weiser. That flow may be either too high or unprotected right now. So I don't think you can tie the two together in that fashion.

MR. STEWART: So in other words, we really do leave a loophole there for California to come in because there's nothing appropriated between there and it is an appropriation there?

MR. NELSON: There's nobody that could appropriate the water if they wanted to. There's no place to use it.

MR. STEWART: You can take it on down to California.

MR. NELSON: Well, I don't think you're going to solve that by addressing a minimum streamflow at Murphy.

MR. STEWART: Okay. Increase the minimum streamflow at Murphy, then you've taken that size in cubic feet per second right on down through the system, and this is what Mr. Bebe's objective was in the original petition is to get this power generation on. You've got an unsubordinated right

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all through the Hells Canyon reach which is your 80 percent among your power generation. And Idaho Power has made no attempt whatsoever to in any way protect that. In fact by your own letter, Tom, you indicated that you wanted to start to allow the water to go out.

MR. NELSON: Well, that's a subordinated right, Fred.

MR. STEWART: Pardon me?

MR. NELSON: All the rights in Hells Canyon are subordinated. They're subordinated to uses within the Snake River watershed. They're not subordinated to uses in California.

MR. STEWART: They're unsubordinated rights.

MR. NELSON: They're subordinated. They're subordinated by the FERC license and they're subordinated by the state water permit.

MR. KOLE: That's a key factor here, too, Fred, is that the subordination clauses say they are subordinated to uses within the Snake River watershed. So as to uses that would take the water out of the Snake River watershed, they're unsubordinated. It's very important to remember that because if any other state tries to make an inter basin transfer, it's going to be our

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argument that that water has already been fully appropriated.

Now, Mr. Cowen's point is very well taken. If the federal government decides to use the federal law to preempt state authority, there's nothing that we as a state can do about that, but we're going to make every effort we can as a state to make sure our house is in order. And that's the reason why this agreement is drafted the way it is.

MR. COSTELLO: Except there is something we can do because they can't take a vested property right without compensation.

MR. KOLE: Right. That's what we're trying to do.

MR. COSTELLO: So we're in better shape than we were before.

MR. KOLE: Correct.

CHAIRMAN: Next question. John?

MR. PEAVEYCUP: John Peaveycup. Gene may have asked this, and I wanted to be real sure, but if we run into a string of really dry years like 1977, and that 4500 was actually say 3600, those water rights that were protected in 1180 are still protected. I mean the power company's junior to

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all existing rights clear down to zero.

MR. KOLE: Those legal rights as of November 19th, 1982. I think it's important to note that in entering the negotiations, the issue of expanded use and quote, unquote the illegals came up. And those parties are treated in the agreement you have before you by paragraph 7E.

MR. NELSON: D.

MR. KOLE: Yeah, 7D, which will require those individuals who have an expanded use in order to get a water right vis-a-vis the power company are going to have to take action by June 30th, 1985. And we'll hope to have an administrative process set up in the very near future to handle that problem.

CHAIRMAN: Questions?

BRUCE: In addressing the junior rights, when you say the minimum streamflow in Caldwell is 3900 cfs in dry years and I have a well 80 miles in Thousand Springs and the aquifer is theorized to move one mile every four years and Idaho Power and the State of Idaho said pretty much just shut your water off, you really get no initial effect of the streamflow in the Snake River for 3200 years under that hydraulic pressure. So when you

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say -- are you going to like last night to me last night you said that wouldn't be (tape inaudible) the burden would be on the state to provide the water (tape inaudible). Tonight I think Pat Costello mentioned it would be just shut off. I just wanted you to address that.

MR. COSTELLO: Well, first of all, the primary of addressing that problem is that the water resource department will do its planning based on not granting any more rights or any kind of rights that would take it down in the worst case to below the minimum streamflow. And when they have finished issuing that amount of rights, which we say will take a few decades anyway, all subsequent rights after that presumably will be coupled with some kind of a condition that in critical water periods they have storage rights or something upstream that they could release water down to protect that minimum flow.

Do you follow me?

BRUCE: You're saying until you reach that critical period of time, then you would -- until you pass a statute that says from now on, our policy is that from now on when we reach the critical point (tape inaudible).

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MR. COSTELLO: Right, yeah. That will be the primary way of addressing the minimum streamflow. But I suppose you could posit a situation between now and the time when the department reaches that where through improper planning or just extraordinary circumstances that we can't conceive of somebody that gets an unconditional water right which is junior to this hydropower right might be found to owe compensation in the event that we get into a critical period that takes us down below the level we now think we can go to.

BRUCE: Is that burden on the permittee or on the State of Idaho?

MR. COSTELLO: On the permittee.

MR. NELSON: I think, Bruce, as we discussed yesterday, you can't in your postulate shut your well off 80 miles away and do any good in 1995 -- (tape stopped and began again at a slower level.)

UNKNOWN SPEAKER: Do we have it already specified how that would be done?

CHAIRMAN: Mr. Gardner, did you have a comment?

MR. GARDNER: I was going to comment on the gentleman's question back here by saying that the

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study by Joel Hamilton (tape inaudible) also delineates what they think are the most likely 195,000 acres that could be developed in the state. I think they worked in conjunction with Chuck Broadway.

CHAIRMAN: Fred.

MR. STEWART: (Tape inaudible.) He stated 1.4 million acre feet actually goes over Milner, and that's all been plowed on, so to speak. The controversy so far is between Idaho Power (tape inaudible). But right here in the Twin Falls/ Jerome area there arises a real problem. You can take that 1.4 million acre feet down to the Bruneau project (tape inaudible) remnants of these canal companies. Does this agreement in any way have an impact upon the decision of that? You've got the private power company, so to speak, is wanting a hydropower dropover. Then you've got many, many small hydropowers in the area. Then you've got you're consumptive use. Now, is that going to be decided by public interest? And if so, who makes that decision? Who has the great omniscient (tape inaudible).

The Constitution says very plainly that consumptive use has the priority over Idaho

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generation. Idaho Power of course has a prior right. But with the canal companies now, I think it's a real critical question because does the canal company put on the 35, 60 million, I don't know where the figures are now for these things, and then all of a sudden they find that their rights are going down to the Bruneau project? Then we're in serious financial trouble here. What ramification is this going to have?

MR. NELSON: The only place we touched that, Fred, is in Exhibit 7A, which is the authority of the -- It's proposed to give the director authority to subordinate hydropower rights. And if that statute were passed and were applicable to the Milner permit, then in theory the director could subordinate that power right. So the situation you postulate could take place, but the power plant could be built and the water could be run out on the Bruneau. But that's the only place this particular agreement would touch on the conflict between the hydropower right at Milner and the Bruneau plateau gravity closest.

CHAIRMAN: Sir.

MR. LEMON: George Lemon. The lowest ever recorded flow was July 9, 1949 by the USGS of

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3,900 feet at about Murphy, but the average flow for the month of July 1949 was 7,702 feet. Now (tape inaudible) say that somehow control of the river had caused that low flow. What is to keep Idaho Power from exercising their dams on the river to drop the flow below the 3,900 feet and a (tape inaudible) cutoff of upstream use?

MR. KOLE: Page four, paragraph 7B says that the operation, any fluctuations resulting from the operation of the company's facilities shall not be considered in the calculations. So in other words, if they hold back water at CJ Strike and that causes the water level to go down, you don't calculate that into the minimum streamflow.

MR. LEMON: So the streamflow runs between six to eight thousand cubic feet per second from the outflow of the (tape inaudible). Now how can they get below that point in the Snake River below there without control or manipulation?

MR. NELSON: Well, pumping out of the main stem. The pumps on the main stem above Swan Falls have a capacity in excess of a thousand second feet.

MR. LEMON: That doesn't get you down anywhere near the 3,900.

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MR. NELSON: It gets you down to 45. It gets you down to 45. In 1981 it occurred in about three days for being well into the 7-8,000 cfs range number 4500. So man's doing a lot of that, George.

MR. LEMON: I realize man controls the river (tape inaudible). To the '30s we diverted it all through the aquifer from above Milner (tape inaudible) maintain more water in the aquifer to keep the minimum streamflows up above.

MS. MARTIN: Elaine Martin. I notice in there that you talk about mitigation and leaving it open for later discussion. Hells Canyon is subordinated to upstream uses. Mitigation, though, will allow you to work out a fee, I take it, for Hells Canyon as well as the other dams for winter storage?

And also, will that mitigation have to be worked out even if the -- in other words, right now, if someone wanted to do a project and it didn't look like it would affect the 5600 per se, would they still have to do the miti -- I mean, you know that it's going to affect it. I mean, there's no doubt about that. But would they have to mitigate from right now immediately, or are we

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talking a mitigation that only occurs when we get close to the winter 5600 cfs?

MR. NELSON: Elaine, the basic reason for the mitigation provision is when we were trying to wrestle with how to regulate the river using streamflows at Murphy, you have to keep the split personality of the river involved, and the numbers were based on zero flow at Milner. But you also have to recognize that winter flows above the critical period are of extreme importance to the company in meeting its load.

So the mitigation was put in in an attempt to recognize that value that even if you're not at 5600, you have to address the value of those flows for hydropower purposes. So rather than move to a number, the control mechanism is mitigation.

All we're addressing here in the terms -- for those of you who are lost on what we're talking about, it's Exhibit 6. And the control for the winter season below Milner and above Murphy states that if you want to divert to storage in that reach in the winter months, you have to mitigate for adverse effects on hydropower. Neutrality is that the parties have

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not suggested where you consider the mitigation as being calculated.

And you have to keep in mind the difference between a legal right to compensation and an analysis of economic damage. And that's what you address in mitigation. We avoided the word compensation for that reason. Mitigation in the sense of "making less harmful" or "lessening the effect of" can be effectively anything. So we just left it open to the policy maker in that case to resolve it if and when you ever get one of those applications.

We can tell in the negotiations we weren't going to solve it, that we were going to loggerhead, we were going to deadlock on that issue. So we said all right, we'll go to the board, suggest or remain neutral, and at such time as somebody presents one of those projects, then it will have to be addressed. Hopefully maybe there will never be one.

MR. COSTELLO: I might just indicate that the other important aspect of that determination was that the controlling mechanism was left in the hands of the state, and the state water board at any time does have the authority to address that

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issue and to make policy determination as to what mitigation means. It's just that on the first cut, the first time we go through this, we're agreeing that we're not going to try and get them to make that determination at this time.

MS. MARTIN: But we are going to allow Idaho Power without any bad feelings to come back and fight for as much as they could possibly get for water used during that period in all dams?

MR. COSTELLO: Corresponding with the other side will fight for nothing. And the state will get caught in the middle.

MR. NELSON: We just, actually, I guess when you come down to it, it was an issue where we had irreconcilable differences, if you will. It sounds like we're getting a divorce and we're not. We couldn't agree and it wasn't important enough to break the negotiations, so we said let's just not talk about it anymore.

MS. MARTIN: I looked at that, too, and I thought well, if they didn't pump the five months in the winter and they couldn't pump the two months in the summer, they had to put water in storage five months out of the year.

MR. NELSON: And they'll have to mitigate

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for it if they do it in that reach. But agreeing not to talk to avoid a fight, that's my wife does. She says do it my way or I won't talk to you.

UNKNOWN SPEAKER: I have a question on (tape inaudible). Do I understand that the overriding reason for the general adjudication is to force the federal government's hand in state court?

MR. COSTELLO: I should clear that up. That's only one of the reasons. There are a large number of other reasons that we have to begin an adjudication. Number one, we think just in a review of what we know now that there is potentially a large amount or large blocks of water available upstream that could be put to beneficial use.

Secondly, it's important I think for everybody to begin a quantification of their own water rights so that they know what they have with some degree of assurance. If you look at the history of the western United States, virtually -- well, in fact every other western state has begun or is in the process or has concluded adjudication of the water rights. And they hit this point 10, 20 years ago because of history. We're at that point now where history is kind of compelling us

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to begin that process even though it's going to be a painful process.

And finally, I think in order to manage the system that we're talking about here, you have to know what you've got. If you don't know what you've got, you can't manage it. It's like taking an inventory and having some idea of what's on the shelf. If you don't have that, you're not going to be able to manage it.

UNKNOWN SPEAKER: (Tape inaudible.) Force the federal government to pick up part of the tab on (tape inaudible). And secondly, what's to keep them from (tape loaudible) if they don't get the answer they like to see?

MR. KOLE: We've already begun to make approaches at the federal government on this issue to see if we can get them to participate in the cost study because of the benefits there will be to their agencies, as well. And what was the second part of the question?

MR. COSTELLO: Second one was can they go back?

MR. KOLE: No, you can't. The US Supreme Court I think has been pretty clear on that. Water law is primarily an area of state court

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jurisdiction. If the state is moving to handle that responsibility that the preferable forum is to go to state court. So that's one of the reasons for taking some responsible action in the very near future.

MR. NELSON: But the race is partly to the swift also because if the federal government gets to the federal court first, that's a major factor of where the case stays.

CHAIRMAN: Any questions?

MR. FERGUSON: Paul Ferguson. When you talk about adjudication, will there be any attempt to quantify the amount of water that should be on the ground or will you leave those old finds as they are? We know there's a lot of them that take our water (tape inaudible). Will there be any disturbing of these water rights?

MR. NELSON: Well, our resource board could answer that.

CHAIRMAN: Mr. Young, would you like to handle that?

MR. YOUNG: The existing water rights normally are reconfirmed in the (tape inaudible) to the extent that they have continued to be used in the way they were originally used. Now,

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beneficial use still is a measure of the water rights. And that will have to be looked at. The state government at this time fully recognizes the value of trying to reach out to (tape inaudible) because of that over application of water. We're going to be reluctant to take away that recharge, free recharge and perhaps have to replace it with a recharge project that everybody pays for. We understand that. That will be considered.

CHAIRMAN: Bill, do you have a question? Elaine?

MS. MARTIN: I've already had several calls today wanting to know if they were one of those 3,000 people being released. Do you have an itemized list of those being released and could I please have one?

MR. NELSON: Well, I am going to mail one if it hasn't gone out already to every lawyer that's appeared in the case and every defendant who has appeared pro se. And if somebody has a question they need to have answered outside of that, we'll be glad to try to respond. It's alphabetical.

Our problem is we didn't always pick up all the names on the permit when we prepared the complaint. But we'll certainly cooperate with you

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if you have a question.

But you probably have a pretty good idea if your water right involves essentially anything but irrigation or an overstated domestic, in other words, if you filed a hundred acres and called it domestic, we'd probably dismiss you. But if you're anything but irrigation, you're probably out. If you were licensed prior to November of 1982, you're out. Or if you filed anything by way of proof of beneficial use prior to November 1982, you're out.

Now, if you were actually in use by November of '82 or had a substantial investment already in your project as of that date, then we don't know about you, but you're entitled to be dismissed. So in that case you need to get with the department. We'll send you some written questions to answer. And based on those questions, then you'll be dismissed later. But we did dismiss all the non-irrigations and all of the known people in use as of November '82 today. So if you're in one of those categories, you're probably out.

UNKNOWN SPEAKER: I was just wondering (tape inaudible.)

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MR. NELSON: You mean the people who are dismissed?
UNKNOWN SPEAKER: Yes, those that will be dismissed.
MR. NELSON: All right. The people that come under 1180 that have been or will be dismissed, the effect of the dismissal is to remove the lawsuit and to remove Idaho Power Company's water rights as any impediment to your development. Now, that obviously doesn't guarantee you a water right if you've got a problem with a neighbor or well terms or something like that, but as far as the power company's lawsuit or its water right, you will have no further involvement with either.
UNKNOWN SPEAKER: (Tape inaudible.)
MR. NELSON: Dismissing.
UNKNOWN SPEAKER: (Tape inaudible.)
MR. NELSON: That's right. It's a recognized subordination of the power company's rights to those permits or licenses.
UNKNOWN SPEAKER: (Tape inaudible.)
MR. NELSON: Anything that was in use or you had the substantial investment as of November '82 or any non-irrigation use effectively will be

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immune from challenge by the power company's water rights.
UNKNOWN SPEAKER: I have one more question. (Tape inaudible.) Between the meeting last night and also again tonight, it occurs to me that (tape inaudible) is that there is a loophole. I don't quite understand it. But it was mentioned last night and again tonight if Idaho Power sold (tape inaudible) money would be put back to the users. What would give them the right to sell this water and to (tape inaudible)?
MR. NELSON: I can answer that. If you remember the nursery story when you were a kid about chicken little running around saying the sky was falling. Well, this is kind of a chicken little situation, and it came out of the politics of the subordination fight. And somebody said well, we have to take Idaho Power's water rights away because maybe they'll sell them to California, take all the money, and run off into the sagebrush.
So this statute is an attempt to say in that unlikely event, the benefit of the money goes to the rate payers and not to the stockholders. Now, the way the statutes are structured now, in

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order for the power company to sell a water right, it would need the consent of the Idaho Public Utilities Commission, the Federal Energy Regulatory Commission, and the Idaho state legislature. When it got all that done, it would have to go to the Department of Water Resources and prove that there was no injury to any other user by reason of the change in place of use or change in nature of use of that water right.
Now when we get all that done, then the water is going to go someplace. But I suggest you and I will be a lot older before that happens.
UNKNOWN SPEAKER: I guess you don't do that for grandchildren or great grandchildren (tape inaudible), but we do know that Idaho Power is in business of selling power. That certainly includes in order to sell power to the general public (tape inaudible). They can sell it to somewhere else and then on the side they can generate their power all the way down to the State of California and generate more power than they'll ever generate to Swan Falls (tape inaudible.)
MR. NELSON: It's a question ahead. But I think when our grand kids hit the turf, they're going to be in the legislature, too. I think

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they're about as likely to approve that situation as the present legislation. I don't see that as a risk, frankly. I mean, it's not even a possible risk in my book. But the statute says if they can work out a deal and get it approved and get money from California for doing it, the money goes to the rate payers. Maybe it's worth more that way than it is raising potatoes. I don't know.
UNKNOWN SPEAKER: (Tape inaudible.) It's kind of just a coincidence really. (Tape inaudible.) It bothers me. It really does (tape inaudible.)
MR. COSTELLO: Could I suggest just a couple of things on that because obviously it's a concern. You know there's more people down in California. They've got more people in Congress than we do. And you look at that and they've talked about it openly. It's been in the press. And their governor's even appointed some commissions to look around to try and find some water. And one of the reasons for that is that Los Angeles is running out of water and Los Angeles has to give up a lot of water to Colorado, Arizona.
But the best way to protect Idaho's

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water I think is for us to get our law and order and to get everybody in Idaho pulling on the same train. If we don't do that pretty quickly, something like that could happen.

UNKNOWN SPEAKER: (Tape inaudible.)

CHAIRMAN: You will be last. Yeah, you.

MR. PETERS: Ralph Peters. (Tape inaudible.) Now that they are dismissing claims against nonagriculture users (tape inaudible), where do we stand on it? Anybody else know where we stand on it?

UNKNOWN SPEAKER: (Tape inaudible.) Prior to whichever date it is, November 19th of '82 or October 1st of '84, either way, will have to go through a new public (tape inaudible). So before we process it, correct me if I'm wrong here, you'll have to have legislation worked out.

MR. COSTELLO: Well, that's not quite right because it's covered by the contract, the 1180 contract which does say immediately subordinate to nonconsumptive, domestic, commercial, municipal, and industrial right out of the box.

MR. NELSON: By negative inference, Norm, what we did was we simply didn't cover those kinds of people in the interim with the suggestion that

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the department proceed to process them. And once we get the public interest criteria in place, then they will be subject to it. But it was our thought because of the minimal impact of those uses, the department could process while we're getting this thing in place to get the backlog for Jerome and Arco and Blackfoot out of the way.

But we didn't say so because that was just kind of left open because we didn't say you couldn't. We thought maybe you'd leap on it.

UNKNOWN SPEAKER: I want to congratulate you, gentlemen, (tape inaudible), and you can come to a compromise and I think although it may not be perfect, I think we are on the road to getting the Snake River working for all the people of Idaho. And I want to congratulate you.

UNKNOWN SPEAKER: I'd like to follow up on Jerry's comments I certainly agree that on May 15th and the next few, if there are any heroes, it will probably be these three fellows at the table and some of their cohorts. In fact, a couple of them will get paid in personal satisfaction (tape inaudible). It certainly is a fine map or opportunity to follow a route laid out for us. On the other hand, I hope the people

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don't get the misimpression the condition is settled. Clearly it isn't. We're halfway or a little over from the final resolution we all hope for, and I certainly hope the water board and the public and the voters will look at this think objectively. It's very complex. There's a lot of interests at stake. A lot of people's rights are at stake. So look at it with an open mind, objectively, and critically. We do have a long ways to go. I think it's very important the public realizes (tape inaudible).

CHAIRMAN: Ladies and gentlemen, on behalf of the Water Resource Board, we again appreciate you taking your time to come out and listen. Give us your comments. We will be holding public hearings. The legislature will also be holding public hearings in the near future.

If you want to go through another session, we will be in Boise November 1st, the gold room, fourth floor, 7:30. So if you are in town, stop in. Thank you for coming.

(End of meeting.)

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REPORTER'S CERTIFICATE

I, Patricia J. Terry, a Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

That said deposition was transcribed by me in shorthand and reduced into typewriting under my direction, and that the foregoing transcript contains a full, true, and verbatim record of the said audio.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal April 19, 2007.

Patricia J. Terry, Court Reporter

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REPORTER'S CERTIFICATE

I, Patricia J. Terry, Court Reporter Pro Tempore, County of Ada, State of Idaho, hereby certify:

That I am the reporter who took the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at , Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand 19th of April, 2007.

Patricia J. Terry, Court Reporter Pro Tempore
CSR No. 653

Orr Affidavit

Exhibit 12

Transcript of Idaho Water Resource Board public information meeting on Swan Falls settlement (Nov. 1, 1984)

ORR AFFIDAVIT EXHIBIT 46

Transcript – 11/1/84

EXHIBIT 46

MAIL 94835

IDAHO WATER RESOURCES BOARD

* * * * *

Public Information Meeting on

the Swan Falls Agreement

Boise, Idaho

TRANSCRIPT OF PROCEEDINGS

Held on November 1, 1984

before Don Kramer, Chairman

* * * * *

Transcribed by
Heidi Blodgett
and Dianne E. Cromwell, CSR No. 21

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ORIGINAL

APPEARANCES

Present:

Tom Nelson, Idaho Power Company
Pat Kole, Counsel for Attorney General
Pat Costello, Counsel for the Governor
Frank Sherman, Department of Water
Ken Dunn, Director of Idaho Department of Water Resources
Charles Jones, District 11, Water Users Association
Gene Gray
Bob Hammeth
Mr. Young
Bill Ringert, Senator
Gail Bray, Senator
Harold C. Miles, Golden Eagle Audobon Society
Marjorie Hayes, Idaho Consumer Affairs
Sheryl Chapman, Idaho Water Users Association
Al Fothergill
Pat Ford

* * * * *

IDAHO WATER RESOURCES BOARD

* * * * *

Public Information Meeting on
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* * * * *

BOISE, IDAHO
November 1, 1984.

MR. COSTELLO: Chairman Kramer, Members of the Board, legislators, and members of the public.

The governor did ask the Board to put on these meetings around the state and is very appreciative of the Board providing this opportunity to explain to you the details of the agreement that we have reached with Idaho Power Company.

To give you the governor's perspective on this agreement, as I think almost all of you are aware, the governor for two years sought an enactment by the legislature of a subordination bill which would have by law imposed a subordination condition at Swan Falls. We weren't successful with that.

The governor never intended by pursuing subordination to create a climate where we could take the river down to zero or down to the minimum flow or anything else. But he did feel very strongly, as he said repeatedly, that the state should be in control of making the decisions as to the allocation of a very precious and ever more

scarce natural resource. And that was his motivation in seeking subordination legislation.

But with the help of Senator Noh and Senator Ringert and others who are here, despite that help I should say, we weren't successful in getting that done.

And after the 1984 session, Idaho Power Company approached the governor again with an offer to enter into a partial settlement of the Swan Falls litigation under the authority of legislation passed in the '83 session, called Senate Bill 1180.

The governor responded with an invitation to enter into negotiations to settle all of the litigation rather than just a partial settlement. And Idaho Power Company accepted that offer in July, and we commenced negotiations.

There were at least eight meetings among the three principals: Attorney General Jones, Mr. Bruce from the power company, and the governor. And in the meantime, the three of us met on virtually a daily basis trying to come to some meaning of the minds as to how we could best approximate what should be the balance between two competing uses: the need to produce hydroelectric

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power and the need to make water available for agricultural development. And what we came up with was the approach that Frank has outlined for you.

The governor, after reflecting on where we ended up with this agreement, feels that what we have done is come very close to where we would have ended up even if the legislation had been allowed to pursue its course. Had either side won a total victory in court, the political will would have been there on -- in support of either side that lost to bring the pendulum back to the middle and to strike some kind of balance.

And just as I think the agricultural community wouldn't have sat still for recognizing that the power company had a right to virtually all the water in the river, neither would the ratepayers have sat still for the kind of no-strings-attached development that could have taken place had the state won the lawsuit.

So either way the legislature probably would have answered this at some point down the road with something like what we've done here, which is to try to take a middle ground between the two competing interests.

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If you accept that thesis, then the question becomes, isn't it better to try to come to some approximation of a balance through negotiation and compromise, or should we go through the process of taking several years and several million dollars to reach the same -- approximately the same position after years of litigation and further efforts in the political arena?

The governor feels very satisfied with where we did end up. He does think that it reflects a very reasonable balance between the two uses.

And he would ask that you look at it in that light and form your own conclusions on that point. But he does think that it's important for both groups to stop thinking in terms of achieving some kind of total victory either in the legislature or in the courts and begin to focus on what mechanisms we can put in place to make sure that while we leave open the opportunity for further development of our agricultural interests on the Snake River, that we do so in a way that does take into account the effect that that development has on all of us ratepayers.

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And with that, I'd be happy to respond to questions after my two colleagues have had their chance.

CHAIRMAN KRAMER: Thank you, Pat Costello.

Pat Kole from the Attorney General's Office.

MR. KOLE: Thank you, Mr. Chairman. I'll be brief because I think you've all been sitting down quite some time and probably want to ask some questions.

The negotiation process that we went through we hope has brought Idaho water law into a new phase, and that negotiation process quite simply is to bring Idaho water law into the 21st century. Our water law in the past has served us well, but it needs to be updated and brought into some sort of fine-tuning to last us into the next century.

What we have tried to do with the agreement that you have before you is to come up with a proposal that will equitably balance the competing interests for a very vital natural resource. Within that context, we tried to focus on certain absolute musts that we felt were necessary.

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The first one was is that a public resource such as water has to be controlled by the people of the state of Idaho. And the decisions affecting that water have to be made in the public forum as opposed to a private corporate boardroom. Now, we were very pleased to find that Idaho Power shared our concern in that regard and felt that they did not want to be the water master for the Snake River. So the agreement contemplates and is predicated upon state control through the public input process of our water resources.

Secondly, we wanted to focus on protecting all of the individuals who are currently using water. I think the agreement that you have in front of you protects everybody who is currently using water.

Third, we wanted to make sure that good water users who have development projects that benefit the state economically, and that includes both agricultural, municipal, industrial, and domestic uses, would be able to go forward. And I think the agreement that you have assures that good water users will be able to go forward into the future.

Finally, we wanted to make sure that

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the state would be in a position to take responsible management actions in the future. And so what we have set forth here is a basis upon which further studies, both of economic factors and of hydrologic factors, can take place so that we will be able to wisely manage the water resource that we have been blessed with.

In conclusion, I think it's fair to say that litigation has benefits for everybody. It also has detriments. And one of the major detriments is that you spend a lot of money on it.

What we've tried to do here is to change the focus away from spending money in an adversarial situation and spend that money in a positive setting towards responsible management of a vital resource.

Thank you, Mr. Chairman.

CHAIRMAN KRAMER: Thank you, Pat Kole. Representing Idaho Power is Tom Nelson.

MR. NELSON: Thank you, Mr. Chairman.

I will say that when the governor responded to our offer to re-open the 1180 negotiations, that the company was glad to accept his interest in trying to settle the whole case.

The power company actually, as a matter

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of fact, as a matter of practice, as a matter of legality, was never a water master; certainly had no interest in being one. But if the perception persisted that that was what happened, it had to be addressed, and I think that the agreement addresses that.

When you read the agreement, I wish you would keep in mind that there's a lot more to that agreement than just a couple of minimum flows at Murphy. The major part of that agreement in my mind and in the mind of the management of the company that's equally important with the minimum flow is the concept of a public interest review of all new water uses. Without that, I don't think the company would have been agreeable to entering into this particular agreement.

You have mitigation for certain kinds of new water uses that's required. You have an adjudication. You have studies that have to be performed. But basically what all that does is really shifts the focus and the direction of the state of Idaho water policy from one of development by he who gets there quickest to a question of what development should proceed and under what conditions. And that's a radical

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change of a hundred year history. That I think is really in summary what the public interests and other parts of that document do.

The state wants the policies replaced. We'll be in a position not only through the statutes to manage the resource, but hopefully we'll have the knowledge to make the resource meet the objectives that are planned for it.

But also when you read the agreement, it looks a little like a camel being defined I guess as a horse designed by a committee. But it makes a lot more sense if you remember what we were trying to do, that we're trying to settle some litigation.

And so in that regard, it looks a little different than it might if you were sitting down to devise a whole new water right system for a brand new state. Hopefully, that would look a little different than what we had to work with, which was an existing constitutional and statutory framework within which we had to settle this litigation.

When you look at it in that regard, then remember that the attempt was to settle all of the issues in the litigation and to settle them

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as a whole. So the agreement was approached on that basis. So it doesn't lend itself very well to picking at little pieces of it. You have look at it as a whole. If makes sense as a whole, that's the way it should be accepted. If it doesn't make sense a whole, then it should be rejected.

And that I think is the last point I want to make, is that this agreement can't be implemented by the governor, the attorney general, and the Idaho Power Company. It takes a lot of work by the real policy makers of the state of Idaho, being the Water Resource Board, the legislature, and some federal involvement also.

So it's not a take-it-or-leave it proposition, obviously, because we're not in a position to say that. But I can say that any changes in this agreement, since it was done as a whole, as an entirety, will open either the possibility that the agreement is never implemented in any form or that the agreement will have to be renegotiated.

So that's why I asked when you review it, that you look at it as a whole. And to me, when you do that, what comes out to me is what's

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left is a lot more important than what could be perceived as having been lost. But in any event, I'd be willing to answer questions when we get there.

Thank you.

CHAIRMAN KRAMER: Thank you, Tom Nelson.

We're gonna take about a 3-minute break, 4-minute break. Before we break, I'd like to recognize Senator Gail Bray. Glad to have you with us this evening.

Let me mention to you, this is the sixth informational meeting that we have put on in the last week or so. We've talked to approximately 300 people, so it's been quite enlightening to all of us who have traveled through the way. So Let's have about a 5-minute break, and we'll be back.

(Recess.)

CHAIRMAN KRAMER: Questions and answers. We hope that you ask the questions, and we have a team up here that can answer. When I look at this whole group, I'm sure you should get some answers. Before we start I'd like to ask, any of the Water Resource Board members have questions? Mr. Gray?

MR. GRAY: I do, Mr. Chairman. I have about

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five of them. Well, after six meetings they accumulate, and we'll save the best for last.

Now, gentlemen, on your exhibit number 2, we're talking about adjudication and the fees that will be charged. It will fall under 42-14, 14B-5. And it's the additional variable water use fee for each claim filed public, $100 per cfs. What entities fall into this public category?

(Inaudible.)

MR. KOLE: Yeah. Well, actually I'll take a quick stab at that. That's all the various public uses that our water is put to; for example, recreation, fish and wildlife, hunting, outdoor activities. That's meant to pick up all of those fees or all of those uses and have an appropriate contribution made by the state in the adjudication formula.

MR. GRAY: But how are you going to charge that 100 cfs?

MR. KOLE: It will be paid for out of the general fund or theoretically out of the general fund. I want to issue one disclaimer on this fee schedule. This fee schedule is obviously something that the legislature is going to have to take a look at, and what we've tried to do through

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a subcommittee appointed by the governor is just come up with a starting point.

And this is a starting point. Obviously, the legislature will have their own ideas. They're much more experienced in this area than we are, and we'll defer to their judgement, obviously.

CHAIRMAN KRAMER: You know, it's really fun that attorneys have disclaimers, and those of us that are not attorneys just say we don't know.

(Laughter.)

MR. KOLE: That's the sixth time you've used that joke.

CHAIRMAN KRAMER: First time.

MR. NELSON: If that's really what you say, Gene, you wouldn't say much but that.

MR. GRAY: Exhibit 3. $200,000 are to be appropriated to the general account for a technical advisory committee which the governor shall over-see.

Is the $200,000 just the first year's shot, or is this going to be an ongoing study-type thing? How do you perceive that?

MR. NELSON: The technical committee estimated it would take a minimum of three years

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to accomplish those studies, so that would be the first fiscal year's appropriation.

MR. GRAY: Okay. How will this tie in with the legislative committee, the study, the legislature committee thing that we've got going on? Will that tie in at all? Will this be separate?

MR. COSTELLO: This group would pick up on the recommendations of the legislative technical advisory committee as to the things they said deserved further study. Primarily, it's to put the department in a position where they can adopt meaningful public interest criteria, for which they need more detailed information on the economic benefits to different uses, as well as the different hydrological implications of uses at a particular location and of a particular type.

MR. GRAY: Okay. I notice in the – that through the whole agreement there's an absence of mentioning of this program. Is this kind of study not needed in continuing this program after it's all put together? I mean, where do we lie with this thing?

MR. NELSON: You mean, the technical study, Gene?

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MR. GRAY: Yeah.
MR. NELSON: Basically, the technical advisory committee to the legislative council committee identified some immediate and pressing deficiencies in technical information. As they saw it, you should fund on-going studies.
But in order to ask the "what if" questions that fall out of this program, what if you develop land here versus what if you develop it here, and so on, you had to spend that kind of money to get yourself in a position to really answer those questions. But hopefully the studies go on afterward to make sure that what you think you know is really true.
MR. GRAY: You know, Mr. Chairman, all week we've heard Mr. Kole talk about the bang for the buck or the buck for the bang, whatever it is we're going to get. But it would appear to me that if monies were going to appropriated for studies, that they would possibly be appropriated to the Department of Water Resources in lieu of a technical advisory committee, because already it would seem like we have a jump on the process.
So is there a reason that you're filtering this through a technical committee in

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lieu of taking the $200,000 and giving it to the Department of Water Resources?
MR. COSTELLO: Well, I don't think there's any -- I'm sure that whatever we do would be in consultation and cooperation with the department. But by housing this advisory committee in the governor's office, it was felt that it would give it a higher level of visibility and also the tendency if it were melded into the department's budget, when it goes through the legislative process, that kind of runs the risk of if you put in a new 200 for that, that you might take out 200 somewhere else and the net wouldn't be there. And we wanted this specifically earmarked to go for these studies to put into place these new public interest criteria.
MR. GRAY: Thank you.
Mr. Chairman.
CHAIRMAN KRAMER: Mr. Gray did this. He knew it was his last chance to get the last word.
Do the Board members have any other questions? Mr. Williams.
MR. WILLIAMS: Sure. I have one question. This is the first time I've had an opportunity of looking at Exhibit 7B, which is one of the

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extensive exhibits that are attached to the agreement.
As I read this, this appears that this not only applies to the Snake River, but any other river in the state. Is that true? And could one of you just briefly review each of the sections for the folks to explain what it is.
MR. COSTELLO: It would be easier to do it at the blackboard in graph form. But it does apply anywhere in the state where there is a -- either an unsubordinated hydro right or a hydro right that it's not clear whether or not it's subordinated.
And basically what we're saying here is that the approach that we arrived at in settling this lawsuit makes good public policy sense and is -- can provide a comprehensive framework for the legislature to regulate hydropower rights under the authority of n 1928 constitutional amendment, which said they could regulate hydropower rights and that they would be treated consistently throughout the state.
In other words, you would use the *minimum stream flow concept* as the primary mechanism for protecting in-stream uses, and that

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any hydropower rights that exist in excess of that minimum stream flow would be held in trust by the state, legal title to that water right in excess of a minimum flow being in the state, for the benefit of the power right holder and also for the benefit of the people to allocate it to up-stream uses only which meet the public interest criteria.
In doing that you are using the hydropower right to say that the river has, in essence, been fully appropriated, because that right exists, and it's the right to -- basically all the flow that gets down there.
And, therefore, the state is in a position to impose rigorous public interest criteria that it might not otherwise be able to do on an unappropriated stream.
MR. WILLIAMS: Okay.
CHAIRMAN KRAMER: Any other board members?
UNKNOWN SPEAKER: Mr. Chairman.
CHAIRMAN KRAMER: First, I'd like to recognize Mr. Bob Hammeth. He kind of got in here without me seeing him. He's from St. Mary, and he's also a board member. Mr. Hammeth.
MR. HAMMETH: I have a question about Washington Water Power's rights in Coeur D'Alene.

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Is there any subordination at all?
MR. KOLE: Well, those water rights at the present time are unsubordinated. It's our intent, in looking at Exhibit 7B, to provide a voluntary mechanism by which Washington Water Power will come in and negotiate with the state, much the same as Idaho Power has, and enter into a similar arrangement so that they would get the benefit of this format. And at the same time, the state would be able to protect people who are currently using water.
As you might know, that facility on the Spokane River really is very analogous to the Swan Falls situation, and because if they were to assert their water right, current water users would have to shut their water use off.
MR. HAMMETH: How about their rights on Pend Oreille?
MR. KOLE: I don't think that's quite the same situation at the present time, though I think Norm Young from the department will probably have to answer that.
CHAIRMAN KRAMER: Mr. Young.
MR. YOUNG: Well, I believe there is a facility on the Pend Oreille River, the Kootenai

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River, it would be Pend Oreille that is using most of the water.
UNKNOWN SPEAKER: Speak a little louder. I'm looking at you, and I can hardly hear you.
MR. YOUNG: I've got a frog in my throat, Frank, and I'm having a little trouble with it. There is a facility on the lower end of the Pend Oreille, that during extreme low-flow periods, can use all of the water and then some. So it has somewhat the same situation.
CHAIRMAN KRAMER: Thank you.
Any other questions from the board members? Any questions from the department?
Ladies and gentlemen, it's your turn. Sir.
MR. FORD: Yes, sir. My name is Pat Ford. I want to ask a question -- maybe it stems from my own lack of knowledge, I'm not sure, but I'm not clear how much water this agreement is going to subordinate. I think my confusion comes from the use of the average daily flow, as it's a number as opposed to another measurement that had been more generally used.
When I talked to Wayne Hoss on the phone, I think it was last (inaudible), he told me

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that as he understood the agreement, it subordinated a block of 600 cubic feet per second of water. I heard Senator Peavey say the same thing on television the other night on a report.
Is that true? How had much water does this agreement subordinate?
MR. NELSON: Well, let me have a cut at it. As Pat said, if we had a blackboard, it would be easier to show. But the amount of water up to the minimum stream flow is unsubordinated. Okay. The amount of water representing current uses is subordinated.
Now, in theory, when you squeeze those together, you come to a block not addressed of 600 cfs. That's the difference between 4500 cfs current flow that Frank talked about and 3900, the new minimum flow. And if you look at that 600 cfs, that 600 is not immediately subordinated. It is subject to subordination by state action as new uses are approved.
So you have, as I say, kind of a three-level approach: some absolutely unsubordinated, some absolutely subordinated, and some subject to subordination as a result of state approval of new uses.

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MR. HAMMETH: I guess my confusion comes from I had -- most of the previous discussions, I think, had been in terms of an average monthly flow as opposed to daily flow.
MR. NELSON: No. The state water plan minimum at, I think, all the gauging stations where they have one on the Snake has always been an average daily.
MR. HAMMETH: Is the 3300 an average daily --
MR. NELSON: Yes. We left it that way for several reasons. One, of course, is that people are used to it. And second, if you're looking at protecting in-stream uses that an average of a period longer than a day, a monthly average, for example, will give you a higher number at the Murphy Gauge. But the problem is zero for 15 days and 10,000 for 15 days is a 5,000 cfs average, but it's not a very good way to run a river.
So you need a narrower time period when you're looking at an absolute minimum. If you're looking at planning, probably the best data you have is on a monthly basis. And that may be where you're picking up your monthly information, is that the planning numbers are usually expressed in

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a monthly denominator. 52, 53, 5400 cfs might be a monthly number at Murphy to correspond to the 4500 daily.

MR. KOLE: And the problem you have with the monthly flow is that the environmental concerns that you have just aren't capable of being met. As Tom pointed out, zero for 15 days and then 10,000 for 15 days, you've got a dry river for 15 days, and you have a lot of fish and wildlife destruction. So it struck us that staying with an average daily flow made a *lot* more sense than going with the monthly flow.

MR. HAMMETH: *So I guess I'm still* not certain -- so this is happening in three stages. I guess what I'm trying to get at is, given the existing flow in the Snake River at Murphy and Swan Falls, is some measurement, what is this agreement?

MR. COSTELLO: Maybe if Frank can bring us that --

UNKNOWN SPEAKER: Gene, in that box in the corner are some marking pens.

MR. NELSON: While they're putting that up, there's one thing you might remember is, this is a critical year look. And in every year but the

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critical year, you'll have more flows than this. So you shouldn't be misled by thinking every year you're gonna be there, because you're just not there. But maybe Pat can show you graphically what happens. And maybe he can't too.

MR. COSTELLO: Under this agreement, everything above 4500 is now subordinated, because *that's the level to which current uses have* brought the minimum flow down to.

In other words, current development results in a potential low flow of 4500. If you were to say what is the minimum flow today, that's the best answer we can come up with. Below the minimum flow, not only on the Snake River but on other rivers similarly situated, the hydro rights would be unsubordinated.

The implications of that are, not only do you have the force of law of the state water plan and its minimum flow with whatever priority *date it has, you also have a private hydropower* right with a priority date quite senior to shore up this minimum flow and make it much more protectable. This area in here between the 3900, 5600, and where we are today is unsubordinated today. Okay?

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Now, when we get to sometime in the future, at whatever level the minimum flow is, everything above the minimum flow will be subordinated and everything below the minimum flow is unsubordinated. And the way this block of water gets transformed in -- from an unsubordinated right to a subordinated right is through public interest review of each new water use application.

And the purpose of doing it this way is so that we can impose very strenuous public interest review that people who are adversely affected by it might think deprives them of their constitutional right to appropriate the unappropriated waters of the state.

But by leaving this hydropower right in place up to this level of 4500, they run into not only the statutory public interest criteria, but also, even if they could get around that, into an *unsubordinated hydropower.*

MR. HAMMETH: Okay. I know that these numbers are not exact, but then the -- you're *defining, you're saying* that the 4500 average daily flow is a measurement of the existing flow.

MR. COSTELLO: That's the best

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approximation we could come up with. That was the first question we asked and asked the department and outside hydrologist was, "Where are we today?" You know, "What is the minimum flow today?"

And that's the best number they had.

CHAIRMAN KRAMER: Mr. Dunn.

MR. DUNN: Yeah. What we do is we take the *historic record flows.* And through the use of computers, we then superimpose on that today's development, 1984 development, and say, okay, now, with these historic flows and all of the development on top, what would be the lowest flow in the lowest day of the lowest year.

And that's where we come up with the 4500. And say, okay, that's as low as the river can get under present conditions. So now we're saying, all right, if we approve some permits, we would protect that so it could -- it wouldn't go below 3900.

UNKNOWN SPEAKER: Okay.

MR. DUNN: And that's the reason for some of these studies, so we can further refine that to make sure we're right. And let's assume we go with a couple of years, or three years, some period of time, and do some studies when you find

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out that where that flow is, the lowest flow is really 4400 instead of 45. We're still staying with 3900. So it means that much less water can be developed.

UNKNOWN SPEAKER: So you've got a block of 600 cfs that you're -- that will be, under the new proposed criteria, granted in permits that satisfy those criteria. Once that occurs, you will continue to grant water rights but they will be subject to the limitation that in some years they might not be there. Right?

MR. DUNN: That's right. If there was any kind of a -- not necessarily. We wouldn't grant them if there was no way to be able to stop their interfering with the 3900.

For instance, if you're pumping in the Snake Plain, and that's a new permit, and we say, okay, we'll issue the permit and then when we get to that low flow period, we'll cut it off.

Well, that physically wouldn't allow the water to get there, so we'd say, no, you can't appropriate any water. Because there's no way to be able to go back and shut a groundwater permit off and have it affect the river until a couple years later.

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CHAIRMAN KRAMER: Harold. State your name, please.

MR. MILES: My name is Harold Miles. I'm representing the Idaho Wildlife Federation, Idaho Consumer Affairs. And I suppose this question should go to Mr. Nelson.

We have a certain core of the United States' decree dated -- it was effective April the 2nd, 1907. And this -- well, item 2 on page 2, the plaintiff is also the owner of a legal and valid appropriation of 10,000 cubic feet per second, the water at Swan Falls.

And they have a water right, license number 14362 for 4000 cubic feet a second dated July the 29th, 1919. Now, these are two valid water rights, and I was wondering how they -- Swan Falls got reduced to 8400 cfs.

MR. NELSON: Mr. Miles, somewhere in the dim dark recesses of the past, the power company acquired water rights that exceeded the physical hydraulic capacity of the Swan Falls power plant. You cannot run that much water through it and never could. I don't quite know how that happened.

MR. MILES: Was this reduced by the -- as a

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followup, Mr. Chairman, was this reduced to 8400, then, by the Supreme Court decision or --

MR. NELSON: No. We stipulated in the district court that that was the physical capacity of the works. In other words, we could have had a paper water right for 50,000 cfs at that site, but your water rights are only what you can use. And 8400 was always the physical capacity of the plant. So how that happened, I don't know.

MR. MILES: Will this water right carry forward if you were able to raise the Swan Falls dam or improve the Swan Falls dam, according to your FERC license?

MR. NELSON: No. There's a new application dated I think sometime in March of '83 or April of '83 for additional water against the possibility that that plant is enlarged. Then there's a new filing for the additional water.

MR. MILES: Has that been granted by the --

MR. NELSON: No.

MR. MILES: Thanks.

MS. BRAY: Gail Bray from Boise, District 19.

Who does the review for that unsubordinated 600 to 900 cfs?

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MR. KOLE: That review is accomplished by the director of the Department of Water Resources through an administrative hearing. And the process, as we contemplate it, the public interest criteria are attached as Exhibit 2 to the agreement here.

That review would be of course protected by all the administrative rights that anybody in the proceeding would have, including the right to have a district court judge review it to make sure that the director exercised his discretion appropriately.

CHAIRMAN KRAMER: Does that answer you?

MS. BRAY: A follow up on that. And I apologize, I might be asking some questions that were answered in the presentation, but I wasn't able to get here.

In that review, it's weighing these public interest criteria against each other, and it's just determining which has priority (inaudible). Is there any compensation in that for any of those interests which are denied?

MR. KOLE: No. The water -- if the water right is approved, there is no compensation to anybody, either to the power company or to any

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other person.
MR. COSTELLO: There would be no compensation that would be due to anybody.
CHAIRMAN KRAMER: Mr. Director?
DIRECTOR: One of the other things that happens with the public interest criteria adopted on the back of the last sheet, in fact, if there's a provision allowing the department to adopt rules and regulations. And that's there so that we can adopt some rules and regulations, implementing the public interest criteria, and they then will be reviewed by the legislature. So it sets some standards by which I'll be looking at the public interest criteria to determine whether I approve it from there.
CHAIRMAN KRAMER: Mr. Jones.
MR. JONES: I think I'm going to ask this of the director: Is there any reasons why some of these additional uses that might be made of the water above the minimum flow could be for a term and duration rather than perpetuity?
DIRECTOR: Well, that's one of the unanswered questions. Hydro filings that I now issue, I issue them for a fixed period of time. I think in the future we might look at other uses,

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irrigation or any other use, and issue it for a period of time subject to the public interest criteria at that time.
You know, if we issue a permit for 30 years or 20 years, 20 years from now we might wish we had done something else with it. If they were all subject to that review, and as long as they met it, you would continue them, I think that's where we could go. And that's probably where we will be, an appropriation doctrine, at least sometime in the future.
CHAIRMAN KRAMER: Ma'am?
MS. HAYES: I'd like to ask Mr. Tom Nelson, how much is this going to cost the consumers?
CHAIRMAN KRAMER: Could you give us your name, please?
MS. HAYES: I'm Marjorie Hayes for Idaho Consumer Affairs.
MR. NELSON: Well, Mrs. Hayes, the plan doesn't cost anything. If there is --
MS. HAYES: I mean, the implementation of the plan.
MR. NELSON: Oh, even the implementation doesn't. The only time you get any cost is if you get some substantial development, and the plan as

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presented does not require it. It permits development to proceed that meets the standards. So my problem with your question is, and we have wrestled with it, is to try to come to some estimate of the cost. The problem is that the cost goes from zero to heaven knows what depending on your assumptions.
But the two University of Idaho professors did a study for the legislature, which came to a particular number. I've seen that one tripled as an estimate of the cost of this thing. And that is basically fairly absurd, because the assumptions under which the University of Idaho economists proceeded I think may well go out the window under this particular plan. So I really can't give you an answer.
My personal belief is that that particular study is very much the outside possibility, and that the actual cost will prove to be less than that within the time period that they looked at. But until we get some handle on what would be a reasonable assumption for the quantity and timing of development, I really don't know that anybody can give you a meaningful estimate of cost.

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MS. HAYES: I'd like to pursue this further. Say there's a ban on hydro, and I've been to the PUC to listen to them debate this question back and forth. This is something that Mr. Swisher said is the most valuable (inaudible).
Now, assuming that you're planning to bring on a great deal more agricultural development, which we did all through this legislature, (inaudible) the hydro flow that we requires new generation. Mr. Dunn told me this when we first discussed it, that it would require new generation. How can you not put an economic value (break in recording) the procedure.
MR. NELSON: Well, I think you can put -- you can obviously put a value on any generating source. That's not the problem. It's estimating the impact on generation that's the problem. Because if you don't have a viable assumption as to what type of development takes place, then while you can estimate how much an acre foot of water will generate in terms of kilowatt hours, you don't know how many acre feet are going to be gone or when. And the timing of those depletions is critical to an economic analysis.
It's not enough to say how much water

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is out of the river. The question is, when is it out of the river. And I haven't yet seen anything more than a wild guess as to how that development will take place.

MS. HAYES: But you are, assuming that you're going to need, bring on, what is it, 20,000 --

MR. NELSON: No. We're not assuming that. That is the outside limit permitted as we had proposed it. We're not assuming that will take place.

MS. HAYES: But in your plan, you are speaking to this, are you not?

MR. NELSON: Well, we're speaking to it. That's a long way from assuming it's going to happen.

MS. HAYES: So what do we buy, then, as a consumer on this plan?

MR. COSTELLO: What you buy is a universe of developable land that the state can choose to allow to develop as it chooses.

MS. HAYES: Or not.

MR. COSTELLO: Or not, depending on what the political will of the state is.

MR. NELSON: We also buy, I think, a higher

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floor on the state's discretion. Right now the state can run the river to 3300 cfs. What this does is limit the state's discretion indefinitely into the future to 3900.

Now, whether they choose to allow it to go to that is a question of state policy, but that's as far as they can go. So you're also buying the comfort that you have 600 cfs left in the river that may not have been there had the state won the lawsuit.

MS. HAYES: But everyone assumes that when this was settled, that this was inadequate. I am wondering how this affects the anadromous fish flow, and this sort of thing, that's been mandated by a congressional act.

MR. NELSON: Well, all I can tell you is that with my experience of anadromous fish proceedings, and I've had considerable, 3900 cfs is a lot better than 33.

MR. KOLE: Ms. Hayes, I think --

MS. HAYES: That may not be enough, is it not?

MR. NELSON: It may not be enough, but it's better. And we can't address that particular problem in settling these lawsuits.

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MR. KOLE: The problem I think that you have is you can look at the glass as half-full or half-empty. Now, what we were confronted with is there is a real possibility that that river could be depleted down to 3300, maybe even below that. And in exchange for looking at this thing and trying to compromise in the middle, we have ended up at a position where the river is protected to a higher degree but that the state can permit future development.

And not just agricultural development. We're talking about development of cities and development of the domestic supplies, development of new industry. Those are the types of interests that we were trying to protect.

And if you look at it from a very narrow perspective, you're going to say, this is not necessarily good. But if you look at the agreement totally, it's a very good agreement.

MS. HAYES: Of course, when you're thinking of agricultural development over the other development that you mentioned, why, that's rather negligible, the water that --

MR. KOLE: It depends upon which studies you look at, what statistics you use. Right now

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agriculture uses the bulk of the water. If you look at the new industrial development that, for example, Colorado has, they've gone from 1 percent to about 8 percent in a very short period of time, consumptive use of water for the new types of industries that people want to have come to this valley. Now, you've got to look at the thing into the future, because you can't just look at it as it is right now.

MS. HAYES: Well, I think this is what we're trying to do, see, and this is where we're having problems with your plan, is that hydro development is something that -- if you travel other places where they don't have it, they would give their eye teeth for it, you know, they're really envious about hydro, and they will purchase it.

So in order to go ahead and develop new agriculture, or wherever we plan to do, we maybe depleting the sources that's worth a great deal of money to Idaho.

But you see what has happened with the Lucky Peak Project. California -- we were over to an energy conference in Washington where California was offering to pay anywhere from five to nine cents a kilowatt hour for firm energy,

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firm hydro energy. They didn't want our nuclear. They wanted hydro.

So this is a resource that is very valuable. It's like having a diamond farm. And what are we going use it with, just throw it away or --

CHAIRMAN KRAMER: One of the things you can do, if it's as valuable a resource as we say it is, you can build more dams and you can create more hydro energy. I don't think we necessarily want to do that either.

MS. HAYES: Well, you have to protect other resources. I'm not advocating --

CHAIRMAN KRAMER: That's why you can't talk and say hydro is the only use for that.

MR. NELSON: But I think, Mr. Chairman, one comment that if anadromous fish require more water for protection, then that interest is going to have to be separately developed. You can't expect the resolution of a dispute over hydropower rights to try to resolve a separate controversy over fish needs.

And if the anadromous fish require more water, the interests that are supporting that are going to have to come forward and make sure that

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that interest is addressed.

Second, one of the reasons for including the public interest criteria and one of the reasons that that's so important, we think, to this whole package is that, as you say, hydro energy on a cheap basis is important. In theory, if this program is properly administered, that importance will be recognized and will itself become a deterrent to the development which will impinge on hydro generation.

So that's reason for doing this, is to make sure that those kinds of concerns are addressed in the process, which we don't have now and no place to really address it.

CHAIRMAN KRAMER: Front row.

UNKNOWN SPEAKER: Gentlemen, I presume we have 600 cfs that, in effect, more or less, is the old Idaho water rights that we are going to sell to whatever is the most economically feasible development program that is brought forward to a Board.

Now, the question I have, is there a priority list as to what you would consider one above the other? Would you consider possibly a fish farm above an agricultural farm, a community

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development above a recreational use? Do you have outlined any priorities along that line?

MR. NELSON: I haven't seen any. I think it would depend -- that analysis as it's focused in the public interest criteria is initially largely economic. So on your examples, my guess is, on an economic basis, in other words, where you say an acre foot of hydropower will develop "X" kilowatt hours, which is worth so much money in this particular time period, that any non-consumptive use would result in a better economic analysis than a consumptive use.

So obviously a fish farm would impinge less on hydro development than would a standard dirt farm. And recreation use wouldn't be -- if you're looking at a reservoir, for example, you get some evaporation, but it's not consumptive in the usual sense.

So on your question, I would say if you had a priority economically, it would be that you're going to have to find non-consumptive uses have less of an economic detriment to hydropower. So they would be preferred that way.

UNKNOWN SPEAKER: Well, if I could continue to question a little bit, doesn't the constitution

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of the state of Idaho give water traditionally some sort of a priority for residential, individual consumption, and then down for communities, and then I believe agriculture in our state.

Are those things going to be negated by this?

MR. NELSON: No. Those things are constitutional preferences, and all that means is that a more-preferred use can condemn and acquire a less-preferred use. So if you needed water for a city, you could condemn water off a farm, for example, but you have to pay for it. It's not a priority. It's a preference.

MR. KOLE: Part of this agreement is that you still have "first in time, first in right." In other words, the best development that's first in time goes forward. So, for example, all the undeveloped permits that are out there that come back through the public interest criteria, they will still have their priority date of when they filed back in 1977, '78, and whenever. But that first in time is still a part of the system.

UNKNOWN SPEAKER: What would you say, then, that those people that are tremendously concerned

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about their power generation, because they're elderly and on fixed incomes and they represent consumer groups, should also consider that the price of food would affect them also. And as far as agricultural is concerned, there are few people that are going to develop a farm that doesn't have an economic return on investment. So I think some of the concerns there are overstated.

CHAIRMAN KRAMER: Mr. Chapman.

MR. CHAPMAN: Mr. Chairman, I've got three questions: one for Pat, one for Tom, and then one for the panel, whoever wants to answer it.

Pat, in a meeting that you and the attorney general and I had sometime back, the attorney general's office was adamantly opposed to the language that is now 7B. They were supporting the language that said "subordinated" but with opposed language that referred to "water rights shall be subject to subordination."

My question to you is, why the abrupt turnaround?

MR. KOLE: Well, every time you're in negotiations, you end up having to give up on some points. And what we ended up agreeing to was to, in essence, have the water right placed in trust

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in the ownership of the state in exchange for which we went with the concept of the subordinatable water right.

MR. CHAPMAN: So the attorney general's office feels that that is as protected as the earlier language, the subordinated language, since the water right is in trust.

MR. KOLE: Yeah. As best we can, we think so. You know, you never can predict everything, 50 years from now what a court will do. But as best we can see, we think we're protected.

MR. CHAPMAN: Thank you. Tom, the question I have for you, it's my understanding that Idaho Power has asked under the 11-80 contract that the existing water users be dismissed. If something goes awry and this agreement falls by the wayside, what happens to those people? Are they re-sued? Are they still left out? What happens?

MR. NELSON: No. The 11-80 contract says that once we dismiss, you know, the earth can tremble and the halls of government come tumbling down and they're still dismissed. And the dismissal was with prejudice. So to the extent that we could build a system which is a total

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sign-off by the company as the those folks, we did that.

Now, as we have talked before, you have to hasten to tell them that this is not a rose garden either. And if they have a problem with their neighbors or some other part of the system, they're still going to have those problems. But as far as the power company's water rights, they're out of the case for good.

MR. CHAPMAN: The last question I have is that the agreement refers to the full utilization of existing storage above Murphy. I've asked the question two or three times before in different meetings as to what is full utilization of the those reservoirs.

And I wonder if any of you have a better answer than you did in the past or whether you now can define what a fully utilized reservoir is. There are lot of people who would like to know.

MR. NELSON: Well, I don't think the answer is any different, Sheri, because our concept is still the same. As you know, the constraints on water use in a federal reservoir is pretty much a question of federal law, at least initially. And

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it's our intuitive belief, at least it's intuitive on my part, that there's some water uses built around excess storage, and that to the extent that within the boundaries of federal policy, the state can force the question to be asked, "Is this really the way we want to use the water," that those questions should be asked.

So my feeling is, what we have written, and I think by compatriots agree, is simply a system that asks the question. And once you run up against a federal policy or a state policy that says, "This is the way it's going to be," then you have fully utilized the water in the reservoir.

I have some real problems with the way the federal policy operates in conjunction with the water bank, where the city of Pocatello sits there with 40,000 acre feet of storage in Palisades Reservior, which is largely unusable by anybody. They can rent it on a short-term basis year-to-year and yet the basis on which they bought it indicates that it's going to be years and years and years before they need it for exchange on their groundwater impact. There should be some system in place where that 40,000 acre feet gets put to use.

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And that was what we intended to enforce or to suggest was, let's ask the question. And if we find out that it's an impossibility to change the federal policies that restrict that use, then that water is fully utilized, and we'll go on about our business. But it seems that's pretty good sense to have somebody ask the question.

MR. CHAPMAN: Thank you.

MR. COSTELLO: Don, could I just say a word on Sheri's first question?

CHAIRMAN KRAMER: Okay. First, be sure to state your name, Sheri Chapman, Idaho Water Association.

MR. COSTELLO: Sheri, you wrote to me or to the governor on behalf your Board a few weeks ago, and I've been out on these circuits and haven't had a chance to answer you. But on that first question, you asked whether because this was going to become subordinated in the future, whether it would take individual subordination proceedings for each new user to have their right become senior to the hydropower right.

Because of your concern we inserted language, that the old language said "subject to

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subordination." The language now reads "shall be subordinated to subsequent uses upon approval of such uses." So that it is automatic, that as soon as they clear the water department, subordination attaches automatically. There isn't any separate proceeding that they have to go through.

MR. CHAPMAN: Thank you.

CHAIRMAN KRAMER: Talk louder, though.

MR. FOTHERGILL: Al Fothergill. Mr. Nelson has said that we don't know how much this is going to cost, and maybe nothing. But as I read this, and maybe you can tell me, Mr. Costello, as I read this, the governor and Idaho Power have signed a piece of paper saying that the public utilities -- they're asking for legislation, really, that 'The public Utility Commission not consider compensation for consumers for lost capacity in the hydropower system, effectively acknowledging it's going to cost the consumer something.

Is that an accurate reading of this?

MR. COSTELLO: No. I wouldn't say it's exactly accurate, Al. The reason -- well, let me back up a second. If you look at this from the point of view of the power company, as the only way they could lose out in this whole transaction

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would be if they gave away their rights.

If their rights were lost because they lost the lawsuit, they could not be faulted by the PUC, and the PUC couldn't take that out of the shareholder's hide, and the shareholders in turn couldn't take it out of management's hide for having acted unreasonably.

But since this is to an extent a consensual transaction in settling the lawsuit, it would expose the company to a claim that they had arguably given something up. And the only way for us to induce them to give something up is to negate the possibility that they would be penalized for that.

But in my view, had the suit gone full-course, there is a very real possibility that they would have ended up, in essence, giving up or having taken away from them much more than they have in this settlement.

So looked at from that standpoint, there isn't a loss to the ratepayer, because had the state won the suit, as they very well might have done, we actually are arriving in this settlement at a position where more water is devoted to hydropower and other in-stream uses

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than would have been the case had it run its full course.

MR. FOTHERGILL: Just a follow-up just to make sure. Does not this agreement say that the Public Utilities Commission will not be enabled to consider the rates from consumers asking for compensation for the loss of the hydropower system?

MR. COSTELLO: As a result of this settlement.

MR. FOTHERGILL: Yes. Yeah, that's what I wanted to know. Thank you.

MR. MILES: I had another question. I suppose this is for Mr. Sherman. First, what is going to be the determination of the groundwater case history, because as we know, the Snake River has two sources. It has Jackson Lake, which is completely dried up at Milner. We have the underground source that comes from Wyoming to Oxford and comes out nearly four or five miles upstream -- or downstream from Milner and eventually at Feldman Springs. The Supreme Court has ruled that groundwater comes under interstate commerce. So how does this agreement propose to settle that knotty question?

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CHAIRMAN KRAMER: Mr. Sherman.
MR. SHERMAN: The lawyers are laughing at me, knowing that all the groundwater geologists don't deal with interstate commerce. One thing it does, Mr. Miles, is the state through this agreement basically is saying that there's a large chunk of water in that river that is already appropriated. It is therefore not subject to appropriation or use by other entities. This is one way that the Snake system is protected. And if the agreement goes through, the other rivers of the state are protected from the diversion of the water to California.
Because we are saying we are making the beneficial use of that water in the state now if you can't take it out of the state. That's the interstate commerce aspect of it.
The question of the Snake going up-river, as I said earlier, we need the money to do the hydrologic studies. 4500 is what we have reached in 1981 at Murphy. The model says we would have reached it several times in the past. If we're going to allow continued consumptive uses on the aquifer, we need to be able to predict what the effect is.

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And I think the first constraint is the 600 cfs that's identified. The second constraint is, the economics of new agricultural development certainly. And many of our small businesses and industrial people are not expanding right now. So I think if we can get the money for the studies, we've got maybe just enough time to —
MR. MILES: Mr. Chairman, Mr. Sherman, can the state of Idaho fully appropriate underground water that — in a navigable river, what about the claims that Oregon and Washington might have in this water?
MR. SHERMAN: Their claim would have to go through either -- will have to go through a river compact. And we are in a position of saying, we're not satisfying a hydropower right in our own state at the moment.
Are we wasting any water, then?
No. Our water in that river is appropriated. Entering into a negotiation as we did with Wyoming or as we did with Wyoming and Utah on the Bear there, our position is, that water is appropriated. Some of it is appropriated as a minimum stream flow. That water would be allowed to pass to Oregon state. That water is

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subject to demands from downstream states. But that water that you say is --
MR. MILES: That's only 4500 cfs.
MR. NELSON: Mr. Chairman?
CHAIRMAN KRAMER: Yeah, Tom.
MR. NELSON: Let me have a shot at this. Harold, if I could search your apples from your oranges for a minute, the case you're talking about involved a state's attempt to control the appropriation of groundwater in its state for use in another state. And the Supreme Court said, "Hey, state, your particular system is no good."
Now, Idaho has a similar system which is not involved in what we're doing here, because we're not exporting groundwater. The Snake River intercepts the groundwater, it becomes surface water, and so far as I know, there's no thought that somebody down in Oregon is contemplating appropriating groundwater in Idaho for use in Oregon. If they want to do that, that's a separate problem, but that has nothing to do with what we're trying to do with this agreement.
MR. MILES: Now, Mr. Chairman, Mr. Nelson, if you look at the water rights filed on the Oregon slope, it takes water from the

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Snake River. And in a low water year, it looks to me like that you would have a conflict between those irrigators on the Oregon slope for some of this water in the Snake River.
MR. NELSON: Well, that may be. It's below Swan Falls and not really involved here. As Frank said, there's really a couple of ways you can do that. You can handle it with a compact with Oregon whereby you would try to limit the Oregon appropriation. You could do it with an interstate stream case in the U.S. Supreme Court, which would probably get done about the year 2056.
But in any event, it has nothing to do with Swan Falls. Those people can't hurt a water right at Swan Falls with anything they do in Oregon.
CHAIRMAN KRAMER: Be sure to state your name, Harold Miles. Mr. Ford.
MR. FORD: On page 4 of the agreement, there's just some language that I wanted to make sure I understood. Number C and D there on page 4: The company's rights in paragraph 7A and 7B are also subordinate, and then subordinate is two different things in C and D.
Does that language refer to the

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unsubordinated right?
MR. KOLE: Yeah, it does. What that language is there for is that if we made a real bad mistake and we totally miscalculated so that existing uses took the river below 39, those uses would still have a subordinated -- or the company's water right would still be subordinated as to existing uses in place today. Okay?
We don't think we made that kind of mistake, but we wanted to make it crystal clear that as best we could, people who are currently using water will be protected by this agreement.
MR. FORD: Talking about in the state, you're talking in terms of the existing hydrologic data.
MR. KOLE: Yeah, if our computer model is wrong. Existing people will be protected.
MR. NELSON: From the power company.
MR. KOLE: From the power company. Now, that doesn't mean that those uses could not be precluded, for example, by a preexisting minimum stream flow. Okay?
MR. FORD: Okay. On D, could Ken or somebody tell me, have you got any estimate of the amount of water that's being beneficially used on

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which there is no application or any filing that we're talking about?
MR. KRAMER: Mr. Dunn, do you know that?
MR. DUNN: That's one of the reasons for the adjudication. We don't know how much water is being used without benefit of a permit. We know there's some because of the old constitutional method, you know, prior to the enactment of statutes that say normally to establish a right is by permit, all you've got to do is use the water and you had a right. There is some of that --
UNKNOWN SPEAKER: Have you got an adjustment, Ken, as to whether C and D are going to come into play and the likelihood of that?
MR. DUNN: No. We're confident it won't. And we -- I don't know how much water is not covered by permit. What I do know is that the water that's being used is not violating it. That's what we're trying to say is, uses that are presently there we ought to recognize, and that is one of the things that the power company has been saying since Swan Falls began, is that there needs to be some way to protect existing uses.
We're confident that C and D would never come into play, but rather than take the

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risk of, for whatever reason, that it would, we have to have those.
MR. NELSON: I think, Pat, too, was, there's a kicker in D that doesn't leap out at you, that some of these people have really got a Hobson's choice to make, if you have a clearly illegal water user.
I mean, a guy who has just gone out and punched a hole in the ground and started to use water, he has no water right at all against anybody today. So he comes in next April and files. He has an April '85 priority. He's got maybe a 1979 use experience, he's got to come back under public interest. And he might find that he doesn't have either a water right or a permit or any chance of getting one, depending on the specifics of his particular use.
Some of those people are going to be hard put to decide whether or not to file by the deadline. I can hardly wait.
CHAIRMAN KRAMER: Chuck.
MR. JONES: I'm Charles Jones. I represent District 11 of the Water Users Association, and my question is to Ken.
Under this agreement, the adjudication

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portion of it, are you planning on re-adjudicating all the adjudicated rivers?
MR. DUNN: Yes. We would --
MR. JONES: Why?
MR. DUNN: Pardon?
MR. JONES: Why, is my next question.
MR. DUNN: Well, other than in the Snake Basin, other than the Payette and the Lemhi, virtually every other decree that was entered into either has a defect in terms of describing the water right or the uses have changed so dramatically that they don't recognize reality in terms of what that right is.
Whatever the uses are, wherever you find the uses are, that would be the water right there. And I know there's some concern in saying, well, gee whiz, if they come in and look at a stream that's adjudicated, they'll take away some of our rights. Well, if a user hasn't been using the water, he didn't have one anyway.
MR. JONES: Are you saying, then, if you re-adjudicate, any legitimate user isn't going to lose his right?
MR. DUNN: That's correct.
MR. JONES: If he's using the water, he's

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going to keep it.
MR. DUNN: That's correct. And in addition, some illegitimate users may get a right because they have been using it for a long time. And you can find that they've got a right that they just never bothered to get a permit for, earlier users. You finally tie down all those rights that we just don't know about.
MR. JONES: Why are you excluding the Lemhi and the Payette?
MR. DUNN: Because we've recently done a general adjudication of those. The Payette is in the final throws that we've been working on for a number of years, and the Lemhi was completed about two years ago finally. We started that in about '37.
MR. JONES: Are those the only two?
MR. DUNN: Those are the only two general adjudications that we've done in my --
MR. JONES: Have you ever done any adjudication on the Snake River?
MR. DUNN: Not on the Snake River, not as a general adjudication. There's been some stipulated summary supplemental decrees issued on existing decrees, but the whole thing has never

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been done.
MR. JONES: Will they be redone?
MR. DUNN: Yes. All of the water rights on the Snake River will be done and its tributaries. Whether they're decreed, licensed, or permit or whatever it is, the court will finally say, this is the water right. And that's what we don't have right now.
Going into the upper Snake, the Rexburg decree, for people who live up there, you know, it's a -- it's almost a holy document. But when you look at that thing, it doesn't define the water rights. It says that somebody has got the right to 50 cfs, but it doesn't describe where to. It doesn't describe the period or point of diversion.
In effect, it has a defect in it. And those things need to be clarified for the protection of that water user against some future people who might say that they don't have a water right.
UNKNOWN SPEAKER: I have one more question, Mr. Chairman. I guess I don't know who it goes to -- Pat, I guess, one of the Pats.
Under the subordination deal, the

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language, is it going to cover all rivers?
MR. COSTELLO: Well, it would -- yeah. Prospective subordination, right. Yeah.
(Simultaneous responses.)
UNKNOWN SPEAKER: New water; not old water.
MR. COSTELLO: Right. Except that it would cover old water to the extent that if there are un-subordinated rights out there, as there do appear to be, they would also be invited to come into this same kind of arrangement whereby in exchange for us recognizing an un-subordinated right to the level of a minimum stream flow, they would agree to place their rights above that in trust with the state to be subordinated over time.
UNKNOWN SPEAKER: To follow up on that, then, say a water district has high ground, that they could re-issue some of this unused water or something when you re-adjudicate. Will they have first preference in putting it back in their own district?
UNKNOWN SPEAKER: No.
UNKNOWN SPEAKER: No.
MR. KOLE: No preference.
UNKNOWN SPEAKER: No.
MR. DUNN: But let's assume that as of -- we

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start the adjudication today, next year, whenever, at the time we're defining those rights, in the intervening time, the districts have gone back and placed some water into the irrigation to protect those rights. Because the irrigation district, and the irrigation district is pretty unique, it has a right to irrigate anything within its boundaries. Not just a specific river.
MR. STRIGGER: Jack Strigger, Southwest Idaho Development Association, Sage Brush Rebellinn, and I guess a couple others.
My question is, well, I guess three parts here and then I'll be still. I don't see where you have really addressed, and I hope that sometime you will, upstream storage which would be beneficial to everyone. And I presume in your appropriations maybe something will be said about that.
And then the groundwater rights have always been a stickler because -- and the water that has been asked for on the wells, there are -- many times there are very legitimate arguments as to whether it has anything to do with what actually gets into the Snake River in a perched water table, and so forth. And just arbitrarily

to draw a line on a map, you can apply for a well here and you can't apply for a well there, there's tremendous political football.

The other thing -- when this is put into practice, are we going to have three layers of state agencies to go through: the water board, the PUC, and a committee headed by the governor? Or are we going to go through the same general procedures that we do now?

CHAIRMAN KRAMER: Let's take that one at a time.

MR. KOLE: I'll do the last one. You go through the department, and there won't be any committee through which you have to go to. And it's our hope that what we have here will cut back on red tape.

MR. STRIGGER: Very good.

MR. NELSON: I will say that you may see some new faces at the department. I think now you have an option for the in-stream flow interests and come in and question the economics or the public interest. You may see the PUC there on the question of what is the lost energy. So you may see some new faces when you get there, but I agree with Pat, hopefully you'll only go one place just

like you do now.

MR. COSTELLO: And on the up-stream storage, I guess it's in here by omission, because by maintaining the zero flow at Milner, it still provides for any future up-stream storage projects that become feasible above Milner.

MR. KOLE: The idea there is that eventually, if you look at the federal government's involvement in up-stream storage projects, it's becoming less and less likely that you're going to see any federal involvement of any significant nature.

So what we're trying to do here is to create some incentive for the state and private parties to begin that up-stream storage enhancement.

MR. NELSON: On the other question you asked, Jack, I guess that's a question of what's a tributary. And it's obvious that in order to challenge somebody's use, you have to show that he's tributary to your use and that he has the potential for adversely affecting your use.

So if you have a true perched water table, then you can say, I'm not tributary. And in theory you could exclude yourself from the

Snake River Basin procedures.

In practice, it's really hard to find a perched water table that's not tributary. If you get the bathtub full, the water is going to run out of it. And if you take the water out, the water that would otherwise run out of it stays in it. So a true perched water table that's not tributary is pretty rare, but you could postulate that they're there, and to the extent they are, they would be found not tributary.

CHAIRMAN KRAMER: It's time to break.

Did you have a question?

MR. FORD: I want to ask a question about the proposed criteria, the public interest criteria.

Mr. Nelson said that we can't expect a resolution of a hydro-rights controversy to settle issues relating to the anadromous fish arrangement. I understand that point of view, but it's also true that, in fact, the settlement does impact all water users on the Snake River, settling the conflict around particular uses, has an impact on all uses.

MR. NELSON: Oh, sure. Yeah. That's why I say that the minimum flow can't address anadromous

fish concerns separately. But I think your point on the public interest criteria is well-taken, because the state presented bills to the legislature last year that had fish and wildlife concerns, for example, in those same criteria.

I lost the battle to include them this time, the theory being that it's already in the local interest criteria, which we left in the statute. So there was some feeling it was duplication, and that was one of the issues. The tradeoffs was that I didn't get fish and wildlife in there because the theory was it's already there.

MR. FORD: Well, let me ask the other parties. Did you consider, then, putting fish and wildlife, other in-stream uses, as a part of the criteria, and if you did, why did you decide not to?

MR. COSTELLO: Well, it's exactly as Tom said because currently the environmental and conservation community views the local public interest prong of the determination as being their opening to assert these -- the wildlife values.

If we had put them expressly in our criteria, we would have had to repeal the local

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public interest. And we thought that we would be buying ourselves a whole lot more or creating a whole lot more suspicion if we repealed the local public interest and said, "This is replacing that." Instead we said, "This is supplemental to that."

So you still have the local public interest, which includes the wildlife, and overlaying on that, the new criteria that addresses streams that have hydropower facilities at the bottom of it.

MR. FORD: But doesn't the local public interest also include all other local public interests: agriculture, hydropower, all the others that indeed you mentioned in the (inaudible). Maybe Ken needs to help me here. And it seems to me this stacks the deck a bit.

You've got now a number of criteria already in place, and then you add these criteria to them. And the director makes a decision on water rights based on the existing ones plus these new ones.

MR. KOLE: Well, Pat, I think you're getting precisely to the point where we sat down and we frankly negotiated back and forth. Some points

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went one direction. Some points went the other direction.

I think if you look at the package as a whole, it's a neutral package. It doesn't favor one set or another set. It's a neutral package. Now, if you read it so you believe it's stacking the deck, then so be it. But the way we intended it is, it's neutral.

And if development can justify itself, it goes forward. If it can't justify itself, it doesn't. And you consider all the factors, but no one factor should be entitled to any higher priority than any other factor. And that's why we specifically wrote that in there.

MR. COSTELLO: And I would also say for the governor's part, if the fish and wildlife interests aren't being -- aren't adequately protected under the current local public interest analysis, I'm sure he would not be opposed to including that in the new public interest analysis that we've proposed here.

UNKNOWN SPEAKER: Senator?

MS. BRAY: Gail Bray, Boise. For Notes can you tell me the intermeshing of the local and the state public interest there, when

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which group applies and which one supersedes and how do they interrelate.

MR. KOLE: Well, you know, you never know until the Supreme Court actually rules on it. But what you've got is a two-tier analysis right now. You've got all the criteria that currently exists under law, and then over and above that you've got the new public interest criteria that will apply in certain situations like in the Snake River.

Okay? So you've got all the protection that you currently have under law, and then you've got these new criteria that a development will have to meet before it goes forward.

MS. BRAY: I have questions about your neutrality in terms of all the same interests that are mentioned in the local criteria right now are mentioned except for fish and game. I'm not sure I see the neutrality there. Why was one excluded and not two or three excluded, or why not all included, both places, so you have the same considerations at both levels?

MR. KOLE: Well, it's just the way you read it. I read it as being neutral, and that's how we intended it.

MR. NELSON: I think, I might say, Senator,

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that in terms of a statute that's easy to use and so on, it would have been my preference to abandon local public interest in the context in which it's used and set out in that section the items you want the director to consider. Because I frankly don't know anything that is or isn't automatically included in the local public interest. I think it's a treacherous standard to leave there, if it's intended to protect important interests. That would be my preference.

But the way our compromise came out was to avoid building ourselves a large constituency, and we would see a plan against their interest to eliminate local public interest. What we did was take a marginally unworkable statute now and make it maybe more so. But we just thought --

(Break in recording.)

MR. DUNN: -- For example, on a stream in the Hagerman Valley, there was some strong protests registered by people who were opposed to a new fish hatchery there because of the environment of that stream. And it went so far as to opposing the hatchery because it wasn't the proper use of the land. Not just the water, the land.

I thought and my predecessor thought that that was carrying public interest too far from my perspective -- from the director's perspective. And that went to court, and the court said no, it isn't, you have to consider everything. You have to look at the use of the land and how does that conform with other uses. So the courts have said that's very broad, and that's the way we've been using it.

MS. BRAY: I have just one last question, and I promise it will be the last. If you've left in place the local public infrastructure for use of local public interest and you have given to the director and the board the state public interest criterion, it seems to me you have excluded one of those interests to be considered at the state level in determining your water right. And I'm still curious as to how, if it was being valuable at the local level, how it's not being equally as valuable at the state level.

MR. KOLE: I really don't read it that way. You know, if you look at the Snake River as a whole, you know, the local public interest has been defined very broadly. I just don't --

MS. BRAY: I know you don't. Can I hear

from him?

MR. KOLE: Sure.

CHAIRMAN KRAMER: Mr. Director.

MR. DUNN: The local public interest is not the public interest of a hundred feet along the stream. If that stream goes someplace, that's the local public interest. Really, if it's a question of impact on Snake River, I think the local public interest is the effects on the Snake River. It's not something that's very, very narrowly defined.

CHAIRMAN KRAMER: Senator?

MR. RINGERT: Bill Ringert, Boise.

Senator, I think you have to understand the definition of local public interest.

MS. BRAY: I'm trying.

MR. RINGERT: Well, it says the people in the area that would be affected by the use, you know, and if that's the whole state, then the whole state is the local public interest. That's the way I read it.

MR. DUNN: Yeah. That's right.

CHAIRMAN KRAMER: Ladies and Gentlemen, it's 10 o'clock. We've been at it two and a half hours. We've cut it off at 10 o'clock at every other time.

These people will be up here. From now on, you can walk on up and talk to them. We will be back January or February for public input from you. Until then, we appreciate your time and your energy and your efforts to come here.

UNKNOWN SPEAKER: Can I ask one question of the board?

CHAIRMAN: The board? Okay.

UNKNOWN SPEAKER: Does the board intend to take a position on this going into the legislature or on specific parts of it? Or are you guys waiting until your hearings --

CHAIRMAN KRAMER: We will wait until we come back out and have public hearings and have input from the public. We have had nothing -- we're no different than you are sitting up to the table right now.

(End of recording.)

REPORTER'S CERTIFICATE

I, Dianne E. Cromwell, Court Reporter, a Notary Public, do hereby certify:

That I am the reporter who transcribed the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at Boise, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand July 25, 2007.

Dianne E. Cromwell, Court Reporter
CSR No. 21

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REPORTER'S CERTIFICATE

I, Dianne E. Cromwell, Court Reporter, a Notary Public, do hereby certify:

That I am the reporter who transcribed the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at Boise, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand July 25, 2007.

Dianne E. Cromwell, Court Reporter
CSR No. 21

Orr Affidavit

Exhibit 13

"Resolution,"
Committee of Nine
(Jan. 17, 1985)

Fourth Orr Affidavit
Exhibit 60:

Letter from Ronald D. Carlson to all Senators and Representatives, and Ken Dunn, dated January 31, 1985, enclosing a "Resolution" of the Committee of Nine dated January 17, 1985

RECEIVED
FEB 4 1985
Department of Water Resources

January 31, 1985

Snake River Water District 1 is the nation's largest water district. Each year the Snake River watermaster delivers nearly eight million acre-feet of water to some 1,700 water rights for the irrigation of over one million two hundred thousand acres of land. This represents approximately one-third of the total irrigated acreage in Idaho. Because of the size of the district, the Snake River water users have, since 1919, annually elected nine men to; represent their collective interests, to act as advisors to the watermaster and, in recent years, to operate the upper Snake Water Supply Bank.

The Committee of Nine is extremely concerned about any action that might impact the long established rights of irrigators to continue using Snake River water. The water users of the upper Snake River remain confident that hydropower rights are legally subordinate to irrigation uses. However, they believe that no one wins in protracted litigation and, therefore, support implementation of the "Swan Falls Agreement."

The Committee of Nine believe that funding for a general adjudication of the Snake River Basin is the most critical element in the agreement; and that even if other parts of the agreement are not implemented it is essential that the adjudication be commenced this year.

The enclosed resolutions were adopted by the Committee of Nine at their January 17th meeting. They have asked that I send you a copy of these resolutions and encourage you to give each your favorable consideration.

Respectfully submitted,

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 10th day of October 2008

RONALD D. CARLSON
Snake River Watermaster

RDC:cw

Enclosures

SCANNED
JAN 29 2007

Copy sent to all Senators & Representatives w/resolutions
Ken Dunn

ASF32

R E S O L U T I O N

WHEREAS, the Governor, the Idaho Power Company, and the Attorney General of the State of Idaho have entered into an agreement to resolve the need to continue pending litigation and solve the controversy over Swan Falls water rights through Stipulation and enabling legislation; and,

WHEREAS, agreement is a preferred method of resolution to avoid lengthy court battles and continued loss of opportunity for economic growth in the Upper Snake River Basin;

NOW, THEREFORE, BE IT RESOLVED that the Committee of Nine encourage the Idaho Legislature to pass requisite legislation to implement the Swan Falls Agreement.

BE IT FURTHER RESOLVED that in implementation it be clear that the following conditions prevail:

1. That there is, and will continue to be, no obligation to provide surface flows for water rights established below Milner Dam and that the "zero" flow at Milner Dam be reaffirmed.

2. That an effective water marketing system is in place through the Upper Snake Water Supply Bank and that any change in marketing of water which might be proposed under the Agreement should be through the existing Water Bank.

3. That "full utilization of existing storage" be understood to mean the allocation of space in existing reservoirs.

4. That the reconstruction of Teton Dam be commenced as though it were in place prior to November, 1982.

Adopted this 17 day of January, 1985.

ROBERT REICHERT, Chairman
Committee of Nine

ATTEST: Reed D. Murdock
REED MURDOCK, Secretary
Committee of Nine

R E S O L U T I O N

WHEREAS, the Committee of Nine recognize the continuation of existing water rights in the present priority structure to be critical to agriculture in the Snake River Basin; and,

WHEREAS, the potential for serious challenges by the continuation of these water rights is largely dependent upon the assertion of unadjudicated claims to water rights by entities not part to previous court actions; and,

WHEREAS, recent court actions have clouded many Upper Snake irrigation rights and left them open to challenges of entities seeking to obtain rights to Snake River flows; and,

WHEREAS, the Idaho Statutes require an adjudication of water rights before a watermaster can distribute water to the respective rights;

NOW, THEREFORE, BE IT RESOLVED that the Committee of Nine support and encourage the Idaho Legislature to immediately provide funding for a general adjudication of the Snake River and tributary ground water systems.

BE IT FURTHER RESOLVED that because of the critical need, that adequate funds be provided to the Idaho Department of Water Resources to commence the adjudication at the earliest possible date in 1985.

Dated this 17 day of January, 1985.

ROBERT REICHERT, Chairman
Committee of Nine

ATTEST:
REED MURDOCK, Secretary
Committee of Nine

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 10th day of October, 2008

Orr Affidavit

Exhibit 14

Transcript of Idaho Water Resource Board public hearing on proposed State Water Plan amendments (Jan. 28, 1985)

Third Orr Affidavit

EXHIBIT 23

REPORTER'S TRANSCRIPTION

OF TAPED STATE WATER PLAN HEARING

ON POLICY 32

IDAHO FALLS

JANUARY 28, 1985

Reported by: Mary Jeana Reiner, CSR#711
Pages 1 - 51

P R O C E E D I N G S

UNIDENTIFIED SPEAKER: Testing one, two, three. This is a recording of the state water plan hearing on January 28th in Idaho Falls at 2:00 p.m.

MR. GRAY: We are only going to have one person who'll testify this afternoon, and we'll close the meeting until 7:00 this evening.

UNIDENTIFIED SPEAKER: What did you say the purpose of the meeting was for now?

MR. GRAY: To take public testimony on Policy 32 of the state water plan.

My name is Gene Gray. I'm chairman of the Idaho Water Resource Board. And with me today is Don Kramer, board member. Dave Rydalch, board member. Jim Shaw, board member. And with staff we have Wayne Haus and Frank Sherman.

Does everyone have a copy of the Currents magazine? I'll briefly kind of go through this. Front page you'll notice the listing of the meeting areas that we have planned for the next two weeks.

On page 2 and 3, you'll find a proposed revision of Policy 32 of the state water plan, which of course deals with the Snake River system. This is a proposed

revision, and this is what we plan on taking testimony on in the six meetings ahead of us.

If you go over to page 4 and on toward the back of the paper, you'll find the legislative package, which our legislators are working on in Boise.

We will not be dealing with the legislative package today. We will be dealing with Policy 32.

When you come up for your testimony, please approach the mic and give us your name, your address and please your telephone number so we can make it a point of record to make sure that we contact you for any mailings that might go out.

So with that, I'll call Dale Rockwood.

Dale.

MR. ROCKWOOD: Mr. Chairman, gentlemen, I am Dale Rockwood. I live at Route 1, Box 218, Idaho Falls. Phone number is 522-4913.

I represent the progressive irrigation district. I'm also a committee -- I'm also a member of a committee of nine. I am not speaking on behalf of the committee of nine, although they have endorsed the changes. I'm just speaking on behalf of the progressive irrigation district.

And I would like to rise in support of the proposed changes going from 3,900 in the summer to 5,600 in the

winter. I like the legislators. I guess I would like to have a green and a red button and then a gray one, and we endorse this just in the wet years, Mr. Chairman.

MR. CHAIRMAN: Thank you very much, Dale.

Is there anyone else that would like to testify at this time?

UNIDENTIFIED SPEAKER: Mr. Chairman.

MR. CHAIRMAN: Yes, sir.

UNIDENTIFIED SPEAKER: I don't want to testify, but there are a lot of people like myself who are not -- just reading the paper is all we know about. I wonder, since probably there will be some time available, if the board couldn't explain to us, at least in a degree, just what's going on. I mean, there is a lot of questions. Would that be asking too much?

MR. CHAIRMAN: Mr. Sherman, would you like to field that question?

MR SHERMAN: How much time we taking, Mr. Chairman?

MR. CHAIRMAN: Well, since we only had one person testify before us, take the afternoon, if you would like. It might take us several.

UNIDENTIFIED SPEAKER: Do you want to close the official hearing?

MR. CHAIRMAN: Yes, I will close the official hearing as of now.

UNIDENTIFIED SPEAKER: Go ahead, Mr. Sherman (sic).

MR. GRAY: Good evening, gentlemen. My name is Gene Gray. I'm chairman of the Idaho Water Resource Board. And we're here tonight to take public testimony on Policy 32.

But first I would like to introduce you to some of the people that we have here. On the far end is J. D. Williams from Creston. Dave Rydalch from St. Anthony. Both board members. Wayne Haus, the Department of Water Resources. Jim Shaw from Eden, department -- or board member. And Don Kramer from Castle Ford, board member. Frank Sherman, department of water resources.

Now, does everybody have a copy of the Currents? If you don't, step back and grab one in the back there.

What you might do is just kind of take a look at the first page to start with. And what we'll be talking about this evening is the revision of Policy 32, which deals primarily with the Snake River system.

In December, the Water Resource Board accepted some revised draft policy for Policy 32. We did not adopt it. We accepted it to bring to the public. So that's what we're here about tonight.

The first two pages would be page 2 and page 3 deal with the revisions that we have proposed that you comment on this evening. In a few minutes I'm going to have

Frank Sherman briefly go over those with you, and we'll go right over the top of them fairly rapidly to kind of get it in your mind exactly how they fit the overall package.

On pages 4 through 7 is what is commonly referred to as the legislative package. And we were here the latter part of October with the people that drafted that. A member from the governor's office, a member from Idaho Power, and a member from the attorney general's office.

So without further ado, we'll have Mr. Sherman give you a brief runover of Policy 32. And if you would like, you might just follow through with it.

When Frank's through, we'll start public testimony, and I would like you to come forward to the mic, state your name, address, telephone number. While Frank is going through Policy 32, we'll accept a couple questions for clarification purposes, because we've got to be fairly short with these so we can get to the public hearing process. After we close the public hearing, if we've got some time, we'll stand for questions if you have any.

Frank.

MR. SHERMAN: The original state water plan, the existing state water plan first -- well, first we we're talking 1976. Under Policy 32, Snake River Basin

basically says the available unappropriated water to the Snake River Basin are allocated to satisfy existing uses (inaudible) for future growth and development and protect the environment. The allocation is recognized under the protective water system rights. The water allocations are made by large regions to allow the widest possible direction of application.

And then there is accompanying text to this policy that discusses all of the water uses in the basin. In some cases allocates water for new development or new uses to those different entities and tries to cover all water use in the Snake Basin as it existed for the next -- to the year 2020.

In looking at that and being faced with the problem of redesigning or amending that policy, because of the Swan Falls agreement, we chose or the board chose to pick out those parts of existing Policy 32 on a real policy rather than just simple allocation, highlight them, that is the policy (inaudible). That is the policy of the water board. And then have underneath those text to explain (inaudible) for that particular policy.

So if you look at page 2 in the Currents, you'll see that it starts out with, "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 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 4750 cfs measured at the Weiser gauging station. A minimum average daily flow of 5,000 cfs at Johnson's Bar 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," which is the next policy, "shall be allocated according to the criteria established by Idaho Code 42-203A."

One of the problems with bringing out these revisions, these proposed revisions at this time, is that we're doing this because it's part of the package that the governor and the Idaho Power Company put together. Part of that package calls for action on the part of the legislature.

What the legislature is being asked to do is contained in the Currents issue on pages 4 and 5, is my guess. And we, the board, is assuming that they'll get their job done if we can get our job done. If they don't get their job done, we won't do our part. So it's sort of a mutual let's see if we can all get it done. So

(inaudible) that are not -- that don't even exist, (inaudible) proposed legislative package.

This policy does several things: One, it represents the compromise the State and Idaho Power made in the flows of Murphy Gauge. The flow of Murphy and the old water plan and the existing water plan -- I keep calling it the old. The existing water plan calls for a flow of 3,300 cfs at the Murphy Gauge year-round.

Historic low flows in the summertime have been down as low as 4,500. Idaho Power claims the water right of 8,400. That claim right was the basis for the legal business going on in (inaudible) district court. The negotiator decided to take the 4,500 historic low flow and what the water plan called for and split the difference. That's the water that's really available use for discussion.

Disagreement. These minimum flows would satisfy Idaho Power to the point that as long as these flows exist, Idaho Power would not protest, and any of their hydro facilities upstream the Murphy Gauge (inaudible) -- any amount of water that comes through, as long as these flows go by the Murphy Gauge.

Now, we talked about waters not held in trust by the State. Idaho Power has a claim of 8,400 at the Swan Falls. It has larger claims at some of the other dams

upstream. Those waters within that claim of Idaho Power are to be held in trust by the State for reallocation of other uses.

Second, the policy directly addresses this issue. And it says that, "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."

It doesn't mean much as you read the ballot, but basically as proposed, 203A are the existing requirements to get a water right. It has to do with (inaudible). It has to be public interest.

42-203C is a whole new set of criteria which the (inaudible) to apply, because this is not unappropriated water. These are waters that were claimed by Idaho Power. They are being held in trust by the State. They are not the unappropriated water (inaudible). Anybody can have a shot at these waters also. But because they were originally appropriated by Idaho Power, the State is going to give special restrictions. (Inaudible) special restrictions. Special criteria from the board that can be given away.

This is the section that discusses the effect on hydropower. It's the family farm interest. The whole series of criteria have been suggested to the legislative

(inaudible).

"32B - Domestic Commercial and Municipal and Industrial. 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 domestic, commercial, municipal and industrial uses in accordance with state law."

The old -- the existing state water plan allocates in terms of acre feet 144 cfs for new commercial -- well, municipal and industrial we called it at that time. There are several columns with that. One, we were allocated more which belonged to Idaho Power, because we thought they were subordinating (inaudible). So all those allocations in the existing plan were based on the idea of (inaudible). The Supreme Court's decision suggests we may not be able to. Therefore, the compromise (inaudible) work with.

In actual fact, though, because the use of water for industry and human consumption is so important, we have actually set aside as much water, in fact, slightly more in this policy than in the existing water plan. We have included domestic uses here. The old water plan was silent on domestic (inaudible). We want to keep track of it.

In terms of actual consumptive use, this probably is

close to doubling the amount, increasing by the same amount of (inaudible), the amount of water and use for this in this part of the state now.

"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, B, and C."

All this is really stating is that the State has some water in its grasp that used to be claimed by Idaho Power, and there are really only two ways to consume it: One is to use it for industry, and the other (inaudible). Any water after you meet the requirements of the municipal and industrial and commercial allocation is left over for agriculture use. Why it's not an iceberg number here is because of the difference in claimed water at each facility by Idaho Power.

The example we use everywhere in this text is the 8,400 versus 4,500 versus 3,900 at the Murphy Gauge. But at different places along the river the amount of water held in the trust by the State is different.

"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."

Idaho Power has already recognized the beneficial use of water. As part of the agreement, these -- this 3,900 flow in the irrigation season, the 5,600 cfs in the wintertime in Murphy ought to be regarded as unsubordinated (inaudible).

Supreme Court rules their right there was not subordinated. For some of the water, we'll continue along the same lines if they are not subordinated.

Idaho Power has stated in the agreement they will not object to those people making beneficial uses of the water at the time the agreement is signed, but they will take action against new users, those users particularly if they are using their water if the flow (inaudible). And the state agrees by signing the agreement. (inaudible) water plan, but they have a legitimate complaint if we ever get below those numbers.

"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."

It says basically the language in the existing plan, the flows provide that the people (inaudible) below

(inaudible) Canyon are satisfied. There should be enough water for recreational uses in the (inaudible).

"32F - Agriculture. It is the policy of Idaho that water necessary to process agriculture products be included as a component of the DCMI as provided in Policy 32B. The minimum flows established for the Murphy gauging station provide an adequate water supply for agriculture, however it is recognized that it may be necessary to construct different diversion facilities than presently exist."

Again, it's no change for the existing water plan. It provides that each one build a plant to process fish (inaudible) commercial user. It says that as long as you are going to have flows in the river, and most of that water in the summertime comes out of the thousand springs, these trout farmers are probably going to be okay. But a water right doesn't necessarily guarantee use flow of water. It guarantees you access to the water. If these guys make enough to reconstruct the stream courses leading away from spring, (inaudible). But as I say, no change in the existing water plan.

"Policy 32H - Water Quality and Pollution Control. It is the policy of Idaho that the use of water to provide pollution delusion is not a beneficial use of water."

There is really no change from the existing state water plan. The attitude of the water board is that there are enough laws to protect water quality. You don't need to take good water (inaudible).

UNIDENTIFIED SPEAKER: You skipped G.

MR. SHERMAN: I skipped G? I'm sorry. Now I've lost my place totally.

"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. Stream flow depletion below the minimum flows is not in the public interest."

It is not in this public interest, because (inaudible) hydropower. It's not in the public interest because of its impact on fish, wildlife and recreation.

Basically, we are guaranteeing by these changes to the water plan, if the agreement package goes through, that there will be more water in the river than there might have been, because the minimum flow was raised from 3,300 at Murphy year-round up to 3,900.

The board is the only authority in the state that can allocate or appropriate water for in-stream flow purposes. They can do it by specific designation in the

water plan, or they can go out and appropriate water from the unappropriated waters of the state on any region of any stream within the state. Between the two, they feel that minimum water is available for these purposes. They don't -- I'm not going to suggest that optimum value for fish (inaudible) for example, but minimum water will be available to keep things more or less on an even keel as they are (inaudible).

Water quality and pollution control we'll skip.

New storage. This is a very awkward one. It impacts (inaudible) to some extent and other parts of the Snake in sort of a different way.

"It is the policy of Idaho that maximum use must be made of the existing storage facilities in the basin. New storage up-stream from the Murphy Gauge should only be approved after it is determined that insofar as possible maximum use of existing storage is being made. Approval of new storage projects that would divert water from the mainstream of the Snake River between Milner and Murphy 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."

The text explains it in two parts: First of all, maximum use of existing storage facilities. We all know that there are people who have a full natural flow right,

and they also have a full reservoir stored water right. How many times they use their reservoir water? It may be once every 10 years. It may be once in 20 years. The city of Pocatello has never used theirs, for example.

There are lots of cases where water sits in the reservoir all during irrigation season, and on October 1st the water master has to turn it down the river because he needs to have space (inaudible).

If we are (inaudible) water short we're going to have special criteria for people who want to use the water. We're going to say that Idaho Power has the water right and some of the dams are no longer valid. It seems wrong to store water that is never going to be used and it's going to be turned (inaudible) October 1st.

The negotiators of the agreement felt that it was appropriate to put this in the water plan and ask the board to ask questions why does this happen. Are there legal or social barriers that we can overcome.

Go through a couple of quick legal barriers. If you store water behind the federal dam, you can only lease it for one year at a time. The state has a water bank plan. You can sell water, but if you don't lease it for one year at a time, nobody can come in and do anything in the way of new development (inaudible) water.

If you stored water in the federal reservoir, you

cannot make a profit and sell the water. That put a little incentive for someone who has water he needs one year in nine or maybe even one year in five to try and wheel it around and sell it off, because he can't make a profit on that water. There are a couple of state barriers. If you don't use your water for five years in a row, (inaudible) washed to water.

There is another state barrier. If you can become efficient and use less water than you have then and you have some excess water, you can't sell it for another consumptive use because that's an expansion of a water right. That water is going on new land.

These are the kinds of things that the water board has been asked to address. Ask the questions at least. If someone were to propose a project today, his (inaudible) on use of the existing storage being made, we probably determine -- the director has the authority, the director of the department of water resources has the authority to make that decision. He would probably decide no, because there is some unallocated water in (inaudible).

Once that water's not allocated, there are no longer unallocated waters in the system, hopefully by that time the board will have at least been able to ask the Bureau of Reclamation, ask about changing the state laws that

seem to be a barrier.

They are working on simplifying the rules and regulations for the water bank as it exists today so the (inaudible) a lot easier.

Hopefully, if all those questions have been asked and we can't got anything changed, then we are doing the best we can under the (inaudible) system. Ideally we would be able to change some of these laws so a person could at least water for more than one year at a time, so a person could make some minimum profit at least by selling his water.

That's the intent of this basically. Bring me people of the state's attention on the fact that we have some water that sits here every year and then goes down the river in the fall so we can make space to make sure there is runoff. If we are finding we're water short, let's try and use that water.

Now, the other one is a different condition in the sense that luckily it only applies for the wintertime diversions below Milner Dam. In this case, because of its impact on Idaho Power's operational scheme in two ways, Idaho Power has a ready market on the West Coast for electricity during the wintertime, because it's used for heating out there. The other way it approaches is that Brownlee Reservoir at the head of the three dam

Hells Canyon complex is they are making storage for runoff, except where they dump water above stream.

So they like to (inaudible) reservoir, and they like to generate power so they can sell it while we're filling the reservoir.

As part of a compromise, it was agreed that if somebody wanted to (inaudible) water below Milner where it's effect is clearly quickly (inaudible) in Swan Falls, they should be subject to supplying some sort of mitigation to Idaho Power for their losses.

Now, a text here very clearly says that mitigation is lessening of the impact. Not compensation, which generally means equal. But mitigation. Something should be worked out so that Idaho Power doesn't take a direct loss.

Now, it could well be that mitigation would be, if you're going to store water in the wintertime, store a little more and let us call for it when we want it. It may be that mitigation is, you're going to release it when we need it. It could be mitigation in money, but that is one of the hardest things of all to work out.

But people below Milner, above Murphy, wintertime diversions for storage, if you come with a legitimate use in the wintertime where you are going to consume that water, or use it right then, that's fine. For storage

purposes, we have to work out a deal with Idaho Power through the Department of Water Resources to try and mitigate the impact on Idaho Power's operation.

The details are not spelled out. The three negotiators couldn't agree what would be appropriate. The water board suggested some language. It did'nt seem to go over very well with the three negotiators or the legal advisors of the three negotiators. It is less silent until such a project comes up and stares us in the face.

Very last policy, "Stored Water for Management Purposes. It is the policy of Idaho Power that reservoir storage be acquired in the name of the Idaho Water Resource Board to provide management flexibility to assuring the minimum flows designated for the Snake River."

As a technician I can tell you that we've got big Snake (inaudible) out there which contributes to the water in Thousand Springs which makes up most of the flow in that reach of the river in the summertime. I can't begin to hit that right on 3,900. It sure would be nice if the State had some (inaudible) if I make a mistake.

That's the intent of this particular thing, the last policy. (Inaudible.) If there is unallocated water (inaudible) why shouldn't the State get -- (inaudible)

they could sell from Idaho Power on a yearly basis. But the State ought to have someplace to call for water if the State messes up and can't (inaudible). I can't shut off the (inaudible), because the impact of shutting it off might not show up for six months. I can't call for water from (inaudible) to get it here (inaudible).

THE COURT: Thank you, Mr. Sherman.

We'll start our testimony now. Would Phil Warner like to be the first, followed by Eldred Lee.

MR. WARNER: Yes. I'm Phil Warner at 2374 Belmont Avenue in Idaho Falls. My phone number is 524-3999.

I'm a past president of the Idaho Falls Chamber of Commerce, and as initiated our industrial and economic development group of which I am now a member. Our group committee is involved in maintaining a balance to economic health in the greater Idaho Falls area, which includes the current industry and agriculture base as well as potential new industry.

I don't have a formal or written document, but we have some comments we would like to make on Policy 32B dealing with domestic, commercial, municipal, industrial uses.

The two comments are, one, the definition of industrial uses as explained in the text appears to be restrictive. That is, it says to process agricultural,

forest, mineral and other products. At least it may be just a clarification, but we're quite concerned, we're trying to attract all types of industry. And in here we're not that, you know, may not be mining or timber, and we're after high-tech industry, you know, electronics and other areas. And the way the text is written, it seems to exclude or potentially exclude broader uses of the water.

Also, it appears that it's directed towards the process of getting the product out when, in fact, I hope it means, or we'd like to it mean the supportive use also of the industrial base, which may include systems to recover heat loss, cogeneration, et cetera. All right. That's the first comment.

The second one has to do with the amount allocated for this DCMI use. I believe over the 35-year period amount allocated might allow if there were no other uses for about a 2-percent growth. We, I know, and the people you'll probably hear in Pocatello were trying to be very aggressive about this, and this may not support a growth, particularly in with the modification of Policy 32D, which now causes any use for thermal power generation to come out of this same allocation.

The previous -- the 1982 plan had 480 cubic feet per second allocated to these two uses, the thermal

generation and DCMi. What's now proposed, 150 cubic feet per second for both represents a 70 percent reduction in this utilization, which seems a lot more than the reduction in the general agreement.

And that concludes our statement.

MR. CHAIRMAN: Okay. Phil, why don't you stand for questions from the board.

MR. WARNER: Sure.

MR. CHAIRMAN: Any questions down below?

J. D.: I do.

J. D.: Mr. Chairman. You made that reference to 2-percent growth. Did you drag (sic) that by for us?

MR. WARNER: Well, I was just -- I hadn't realized -- I was just -- we were looking at in general just the amount of growth, but when you mentioned that the 150 for the whole area might be a doubling of the amount that's used now, a quick calculation says that would allow for a 2-percent growth. That's all. If it includes all the other, you know, commercial, domestic uses. It's 35 years we're talking about. That's how I came to that number.

MR. CHAIRMAN: Mr. Rydalch, any questions?

MR. RYDALCH: No.

MR. CHAIRMAN: Thanks a lot Phil. I wonder if you might do something for us.

MR. WARNER: Sure.

MR. CHAIRMAN: Might you structure some kind of wording that you can get to us. We will be accepting written testimony until February 22nd. And if you like, you might mail it to the Idaho Water Resource Board --

MR. WARNER: Okay.

MR. CHAIRMAN: -- State House in Boise 83720. We would be very receptive to --

MR. WARNER: Yeah. Fine. I didn't know on the text on the industrial uses. I thought it probably needed some lawyer to -- but we wanted to make sure it didn't exclude the kinds of growth that we are after here in this part of the state.

Thank you.

MR. CHAIRMAN: Thank you very much.

Mr. Lee.

MR. LEE: My name is Eldred Lee. I'm the secretary of the Great Feeder Canal Company. It doesn't own specifically any water. However, it takes water out of the South Fork of the Snake River and is efficient in, I call it, fighting the river in order for 14 different major canals, plus about 25 or 30 other individuals to take water from the South Fork. There are very few diversions on the south side of the river from Heise on down that do not take out of the Great Feeder Canal.

And I asked Ron Carlson what we were running last, a year ago last spring. And our head at that time was 450,000 second feet. So it's not a small operation.

And I'd just like to comment about two or three of these things. The fact that a person may not be against or for this plan still causes questions to arise in a person's mind. And I think that the question arises more is one of administration probably than it is maybe a principle.

Anyway, it depends upon how it's administered. And so maybe we could look at it in that point of view.

So let's look at two or three things. One of them 32D. Now, we've gone through these other things, and apparently they have been given some pretty good consideration. "It is the policy of Idaho that hydropower 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."

Now, up to that point we're talking about the minimum flows. However, it is the policy of Idaho that hydropower used to be recognized as a beneficial use of water, period, seems to put anything above the minimum flows in an equal category with anything, any other type of development.

Now, it's conceivable -- if my reasoning is correct, it's conceivable then that hydropower in the administration of it could take precedence under certain conditions of industrial development, agricultural development or other development depending upon how it's administered; is that correct?

MR. CHAIRMAN: We are taking your testimony right now.

MR. LEE: Okay. Maybe you can answer that question later. But if hydropower at some time should become so important that these other things are minimized, and that the future development in these other categories could not take place, then the question that hydropower be recognized as a beneficial use might be important in the decision-making of whether a decree or a right might be awarded to them rather than to something else as I look at it.

Okay. Let's go on to 32I. New storage. It's our opinion that the legal language in this particular section would cause difficulties if there should be a need and a desire to build a new dam. In our opinion Teton Dam is essential. There are other areas on the South Fork of the Snake River, which could be utilized in storing water. If there is to be any large development and use of water over the next many years in the state of

Idaho, the only way that you're going to get sufficient water to take care of it is to have some storage. If there is any impediment put in the way so that new storage cannot be built, then you're going to delay and restrict the development of anything that comes under the jurisdiction -- under the Snake River where water is essential.

It appears to me that since the minimum flows, and it says back here in some of this material in the back that this entire policy is based on a minimum flow at Milner that anything that can develop or anything that's affected above Milner should not be affected by this agreement. And it is affected by that agreement.

New storage, this phase right here is affected, very seriously, because now if it is put into effect in order, for instance, to have the Teton Dam, we're going to have to overcome this particular paragraph right here. And it's my opinion, and it's the opinion of many of those that are in our system, that new storage is going to be essential.

Now, last year I understand that 6,800,000 feet went over Milner -- second -- acre feet went over Milner. Now, that's enough water to take care of all of the water needs in the entire state of Idaho for a year, so I'm told. No verification. But it's a lot of water.

The only way that that's going to be captured and utilized to any large extent, because it comes through in such a large quantity and at such a time that it can be spread out, the only way that's going to be utilized is to have some new storage. I think that we should encourage new storage rather than to put anything in it that restricts it.

Let's go down to manage storage -- stored water for management purposes. I've listened to the discussions, and I was in the meeting last fall. In my opinion, there's a conflict of interest if this is done. And I say that because on my -- my understanding is that the State of Idaho and the Department of Water Resources is primarily responsible for distributing the water according to the decrees and the claims that are on it. And they have -- they have a very delicate job in trying to satisfy all of the claims that are there and to keep everybody happy. If they get in the position that they are going to own water and they have the ability then to put it here or to put it there, or to utilize it if it's going to be utilized solely down below Swan Falls, it's my opinion that it's subsidizing primarily in addition to what's here, the claim by the, or the right by Idaho Power to have the minimum flows at Swan Falls.

I don't know whether I make myself quite clear, but

the legislature right now is battling over where they are going to get sufficient money to supply the needs of the various agencies in the state.

Whether it's right for State of Idaho to invest state funds, which are badly needed somewhere else, in water, which is available only on a call, can we say, or a short-term basis, I question it very seriously. I question it. And if Idaho Power is content to have a minimum flow at Milner, it's my opinion that the State of Idaho is not responsible, if that should fall below that particular point, they are not responsible to make that flow up.

And as I understand it, additional water can be allocated, but I think that if additional water is allocated after today, you know, shall we say, anybody who gets a water right with a right later than 1985 is going to have to take a chance on that thing being shut off once in a while, and --

--- **TAPE 2** ---

MR. LEE: -- including Idaho Power be subsidized below Milner when the rest of the Snake River is not.

I have one other item that I want to comment on, and I don't think that's in this proposed revision, but then I think it's something that should be considered. And I think if we don't get a chance to go over to the

legislature to get testimony, why maybe you can carry it over there.

And that is the fact that in the adjudication process they say that the fee has to be paid the first year and you pay interest on it after that for five years if you want to delay your payment. It appears to me that if it's going to require ten years to adjudicate and complete the adjudication process, that anybody who is making a claim and has a right to delay the payment of their -- that is for the adjudication process, that it should not be necessary to have to pay interest.

I think that that's in the budget that's set up by the Department of Water Resources for the adjudication process. Now, I haven't seen this, but I was told today that there is no place in that for the addition of the money which would be accrued in interest to going to that fund.

And personally, I think that those laws or rules ought to be changed so that if they make their payments substantially as they should, that interest is not necessary.

I think those are most of my comments.

MR. CHAIRMAN: Thank you, Mr. Lee. We'll see if we have some questions from the board.

Mr. Williams?

MR. WILLIAMS: No.

MR CHAIRMAN: Mr. Rydalch?

MR. RYDALCH: No.

UNIDENTIFIED SPEAKER: I don't believe (inaudible.)

MR. CHAIRMAN: Mr. Lee, I wonder if you might -- you had indicated where hydropower under 32D seems to have been placed above and beyond maybe the other uses in the posed language of revision 32. Might you give us something in writing between now and February 22nd?

MR. LEE: Yes, we could. Now, I don't know whether I interpret that right or not, but as I understand the present law, it includes certain categories, but it does not include hydropower as a beneficial use in the public interest.

And just the way this thing is written, if it includes anything other than the minimum flows which are set up, then it's my -- I get the idea that it pertains to any right which Idaho Power could obtain. Now, if that's true, then I think that it's carrying that opportunity quite a bit far, because as I understand it, any rights from now on are going to be subordinated to these other consumptive use privileges.

Is that right?

MR. CHAIRMAN: As soon as we get our public testimony over, we'll try to have question and answer.

MR. LEE: Okay. Thank you.

MR. CHAIRMAN: The board would call Jerry Jayne, please.

MR. JAYNE: My name is Jerry Jayne. I live at 1568 Lola Street in Idaho Falls. My phone is 523-6692.

And I want to thank you members of the board and the department for the time and effort of holding these hearings.

I went to one of your October meetings last year and was a little frustrated in not being able to sound off there, because I thought -- I went under the impression it was a hearing, and it was just an information session. So I get my chance tonight. So that's all right.

I'm quite unhappy with the Swan Falls agreement. I think Idaho Power gave up too much. And I think the whole agreement is biased too much to favor future new irrigation development at the expense of other public resources and values.

There are parts of it I support, which I think we need to do. For example, the adjudication, which is going to be expensive and time-consuming, though I think it's necessary in order to get a better handle on the flows in knowing who owns what and what we have left in the Snake River Basin.

I certainly support the establishment of an

effective water marketing system where a willing seller could sell to a buyer a water right. And probably the hydrologic and economic studies in the Snake Basin are worthwhile, too, even though they may be slightly expensive.

As far as your alteration of Policy 32 of the water plan, I support the one that would rescind the endorsement of the target of 850,000 acres in the new irrigated land in the Snake by the year 2020. I think, as you recall, conservation groups have been complaining about that ever since it was proposed in 1976. It's not realistic, and I'm glad to see you're talking about doing away with that.

All right. The problems I have are basically two, two major points: One is the minimum Murphy flow, and the other is the public interest criteria. And I don't know if you're going to be making recommendations on the latter or not to the legislature. I'm assuming you are, since they were eluded to here in one of the policies as the new criteria, I assume, the (inaudible) criteria on allocation.

These criteria, again, are biased -- or the proposed criteria are biased very much in favor of new irrigation development at hydropower development. There is no mention whatsoever of fish, wildlife, and recreational

values. And I think frankly the governor and the attorney general of Idaho Power sold us all down the river there on fish and wildlife values.

I would recommend there a couple of changes: One would be to add a criterion on maintaining fisheries' habitat, both anadromous, below Swan Falls, of course, and the resident fishery habitat and adequate needs there. And I would also do away with the criterion calling for staged development a new irrigated land 20,000 acres per year, 80,000 for four. I think that's part of the old fix we had on the need or perceived need to develop more irrigated land, which is anything but true.

The minimum flow proposed is not a compromise. The legal existing minimum flow -- the legal minimum flow at Murphy of course is 3,300 second feet. The actual low flow as it was indicated gets down to about 4,500 second feet. That's what the fish have to live with. And that's already below, well below an optimum for fish and wildlife needs below Murphy.

Taking the mid point and giving 600 cfs to a future development, much of which would go for probably new irrigation development or whatever is proposing not to compromise but to take away significant fraction of the flow, the actual low flow there now. And this would be

quite detrimental to fisheries, not to mention Idaho Power customers.

So I would propose that you set that figure at 4,500 and namely make the actual flow the legal minimum flow, 4,500 cfs. The water that's in the river should stay there. New irrigation development or new developments are to come from water rights that are exchanged to the water marking system or by conservation.

I support several of the provisions that you are talking about tonight in Policy 32, of course. Provision for hydropower 32D and 32E for navigation and 32B for DCMI. And of course I do support 32H, I believe it is, to provide use and flexibility to try to meet minimum flows by owning for the state of Idaho some of the water that hasn't been allocated yet that's on the reservoirs. I think that's very worthwhile.

In fact, I have a problem with Policy 32C -- I'm sorry 32A. Water held in trust by the State. That seems to me that by proposing to hold water in trust for future development, this is upside down. You ought to be holding the water in trust for public values for in-stream flow needs rather than promoting more development, which is going to be very unwise.

I wanted to comment also on the subsidy, which is now offered to new irrigation development, especially the

large-scale ones. It's been documented that it costs something over $400 an acre per year to open new irrigated land in the lower Snake Basin. For electrical energy, this is primarily a replacement cost as well as the high pumping costs. And the thing that is the kicker in this, is that the new developer, the developer of the new land doesn't pay much of this. The Idaho Power customers, of course, would.

So it places an unnatural type of motivation on that kind of development, which is not only environmentally damaging by taking more water out of the river, but also very expensive and wasteful, detrimental to existing farmers by producing (inaudible) on the market and expensive to the Idaho Power customers.

So I would hope you just recommend 4,500 cfs as the legal minimum.

Thank you.

MR. CHAIRMAN: Okay. Jerry. Jim.

Jerry, you had indicated that you think the language should be expanded maybe some for fish, wildlife and recreation. Might we ask you to take your leisure time and get it to us by February 22nd.

MR. JAYNE: Sure.

MR. CHAIRMAN: Take 32G and expand it for us a little bit.

MR. JAYNE: I don't think that mentions the criteria proposal at all, does it? That's why I wasn't sure you were going to listen to comments about it tonight and why I hadn't prepared very well on that. But apparently you are going to be making comments on the proposal.

MR. CHAIRMAN: (Inaudible) proposal. Anything having to do with Policy 32.

MR. JAYNE: Gee, it's A, isn't it, you're talking -- is that the --

MR. CHAIRMAN: No, it should be Policy 32G. Fish, Wildlife and Recreation.

MR. JAYNE: Well, that's as distinct from the public interest criteria talked about under 32A, isn't it?

UNIDENTIFIED SPEAKER: Talking about the legislation (inaudible) mentioned in Policy 32A.

MR. JAYNE: Oh, okay. Yeah. I'll be happy to send you something.

MR. CHAIRMAN: Thank you.

MR. JAYNE: Sure.

MR. CHAIRMAN: Is there anyone else who wishes to testify.

Yes, sir.

MR. STORER: Claude Storer is my name. I'm a member of the committee of nine. I also farm in the area, and I run a fairly large cattle operation in the area.

I'm concerned mainly about the water marketing plan. You mentioned a while ago that the State could buy (inaudible) water and use it to fill this. Well, right now, my understanding is that (inaudible) water cost about $5.00 an acre foot. And not only $5.00 an acre foot, but by the time it gets to the river through that fancy channel they've built, it loses 50 percent of that.

So I don't see any way the State can acquire (inaudible) water at $10.00 an acre foot to use for this program. And that's what it will cost by the time it gets to the river.

Second, this marketing plan of water you talked about for the public use, a long-term marketing program, you take -- right now through the water bank, water is 2.50 an acre foot, which is about the limit that agriculture can afford to pay. Well, you open this up to a long-term marketing, and I can see what in the future what Idaho Power can afford to pay for that water.

Myself, I own 950 inches of water in two different canals. Just suppose that I sell that water to Idaho Power, put that ground in crested wheat for a long term. Now, one year I can't do this. But if I put that ground to long-term in crested wheat, can you imagine what's going to happen to District 93's tax base, Boghill (phonetic) County's tax base when that water goes into a

long-term period? You think about that. On one year I can't do that.

Right now we have an effective water marketing plan through the committee of nine and through the water bank one year at a time. There is no way that Idaho Power or anybody else can buy that water off them farms and I can put them farms in crested wheat for one year.

You think about this long term and what it could do to Boghill County's tax base. If this water should be transferred down the river, a lot of those farms, I pay several thousand dollars in taxes. I'm not so sure I wouldn't sell that water for a million dollars, which appears it's worth, and put them farms in crested wheat if this long-term marketing plan goes into effect.

Before you put this long-term marketing into effect, you better consider what this will do to the tax base of many counties around Idaho. School districts, for one thing. I pay several thousand dollars in school taxes.

Before you put this long-term marketing program into effect, I suggest you think long and hard at this.

Thank you.

MR. CHAIRMAN: Any questions.

Anyone else would like to testify?

How many members on the committee of nine?

UNIDENTIFIED SPEAKER: Nine.

MR. CHAIRMAN: We will close the testimony, and we will stand ready to answer some of your questions if we might.

Mr. Sherman, could you come forward, please. If you have a question, if you would come forward to the mic and maybe we can get Mr. Sherman over here a little closer to this one. (Inaudible.)

UNIDENTIFIED SPEAKER: I believe I can be heard from here, but I'll go to the mic if I need to.

UNIDENTIFIED SPEAKER: Are you picking it up?

UNIDENTIFIED SPEAKER: Yeah, I'm picking you up.

UNIDENTIFIED SPEAKER: My question is, it seems to me we're bringing together here three major entities: One is water users, the agriculture people, commercial use. And then especially on the Salmon River drainage, the Middle Fork drainage, some of the streams where agriculture and commercial use have been very restricted. I understand that the federal government has got to be an important portion of the adjudication process.

What do you feel the impact of that is going to be?

UNIDENTIFIED SPEAKER: You can do an adjudication without involving the federal government, sir. I think most of the ones done in the state to date -- in fact all of them, that I know of, have been that way.

The concern here is that when you're talking about

such a large portion of the state where you've got a major Indian reservation, those federal reserved rights become important if you're going to try and manage the river down to some magic number like 3,900 cfs in the summertime.

The reason for starting way down at Lewiston, so you're talking about the Salmon and Clearwater where there are basically no agricultural developments, is to be sure we can force the federal government to come into the state court, participate in our adjudication process.

There is a federal law which says if the state is doing a system wide adjudication, the federal government will participate.

Hopefully a compromise will be reached so that the adjudication starts at Swan Falls Dam at Murphy Gauge more properly. But because of the amount of water that may be reserved and unquantified for the Indian reservation, for the national parks, or the historic monument out here, and the forest service areas, if you're going to try and manage the thing down to some magic number, you need to know those. And that is the reason for the adjudication, the reason for trying to bring the federal government in.

MR. CHAIRMAN: Mr. Gray.

UNIDENTIFIED SPEAKER: Mr. Sherman, I think one of

the questions was asked also, this agreement is not to stop new storage. It's just to find out what we have in the storage; isn't that correct?

UNIDENTIFIED SPEAKER: Mr. Chairman, Mr. Kramer. The adjudication is to find out how much water we use, where and when, because if we've got worry about the exact flow in the river, we'd have to start worrying about consumptive uses and not amounts of water diverted.

The agreement and proposed revision to the state water plan does specify that before a new storage can be constructed, the director of the department of water resources has to make a determination about maximum use of existing storage is being made.

UNIDENTIFIED SPEAKER: Okay. But what has to be done there if we talk about two people we're really concerned about that we had stopped the new storage. If we find out that we need new storage or that the water in the dams is used, then we can -- there is no problem.

UNIDENTIFIED SPEAKER: (Inaudible.) Yes, then we're doing the best we can under existing rules and regulations and under existing laws. The intent is for the water board to publicly or privately have those rules and regulations examined. Ask if there can be changes to make the water marketing system more efficient.

If the board does that, and we can't change the

federal law that says you can't lease for more than one year at a time, or you can't sell your water for a profit, then the director has no option except to find, in my opinion, once there is no unallocated water, the maximum use is being made under existing criteria.

UNIDENTIFIED SPEAKER: I think you will find that after this adjudication is made, I'm kind of in favor of the adjudication itself. I think maybe we need that. But I think that you'll find that after this adjudication is done the water findings are done, by the time the Indians take out their block of water that they are going to take, everybody gets their block of water, I think that the government will come to the fact that we do need Teton back, because I don't think that water is going to be there.

MR. CHAIRMAN: Mr. Lee.

MR. LEE: The point that I have raised is that it is the policy of Idaho that maximum use must have made existing storage facilities in the basin before new ones were made. Why have it there at all. Why use their (inaudible). The only thing this does is assure the Idaho Power company that you're going to get the heavy spring flows that go through.

And instead of running them right straight on down the Snake River, we just as well put them in the dam and

spread them over the year so that they can be utilized in some manner, perhaps it might be advisable in our use of it. Spread it over the year so that they can be used. But we're putting restrictions (inaudible) that can be used in court on building or putting in new dairies. And why have it there at all. And there are lots of places up above Burley (sic) that are suitable and yet we say that this pertains -- their plan pertains principally or I've heard solely (inaudible), and that's not true.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: I didn't hear the question, Mr. Chairman, but I will say Mr. Lee is correct. The idea that maximum use of existing facilities be made is for the whole system (inaudible.) The restriction calling for mitigation for wintertime diversion supply is only below (inaudible) dam.

Mr. Chairman,

MR. CHAIRMAN: Mr. Haus.

MR. HAUS: To respond to the man's question, why is it there at all or why is it in the proposed draft to the state water plan, I think the answer is that the three negotiators or the three parties to the agreement, this is one of the things that they asked for.

In the October 25th agreement and in the (inaudible), they said that this is part of the

agreement. So the draft state water plan, since it was drafted to reflect what would be needed in the state water plan to reflect that agreement, that's the reason it's in this state water plan.

MR. CHAIRMAN: Mr. Lee.

MR. LEE: What I'm saying is that you don't have to agree with it, and we don't have to agree with it. And we ought to throw it out.

MR. CHAIRMAN: Mr. Darrington.

MR. DARRINGTON: How comfortable is the committee. There are lots of things that have come up here in a short period of time. We stored it back in the fall. And we're pushing this thing right along, which I agree with it, but I wonder -- I've always been concerned that Idaho Power have their homework done a little better than the rest of us did when the (inaudible) started.

And I'm wondering now if the time window, if being compressed so, that when we get through here and we get so these meetings don't cost us money, if there is going to be a tremendous amount of trying to (inaudible) the position from environmentalists and from Idaho Power.

MR. CHAIRMAN: By committee, do you mean the Water Resource Board?

MR. DARRINGTON: Yes, Water Resource Board.

MR. CHAIRMAN: I don't think the Water Resource

Board is comfortable at all. We have ten more meetings after tonight to go to the public with before we can form any kind of an opinion.

MR. DARRINGTON: Are you prepared to lengthen -- now, as I understood in the fall we had a time deadline on this. If we failed to meet that time deadline, then everything was off.

MR. CHAIRMAN: Yes. If you'd all turn to page 7, and I'm sorry I didn't mention that when we first got started. On the right-hand side, it says, "Action must be taken by May 15th, 1985 to validate agreement. Number one, state water plan is amended." Well, that's what we're attempting to do now with the public hearings that we're doing. And your input tonight will be part of what the board's final decision will be.

Number two, the legislative package is passed. And they've indicated pretty much that the package, which is in your paper here from page 4 to 7, must be passed pretty much intact, as it reads.

Number three, appropriate action by the PUC or legislature is called for and the agreement is taken.

Four, an appropriate order by federal energy regulatory commission acceptable to the parties to the agreement is issued.

Five, the Idaho PUC dismisses the 1977 petition by

the Idaho ratepayers.

Six, if required, the Oregon PUC approves the package.

And seven, enactment by the legislature of subordination language as set forth in Exhibit 7A and 7B of the agreement.

So all of these things have to fall in place by May 15th, 1985.

We have with us tonight Rich Hahn from Idaho Power Company. And if you have questions of a power company representative, I'm sure Rich would be able to, be glad to answer them when you write your -- okay.

If -- my understanding is that if this isn't taken care of by May 15, then the three parties will go back in negotiations.

UNIDENTIFIED SPEAKER: Or decide that the negotiations are not necessary and go back to court.

MR. CHAIRMAN: Or decide that negotiations have ceased.

UNIDENTIFIED SPEAKER: What's the feeling of you gentlemen at this point in time? Are you comfortable with the 15th?

MR. CHAIRMAN: I don't think we can really make that determination until we've had all of our public hearings, because we want to hear what the people of Idaho -- we're

representing you. So we want to know what you have to say, which brings me to the point that tomorrow evening we'll be in Pocatello, following evening Burley, and the evening after that Twin Falls, if you wish to attend those meetings.

Next week on Tuesday we'll be in Boise, and Wednesday in Lewiston. And we'd be glad to have all of you come with us.

Written testimony will be accepted until February 22nd.

Yes.

UNIDENTIFIED SPEAKER: Do you have final say on the Murphy (inaudible) flow or does the legislature have that say?

MR. CHAIRMAN: If you will take a peek on page No. 1 it talks about SJR 117, which was a constitutional amendment. It used to be that you, the people of the state of Idaho, through your Water Resource Board had the final say on what happens. The voters of the state of Idaho decided in November that's not the way it was going to be any longer. So the legislature will have the final say no matter what we come up with. I believe they refer to it as overview.

UNIDENTIFIED SPEAKER: How about the public interest criteria? Are you going to be making recommendations on

those also to the legislature or (inaudible)?

MR. CHAIRMAN: We will be making some recommendations on that, yes. Hopefully we'll be picking up some ideas as we go through our 12 meetings.

MR. KRAMER: Legislature makes that decision.

MR. CHAIRMAN: That's right. Mr. Kramer has very accurately pointed out that the legislature will also make that decision.

UNIDENTIFIED SPEAKER: That's a piece of legislation, so.

UNIDENTIFIED SPEAKER: Yeah, that was my understanding. I didn't know if you could make a recommendation at all.

MR. CHAIRMAN: You will notice if you study Policy 32 that all through it it refers back to sections of the Idaho code. And those sections of the Idaho code are the proposed changes to the Idaho code and/or additions to the Idaho code.

Any other questions, ladies and gentlemen?

Okay. We'll adjourn the meeting.

Thank you for coming.

(Conclusion of hearing.)

REPORTER'S CERTIFICATE

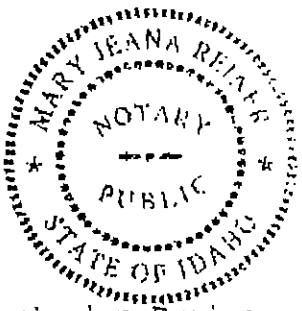
STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, MARY JEANA REINER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That said taped proceeding was taken down by me in shorthand and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said taped proceeding.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 6th day of November, 2007.



MARY JEANA REINER
CSR and Notary Public
in and for the
State of Idaho

My Commission Expires: 10-24-2013

Orr Affidavit

Exhibit 15

Transcript of Idaho Water Resource Board public hearing on proposed State Water Plan amendments (Jan. 29, 1985)

Third Orr Affidavit

EXHIBIT 24

STATE WATER PLAN HEARING)
_____ _____ _____)

PUBLIC HEARING

BEFORE THE IDAHO WATER RESOURCE BOARD

POCATELLO, IDAHO

JANUARY 29, 1985

2:00 P.M.

TRANSCRIPTION BY:
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A P P E A R A N C E S:

Gene Gray
Dave Rydalch
Jim Shawver
Wayne Haas
Don Kramer
Frank Sherman
Catherine Spinner Schueren
C.R. Schueren
Sally M. Gibson
Dan Nev
Mike Caldwell
Richard L. Hahn
John R. Scott
Gary Gunderson
Lyle Michaelson
Gerald Ramsey
Herman McDevitt

(Proceedings begin.)

MR. GRAY: This is the State Water Planning Hearing, January 29, Pocatello, 2:00 p.m., Littletree Inn.

Good afternoon, ladies and gentlemen. It's nice that you braved the weather to be here. My name is Gene Gray and I'm chairman of the Idaho Water Resource Board and I should explain to you the two entities we have in the State. We have the Department of Water Resources which deals with management of water. We have a regional office over in Idaho Falls, those folks, and we're here as the Water Resource Board and we're appointed by the governor and passed through the senate confirmation proceedings.

The members with us today are Dave Rydalch on the end. Dave is a farmer in the St. Anthony area. We have Jim Shawver who farms in the Eden area, both board members. Wayne Haas is with the Department of Water Resources out of Boise. We have Don Kramer who's a farmer in the Castleford area and I'm an insurance agent and small-time farmer in the Payette area. We have Frank Sherman with the Department of Water Resources who will be explaining some of the procedures.

We're here today mainly to take your oral or written testimony of proposed changes to Policy 32, the State Water Plan. And since there are only 1 think two of you that will be testifying, what we're going to do is kind

of break tradition. Instead of going into the testimony and just taking that and then closing the meeting, we're going to give you a few comments. We'll have Mr. Sherman kind of give you an overview of the proposed changes to Policy 32 that we would like to do. Then we'll take the public testimony. We'll close the meeting and then we'll open it up to questions if you have any.

So that might make it a little better. If you take a look at your "Currents," I'll try to explain to you how the thing is set up. On December 13 of 1984, the Water Resource Board accepted a proposed change for Policy 32. We have not adopted it. We have just accepted this to bring it before you to get your testimony and see how you feel about it or if you think it should be changed, it should be thrown out, whatever should be done. That's what we're here to listen to.

The first page kind of gives you some general information at the bottom. We have the meeting schedule. Tomorrow night we'll be in Burley and the next night, Thursday evening, we'll be in Twin Falls. On February 5, we will be in Boise and on February 6, we will be in Lewiston. We will accept written testimony from you until February 22. Any written testimony that you might like to give us today we'll accept of course but if you want to go home and do some homework and do some talking with other

people and things and get it to us later, that's great. But get it to us by the 22nd day of February and just use the address that's on the "Currents" and that's -- you can use the Idaho Water Resource Board, Statehouse, Boise, Idaho, 83720.

First page, general information. Page 2 and page 3 are the proposed revisions that we're bringing before you today. Mr. Sherman will be covering those shortly for you.

From page 4, 5, 6 and 7 is what is referred to generally as the legislative package and this is what the -- what the legislature is supposed to get passed to make this whole thing work. If you look on page 7 on the right-hand side, it shows you the action that must be taken by May 15, 1985 to validate the agreement. No. 1, State Water Plan is to be amended and that's why we're here today to get your input because we will be the body that will be doing the amending to the State Water Plan.

No. 2, the legislative package must be passed. No. 3, the appropriate action by the PUC or legislature is called for and agreement must be taken. No. 4, an appropriate order by the Federal Energy Regulatory Commission acceptable to the parties to the agreement must be issued. 5, the Idaho PUC must dismiss the 1977 petition by the Idaho rate payers. 6, if the Oregon PUC enters into any of it, they will also have to be approved as far as

(inaudible) is concerned. And 7, enactment by the legislature of subordination language is set forth in Exhibits 7A and 7B to the agreement. You'll find those on pages 4 through 7.

And with that, Mr. Sherman, would you like to go ahead and we'll start right on page 2 and Frank will just start with 32 and go through all of the amendments. If you have a very short question as Frank is going through this, we'll try to answer it but we would like you to hold your questions until after we have the testimony. Mr. Sherman.

MR. SHERMAN: I'll start with the existing water plan. Policy 32 is a policy which allocates the unappropriated waters in the Snake River Basin. When the Idaho State Supreme Court decided that Swan Falls -- the water right that Idaho Power claimed at Swan Falls was a legitimate right and had not been subordinated with their agreement concerning Canyon Complex, it made the existing Policy 32 wrong basically because the water that's allocated to various uses in this policy relied on being able to take Idaho Falls water away from them.

When the State and Idaho Power entered into the agreement in October of last year, they specified certain trade-offs and balances, compromises between the State and Idaho Power.

We start right off with Policy 32 as it's shown in

front of you. The intent of this policy is to establish the minimum flows called for by the agreement at Murphy Gauging Station which is just below Swan Falls Dam.

The existing water plan says that the year-round minimum flow at Murphy shall be 3300 cfs. This is an unrealistic estimate if indeed Idaho Power has a legitimate right at Swan Falls greater than that number.

The compromise basically is you will set 3900 cfs through your irrigation season, 5600 cfs during the wintertime. In return for the State Water Plan saying the river should never go below those flows, Idaho Power will give up some of the water they claim.

The board has also added some minimum flows at Johnson's Farm and Lime Point which are gauging stations or measuring points below the Hell's Canyon Complex. The existing State Water Plan recognizes that these are (inaudible) licensed and called for by the license. The board in this plan acknowledges that they're important flows and they're necessary for the well-being of the people on the river.

The proposed revision would incorporate those (inaudible) state flows also. It gives it added recognition that if for some reason there would be a change in the Idaho Power license, those flows should still be guaranteed by the State Water Plan.

The next policy, 32A, water held in trust by the state. You're going to find some references here and other places to Idaho Code 42-203C or whatever. These parts of the Idaho Code don't even exist yet. They're in the so-called legislative package that's in the back. So you can check -- if one of those things bother you, you can check the back.

It is the policy of Idaho that water held in trust by the State pursuant to blah, blah, blah of the Idaho Code be reallocated to the uses only that meet certain criteria. The agreement basically says that water that Idaho Power has claimed to give to the State, the State can reallocate that to other uses. Because it's water that has already been appropriated, the new criteria for the use of that water can be (inaudible). And that's basically what Policy 32-A says.

Any of the water that Idaho Power claimed that has been given to the State special criteria other than the normal beneficial use, non-speculative, the impact on your neighbor, those kind of (inaudible) still will be in place but there will be additional criteria for this water that Idaho Power had claimed.

32B, domestic, commercial, municipal and industrial. The existing water plan which talks in terms of acre-feet rather than cfs set aside a certain amount of

water for municipal and industrial uses.

The proposed revision would change that volume to a flow rate and basically keep it the same. We're talking in this case though rather than amounts diverted because the intent now is for the State to try and manage the river until we get to these magic flow numbers, the intent here is to allow up to 150 cfs consumptive use. Existing diversion from the basin for these kind of uses, domestic, commercial, municipal and industrial. The best we can estimate is an average of 404 cfs.

Much of that -- this is where it gets a little complicated. Much of that is for non-consumptive uses. If you know water budget, the water that's taken from municipalities that people drink, the waste products go back to the river and the water basically balances out. Or it comes back to the system through whatever sewage disposal there might be. We know consumptive uses in these kinds of diversions but lawn watering in (inaudible) community, golf courses, those kind of things, swimming pool (inaudible) consumptive use. So 150 cfs of water for consumptive purposes will be significantly more in terms of diversion from the river.

(Inaudible) the State are setting this aside from whatever block of water is available from Idaho Power. Now, I say from whatever block of water because the

examples in the discussions always revolve around the flow at Murphy because that's where the court case is held (inaudible).

Idaho Power has a claimed right in all their (inaudible) facilities in the river. In many cases, it's larger than the claim at Swan Falls but as part of the agreement, Idaho Power has said they will not protest lack of water at their upstream facilities as long as the 3900 and 5600 (inaudible) Murphy Gauge. They might protest if something illegal is going on but as long as everybody's willing to say, well, they're not getting their water at some other dam, as long as the 39 and 56 are going by Murphy, they're satisfied.

Policy 32C, agriculture. The existing water plan, as I say, was first adopted in '76 and at that time, the board set targets or at least hoped there would be new agricultural development. There's been sort of a controversy over a magic number of acres and we haven't come close to reaching that number with the agricultural economy at the present. There isn't (inaudible) irrigation.

What the board proposes in this new policy is basically to say those waters that they hold in trust, some portion has to go for domestic, commercial, municipal and industrial. The rest is available for agricultural uses.

The only magic acreage number now is the restriction saying that no more than 80,000 acres should go in a 4-year period. Over the last 8 or 10 years, the average number of new acres coming into the development (inaudible) irrigated agriculture development in the State is right about 17,000 per year. So the average of 80,000 over a 4-year period would be up to 20,000 acres per year but no more.

Policy 32D, hydropower. Basically that says hydropower shall be recognized as a beneficial use. That the depletion of river flows below the levels established in the beginning, the Murphy Gauge criteria is not (inaudible). Idaho Power's already recognizing (inaudible).

The minimum flow at Murphy serves several purposes, certainly one of which is hydropower. It guarantees so much water will come through the lowest dam, the Swan Falls Dam, the one that (inaudible). It provides flow for fish wildlife (inaudible) so it is not in the public interest for the flows to go lower than that.

Policy 32E, navigation. This is basically a repeat from what's in the existing State Water Plan. It says these kind of flows are enough to satisfy the needs of recreational water users and those commercial boaters who use the river below Hell's Canyon Dam.

Aquaculture. Once again, a repeat basically of

what is in the existing State Water Plan. Basically it says if you want to process aquaculture products, you need more water, you come out of the DCMI because it's a commercial endeavor. It says that the minimum flows established should provide enough water for aquaculture uses. They should probably realize many of the (inaudible) farmers rely on discharges from Thousand Springs.

The policy points out that this agreement will insure that some discharges continue to occur at Thousand Springs because that's basically where the river gets its water below Milner Dam to insure a flow to Murphy. But the State is not going to promise someone who uses those spring flows that it's always going to be there in the amount they may need. They may have to reconstruct the diversion dam. In an extreme case, they might have to drill wells because a water right in Idaho does not guarantee (inaudible) diversion. It (inaudible) a right to water.

Policy 32G, fish, wildlife and recreation. This is an awkward policy. The board has done the best they can I feel. It is the policy of Idaho that the minimum flows established are sufficient and are 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. The stream flow depletion below the (inaudible) is not (inaudible).

The board will recognize that these are not optimum. These are not the best flows for fish and wildlife and aquatic life. They are the minimum flows. They will support and sustain the fishery for example. They will provide for recreational uses.

The board has two different mechanisms to establish minimum flows. The one we're talking about today is by stating in the water plan. The flow at such and such a point shall never go below whatever. They also have the authority to appropriate the unappropriated waters in the state for in-stream values. Now, they have done that in many cases on streams that are tributary to the Snake River and will probably continue to do that. Their hope is that between the processes, we'll be able to support the kind of fisheries and wildlife recreational values (inaudible).

Policy 32H, water quality and pollution control. A repeat of what's in the existing water plan. It basically says you can't use good water to dilute bad quality water to try and satisfy the citizens of the state or the federal government. The board feels there are enough existing rules and regulations and laws in place to ensure the reasonable water quality within the state. This is not in their mind an appropriate use of water to use water just to dilute somebody's contaminated water.

Policy 32I, new storage. This is a very

complicated sensitive issue. The negotiators of the agreement specifically asked the board to address this problem, specifically suggested language that they felt was appropriate. There are two basic criteria here or two parts to this policy.

The first part is that before new storage is constructed anyplace in the basin above Swan Falls Dam, the director of the Department of Water Resources should make a determination that maximum use of the existing facilities is being made.

It's almost an impossible task. There are several reasons for this. There at the moment are unappropriated waters in the reservoirs within the system. There are also a lot of appropriated waters that are not used for the purpose they were appropriated. Those waters are generally released by the water master on October 1 so he can make space for next year's run-off. If we're in a situation where people are fighting over the water in the system, it seems inappropriate to have the water stored and it's not being used and it's basically dumped every October.

So the negotiators wanted the board to address this question. The board has agreed to do this. They've incorporated the suggested language in this policy and they have agreed to look at some of the social and legal barriers to more efficient use of water in the system.

I'll just skip over a couple of areas very quickly. There is an established water bank in the state. There is a mechanism and rules and regulations where a person who has more water than he needs can sell or lease that water to someone else. Some uses these rules and regulations made (inaudible) by the committee and I (inaudible). But it's not used to any great extent. The reasons are if a person has water stored behind a reservoir, he can only lease or sell that water on a one-year contract. Like someone who's coming in and wants to do something new is only assured water on a limited basis. He's not going to put very much money in (inaudible) financed.

The other problem was water stored behind the federal reservoir is you are not allowed to make profit on that water. It seems a reasonable rule in that if my father had had an old water right and we were building one of these dams 20 years ago, I'm not using the water, the federal government paid for most of the construction cost, why should I be able to take that water and sell it at a profit to me?

It seems reasonable from that point of view but it seems very illogical in that if I can't make a profit on that water, why should I bother to go through the hassle of trying to sell it to somebody else. Therefore it sits there year after year and it's not used.

unappropriated water in the system. Once there's no longer unappropriated water, his finding would have to be these legal barriers prevent us from doing anything different. Therefore, we're doing the best we can. If the water board through their efforts in conjunction with the Bureau of Reclamation, for example, can get some of these policies changed, then there will be water available for other uses and new construction may not be necessarily a mere term.

There's a second part to this new storage policy and it applies only below Milner Dam. Idaho Power's wintertime operation is an important part of their whole system. There's two -- my understanding, there are two key ingredients here. One is that they have a guaranteed buyer on the west coast during the wintertime because of all the electric heating. It's getting so (inaudible) guarantee to buy in Idaho because of the cold weather we've had lately also. So they can sell power very easily at that time.

The other reason of course is that the Hell's Canyon Complex and Brownlee Reservoir has to get filled and that's when it gets filled, during non-irrigation season.

As part of the trade-offs, the State agreed that anyone who wanted to divert water during the wintertime for storage purposes below Milner Dam would have to enter into some kind of an agreement with Idaho Power Company and mitigate for the company's operational losses. What the

There are State barriers to more efficient use of the water in the system. Even though we have the water bank business, the user has to be very careful that he would lease his water for five years in a row because if he doesn't apply it to his own land for his own beneficial use, he may lose his water right.

If a person has that water stored that he doesn't need and he tries to sell it to someone who's going to consumptively use that water, that becomes an expansion of a water right. The only way I could sell the water held in storage that would reduce the amount of acreage I would irrigate. Otherwise that water which was proven up as beneficial use for my property, it goes to another consumptive use. That's a violation of State law.

So this policy basically says the board is going to push for everybody involved, Bureau of Reclamation, the State, to take a look at these kind of problems and see if we can more efficiently use the water system.

Everybody wants to know is this a real barrier to new storage? I think to some degree maybe but certainly it's not as much of a barrier as (inaudible) lack of good downsize, the lack of water to fill the major reservoir on a year-to-year basis. It's a barrier only if the director has to make a finding. If the director were asked today to make a finding, he would probably say no because there's

mitigation will be, no one knows. It's going to be on a case by case basis. It certainly is a barrier to new diversions below Milner Dam. It may be that you're building a few extra thousand acre-feet to let Idaho Power call when they want and that may be enough (inaudible). If you can show the timing of your releases will benefit Idaho Power rather than really hurt them, that may be mitigation. But at the moment, no one is really clear.

But the agreement asks for and the proposed State Water Plan will say that wintertime diversion for storage below Milner Dam, some kind of mitigation for Idaho Power has to be considered.

There's only one last policy, Policy 321. Storing water for management purposes. The whole idea of the agreement is that the whole Snake Basin is going to be managed by a summertime and wintertime flow at Murphy Gauge and Swan Falls Dam. As a person who works for the Idaho Department of Water Resources, I know that at some point down the road, that's going to be a real difficult task to accomplish. This policy suggests that while reservoir storage while unappropriated water is available, the State should try and get some so that if the regulators make a mistake down the road, they've got a place to call for water and meet these flows.

The real problem is not within the river itself

because we can shut off (inaudible). The problem is that a zero flow allowable at Milner Dam during most of the irrigation and low flow periods of the year, the water in the Snake River is discharged from Thousand Springs. That's where the Snake River excess goes. Trying to manage the whole Snake (inaudible) aquifer in conjunction with a river to meet these minimum flows at Murphy Gauge is the real task. Certainly most of us know enough about (inaudible) to know that if you made a call (inaudible) on a pumper who is 50 miles from Thousand Springs, the effect of shutting him off might not show up for six months at which point, who cares.

It's not appropriate if you're going to manage groundwater and surface water together. You have to (inaudible) the impact of the aquifer on the river in the summertime to shut off the (inaudible) when there (inaudible).

So from the point of view of the regulator or the manager, while there's unappropriated water available, it sure would be nice if we could get a hold of some of that. Now, from the day we could get a hold of it until we made the mistake that causes to use it for this purpose, that water could go to the water bank where anybody who wanted to use it for a year or whatever could do so. It could be sold to Idaho Power for example. But it would be sort of

an insurance policy much like an irrigator has stored water for insurance if he doesn't get his natural flow right. This would be an insurance policy for the Department of Water Resources if they find they can't meet the terms of this agreement.

One thing I would say about calling for that water in a low flow year, the agreement -- this is not part of Policy 32. The agreement specifies that all current users, all people who have (inaudible) water use upon signing of the agreement are protected. If nature didn't cooperate and the flows were going below 3900, those people who were in place before the agreement was signed would still be allowed to use the water right with only the people who (inaudible) on water after the signing of the agreement, that would be subject to being shut off (inaudible) flows.

MR. GRAY: Thank you, Mr. Sherman. We'll now take public testimony. We'll first hear from Sally M. Gibson followed by Mike Caldwell. Sally, please state your name, address and telephone number for the record, please.

MS. GIBSON: I'm Sally Gibson. I'm the president of the League of Women Voters of Idaho and I'm representing that organization here today. I live at 1507 East Lander in Pocatello. My telephone number is 233-6516.

The League of Women Voters thanks you for this opportunity to comment on the suggested revision of Policy

32 of the State Water Plan. We recognize that changes are necessary to implement the Swan Falls agreement between the State of Idaho and Idaho Power Company.

A general adjudication to determine the nature, extent and priority of all water users in the Snake River Basin is vital to the entire water plan. We must have an inventory of water rights. No good manager would ever consider a guess about the most important commodity in his business; in this case, water.

We recognize that this process will be costly but it is essential for the State to know precisely how much water is legally claimed and how much, if any, remains for future appropriation. Until adjudication is complete, the minimum flow at the Murphy Gauging Station should be set at 4500 cubic feet per second. This is the present average summer flow.

It is our position that for the present, actual Snake River flows remain in the river. It should be possible to establish a mechanism for the transfer of water rights between willing sellers and buyers. With this in place, water for new development could be brought or acquired through water conservation. Preventing speculative agricultural ventures is a benefit to Idaho's present agricultural community.

Along with adjudication of water rights must come

complete hydrologic and economic studies of the Snake River Basin. These studies are needed to determine the lengths between surface and groundwater supplies. We must have information on the physical characteristics of our aquifers. Thousands Springs provides the Swan Falls flow. Groundwater depletion is serious and we need geologic data.

The League of Women Voters advocates multiple use for the water remaining after priority water user claims. We are very much disturbed by Policy 32C which would make water held in trust and not used for domestic, commercial, municipal and industrial purposes available for irrigation requirements. As I stated previously, we maintain that speculative agricultural ventures are not beneficial to our agricultural industry.

While we believe that every effort should be made to honor current valid water rights, we also maintain that there are more than two competing uses. Negotiators have talked about balancing the need to produce hydroelectric power against the need to make water available for agricultural development.

We respectively (sic) submit that there are other uses for Snake River water, namely, fish, wildlife and recreation. We are concerned about the impacts on fish, wildlife and recreation. We do not believe that these uses can take any decreases in water rights. All beneficial

uses could be made more equal by not putting specific figures in for only one beneficial use. Putting in a quantitative target for agricultural development only means that fish, wildlife and recreation uses will be subordinated.

Policy 32G states that minimum flows 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. We would like to see economic reasons for and development targets for all beneficial uses.

Finally, we are concerned about representation of the public interest. We know that individuals will not come to these hearings to represent themselves. Witness the few numbers at this meeting this afternoon. Our organization is a public interest organization but we cannot and do not represent all aspects of the public. Our aim is to encourage individuals and groups to speak for themselves at these hearings. Consider the opinions of those who will not come to these hearings. They are the public interest and so are their children and grandchildren.

A river system is a dynamic and connected whole which should be treated in the nature of a public trust for the whole state. Thank you for listening to us.

MR. GRAY: Sally, might you stand for questions from the board members, please? Mr. Rydalch, any questions?

MR. RYDALCH: No questions.

MR. GRAY: Jim?

MR. SHAWVER: I have no questions.

MR. HAAS: No questions.

MR. GRAY: Thank you very much. Might we get a copy of that if you have an extra? Thank you very much.

Chair calls Mike Caldwell.

MR. CALDWELL: Thank you. I'm Mike Caldwell. I live at Route 3, Box 173, Blackfoot, Idaho. I live on (inaudible) Road.

The main reason I'm here today to testify before you gentlemen is that one thing to start out to (inaudible) you a little bit and to make the point that a number of people have mentioned to me and to different meetings across the area that perhaps that the big money people, the utilities in particular, have went around you. You gentlemen are sitting on the board seeing this thing kind of coming and then allowed yourselves to be boxed out politically away from where the decision-making was to be made. You're appointed by the governor in my opinion to kind of oversee this water thing and when the final agreement was made at Swan — on the Swan Falls agreement,

evidently you guys were — you gentlemen were left out in the cold on how the minimum flow was going to be.

I also want to kind of praise you a little bit too. I want to thank you for the opportunity to come and to have these -- or to give the testimony here and also to let you know that this idea of being allowed to take your water out -- that's in reservoirs and allow it to be sold for another use perhaps would be one of the finest solutions that could come out of this agreement. I personally feel that this is the way to go.

Another thing I'd like to talk to you about is the reservation water right. I'd like to -- at this time, nobody's mentioned anything about it. Do the Indian tribes in Idaho have a -- have a right on — in this agreement or how is it going to be addressed at a later time? Is there — a question could be answered to me how is that going to work? And that probably finishes my testimony. Thank you.

MR. GRAY: Mr. Rydalch, any questions?

MR. RYDALCH: Don't have any.

MR. GRAY: Mr. Shawver.

MR. SHAWVER: I think I'll answer that question for you after the hearing.

MR. GRAY: Mr. Kramer.

MR. KRAMER: None. Not right now.

MR. GRAY: Okay. Thank you very much, Mike. Is

there anyone else who might like to testify that we don't have indicated here? If not, we'll close the formal hearing and we'll open it up for questions and answered.

Mr. Sherman. What we'd like you to do is if you have a question, please come to the mike so we can get it on tape. We've found that we've had some questions that have given us a lot of information that we really need that didn't wind up on tape. So what we would like you to do is come forward to the mike and state your question or if you can carry far enough so we can hear it on the recorder, that would be fine too.

Questions, ladies and gentlemen. Mike.

MR. CALDWELL: Could I get an answer to the question I asked during the testimony? Where is the -- where does the individual Indian water right come into this thing?

UNIDENTIFIED SPEAKER: Mr. Chairman. This really isn't the board's problem. It's not part of the State Water Plan as proposed -- the proposed revisions would have the State Water Plan Policy 32 read. The existing State Water Plan had asked the Indian tribes and the federal government to quantify their rights before today (inaudible). It's yet to happen.

One of the main purposes for the adjudication and one of the reasons it gets more widespread support than one

would necessarily expect is that the adjudication is designed to force the Indian tribe and the federal government to quantify their water rights.

The federal government can only be forced to participate in an adjudication if it's what's called a system-wide adjudication (inaudible) system-wide adjudication. Indian tribes and the so-called federal reserved rights will be quantified. That includes the order that the Forest Service might want, (inaudible) whoever. That's why right now, the adjudication is scheduled to start in Lewiston and include the Salmon and Clearwater Rivers which are obviously not a part of the problem at Swan Falls Dam but by starting there or threatening to start there, we feel we can force the federal government under their own rules to participate in the adjudication and to do the adjudication in the state courts. Okay.

MR. CALDWELL: On the year -- your statement you give before the testimony stage, you said that there would be a year that after the modification of these things went into effect and anything that come along after that would have to stand by the agreement? Is that -- does this include the --

UNIDENTIFIED SPEAKER: No. Part of the adjudication of a water right is, one, proven that it's

been beneficially used and its priority date is given (inaudible) system. Federal government and the reservation would have priority dates based on when that land was withdrawn from the public domain meaning Fort Hall could have an 1800 water right.

MR. GRAY: Yes, sir.

UNIDENTIFIED SPEAKER: As far as you stated in your testimony that all those rights that have occurred and applications that have been filed prior to October of 1984 would be given that right under the existing rules, but the water rights that are applied for after that date would come under the criteria of the agreement. In addition, there would be special criteria they would have to meet -- that Idaho Power --

UNIDENTIFIED SPEAKER: No, not Idaho Power. You were right -- I was with you all the way until -- you had it exactly right. Those waters held in trust by the state, it says established by Idaho Code 42-203A and that's basically the existing criteria to get water right and Idaho Code 42-203C.

UNIDENTIFIED SPEAKER: (Inaudible.)

UNIDENTIFIED SPEAKER: The legislature has to adopt these; not Idaho Power. It's something that the legislature's got to adopt and Mr. Gray can give you the reference to the page.

UNIDENTIFIED SPEAKER: This is criteria that is in the agreement that has been additionally put in over and above what was done before?

UNIDENTIFIED SPEAKER: Right.

UNIDENTIFIED SPEAKER: And this is the additional criteria that that refers to.

UNIDENTIFIED SPEAKER: Right. And those will be for the water that Idaho Power claimed that the State is not (inaudible).

UNIDENTIFIED SPEAKER: This is the 45 to 3900 cfs?

UNIDENTIFIED SPEAKER: That's at the Murphy Gauge. It's a different number at every different dam on the river. But yeah, that's true.

UNIDENTIFIED SPEAKER: It's not -- too, I'd like a clarification or have you elaborate on your interpretation of the beneficial use criteria that would have to be met by say a person applying for a water right for a deep well. Is this going to be -- is your understanding -- is this something that's going to be similar to like EPA environmental impact statements?

UNIDENTIFIED SPEAKER: No.

UNIDENTIFIED SPEAKER: Or is this going to be something similar to like in the past a little bit more simple that an individual farmer might be able to handle?

UNIDENTIFIED SPEAKER: It's going to be not that

different. A person who's going -- wishes to use a deep well, for example, I would say (inaudible) because that brings the whole thing together will have to meet the criteria they have to meet right now plus they will be evaluated on their impact on hydropower generation, are they in the family farm tradition, and I can't remember the others but they're listed in the page there what the legislature's going to ask to adopt. What the legislature actually adopts may be different and that (inaudible) changes. But it's supposed to be a simple check-off system that's going to take order, yes, it's going to hurt Idaho Power directly in terms of hydropower generation because we have to analyze the impact on the rate payers in the state. (Inaudible), yes or no. We come up with a simple five or six check-off list that the department does as part of the routine process in application.

UNIDENTIFIED SPEAKER: Look on page 6 of this "Currents" and the first column, clear at the top. This is the additional criteria. It starts on the previous page, the public interest determination (inaudible) being aproved and continues on page 6. As Mr. Sherman indicated, this was the draft language. This is before the legislature -- what they finally end up with of course we don't know. But I guess the parties to the agreement, one of their stipulations was that whatever the legislature ends up with

is supposed be quite close to this. They said that any major changes they would have problems with.

UNIDENTIFIED SPEAKER: Pretty well void the agreement (inaudible). (Inaudible) considered by (inaudible) there's any drastic changes as determined by those -- any one of those two parties, they can avoid the whole agreement. Is that correct?

UNIDENTIFIED SPEAKER: That's what we heard.

MR. GRAY: That's the talk on the street.

UNIDENTIFIED SPEAKER: So it's pretty well going to have to come in line with what's been signed within pretty close limits.

MR. GRAY: If this does not fall in line by May 15 as it's supposed to, 1985, then the negotiators will meet again and they'll either come up with another proposal or else it will go back in the courts.

UNIDENTIFIED SPEAKER: It will go back to step one again.

MR. GRAY: That's correct. Mike.

UNIDENTIFIED SPEAKER: Was your gentlemen's original thoughts on this when you was confronted with the Swan Falls issue in itself was to condemn the dam at Swan Falls and to have the State end up owning them and then selling it back to Idaho Power without its water rights?

MR. GRAY: No. The board -- the board never did

make a determination that they should purchase Swan Falls. What we did is we requested staff to look into the possibility or the fees --

(Tape No. 1 ends. Tape No. 2 begins.)

UNIDENTIFIED SPEAKER: The way I understood it at the beginning there, it was one of the thoughts -- this is (inaudible) you fellows (inaudible) to that initial thinking.

MR. GRAY: No. We have broad shoulders and we're back. Anymore questions? Sally.

MS. GIBSON: I think what you state the action that must be taken by May 15 is kind of scary. Do you really anticipate that all of this will be done by May 15?

MR. GRAY: Do I really have to answer that question? We hope that it takes place by May 15.

UNIDENTIFIED SPEAKER: Mr. Chairman, could I add --

MR. GRAY: Yes.

UNIDENTIFIED SPEAKER: Could I add that the principals to the agreement stated that they would sit down on May 15 and (inaudible). There's a little leeway (inaudible) they're not going in the right direction or not.

MS. GIBSON: Because you're even dealing with a different state here and I know that these things take a long, long time to get done so, in other words, we could

best push for that.

UNIDENTIFIED SPEAKER: That's correct. Thank you.

MR. GRAY: I'd like to point out that Mr. Herman McDevitt from Pocatello, attorney at law, is with us and Herman is a former board member. It's nice to have you, Herman.

MR. MCDEVITT: Thank you.

MR. GRAY: We also have Rich Hahn in the back. Rich is with Idaho Power Company. He might be able to field a couple questions if you have one that you'd like to direct toward the utility.

UNIDENTIFIED SPEAKER: Do you think that there will be any -- my thinking on the deal is that the reason why -- one of the reasons why Idaho Power's rates have been so low for so long is the possibility in the back of their mind the company's thinking that there was a chance they wouldn't have any water right in the river and that if they had the guaranteed stream flow of this 3900 cfs that there might not be the thinking in their mind to keep the rates low or (inaudible). He's probably not going to admit it even if there is but --

MR. HAHN: I really can't answer that question. I wasn't a part of the negotiating team and that would be better responded to our representative on the negotiating team (inaudible). I'm here simply to observe the meeting.

UNIDENTIFIED SPEAKER: Mr. Chairman.

MR. GRAY: Yes, Mr. Sherman.

MR. SHERMAN: I would -- as part of follow-up to that question though, until the Idaho Supreme Court made the decision that the Swan Falls claim by Idaho Power had not been subordinated by the Hell's Canyon Drain, both the power company and all State agencies were operating under the assumption that the water right at Swan Falls was (inaudible). I don't think it was until '82 that Idaho Power realized that they really had a claim toward (inaudible).

MR. GRAY: Yes, sir.

UNIDENTIFIED SPEAKER: As I understand it, this 4500 cubic feet per second at the Murphy Gauge, that is the present low flow for the irrigation season and that's why -- that's why they (inaudible) at that point and they kind of split the difference between 45 and 33?

UNIDENTIFIED SPEAKER: Yes, that's correct. The historical flow at Murphy is 4500 cfs for an irrigation season. The water plan called for 3300. That was the starting point for the State. The 45 that Idaho Power actually had had been given was at least a reasonable starting point from their point of view (inaudible).

UNIDENTIFIED SPEAKER: And so this pretty much gives the State an additional 600 cfs during low flow that

they can appropriate and give out in (inaudible) to water users.

UNIDENTIFIED SPEAKER: That's correct.

UNIDENTIFIED SPEAKER: Whether it be domestic or (inaudible).

UNIDENTIFIED SPEAKER: And in good water years, there's more water than that available.

UNIDENTIFIED SPEAKER: Thank you.

MR. GRAY: One thing I would like to address, Mike, you made mention of the fact that the Water Resource Board had not been party to the negotiations. One thing you have to keep in the back of your mind that the governor was one of the three parties to the negotiations and he is our boss.

UNIDENTIFIED SPEAKER: I realize that. He was taken into it from you gentleman supposedly when the (inaudible). The thing that probably -- if you lay it out in black and white, everybody can see how everybody's being handled and one thing another, (inaudible) but it seems like it was a closed-door deal done over a cup of coffee or if they didn't drink coffee, (inaudible). But there was -- it seems like a deal that was made -- the same kind of deal that was made with -- that Len Jordan was supposed to have made with the president of Idaho Power in the beginning when he said they were going to have this subordination.

And what bothered me about it is it's out here in black and white. Everybody can read it and it's fine for now, but what's going to happen when Governor Evans has passed on for six months and Idaho Power decides to change their mind again?

UNIDENTIFIED SPEAKER: Well, the thing is, it's very important for us to take the input as we go down the Snake system because that is going to be an important part of the overall package and you are going to have something to say about it and that's what's good about our system I think. I think Mr. McDevitt's in the starting blocks. Herm, did you want to make a statement?

MR. McDEVITT: Mr. Chairman, I'd like to carry on with Mike's comment not saying you guys were left out but in saying that the intent certainly to assure the agreement for more than the length of Governor Evans' term is by getting specific pieces of legislature. It's by putting it in the water plan. But quite honestly, once it's in place, the water plan gets reviewed every five years by law. It can be changed. The legislature meets yearly and can change any law they want. So there's no real guarantee. The best you can do is make it the law of the land and that's certainly the intent.

UNIDENTIFIED SPEAKER: Thank you. Any other questions? Yes.

UNIDENTIFIED SPEAKER: How is the -- this SJR-117 actually going to affect the Department of Water Resources? Is it going to put the whole water plan up for debate every year in the legislature or --

UNIDENTIFIED SPEAKER: No. SJR-117 doesn't affect the Department of Water Resources whatsoever. It affects the Idaho Water Resource Board but it does not change the function of the board. Our main function is still to develop water policy for the State of Idaho. But now the legislature has overview of our process or let's put it this way: Your process.

UNIDENTIFIED SPEAKER: They have the final --

UNIDENTIFIED SPEAKER: That's exactly correct.

UNIDENTIFIED SPEAKER: -- acception or rejection of what the policy --

UNIDENTIFIED SPEAKER: That's correct.

UNIDENTIFIED SPEAKER: What policy you feel -- what you hope to come out with saying this is the policy the State should use that goes before the legislature and they have to say yes, this is what will happen (inaudible). They give it back to you and say try again.

UNIDENTIFIED SPEAKER: That could happen. Basically the process now is the board goes through. We take public hearing and we develop policy on what we think you said. That's the public process.

UNIDENTIFIED SPEAKER: Right.

MR. GRAY: It used to be when the board then said this is policy, it was policy. Well, it isn't that way or won't be that way from now on because when the people of the State of Idaho voted to accept SJR-117 or the constitutional amendment, what they said in fact was, yes, we realize the water board is going to develop policy but we want to give the legislature overview of what they do and that's what SJR-117 did.

UNIDENTIFIED SPEAKER: So actually it's going to give the legislature the right to accept or reject the policy you come forward with?

MR. GRAY: That's correct. Or change or amend.

UNIDENTIFIED SPEAKER: Or change.

MR. GRAY: Or change or amend.

UNIDENTIFIED SPEAKER: So then how much are you going to have to say about what actually becomes water policy?

MR. GRAY: We're going to have a whole lot to say about what the process involved is to get it to there but on the final say-so, you better talk to your legislators because that's -- that's what the public decided they wanted to do with this.

UNIDENTIFIED SPEAKER: Thank you.

MR. GRAY: Okay. We'll meet again tonight at 7:00

p.m. in the same room if you would like to join us again and you're certainly welcome.

(Tape ends.)

STATE OF IDAHO)
) SS
COUNTY OF CANYON)

I, TAMARA A. WEBER, State-certified and licensed transcriber, do hereby certify:

That the foregoing transcript is a transcript of cassettes made of the proceedings in the matter of the Public Hearing in re: State Water Plan before the Idaho Water Resource Board, January 29, 1985, 2:00 p.m., Pocatello, Idaho; that the foregoing pages 1 through 39 of this transcript contains as accurate and complete a transcription of said cassettes as I was able to make.

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of November, 2007.

TAMARA A. WEBER, CSR RMR
Idaho CSR License No. 278
Transcriber

STATE WATER PLAN HEARING)
_____)

PUBLIC HEARING

BEFORE THE IDAHO WATER RESOURCE BOARD

POCATELLO, IDAHO

JANUARY 29, 1985

7:00 P.M.

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A P P E A R A N C E S:

Gene Gray
Dave Rydulch
Jim Shawver
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Don Kramer
Frank Sherman
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Lynn Ruby
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Dan Daley
Mack Gamblin
James Osborn
Tom Stroschein
Gordon Toeus
Harold Funk
Ritchey Toeus
Ben Caveness
Gary Gehring

(Tape begins.)

UNIDENTIFIED SPEAKER: This is a recording of the State Water Plan hearings in Pocatello on January 29 at 7:00 p.m.

MR. GRAY: -- Resource Board's public hearings on the revisions of Policy 32 of the State Water Plan. With me tonight is Dave Rydalch. Dave's a farmer in the St. Anthony area and he's also a member of (inaudible). And Wayne Haas with the Department of Water Resources; Don Kramer who's handling the sign-in sheet back there is a farmer from Castleford, board member; J.D. Williams, attorney at law from Preston. We have Ken Dunn, director of the Department of Water Resource with us tonight. Frank Sherman from the Department of Water Resources will be talking to you and we have Tom Stroschein is Congressman Stallings' agricultural fieldman.

So with that, we'll kind of get started. If you kind of grab your "Currents" and take a look at the front page, the front page will give you a general rundown of what has transpired to this point as far as the board is concerned. The board is charged with making water policy for the State of Idaho. The State Water Plan was developed and put together for the public hearing process by the Idaho Water Resource Board. What we're going to be talking about tonight is revisions to Policy 32 and we accepted

some revision language in December of 1984 and that's what we have with us tonight and that's what we would like you to testify on.

If you take a look at page 2 and page 3 inside your paper, you'll find the language and proposed revisions for Policy No. 32. Page 4 through 7 is the legislative package that our legislature is working on at the State capital present.

Now, in order of representation, if you'll look at the right-hand side of page 7, you'll see actions that must take place for this thing to be in place and that must all be done by May 15, 1985. No. 1, the State State Water Plan is to be amended and that's what we're here in front of you for this evening is to get your input on that portion of it.

No. 2, the legislative package must be passed. No. 3, the appropriate action by the PUC or legislature as called for in agreement is taken. 4, an appropriate order by the Federal Energy Regulatory Commission acceptable to the parties to the agreement must be issued. The Idaho PUC must dismiss the 1977 petition by the Idaho rate payers.

No. 6, if required, the Oregon PUC must also approve the package. No. 7, enactment by the legislature of subordination language as set forth in Exhibit 7A and 7B which you find on pages 4 through 7.

So with that, we'll have Mr. Sherman briefly give you an overview of the changes that we're contemplating in Policy 32. We'll follow that by public -- your public response. We'll close the public response and then we'll open it up for questions and answered. Mr. Sherman.

MR. SHERMAN: The existing State Water Plan is a policy that's directed towards water use in the Snake River Basin. It needs to be changed for two reasons. When this plan was first drawn up, the idea about managing water in the basin was to allocate the water in the system for specific uses.

When the Idaho Supreme Court in 1982 decided that the water right at Swan Falls Dam held by Idaho Power was an unsubordinated water right, (inaudible) water year, it made these allocations inaccurate. When this plan was put together, it was assumed that the Idaho Power water rights at Swan Falls was subordinated and the State could take that water away from the power company.

So allocations that are (inaudible) how much water's available. The other and more pressing (inaudible) is that, as Mr. Gray explained, the State and Idaho Power reached an agreement and compromised to resolve the conflict. They specified certain changes that they felt had to be made to the water plan.

Proposed language addresses those changes very

specifically (inaudible) incorporate (inaudible) into the State Water Plan. The old policy was just a general statement saying that it is the policy of the State that the water shall be allocated to the public with the following criteria or uses.

What we've attempted to do in the revised version is spell out this policy of the State of the waters and how they will be used and what the board feels about the different uses (inaudible).

So let's start right off with Policy 32. It's a key policy. The intent of the agreement and certainly the way the agreement can be implemented in terms of water -- managing the water in the system is treat the groundwater and surface water as an entity to try and manage all the waters in the basin.

The agreement says that because of the conflict at Swan Falls and the Murphy Gauging Station that's the nearest U.S. Geological Gauging Station on the river to Swan Falls, there's a controversy around that and the fact that the existing State Water Plan specifies a year-round flow of 3300 cfs. The key change right away has to be we're going to change those flows.

Idaho Power had claimed -- has a claimed water right in the Swan Falls Dam of 8400 cfs. The river has been as low as 4500 cfs in the summertime. This is a

historic fact. The negotiators in trying to implement some kind of compromise said, "Well, we've already been down to 45. The State Water Plan calls for 33. Let's split the (inaudible)." We come up with 3900 in the summertime because a significantly larger (inaudible) water goes past that point, the (inaudible).

The compromise (inaudible) 5600 cfs (inaudible). It's a compromise. Why is it a compromise? Because Idaho Power says as long as that volume of water flows past that gauge, they will not take action through the State against anyone for (inaudible) water rights providing those people are making beneficial use of that water right prior to the signing of agreement. The whole intent of the agreement is to rationally split up the water that's left; protect the existing user.

You'll note that the proposed policy discusses minimum flows of (unaudible). In the existing water plan, the plan recognizes these flows because they are part of Idaho Power's license to operate (inaudible) hydropower complex.

It was felt that by incorporating these officially into the State Water Plan, they would assure those flows no matter what might happen to the (inaudible). So the draft language suggests that two additional (inaudible) would be appropriate. There are two other flows in the existing

water plain which will remain unchanged. One at Milner Dam. (Inaudible) has to be fixed because if water shortage -- all the water's appropriated above that plan. That (inaudible) should stay the same. It's the minimum flow established by the gauging station in Weiser set for 4750 cfs. That flow will remain unchanged.

Policy 32A, water held in trust by the State. In trying to effect the compromise, what happened to the water that Idaho Power claimed that they were no longer going to get guaranteed to them? The decision was made that that water should be held in trust fund (inaudible). The State could allocate it to the uses.

The problem that comes into the matter is that these (inaudible) had already been appropriated. We're not talking about the unappropriated waters of the State. We're talking about water that we generally and is now available for reallocation to other uses.

The agreement that was reached says you can reallocate the water. Idaho Power has the use of that water until it is reallocated. Because it's sort of special water, the State can and will put special criteria upon people who want to use it.

You'll notice at the end of the draft language, it talks about Idaho Code 42-203C. There is no such piece in the Idaho Code today. This is what the legislature has to

do. The board is recognizing that because it has been appropriated or claimed at one time, new criteria can be put on people who want to use it. It's up to the legislature to establish those criteria. The suggested language for those criteria is contained in the back pages of the (inaudible).

Policy 32B, domestic, commercial, municipal and industrial. Existing water plan has an allocation of water that's based on mistaken assumptions about no water being available (inaudible) for municipal and industrial uses. It's given in acre-feet. The existing water plan is volume. The negotiators talked always in terms of rate of flow. If you convert the volume it set aside and the water plans to date from municipal, industrial uses, you come out to about 144 cfs. The proposed language suggests setting aside 150 cfs for consumptive uses (inaudible).

We're still talking about how much water (inaudible). How much water is (inaudible). The department is going to be charged with managing this block of water and how much water is consumed.

If you do water budget analysis for a community, consumptive losses are basically (inaudible) watering grass. People who drink the water, it goes on through to the treatment plant and back to the river, back on the land. It's not lost in the system. So consumptive uses

for new industry (inaudible) consumptive use for standard population is very low. Many of the new industries who come in (inaudible) irrigated. Therefore, they may even get a net increase if the water is available to the State to use. We set aside 150 cfs.

As you probably know, the water plan has to be reevaluated and readopted every five years. If this number was off by a major factor, it would be changed.

Policy 32C, agriculture. The existing plan said that it was the policy of the State to try and maintain Idaho's position in the nation in terms of food and (inaudible) production. Based on that, estimates of what the agricultural growth in the nation would be and the plan hoped for specific months of new irrigation.

Recognizing that now there's not as much water available as we thought there was, this particular policy would only state that of those waters held by the State what used to be Idaho (inaudible), after we satisfy all the DCMI uses, the remaining water be would be available to (inaudible).

32D, hydropower. This is so short, I can read it. "It is the policy of Idaho that hydropower use be recognized as a beneficial use of water." (Inaudible.) And that depletion of flows below the minimum average dail flow set forth in Policy 32 is not in the public interest.

If you're a ratepayer, it's not in the public interest to see (inaudible). As part of the trade-off of getting the water released by Idaho Power, the negotiators had to say, "Okay. We can treat those minimum flows as part of your water right. Now the water's going to be guaranteed to you forever." (Inaudible.)

Navigation. This is basically the exact language that's in the current water plan. It just says that by the establishment of an easement, there's always going to be enough water to use for recreational purposes and for commercial and navigation (inaudible) navigation purposes.

Aquaculture. There's two basic statements. The first one is that anyone in the aquaculture business who wants to get a water right to process (inaudible) that water should be counted against the DCMI reservation. Second part which is really already in the water plan is that because of the minimum flows and because of the fact that for most of the summer, the water in the river where aquaculture occurs, water comes out of Thousand Springs. That water will hopefully be -- certainly enough would have to be here to satisfy (inaudible) gauge. So there should be water available for aquaculture purposes.

Because some of these people rely on discharge from the aquifer itself at Thousand Springs for their water use, the State cannot guarantee that their need for diversion is

protected. The water right in the State of Idaho guarantees you access to water. It does not necessarily protect how you get it. If you continue (inaudible), a trout farm might have to change it's diversion (inaudible) in extreme cases (inaudible) and dig a well. It takes priority (inaudible).

Policy 32G. Fish, wildlife and recreation. This is basically the language that's in the existing water plan and realize that the language that's in there was based on a year-round flow of 3300 (inaudible); not the 39 (inaudible). It's a policy of Idaho and the board that these minimal flows satisfy the minimum requirement of fish and wildlife and aquaculture and aquatic life and recreational purposes.

The board does not pretend that these are optimum (inaudible) but they are the minimum values in the state to serve sort of outdoor recreation (inaudible) come to accept being available to us in Idaho.

Water quality and pollution control, Policy 32H. The part of the country where we're concerned about the amount of water available are the people who use any water. It seems inappropriate to take good water and mix it with bad to cover up a pollution problem. The board feels that there are enough laws about water quality that if they're all implemented, we don't have a real major water problem.

The water quality problem in Idaho (inaudible). Therefore, pollution dilution is not a beneficial use of the water.

Policy 32I, new storage. Very complicated policy that tries to express two different criteria I guess with two different -- there's going to be some parts overlapping areas of the state. The State, we're saying there's not enough (inaudible) to satisfy existing old water rights. It seems wrong somehow that on October 1, the water master on the representation changes the flow at Milner Dam from a few thousand cfs to 12,000 cfs. This flow is basically made up of water that is held in the reservoir storage all summer long and dumped to make room for next year's run-off.

(Inaudible) terrible (inaudible) in our water, we got to manage it better if we can. So the very first part of this policy is that no new storage projects above the Murphy Gauge should be approved unless the director of the Department of Water Resources finds that maximum use is being made of the existing system.

Today, he probably couldn't find that because there are unappropriated waters at least in one major reservoir in the system. Once those waters are appropriated, what other barriers that you would have to look at. We really want to use our water and use it as best we can. There are some legal barriers to water trade-off.

The State has set rules and regulations for a water bank. (Inaudible) users. (Inaudible) has used that in the upper Snake as a means for someone who has excess water to sell it to someone who doesn't have enough.

One of the things that the board will be asking is can these rules and regulations be approved but there are some other more serious barriers. The person that stores water behind the federal dam, he may not release those (inaudible). No problems to the farmer involved except it's (inaudible). The big problem for a new user, you want to be guaranteed water while you're (inaudible). Major legal difference.

Another major federal legal difference is if you have water stored behind the (inaudible), you may not sell that water (inaudible). You can't sell it (inaudible). This is not only not an incentive. It's clear disincentive to people who have water storage. Why should they go through the hassle of arranging an agreement with (inaudible) going to the water bank if at the end of all of this there's no profit?

So there are people who have full (inaudible), full right to stored water who use that store water once (inaudible) in some cases, (inaudible). The city of Pocatello is an example. They had an emergency water supply (inaudible) reservoirs. They don't even have a good

way to get out of it. The water sits there all summer long (inaudible).

So the board has accepted the charge of negotiators to try and look at these kind of problems. The State has their own problems. If you have water and you want to sell it to another user, that user better not be a consumptive user or you're (inaudible) your water right if you continue with your own operation. That's a real problem. You have to hope to find a non-consumptive user and (inaudible).

The second part of this policy is directed specifically to that (inaudible) of the river below Milner Dam. Idaho Power Company and their systems operation relies on wintertime flows for two purposes. One, they can sell to the west coast for using (inaudible). The last few winters, there have been plenty of demand for electricity for heating in Idaho itself.

The second reason is that gas (inaudible) reservoir. (Inaudible) storage reservoir in the (inaudible). So they are concerned that they did not want to see a lot of water taken out in the wintertime when it would impact on their operation (inaudible). They can't -- did not argue. The negotiators agreed that above Milner there is a requirement for zero flow back to the dam. They couldn't work out (inaudible) but below Milner to the Murphy Gauge, the negotiators compromised and said, "Okay.

Anybody who wants to divert from that (inaudible) of the river during the wintertime for storage purposes, some kind of analysis and mitigation must be supplied to the power company if there's a negative loss or negative effect on their operations.

The word "mitigation" is carefully used. It implies a lessening of the impact. Compensation was avoided because that generally (inaudible). Certainly if someone wanted to use some of that water and store it during the wintertime, they had to replace its value on a dollar for dollar basis because (inaudible). Mitigate means lessen the impact in some way. Maybe by storing some of that water in your own facility which you would like (inaudible). It may be that your releases will be timed so that they (inaudible). It may be economics (inaudible).

How is mitigation calculated? Something the water board has to face when the time comes. The negotiators couldn't agree amongst themselves (inaudible) what they feel is an adequate resolution. The whole composition of the river shouldn't be held up by (inaudible). If and when we get a general proposal, the water board is charged (inaudible).

Policy 32). The last one. It says "Stored water for management purposes." As I said earlier, it is available perhaps. There are at least unappropriated

waters in the system. If the State is charged with managing the river so it never goes below (inaudible) in the summertime, 5600 in the wintertime, we can hire the best technicians you want for that job and sooner or later someday probably somebody's going to mess up.

If they don't mess up, they have been so conservative that we're not taking full advantage of the water that's available. But if they try and issue water rights and try and manage the river now to this magic number, (inaudible), the State should have some (inaudible) call for (inaudible).

Many of the junior users are probably going to be out on the (inaudible). We (inaudible) with the effect of shutting them off in flow the Murphy Gauge, it's not going to show up for six months or it might be so subtle, you never see it. Therefore, to meet that flow, we're thinking in terms of water available to (inaudible).

It seems appropriate to try and get the water now while there are unappropriated waters rather than to wait 10 or 15 years and realize we may need that water and not be able to find it; at least not be able to find it as cheap as we may find it now. There's no (inaudible) if the State could acquire some water, it will probably go to the water bank. It could be sold to Idaho Power or be put to use but it will be there in case the problem would develop.

I think Mr. Chairman, I'd like to stop.

MR. GRAY: Thank you, Mr. Sherman. We will now start taking public testimony and the chair would call first Dan Daley.

MR. DALEY: Mr. Chairman, members of the board. My name is Dan Daley. I'm a fisheries biologist for the Shoshone Bannock Tribes.

MR. GRAY: Dan, would you give us your address and telephone number so we could reach you if we need to?

MR. DALEY: Sure. Post Office Box 306, Fort Hall, Idaho, 83203. And the telephone number is (208) 238-3900.

MR. GRAY: Thank you.

MR. DALEY: The tribes are concerned about the new State Water Plan for the Snake River Basin and also can only view the State Water Plan in light of the Swan Falls agreement and the later general adjudication in the Snake River Basin.

We think the State Water Plan is being modified in view of those -- of the Swan Falls agreement and in view of the later general adjudication and therefore must be viewed in concert with those -- with those two actions.

We have two general concerns, two basic concerns. One of those is that we're concerned that the changes in the State Water Plan and the Swan Falls agreement are being viewed as a local level decision and being viewed as having

impacts only on a local basis.

This is just untrue. Any changes we make in water use in the Snake River Plain in the Snake River Basin will have a regional impact not just throughout Idaho but throughout the Columbia River Basin.

One of the reasons this is true is because any agreement at Swan Falls and any change in water use can potentially affect the water budget and for the benefit of anybody in the room who's unfamiliar with the water budget, I'll briefly describe it. It's a plan that was initiated by the Columbia Basin -- or by the Northwest Power Planning Council in their Columbia Basin Fish and Wildlife Program. It's implemented through Bonneville Power Administration largely at the expense of the rate payers.

And the plan itself is designed to guarantee flows and guarantee storage within the Columbia River Basin including the Snake River to -- or moderate flows throughout those basins to guarantee passage flows during anadromous fish, fish both migrating upriver to spawn and (inaudible) migrating downriver to the ocean.

This plan requires certain storage within the Snake River so that that storage can be moderated and allowed to spill over the dams at those critical times when fish are migrating upriver and migrating downriver. Any agreement at Swan Falls could have impact on Idaho Power's ability to

comply with the water budget.

Non-compliance with the water budget on Idaho Power's part could have an impact all the way down the Columbia River Basin but more importantly, it's certainly going to have an impact on fish reaching the Salmon River Drainage and the Clearwater Drainage, anadromous fish reaching those areas. That in turn will have an impact on aboriginal treaty rights that the Sho-Bans hold and that the Nez Perce hold and also on Idaho sportsmen in general.

A decline in the number of fish reaching either the Salmon River or the Clearwater River will be felt throughout Idaho and probably throughout the Columbia River Basin. That's one of our concerns and that's one reason why the State Water Plan should be viewed in light of any impacts it might have on a regional basis.

The other concern we have is that we see very little indication that water quality impacts are being considered either in the State Water Plan or in the Swan Falls agreement or later in the general adjudication. Whenever you change the priority use of water, in this case from hydropower to irrigation, and if you open up new lands for irrigation, you're going to have a definite water quality impact.

In other words, when water is used for irrigation and returns to the river as surface flows, it brings with

it certain amounts of dissolved salts, suspended sediment, the changes in temperature, normally an increase in temperature and that has a water quality impact throughout the Snake River and below Swan Falls; not just in the general area of irrigation or the general area of new development.

Our concern in this light is that at the present time, we have very little idea how water -- how much water returns to the Snake River as groundwater flow, how much water recharges the Snake River as surface flow and in fact, we have -- we have only a vague idea of how much water is being diverted at each point along the system.

Without these kinds of information, we cannot develop a detailed comprehensive river model. Without a detailed comprehensive river model, we should be very cautious in accepting any kind of State Water Plan or Snake River water plan and any kind of agreement at Swan Falls.

In other words, the kind of information we need to gather is once water is diverted from the Snake River and it's either spread over the land through a sprinkler system or flood irrigation, we need to know how much water is lost through evaporation. How much water is lost through transpiration? How much water returns in groundwater flow since -- if it recharges the Snake River as groundwater, it has a chance to filter out some of the impurities and how

much is returned as surface flow.

Our main concern is the larger point of the water that's going to return as surface flow because that's the water that's going to contain the higher quantities of dissolved salts, higher suspended solids and probably increase the temperature.

An example of the lack of interest in the Snake water plan in this regard is Policy 32H, water quality and pollution control. And this policy -- this part of the Policy 32 states that it is a policy of Idaho that the use of water to provide pollution dilution is not a beneficial use of water. If we increase the amount of water diverted through irrigation and if the amount of water that returns to the Snake River increases or it returns to the Snake River by surface flow increases, this is going to have a definite impact on water quality in the Snake River. It's going to degrade the water quality.

Lack of mention that increasing the amount of water that stays in the river could dilute this impact is either an oversight or it's -- it's ignoring the fact that we're going to have water quality impacts. These water quality impacts are going to be detrimental to irrigators farther downstream and they're going to be detrimental to fish and wildlife.

One last concern is that although Policy 32 states

that the minimum flow set in the policy should provide for the protection of fish and wildlife habitat -- aquatic life, recreation, aesthetic beauty, transportation and navigation values and water quality, it becomes apparent that these minimum flows, particularly the minimum flow of 3900 cfs during the irrigation season in Swan Falls will not provide for the protection of fish and wildlife.

This is based on the fact that in 1977, Idaho Fish and Game prepared a report that stated or recommended minimum stream flows below Swan Falls at 5500 cfs for rearing -- for rearing of fish alone. Okay. Generally, that rearing time occurs right during irrigation season, exactly when we're guaranteeing only 3900 cfs over Swan Falls in this water plain.

So it's the Shoshone Bannock Tribe's policy or at least concern that we are not adequately studying the impacts of this water plan. We are not adequately studying the ramifications -- regional and local ramifications of the Swan Falls agreement and we cannot adequately predict what impacts this water plan and the agreement is going to have on the Snake River Basin without first development of a detailed comprehensive water plan of the type that I just described a few minutes ago.

Thanks very much for your time.

MR. GRAY: Thank you, Dan. We might have a

question for you here if we could. Mr. Rydalch, any questions?

MR. RYDALCH: I don't believe I do.

MR. GRAY: Mr. Williams.

MR. WILLIAMS: I do. Mr. Daley, on the water budget concept (inaudible), do you have any particular recommendations (inaudible) our planning to assist with that program (inaudible)?

MR. DALEY: Yeah. Well, one of the most direct and immediate things we can do is request Idaho Power to project -- they have the information available and they can project whether they're going to be able to comply with the water budget.

(Tape No. 2 ends. Tape No. 3 begins.)

MR. DALEY: The Swan Falls agreement will put a further constraint on their compliance. What we're primarily concerned on a political level is that the Swan Falls agreement will give Idaho Power an out. They'll say we can't comply with the water budget and with the State Water Plan and the Swan Falls agreement all at the same time. Therefore, the water budget will go down the tubes and we still have the Swan Falls agreement. Without the water budget, we cannot assure anadromous fish runs in the Salmon and Clearwater Basin. Plain and simple.

We know for a fact that the guaranteed 3900 cfs at

Swan Falls during low water years will interfere with the storage capacity of Brownlee Dam. That storage behind Brownlee is primarily going to be responsible for compliance with the water budget.

Now, whether -- whether Idaho Power can alleviate that or not is -- needs to be determined at some future date, but I would suggest that we request Idaho Power to lay their cards on the table as far as water budget goes.

MR. WILLIAMS: Anything else? Any other ideas?

MR. DALEY: As far as Idaho Power --

MR. WILLIAMS: The water --

UNIDENTIFIED SPEAKER: Affecting the water budget.

MR. DALEY: Well, there's actually a group of experts involved with the water budget called the water budget managers. Those people need to be contacted by the State. I've already talked to them and they've described in general what kind of impacts they think will occur and they could supply very detailed information, very detailed predictions or at least projections as to what kind of problems or lack of problems they're going to have with the Swan Falls agreement and the water budget.

The other people who can probably give technical advice is the Northwest Power Planning Council -- the staff of the Northwest Power Planning Council and I would suggest we contact them.

MR. WILLIAMS: Thank you.

MR. GRAY: Mr. Kramer.

MR. KRAMER: That was a very good presentation considering I don't see a whole pile of notes there.

MR. DALEY: I'm getting used to it.

MR. GRAY: A couple things, Dan, before you get away.

MR. DALEY: Yeah.

MR. GRAY: You made mention that the way that we have structured 32H is very weak in reference to water quality.

MR. DALEY: Yeah.

MR. GRAY: Would you be willing to sit down yourself and write out something the way you would like to see it?

MR. DALEY: Certainly.

MR. GRAY: And we will be accepting written testimony until February 22.

MR. DALEY: Certainly. Be glad to.

MR. GRAY: And just send it to the Department of Water Resources, Statehouse, in Boise at the address on the "Currents."

MR. DALEY: Okay.

MR. GRAY: Another thing in regard to your -- to

your water budget, the Idaho Water Resource Board has been working on a project on the Weiser River for several years now and that's referred to as the Galloway Project. Are you familiar with it?

MR. DALEY: Vaguely. Vaguely.

MR. GRAY: The Corps of Engineers should have their feasibility study completed by July of this year. There are three levels of dams that they're investigating. If the large dam were to go in, it would store 1.2 million acre-feet of water. So that's something that we may be asking you help on later but I just give you that for information because there is that possibility:

MR. DALEY: And after that feasibility study is complete, you can be sure you'll be hearing from Shoshone Bannock Tribes on the issue also.

MR. GRAY: Fantastic. Thank you.

MR. DALEY: Sure.

MR. GRAY: The board would call Charles Pace.

MR. PACE: Thank you. My name is Charles Pace. I live here in Pocatello. No. 7 Dartmouth. I'm an economist at Idaho State University and Idaho State of course doesn't necessarily endorse the views that I'm advocating.

I think there's a number of good things about the Swan Falls agreement. One of course is the recognition -- explicit recognition of the interaction of surface and

groundwater with all the accompanying hydrological and economic implications that are location-specific. The other thing that I think is probably good about the agreement is that it sort of diffuses the situation in that it's worked out any time you can work out or negotiate, work out a deal, it's probably preferred to ending up in court. The question is whether that activity can be extended.

If we start looking though at the economic implications, one of the things that the agreement does is it contains language in there that says priority will be given to future allocations of water that promote the family farming tradition and so on. And economically, there's a lot of uncertainty in Idaho. Where are we going to be in 20 years? If you the present situation and extend it in the future, I think the consensus among most people is that the water probably has its greatest value left in the river in terms of its ability to just simply generate revenues. I mention there the Hamilton Lyman (phonetic) Study on the loss of power concept and so on. But there's no reason to think that that's going to be the situation forever. And I think it's probably a mistake to get locked into public interest criteria that tend to favor one particular approach.

There's also the question of how we define the

public interest. The agreement sets aside 600 cfs for use according to the public interest. And obviously the way that the public interest is defined is going to be critical here. In terms of the criteria that have been suggested in the agreement and are contained in your newspaper, the public interest really needs to have further -- further definition. I think you have to look at both quantifiable and qualitative effects of different alternative strategies. What will be the value of the loss of hydroelectric capability if stream flows decline?

And like Dan Daley already pointed out, you have to not only consider Swan Falls. I think PUC came up with a $55 million figure at Swan Falls but you have to consider the Idaho -- the Hell's Canyon Complex, the three in Hell's Canyon and then you have to consider also the Lower Snake River, the (inaudible) and then the lower -- hydropower generation on the Lower Columbia: The Dalles, Bonneville, John Day, McNary. All of those will be affected by depletions of in-stream flows in terms of loss to evaporation and tranpiration and also other types of losses of water with diversions.

So I think you have to look at the loss of hydro capability not just at Swan Falls but all the way downstream. You also are going to have to consider the primary -- or in the public interest criteria the primary,

secondary and tertiary values generated by consumptive uses and often those have substantial economic values.

But those things are already placed on the agenda. The things that are sort of lacking here are the things that Dan Daley was bringing out. What will be the impacts on fish and wildlife if in-stream flows decline? You have to consider a number of resident fisheries. It may be that we can use a market -- a water market. We can design a water market to facilitate water rental and transfer of water rights down the road and provide water for consumptive uses or use the water in-stream to generate hydroelectric power.

But if we cut down on the minimum -- on the minimal flows from 4500 to 3900 and from 65 or the 2800 that's going to be cut off in the winter and it has the kind of biological impacts that we're talked about, what we mean there is irreversible changes in the amount of genetic information and just because things like resident fisheries are not exchanged in the marketplace doesn't mean that they don't have economic value. It may be that that is the long-term effect here in terms of how we're going to be looking back at this say 50 or 100 years from now. This is when we add some irreperable damage to the resident fisheries.

It's also significant that you have an endangered

population of white sturgeon in the upper river. In the lower river where this -- where this fish isn't endangered provides significant fishery. People spend literally hundreds of dollars on equipment and very valuable fishery on the lower river and it's possible that the sturgeon might thrive in the upper river.

Another issue that was brought out with this whole question of the water budget and one of the other things besides the question of fish and wildlife in-stream that was neglected here was the whole question of out of region import -- out of state but within the region impacts on fish and wildlife. And the water budge is an obvious concern there but there's also a lot more to the Northwest Power Planning Council's activities. There's a whole area of restricted development, protected areas and a focus also not just on anadromous fish but also on resident fish so I think that has to be taken into account here too and it's obviously not being taken into account.

I think that's probably the greatest thing -- the greatest flaw in this agreement is that it was worked out by two of a number of interests -- of a number of groups that have interest in water policy in the Snake River. The new agreement neglects fish and wildlife, it neglects federal reserve rights and interests outside of the State of Idaho.

As it was pointed out before, the whole agreement is also intimately bound up with the whole question of adjudication of the Snake River and here the potential I think for negotiation of federal reserve rights is enormous as are the dangers of not negotiating, of ending up in court and settling those with litigation. The last thing in the world I think that anybody wants is to have enormous amounts expended on legal fees so there's -- I'm not sure of this but I would guess that there is a very large possibility, a great deal of room for negotiation when it comes to the whole question of federal reserve rights. Not just the Shoshone Bannock rights but also the INEL questions and so on.

I've already mentioned the impacts on fish and wildlife throughout the Columbia River Basin. Another thing that the agreement calls for is the design of efficient water markets so that water can be provided outside of an appriate -- or an appropriation process. This, as you pointed out, is going to require changes in Idaho water law. But there's another question here and that's how should the market be organized and one principle here is that you should have limit -- as few limitations on entry as possible; that the State should use water price -- the price of water to allocate between different uses rather than restricting the participation of different

groups in the water market. That will tend to guarantee a greater efficiency in the allocation decision than it will if you simply bar individuals from participating in the market.

As you mentioned before, there's a possibility for purchasing unallocated water storage, primarily from the Federal Bureau of Reclamation and the Corps of Engineers. I'll close on this because I was at a conference not too long ago in Portland and a man from the Yakima Indian Nation, Bill Yellup (phonetic), stood up and gave a speech and he went through a lot of different things but what he had to say basically was, look, this is a wet year now. Okay. When this comes to a dry year, what we're going to do is we're going to end up in court.

And that -- I think that's probably something to remember. While that water is out there now, it may be a good time to get an agreement, but at the same time, you want to get that agreement in terms of not just -- not just the wet water years but also nail it down in terms of what happens during the years when there's not enough to go around to be allocated to a fully allocated system. I think that's a real difficult question.

MR. GRAY: Thank you, Mr. Pace. Mr. Rydalch, any questions?

MR. RYDALCH: Are you in favor of Policy 32J on the

stored water for management purposes? You're kind of vagu on that.

MR. PACE: The question of storage I think has to have a full accounting of costs. There's several things that you hear in Idaho about -- it's almost as if we could dewater the river at the Idaho border and that would not necessarily be bad for Idaho. I certainly don't think that that we need to hold back every bit of water. The water in the stream flowing down the river has uses; not just hydroelectric.

In terms of additional water storage, I'm not necessarily opposed to additional water storage but additional water storage that doesn't account for severe impacts on fish and wildlife I think would probably be a mistake. So the question on the Galloway Project for example in Weiser, I'm not sure it's in the -- or the power planning council is going to see it as a contribution to their efforts to budget water for downstream migration if you have significant detrimental impacts on upstream fisheries.

So I think there's -- you know, as long as you have a full accounting of costs in the question of water storage, I don't see any problem with that.

MR. RYDALCH: Thank you.

MR. GRAY: Could we -- could we request you send us

a copy of your testimony?
MR. PACE: Sure.
MR. GRAY: By February 22.
MR. PACE: You bet.
MR. GRAY: Okay. Thank you. Is there anyone else who would like to testify at this time? We will close testimony and open it up for questions and answers. Questions, anybody?
UNIDENTIFIED SPEAKER: I have one question. Possibly readjudication I guess (inaudible). The concern of some of the people with some of the old established rights (inaudible) groundwater system -- we end up with two rights. You got an underground water right on the piece of ground and also a right on the land that is under Reclamation property (inaudible). Is there going to be some latitude (inaudible). Is that one -- is that person going to have to decide which right that he's going to have or (inaudible) there going to be some latitude to release it (inaudible)?
MR. GRAY: Frank, would you like to respond to that?
MR. SHERMAN: (Inaudible.) If a person has a claim or a water right of surface and groundwater, the value of his right is only for the amount of water he can put to beneficial use. (Inaudible) is the water right to be

recorded (inaudible). It's no different than Idaho Power's right. They claim some large water right in Swan Falls in excess of (inaudible). Certainly a latitude for which right the person will have to sell in terms of surface (inaudible) property if he indeed wants to sell. (Inaudible.) In fact, he could assume (inaudible), he could change his point of diversion and use one or the other (inaudible).
UNIDENTIFIED SPEAKER: My concern is that really it's going to be hard (inaudible) understand that (inaudible). See, that's my concern.
MR. SHERMAN: Under the (inaudible) system, it's tied to the land and the (inaudible) release it for some period of time but it would be up to the (inaudible) director himself (inaudible).
UNIDENTIFIED SPEAKER: So a determination is going to have to be made though because only so much water's going to be indicated for that piece of land, right?
MR. SHERMAN: Right. (Inaudible.)
UNIDENTIFIED SPEAKER: Tell me about the adjudication in general. People are terribly concerned about what the adjudication does (inaudible).
MR. SHERMAN: In addition to quantifying what's happening out there, it really provides a court order saying this man is entitled to this much water and it sets

the priority date (inaudible) shut off in terms of managing the water for the local area (inaudible) system. So we've done adjudication in this part of the state (inaudible) thousands of water rights gone on for years and years have (inaudible).
MR. GRAY: Sixteen.
MR. SHERMAN: Sixteen people (inaudible). So it ends up getting resolved. People have (inaudible) claims of this rights (ineudible) and they sell their property, the buyer knows what he's getting. Anyways (inaudible) individual. The problem with this adjudication (inaudible) that for the first (inaudible) past adjudications that they have (inaudible). In other words, it's take 10 to 15 years to do (inaudible). What was different is that we're talking about big dollars because we're talking about a big land area. Hopefully there will be enough dollars (inaudible).
The agreement itself specifies that any person who was making beneficial use of the water including in terms of when (inaudible) shall be protected. (Inaudible) a natural cause, (inaudible), those people will be protected. Even if the flow at Murphy goes below 3900 through natural causes, those people will be protected. If the flow were to go below 3900 in a natural drought disaster, only people who have appropriated water and approved (inaudible) uses

after the signing is (inaudible).
MR. GRAY: Yes, Dan.
MR. DALEY: One of the problems there, the tribes ask (inaudible). And that being the case, we really hate to see the State rush into (inaudible) water rights for a couple of reasons. First, the (inaudible) require trying to quantify his water rights. We hate to see our water rights appropriated above us.
The other problem is that since we're dealing with the Snake River Adjudication of the Snake River Basin, we're also involving the Shoshone Paiute and (inaudible). And we're going to be -- it looks like we're going to be adjudicating all the way up the Salmon River and the Clearwater River also. These guys have never been involved in any of the discussions and we're already anticipating this (inaudible). We're still going to require some (inaudible) administration of the Shoshone Paiute (inaudible).
So as far as federal reserve water rights go, the only adjudication we can do is (inaudible) to gather more information (inaudible) Water Resources need to gather more information than just how much the water (inaudible).
UNIDENTIFIED SPEAKER: You've raised several key points, Dan, and I don't disagree with any of them. (Inaudible) what I think is the (inaudible) negotiator

takes (inaudible). The reason for improving the Salmon (inaudible) is to assure (inaudible).

UNIDENTIFIED SPEAKER: (Inaudible.)

UNIDENTIFIED SPEAKER: (Inaudible.)

UNIDENTIFIED SPEAKER: Yeah, but I think in the compromised position (inaudible). The second point is that I know you've (inaudible). We're not ready to (inaudible). The estimate we're making now is ten years. It's going to be (inaudible). It goes into (inaudible) that really struck me is it may not be (inaudible) but we have (inaudible) take the position that we (inaudible) terms of how does that protect you, Idaho Power's (inaudible) 8400 and (inaudible).

MR. GRAY: Dan, one question. When was the reservation created? What was the date?

MR. DALEY: '67 (inaudible).

MR. GRAY: 1867?

MR. DALEY: Yes.

MR. GRAY: Any other questions? Yes, sir.

UNIDENTIFIED SPEAKER: Where is the actual process (inaudible) applications? At what point in the State Water Plan do you have to make that decision and is that in here someplace or is that (inaudible)?

MR. SHERMAN: In terms of future applications, we're talking about a general application for appropriated

water?

UNIDENTIFIED SPEAKER: Consumptive use.

MR. SHERMAN: As long as it's not wintertime diversion below Milner Dam, (inaudible). The agreement specifies as part of the agreement (inaudible) enable the governor to enter into (inaudible). That's being done. 7500 (inaudible). The agreement would provide that anybody who had not proven beneficial use (inaudible) but had an application filed with the department, they would be reviewed in terms of do they meet the new criteria.

(Inaudible) file -- new filing would be behind the applications on hand in terms of (inaudible). Certainly nothing can be done till the legislature (inaudible). (Inaudible) is obligated to process those ones they've been holding for (inaudible).

UNIDENTIFIED SPEAKER: Are they doing that now? Is that --

MR. SHERMAN: They have to wait until the legislature (inaudible).

UNIDENTIFIED SPEAKER: But the department is (inaudible) the legislature, are they going to do it after the rule setting (inaudible)?

MR. SHERMAN: The legislature will adopt the language which directs (inaudible). They would have to probably (inaudible). But people have been asking me

should they file (inaudible). I had one guy (inaudible). I think the date of your application is still key (inaudible). So yes, (inaudible). Remember that there's a filing fee. If the agreement doesn't go through, the department may hold that filing fee for the next 10 years and you're not going to see it. (Inaudible.)

MR. GRAY: Yes, sir.

UNIDENTIFIED SPEAKER: My understanding is that the 3900 is sufficient (inaudible).

UNIDENTIFIED SPEAKER: I can't say that for an honest fact. I almost doubt it but it is the compromised numbers that are (inaudible). I think certainly the 5600 in the wintertime, typically you see (inaudible). I doubt that 3900 with a flow going through the reservoir (inaudible).

UNIDENTIFIED SPEAKER: The reason I ask is if that's what those figures are based on, why is there any reason (inaudible) fish and wildlife and recreation and necessarily be -- not be subject to (inaudible) impact? In other words, because of the (inaudible) minimum flows established (inaudible) are sufficient to meet the minimum requirements but I guess what I'm thinking is that my understanding is that those minimum flows were set (inaudible) and not for fish and wildlife. Is there a (inaudible) sort of study of fish and wildlife that

(inaudible)?

UNIDENTIFIED SPEAKER: Yeah. Not at 39 specifically because that increases (inaudible). The State Water Plan (inaudible), 3300 was a compromise which after hearing public testimony (inaudible) they decided that was a reasonable number that's not (inaudible). The legislature proved that (inaudible).

So from a pure fishery point of view, now is when the (inaudible) could have been -- the whole agreement when we pick at bits and pieces of it, you have to remember that three different entities sat down basically and looked (inaudible). We think that 3900 is still (inaudible). I agree with Dan that it would have been nice if (inaudible). I guarantee more (inaudible). We were not (inaudible).

MR. GRAY: Mr. Dunn.

MR. DUNN: One of the other things that happens with the 3900 (inaudible), you don't have 3300 is that the 3300 was never set by (inaudible). Let's assume we get down the road 20 or 30 years and they approach that 3300. If the pressures were such that (inaudible) to lower that to 3000, all that would need to be -- to do to accomplish that would be (inaudible). The State Water Plan is (inaudible). With the agreement (inaudible). You can't remove that. The only way you can lower that (inaudible) from that point on. You'd have to purchase that

(Inaudible) down to the system. So it gives you — to guarantee the 39 can't be (inaudible).

MR. GRAY: Dan.

MR. DALEY: There's also a disadvantage to that because it is a vested water right and you can't raise it either (inaudible).

(Inaudible discussion had.)

UNIDENTIFIED SPEAKER: The only thing that — the only thing behind it was if the power company allows us -- puts in play — it allows us to go down to 3900, (inaudible), through the agreement, they won't have any recourse when that one day flow is 3900. If the decision (inaudible) whether is to raise it (inaudible). But you can never go below that amount.

UNIDENTIFIED SPEAKER: (Inaudible) the fact that the 3900 was arrived at by three lawyers essentially negotiating (inaudible) based on these lawyers who have very little expertise in (inaudible) flows and (inaudible) minimal (inaudible). There's nothing you can do about it except say that we're not going to repeat that mistake. (Inaudible). It really scares me that (inaudible) regional impact and negotiate an entity such as the Swan Falls agreement based on the three lawyers (inaudible).

MR. GRAY: Dan, let's let Mr. Caveness say something. I think he might have something —

MR. CAVENESS: (Inaudible.) One of the things that I think you have to keep in mind is that when our state was formed and our laws were set up, they were set up strictly (inaudible) orientation. Either mining, manufacturing or agriculture with no reservation whatsoever for (inaudible). What they were — and our laws to this day are designed for (inaudible). It doesn't matter what happens it the fish. If there are enough farmers on the creek to dry the creek up, the creek is dead and the fish are dead and nothing's left. And it was that concept of the law framework that those parties were negotiating from.

The scenario that was faced by the negotiators was one if Idaho Power proposed (inaudible) they would be entitled not to change the water plan. It was draw down to the 3300 feet both winter and summer that they would be entitled to receive compensation for hydropower losses only. There would be no (inaudible) under our existing law other than (inaudible) minimal stream flow protection under the recently enacted provisions of the Idaho Code which relate to public interest and trying to establish stream flows.

They could possibly (inaudible). But otherwise, the power company would give compensation to rate payers (inaudible) because they would receive compensation for the losses. Idaho Power would (inaudible) 3300. The fish and

wildlife would not have any protection. Consequently, on the flip side, if you want to call it (inaudible) or the irrigation interest at this point. The river still could be depleted to 3300 feet summer and winter but no compensation to the power company. No compensation for the fish. So I think that the (inaudible) and the difficulty that the negotiators were addressing was they were addressing legal issues based on existing legal rights under existing laws and they had no legal authority to give any legal status to (inaudible) interest in the river and since they were increasing the minimum flows above those presently set, I assume that they were thinking they couldn't hurt anything because they were only increasing the amount of water in the river.

The other comment that I was going to make was that people should be aware that the average flows of that river are greatly in excess of 3900 or the 5600 in the winter. Those are the lowest recorded flows since the beginning of time. 4500 and 6100, Tim, 6300. 6300 is the lowest recorded flow in the winter and 4500 is the lowest recorded flow in the summer.

And essentially what they did then (inaudible) took the 1200 cfs that was left over and seen what the average flow was and the lowest flow (inaudible) for power and fish and will allow only 6 of the 1200 left (inaudible) to be

used for irrigation (inaudible). I guess it's a legal (inaudible) reason they acted the way they did is because of the archaic laws which stressed consumptive use over all other issues in the river.

MR. GRAY: Thank you.

MR. CAVENESS: (Inaudible.)

MR. GRAY: I knew you would though. Are there any other questions? Yes, sir.

UNIDENTIFIED SPEAKER: I'm a little confused about the distinction that's drawn between man-caused reduction in the flow and (inaudible). I had the impression that water users' rights were protected under a certain (inaudible) and the river could then be gone down below that minimum flow established (inaudible).

MR. SHERMAN: That's correct. The person whose use is in place will be protected even if it went below that (inaudible).

UNIDENTIFIED SPEAKER: So we're not talking about (inaudible).

UNIDENTIFIED SPEAKER: (Inaudible.)

UNIDENTIFIED SPEAKER: Except in order to go below 3900 (inaudible), you have to have a situation that is substantially more than that (inaudible). With the existing development and the (inaudible), you still don't get (inaudible).

UNIDENTIFIED SPEAKER: (Inaudible.)

UNIDENTIFIED SPEAKER: That's what we're trying to do is the increased use would be limited so we didn't violate that. That's what we aim for is taking the dryest period (inaudible).

UNIDENTIFIED SPEAKER: (Inaudible.)

UNIDENTIFIED SPEAKER: I'd like to see some water available if we get down to 3900 and it turns out (inaudible).

MR. GRAY: Anymore questions? Okay. We'll call the meeting adjourned.

(Tape ends.)

STATE OF IDAHO)
) SS
COUNTY OF CANYON)

I, TAMARA A. WEBER, State-certified and licensed transcriber, do hereby certify:

That the foregoing transcript is a transcript of cassettes made of the proceedings in the matter of the Public Hearing in re: State Water Plan before the Idaho Water Resource Board, January 29, 1985, 7:00 p.m., Pocatello, Idaho; that the foregoing pages 1 through 47 of this transcript contains as accurate and complete a transcription of said cassettes as I was able to make.

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of November, 2007.

TAMARA A. WEBER, CSR RMR
Idaho CSR License No. 278
Transcriber

Orr Affidavit

Exhibit 16

Transcript of Idaho Water Resource Board public hearing on proposed State Water Plan amendments (Feb. 6, 1985)

Third Orr Affidavit

EXHIBIT 28

IDAHO WATER RESOURCES BOARD

* * * * *

Public Information Meeting

regarding changes to State Water Plan - Policy 32

TRANSCRIPT OF PROCEEDINGS

Held on February 6, 1985, at 2:00 and 7:00 p.m.

before Gene Gray, Chairman Idaho Water Resource Board

Lewiston, Idaho

* * * * *

Transcribed by
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ORIGINAL

APPEARANCES

Present:

GENE GRAY - Chairman of IWRB
ROBERT HAMMES
DAVE RYDALCH
JIM SHAWVER
WAYNE HAAS
FRANK SHERMAN

Audience members who testified:

MALCOLM CRAWFORD (2 p.m.) - Lewiston Orchards Irrigation District

PAUL TUTCHER (2 p.m.) - 1411 Prospect Avenue, Lewiston

DONALD SATCHWELL (7 p.m.) - North 4340 Idaho Road, Post Falls

* * * * * *

Page 1

IDAHO WATER RESOURCES BOARD

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Page 2

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* * * * * *

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LEWISTON, IDAHO
February 6, 1985, 2:00 p.m.

CHAIRMAN GRAY: Good evening, Ladies and Gentlemen. My name is Gene Gray. I'm chairman of the Idaho Water Resource Board. With me today, we have Robert Hammes, who is a Board member from St. Maries, in the newspaper business and the book business; Dave Rydalch from St. Anthony who is a farmer and also from Committee of Nine which is a water organization on the Upper Snake system; we have Jim Shawver from Eden, Idaho who is secretary of the Idaho Water Resource Board and a farmer in the Eden area; and Wayne Haas from the Department of Water Resources; and Frank Sherman, geologist from the Department of Water Resources.

And what we are here to speak to you about today is Policy 32, the existing state water plan. In December of 1983 the Board accepted some draft language for a proposed change to Policy 32.

So what we are here today is to take your testimony. Since we don't have too many people, we are going to kind of break training here a little bit and do this a little different. I will have Mr. Sherman give you a brief overview of

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Policy 32. After that, we will take testimony, oral testimony, from those of you who wish to testify. We will close the testimony, then we will open it for questions and answers.

Now, if you kind of follow through The Currents, the first page kind of gives you an overview of the state Water Resource Board, what our function is. Page 2 and page 3 will give you Policy 32 as we've accepted the draft language. And that's what we would like you to critique for us, or at least give us written testimony on.

Going on over, you will see page 4, page 5 is the Swan Falls agreement that was put together and agreed upon by the governor's office; the office of the attorney general, state of Idaho; and Idaho Power Company.

Going on over to Page 6, basically the right-hand side of page 5 and page 6 and 7 is the legislative package which our legislators are now working on at the State Capitol.

If you take a look on page 7 to the far right-hand column, you will notice actions that must be taken by May 15 for the implementation of this whole thing.

No. 1, the state water plan is to be

Page 5

amended. That's why we are before you today is to get your suggestions, your fears, whatever you might have, as far as the Water Board revising this and then passing it on to our state legislature.

No. 2, legislative package must be passed, and it's going to have to be passed pretty much intact as you will find it in The Currents.

No. 3, appropriate action by the Public Utility Commission or the legislature; as required an agreement must be taken.

No. 4, there must be an appropriate order by the Federal Energy Regulatory Commission pretty much okaying the way the package is and the way the legislature may go ahead and pass it.

No. 5, the Idaho Public Utilities Commission must distniss the lawsuit from 1977 which was filed by the Idaho ratepayers.

No. 6, since we have three dams in the state of Idaho which border our neighburing state of Oregon, the Hells Canyon Complex, if required it may also have to be okayed by the Oregon Public Utilities Commission.

No. 7, enactment by the legislature of subordination language as set forth in 7A and 7B. You will find 7A and 7B on page 7 just to the left

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of the box we are looking at.

So what we will do now is, we will have Mr. Frank Sherman from the Department of Water Resources give you an overview. And if you like, you can kind of follow what he's discussing on page 2 and page 3.

Mr. Sherman?

MR. SHERMAN: Unless you live with that whole situation almost on a day-to-day basis, it gets a little bit complicated in that there is in place the Idaho state water plan.

There were two different documents signed in October of last year; one, an agreement to agree, and one, a legal document using legal language specifying what the state and Idaho Power agreed to. They are the exhibits as in The Currents for proposed legislative changes. Some of those have been amended already or modified as they proceed through the legislature.

And then there are the proposed changes to the water plan that the Board wishes to address at this time. It does get a little bit complicated. Since I assume most people here aren't particularly interested in what happens above Swan Falls and Murphy Gage (unintelligible),

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I will try and emphasize those things that might be important to the local area.

The existing water plan has policies for the Snake Basin, the Bear River, the Panhandle region. And the intent back in 1976, when this plan was first adopted, was to allocate the remaining unappropriated waters in the system or in that particular basin for specific new uses.

The agreement that the state and Idaho Power entered into called for specific changes to that. It needed to be updated anyhow. It is updated every five years. But in 1982, when the Idaho Supreme Court ruled that the power company had a legitimate and valid unsubordinated claim at Swan Falls Dam for water, all the allocations in the existing water plan were based on the premise that the state could take Idaho Power's water and use it for their purposes in the 3300 minimum the Supreme Court established for Murphy Gage just below Swan Falls.

This plan, as it stands today, specifies probably an unrealistic number given Idaho Power's claim in Swan Falls Dam.

Now, we got into litigation, and it finally came down to the point where both the power

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company and the state felt that trying to resolve these complex issues in the courts was not the way to go. It was back in district court. Certainly any decision reached in district court, one of the two parties would have taken it back to the Idaho Supreme Court. It may have been five or ten years before something was put in place by the courts which would have then directed the Department of Water Resources, particularly, on how water was to be used in the system.

Part of the problem, of course, was they assumed, as did the Supreme Court, recognized the valid right of Idaho Power. The Department of Water Resources stopped issuing new water rights above Swan Falls Dam. Now, if we couldn't satisfy Idaho Power's water right and it was legitimate, we certainly couldn't be issuing new permits for the use of water (inaudible) and declare a moratorium. We have several thousand permits on file that have not been ruled on. If we had to wait another five or ten years, clearly it would be more (inaudible).

People in the basin were being done a disservice in that they wanted to do something, and they had to wait and see what would happen. Everything is sort of at a standstill. The state

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and Idaho Power agreed to the compromise, and the compromise itself speaks to several different things. It speaks to new stream flows at the Murphy Gage. If you're going to have a compromise we have two different positions someplace in between the compromise.

Now, the state water plan calls for a minimum year-round flow at the Murphy Gage just below Swan Falls Dam at 3300 cfs. Idaho Power had a claimed water right of 8400 cfs, quite a discrepancy if indeed we had to satisfy their right.

Even in the negotiation process, Idaho Power recognized that the minimum flow had already been down to 4500 cfs. Typically, for management purposes, we use the average daily flow: Four readings, ten readings, 24 readings in one day averaged together because of the influences of minor thunderstorms, pumps on and off, Idaho Power's (unintelligible) operations. So we talk in terms of the daily average.

It had already been up to 4500 cfs. The only way we could guarantee more water than that was to shut off current users in the basin. The legislature has clearly shown in several efforts,

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1, to subordinate Idaho Power's water right; 2, to allow the governor to enter into a contract with the power companies, that they did not want to see existing users shut off.

So the compromise was affected between the historic low flow and what the state water plan called for. And that's where 3900 comes from. If you take 4500 and 3500, the difference is 1200 cfs, and you compromise and cut that number in half, you get 600.

The power company basically is saying, "We are going to split what's available, and you take this part and we will take the other part," to satisfy upstream development (unintelligible) additional depletion.

So the 3900 which is specified in the agreement in Policy 32 of the Snake River Basin speaks to what was reached by the negotiators. And in discussing the idea of compromise, there is certainly a lot more water going past that gage in the wintertime than in the summertime so they just chose a higher number.

There are several legitimate reasons for this number. Principally, if you take and project the kind of development that might take the Snake

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River down to 3900 frb, plug that back in the wintertime uses, it turns out (inaudible) for the wintertime season. But change from the existing water plan in that it specified a year-round flow is not a change in terms of water law or thinking because most water uses in the state (inaudible), typically irrigation, from April 1st to September 30th.

The existing water plan recognizes the importance -- and this is the most important for the people in this area, particularly -- recognizes the importance of the FERC license of the Hells Canyon Complex. It talks about minimum flows at Lime Point and Johnson's Bar (inaudible). In order to assure those flows, the intent of the Board is to add those flows as a state water policy.

While we recognize that those flows would be desirable, if the federal government and Idaho Power reach some different compromise (inaudible), those flows could go away. The intent of the Board is to add them to the state water plan specifically as state policy so that, if for some reason the federal government and Idaho Power change the license so that it wouldn't have to be those numbers, they would still be guaranteed by

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the state water plan.

So that really is all Policy 32, as identified here, does. It proposes to use the 3900/5600 cfs at Murphy as specified by the agreement and to add, as far as the state water plan, minimum flows at Lime Point and Johnson's Bar.

It goes on to talk about waters not held in trust by the state are considered unappropriated waters, and those waters held by the state shall be issued under certain criteria. Now, what this proposed revision does is to break out of the old water plan every one of those allocations and try and identify them as a specific policy. And in doing that, the whole question of what happens to the water that Idaho Power claimed becomes policy in and of itself, really.

So Police 32A, Water Held in Trust By the State. What Idaho Power and the state agreed to was that, as long as 3900 cfs in the summertime and 5600 cfs wintertime goes past the Murphy Gage, Idaho Power will not take action against any other water user in the basin and call for water based on their current right at Swan Falls, nor will they call for water at any of their upstream facilities.

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All the examples talking about the Swan Falls compromise, all the assumptions made really seem to revolve around the Swan Falls Dam because that's where the lawsuit originated. That's where the numbers that were developed in court and where the compromise came from. But in fact Idaho Power claims a lot more than 8400 at (unintelligible) Dam.

As part of the tradeoff with the state, as long as the 3900 cfs in the summertime goes past the Murphy Gage, Idaho Power will not call or exercise their water right on upstream structures.

But what it basically comes down to, using the Swan Falls example, is Idaho Power says, "We have a valid claim according to your Supreme Court." Now, what the size of that claim might be is dependent upon what district court. "We weren't getting the water we claimed; therefore, maybe" -- (inaudible) the idea of forfeiture, if you don't use your water within five years (inaudible) is one of the things the state law and Idaho Constitution provides in statute. The state may regulate stream flow for Idaho Power purposes (inaudible) entitled to all this water that they were claiming.

So Idaho Power said, "We will give up

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our water right provided you assure us it will never go below 3900." Those waters, then, that Idaho Power is saying "we are giving up" were actually appropriated waters of the state. They filed the proper claim. The paperwork is on file with the Department of Water Resources. Because those waters were claimed at one time, they are not considered the unappropriated waters of the state. Most of you realize that the citizen in Idaho is guaranteed the right to appropriate, use the unappropriated waters of the state. Now, that right shall never be denied, according to the Constitution.

But because Idaho Power had already appropriated those waters, put it to beneficial use by running it through their generators, they are not available for the ordinary citizen to rely upon or to use. So, so much for the subordinating Supreme Court ruling that it's not subordinated.

So Idaho Power turned over, basically, all their water rights above 3900 cfs to the state. The state says, "We will reallocate that water for other uses provided you meet certain criteria." And that's Idaho Code 42-203A, B, C, as listed on Policy 32A.

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There are existing criteria that have to be satisfied before you can get a water right from the state, and those are basically listed in the Idaho Code as 42-203A.

203B specifies that, yes, Idaho Power, or any kind of power water right, can be held in trust by the state. And 42-203C says that, if the state wants to reallocate water that had been claimed by a hydropower company, they may impose special criteria upon anyone who applies for that water.

Now, the special criteria as proposed by the negotiators as part of the legislative package talks about the effect upon the economy of the state, the effect upon the hydropower rate base, the effect upon the family farm tradition. There are five or six new criteria that, before you can get some of this water that used to belong to Idaho Power, you have to satisfy this new criteria.

Policy 32B, Domestic, Commercial, Municipal, and Industrial. The existing water plan sets aside a volume of water -- because when this was first drawn up, it was in terms of acre feet -- for new municipal and industrial uses. They converted that figure to cubic feet per second,

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which the negotiators were talking about and what was in the agreement. It turns out to be roughly 150 cfs; in fact 144. By adding domestic, the intent is to add a little bit more water to that number just to cover it. But if you stop and think about it, we are talking about consumptive uses now. It really doesn't matter how much water you divert; it's how much water you consume out of the basin.

An irrigator that burns six or seven acre feet per acre and his crops only use three, the other water goes to recharge the aquifer or comes back to the river directly as surface runoff.

So we are talking about consumptive use. And in terms of any kind of water budget analysis, the person who drinks water, the individual human, doesn't consume much water. The amount of intake he has from beverages that are bottled outside the basin, that's a lucky thing. In the Snake Plain Basin, there is only one brewery, for example.

Your wastewaters actually balance out what you drink if you could ignore the amount of water actually lost from perspiration. By digesting food, you actually create more water than you're consuming. So the domestic, the amount of

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water that's used by the human population of the area is not a significant factor. In fact, if you take a look at the numbers the department has, it turns out that those municipal diversions which are used to water lawns, golf courses, city parks, are probably the biggest consumers in the whole basin.

This amount, 150 cfs, of this water that the state now owns in trust is set aside for consumptive purposes. It will probably allow for the doubling of the population and industry of the whole basin.

If you take -- it's a fairly inclusive title -- if you take domestic, commercial, municipal, industrial, probably the only other consumptive use is agriculture. So Policy 32C specifically says that those waters now held by Idaho, less the amount reserved for DCMI, shall be available for new agricultural development or agricultural uses in general. It specifies that, if you are applying for that water that Idaho Power formerly claimed, you have to meet new additional criteria. Conceivable, and certainly the intent of the negotiators, was the idea that the first applier who thinks he can put it to beneficial use automatically has the right to the water. That's

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no longer going to be the case.

These waters are special waters. They belong to somebody else. They have been returned to the state for a new allocation, new criteria.

Policy 32D, talks about hydropower. Specifies that the use of water for hydropower is a beneficial use. That's already in the state water plan, the Constitution -- not the Constitution -- the Idaho Code, and points out that the depletion of flows below the minimum average daily flow as set forth in Policy 32 is not in the public interest.

As part of the tradeoff from the power company to the state, the power company had to be guaranteed something. And what they have been guaranteed is 3900 cfs in the summertime and 5600 cfs in the wintertime.

If the flows were ever to go below that point, Idaho Power should, would, and will take action through the state against any new appropriator of water. The intent of this agreement is to protect the existing user. For anybody who can prove, can only show beneficial use of water after the signing of the agreement, if the flows ever get below those specified, Idaho Power

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has legal grounds to demand he be shut off or he supply them with water somehow.

Policy 32E, Navigation. This is basically no change from the existing state water plan except that in '76 and '82, when it was re-adopted, the Board was thinking in terms of 3300 cfs at the Murphy Gage coupled with the federal licenses for the Idaho Power Complex supplying enough water for recreational purposes and commercial navigation below the Hells Canyon Complex. They now have raised it to over 3900; they feel, therefore, even better about the fact that there is enough for recreation and navigation.

Aquaculture. The major factor, particularly in Twin Falls (unintelligible) of the river, trout farming, catfish farming, this specifies clearly that, in aquaculture if you want to process fish, any water for that purpose has to come out of the commercial, municipal, and industrial uses. It's not a very water consumptive commercial operation, but it should be counted against that 150 cfs set aside for those purposes.

It points out that many of these fish farmers rely on the discharges from Thousand Springs for their water flow, divert the water from

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the springs discharge through the (unintelligible). They have a water right. Ford and the department feels that, by having 3900 at Murphy, they are going to probably always have water coming out at Thousand Springs.

The plan as it exists -- and it's proposed to revise it or not change -- calls for a zero minimum flow at Milner Dam near Twin Falls. All the water in the Upper Snake above that point is basically allocated to existing uses.

It is legal, and has happened on rare occasions, that there is no water coming past the Milner Dam. The only major recharge to the river, then, between Milner Dam and the Murphy Gage below Swan Falls is the Thousand Springs discharge.

So if you are going to specify 3900 at the Murphy Gage, and most of that water in the summertime is coming from Thousand Springs, those trout farmers relying on the Thousand Springs should have water available to them.

But state law does not provide that a water right guarantees your needs of diversion. It provides only that you have access to water, the priority date associated with that water right.

Conceivably, if the flow sent to

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Thousand Springs was to decline, the trout farmer may have to change his diversion structures. In the worst case situation, he may actually have to construct a well.

But as I say, law does not provide that a water right guarantees you a means of diversion; it just specifies you are allowed (unintelligible) water.

And that basic language is in the existing water plan, not necessarily that all the trout farmers were aware of the existing plan, if anymore are aware of this proposed revision.

Policy 32G, Fish, Wildlife and Recreation. Back when the original water plan was adopted in 1976, there were a number of studies conducted about the need of fish and wildlife, for water for recreational purposes in the basin particularly at the Swan Falls (inaudible).

The numbers are significantly higher than 3300, and they are higher than 3900. The water plan represents a compromise just like the Swan Falls agreement does. And in '76, by trying to balance the fish/wildlife interests against the interests of new consumptive upstream development, the Board reached 3300. It's what they thought was

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a reasonable compromise. They recognized in the existing water plan that is not the best number that flows for fish, wildlife, and recreation, but it is one they felt would afford some protection for those resources and form a basis for continued use of it. By raising the minimum flow, the Board had at least the feeling it was moving in the right direction, and, while still not optimum by any means, it does afford some protection for fish, wildlife, and recreational uses.

Policy 32H, Water Quality, Pollution, and Control, in an area of the state where we are so water short that you can't satisfy the existing water rights, it seems to be a misuse of water to allow it to be used for simple dilution of pollution.

The Board proposes to adopt this policy -- and it's spelled out in slightly different terms in the existing water plan -- that to use water, good water, to dilute bad water is not a beneficial use for water. The Board feels there are enough existing state and federal laws on the books if properly enforced that water quality in Idaho shall be maintained at a fairly high level. Certainly no one should be able get a water

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right to use water just to dilute their waste (inaudible) rather than acquire water for that purpose.

Policy 32I, New Storage, one that may not be particularly significant in this part of the state. It's a key factor in the upper basin in the whole Snake system above Murphy.

This particular policy has two specific parts, both parts mandated by the agreement. The first part basically says that, unless some kind of determination is made that we are making maximum use of the water storage facilities in the basin, no new storage should be created.

(Unintelligible) for several different competing interests. Certainly there is a large segment of the population that says we have enough dams. Idaho Power likes to see as much water coming down the river in the wintertime as possible. It chose the Brownlee Reservoir which is the only storage facility of the Hells Canyon Complex -- or in the Hells Canyon Complex, at least.

If you stop and look at what the negotiators were really asking, in this case they were asking the Water Board, wanted it included in

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the water plan, to take some action. Most of the reservoirs in the system were built for irrigation storage. Some minor benefits for flood control and recreation in some cases. Some would have it constructed totally for irrigation storage, and yet they seem to be partially full in the summertime, in some cases quite full. And that's probably because of a number of reasons.

In Idaho, water law provides that you can have a full natural flow right for a consumptive purpose. Using irrigation, for example, you may have as many water from a stream as is necessary to irrigate so much acres. And you may have an 1870 or 1880 priority right.

That water is almost always going to be guaranteed for you. But law provides that you may have an additional full water right in storage as an assurance point.

Some of the farmers in Eastern Idaho with early priority rights on natural flows used their water once in five years, once in ten years, or less. The city folk felt, for example, a water right in a reservoir which they required years ago, they thought Pocatello was going to increase in amount and size, and water and consumptive needs

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would increase.
They never called for that water. They had no means to divert it. If they called for that water, the only way they could get it would be to put pumps in the river and try and catch it when it went past.
So there are lots of examples one can use about water held in storage that's never used. And on October 1st, when the water master in that area has to create new space for the next year's runnff, he just dumps the water down the river.
It's not necessarily going to waste. You got Idaho Power, you got downstream hydropower generation facilities. But in late fall, even Idaho Power is not trying to fill Brownlee Reservoir. So this water is basically water that has sat around, has not been used. If there were some way that this water could be exchanged for new uses, maybe we wouldn't be as water short as we think we are.
Now, federal law provides -- and these are some of the kinds of areas: First of all, the dam was built for a specific purpose all brought by Congress. The water stored behind that dam can only be used for those purposes. It might be only

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for irrigation, it might be only used for a certain project. So you can't move it around even if you wanted to.
The state has a water bank mechanism so that a person who has excess water can lease it to someone who needs the water. But the federal law provides that the waters behind a federal reservoir are (unintelligible) a federal dam. You cannot sell it and work a profit.
It's a fair deal from the point of view that, why should somebody be able to make an enormous profit on water that his grandfather or father paid some minimal amount and helped support the construction of the dam (unintelligible); and why should he be able to make a big profit off water stored behind the dam, then? At least a part, and in some cases the biggest part of it, was paid for by federal dollars.
So that's realistic from that point of view. It would be very unrealistic if you expect someone who has excess water to make it available to someone else. It's hardly worth its while if you can't make a profit letting go of this water.
Another federal restriction is that you can only lease or sell your water for one year at a

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time. The intent of that, I suppose, is to protect the irrigator, the person who holds the water. There is no way that big business or even new farmers can come in, and if all they are guaranteed is water at a one-year-at-a-time basis, well, they'll not finance that kind of operation.
All you have to do is (unintelligible) the people in the area, and there would be no water available when you have business. So you can't lease or sell your water for more than one year at a time. There is certainly a barrier for trying to move this water around so that newer uses can be satisfied.
The state has a number of laws which apply to this situation, and they are equally restrictive. You can't expand a water right. You have water, and its beneficial use is to be used to irrigate these certain number of acres described in a water right and the certification. The law provides that you cannot use that water for a consumptive use at any other point. It makes sense, in trying to keep track of the water in the system in that you would never have any idea how much water was going to actually be consumed if these people could actually sell their water to

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someone else who were going to consume a portion of it. So -- but it certainly provides a barrier because the only use a person with excess water, even if he does put the water back in theory, the only use that can be made of it is for a non-consumptive use.
It's the argument, then, if you don't use your water, you're not supposed to use it once in five years; typically you lose your water rights. So there are both state and federal barriers to state a more efficient use of water in the system.
The Board has been asked and has agreed to trying to find out, are there ways to get around both state and federal restrictions on optimum, maximum, whatever you want to define it, better use of the water that is stored already in the system.
If you had to ask the director of the Department of Water Resources today to make a decision on it, are we doing the best we can on our water, he would probably have to say no because there is some unallocated water behind the reservoir (unintelligible) to the Snake.
Once that water is allocated, the director has to make a decision and would probably

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have to rule under existing law, and we're probably doing the best we can. The intent is for the Board to see some of these restrictions about how we can better use the water. Some of those restrictions can be changed.

Certainly there's a lot of problems to try and change state or federal law as it relates to reservoir storage, but the intent of the Board, as far as response, is to look into can these things be changed.

The second part of Policy 32I applies strictly to the reach of the river from Milner Dam downstream to the Murphy Gage. Idaho Power is quite concerned about filling Brownlee Reservoir. There is no question about that, the amount of revenues they generate from a full Brownlee Reservoir. If Idaho Power is going to participate in the Northwest Power Claim Council Fisheries Augmentation Scheme, they are going to need water there to provide for the so-called fish rushes.

In trying to work out compromises, the negotiators agreed finally that filling that reservoir is so important that anybody who wanted to divert water directly out of the river during the wintertime for storage purposes, the impact of

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that diversion can be measured in some sort of mitigation should the supply be granted and given to Idaho Power for that impact on their system's operation.

The plan does not specify, the proposed revisions of the plan do not specific, what that mitigation would be. Certainly it would have to be calculated on the individual base. The amount of water diverted at the time of the year, each project, each proposed wintertime diversion, would be different.

The intent is to lessen the negative impact on Idaho Power's operations. It may be that the timing of the return flows is beneficial to Idaho Power than the mitigation (inaudible) itself. It may be that someone who wants to have water in the wintertime can do additional amount of acre feet which are available to Idaho Power at cost. These are the kind of things that mitigation (inaudible). It doesn't mean a calculation of the economic dollars lost by Idaho Power. That's not the idea behind it. The idea is somehow, before we can let somebody take water out of the river in the wintertime in that region, we have to evaluate and try and lessen the impact on Idaho Power's

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operations.

There is one last policy, and it's called Stored Water for Management Porposes. This is one the few changes that's not directly a reflection of either the agreement or the Supreme Court decision, but it's certainly indirectly a reflection of that.

The agreement and the proposed changes to the water plan require that the Department of Water Resources always maintain 3900/5600, depending on the time of year, at the Murphy Gage.

If the department is going to issue any new water rights for upstream development, they have to be weighed, then, against their impact on those flows. As I said earlier, there can be no -- conceivably there are periods of the year when there is no flow coming down the river past the Milner Dam and we are relying totally upon discharges from Thousand Springs, the discharges from the Snake River Plain aquifer.

We try to manage water. As soon as you start talking about trying to manage groundwater and surface water, that's the intent of these changes in the water plan; that's the intent of the agreement that you're going to try and manage all

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the water, ground and surface water, within the basin as a unit, or at least manage them so that you're always concerned about the minimum flow at Murphy.

It gets very complicated when we are talking about an aquifer that's sort of 100 miles long and 50 to 70 miles wide. And someone who is pumping water 50 miles from Thousand Springs, if the flow gets low at Murphy Gage and you want to shut him off, it would do no good to the flow at Murphy Gage because the effects of his pumping groundwater out there might not show up for weeks, months, (inaudible).

So if the department is going to be allowed to issue new water rights, particularly for groundwater purposes, they are going to have to either, one, be very conservative because there is no magic cutoff when you get close to 3900 because you're shutting off at (unintelligible), or they have to have some water someplace they can call from to cover up the mistake they might make, like over-appropriating water. And that's the intent of this.

There are unallocated waters. There is water available in the Upper Snake system that

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could be specified for the use. If it could be obtained by the state, it would be there if the department gets down too close to 3900 and they make a mistake.

Ken Dunn, the director of the department, in a public hearing said, "The possibility of me managing the river, coupled with the aquifer to 3900 exactly, is nil. We don't know enough about the aquifer to do it. Even if we knew a whole lot more, the possibility of managing to some magic number like that are nil." The idea is to have this water available in case the department goes overboard, particularly with the idea that, if we issue too many permits to groundwater users, we can't make up the water in the river.

The idea here, of course, is that, if we can acquire some water in the system, it would not sit idle. It would be put in the water bank, it would be sold by Idaho Power or whatever. But it would be available as insurance if the department were to need it.

Those are the policies as proposed. I would just like to touch on a couple of things about the agreement that relate to the policies, I guess.

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The agreement specifies that, if the flow of Murphy goes below 3900 and it's the cause of natural consequences, not some mistake on the part of the Department of Water Resources, Idaho Power will not protest. They will take no action against the nexus of the user. If the flow goes below 3900, any new appropriator, anyone who has got some of this water or is using water to formally (unintelligible), they will be subject to call. They would have to shut off so the department could get their water.

The agreement speaks to establishing the criteria for the re-allocation of this water, and the Board is merely saying that in this case it will recognize whatever the legislature does. The agreement speaks to the so-called general adjudications of the system, and (unintelligible) requirements for two purposes. One, if the state is going to finally manage the river and the aquifer together so that it always maintains flow on the river, they need to know what uses are there (inaudible). They need to get a priority system so that in a water shortage, certain users can be shut off. That's part of it.

The other part, of course, is that the

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federal government and the Indian tribes claim reserve water rights. Now, if you take all the national forests, the Craters of the Moon, the INEEL, the reservation near Idaho Falls, plus the Fort Hall Indian Reservation, there are a lot of federally reserved water rights in the Upper Snake system.

The only way an (unintelligible) is adopted in '76, it asked the federal government and the Indian tribes to quantify the amount of water they feel they need. The existing plan provides that the Department of Water Resources will provide technical assistance to the Indian tribes, for example, to quantify their water rights.

To date, these have not been quantified. The only way to force the federal government to quantify their water right or to participate in the state adjudication is to do what's called a systems adjudication. Negotiators felt that, if they started at Lewiston where the Snake River starts out of the state and include all the tributaries upstream, that's a system-wide adjudication. There is nothing more the state can do as far as where it leaves the state.

That's why the existing legislative

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package specifies an adjudication beginning at Lewiston. Its sole intent in starting at Lewiston is to force the Indians and the federal government to participate in the adjudication. In the state court, it specifies how much water they feel they need for the purposes of (inaudible) regulation, and once and for all we will have a list of all the water (unintelligible) in the Snake system.

Now, they had a piece of legislation introduced this session which would provide that the Indians not participate in the adjudication, for the Fort Hall group particularly, not participate in the adjudication, but that they negotiate their water rights with the state.

What that means in terms of what it could pass, what that means in terms of how they vote the adjudication is handled, I don't think it's important because the adjudication is basically a negotiation between an individual water right holder and the state. If an adjudication is done and this area is included, what happens is, the department comes out with their records and sits down with every water right holder in the area and says, "This is what we show. What do you claim? Let's discuss it. If we can reach an

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agreement, fine, that's it," otherwise the private individual has the right to go to court (inaudible).

Once everybody compromises or goes to court, the court issues a decree and places all the water rights into whatever basin -- and in this case, let's say from Lewiston above -- in order of priority. It establishes the mechanism so the water master in a time of water shortage can (inaudible).

Mr. Gray, I think that's enough.

CHAIRMAN GRAY: Excellent. We will now open up the meeting for public testimony, and we have one person to testify. Malcolm Crawford.

Malcolm, would you please step forward, state your name, address, and telephone number for the record, please.

MR. CRAWFORD: My name is Malcolm Crawford. I'm manager of Lewiston Orchards Irrigation District. I reside at 521 Karen Avenue in Lewiston.

(End tape 1)

MR. CRAWFORD: I'd like to thank the Board for coming all the way up here to Lewiston to participate with us. We appreciate some attention

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up there on this end because we realize that the big lag is usually on the agricultural end. Even though I'm manager of an irrigation district, under Reclamation law, it's not what you guys are used to down at St. Anthony's or along the Snake.

It's a water utility company, essentially. We no longer have any commercial agricultural interests at all. It's 4,000 acres of subdivisions, and it's really the bedroom for Lewiston up on the hill.

I want to testify today in three areas: One, the need for adjudication; two, the need for the beneficiees to pay for the adjudication; and three, the need for upstream and off-stream storage in the state of Idaho.

I'm a member of the Idaho Water Users Association. I'm also the American Waterworks Association which has to do with our utility affiliations. I'm glad to say that the convention in Boise last month, the Idaho Water Users voted to support the water plan as -- pretty much as presented. And as I circulated there and talked to people, mostly farmers, who were at that convention, there was very little opposition to the plan in its entirety.

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There was some opposition to it in regard to the fees, the apportionment of who was going to pay for it, and how it was -- how those fees were going to be collected, and this sort of thing. But in general, the people who were objecting on the score of, say, a dollar per acre for an adjudication fee, in my opinion are extremely short-sighted. I think they are not taking into account the real need for an adjudication process in the state of Idaho in order to clarify the appropriations on the Snake Basin. It's just got to be done in order to -- so that we aren't constantly in the courts.

It's all been explained here, and you're all more aware than I of the ramifications of it. But I want you to know that, you know, representing about 17,000 people here in my irrigation district, we can see the benefits of adjudication. And we are in favor of adjudication. We are in favor of paying a fair share acreage-wise based on our area up there for consumptive use for our M&I consumption.

Either way it's something that we feel is necessary. It has to be done, and we're very glad to see the state of Idaho moving in that

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direction. And I believe that all the people who benefit need to pay for it. I think there has to be a look at methods of other users that you wouldn't normally be able to put your finger on, like the recreational people, and all of those who benefit from the use of the waters in the state.

That's the most difficult area, of course, is to collect fees, but maybe through licensing or use fees, or something like that, that could be done.

I've been -- well, I started out as a mining engineer, and I've been in this kind of work in Oregon and California and now Idaho for the last two years all over the West. And the real way to get more water to use for beneficial uses is through upstream and off-stream storage. That's the only way that you can help nature to provide more of this resource.

And we just had a good, long dissertation about the reasons why we aren't even able, at this point in time, to utilize all the storage resources that we have on the Snake. And that's really a shame. Those rules, those laws, were made by men, and they can be corrected -- well, maybe that's not the right term. I don't

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know enough about it to say whether they should be corrected, amended. But some way that pathway should be eased so that beneficial use can be made of that water on the year-round.

Why have 56,000(sic) cfs at the gaging station in the winter and 33,000(sic) in the summer - if the best use of it were otherwise than that, if you can save that spring runoff and use it at other times and trade off through the water bank, or whatever. And those things have to be pursued by the state, the legislature and the Water Board as well.

I know it's being done on the Columbia with centralized computer use of the water. It's being done on the Central Valley Project in California. And where the Snake River is the trunkline, the vital water passageway, through the whole state of Idaho, essentially, it seems to me that it's within our grasp to take control and to increase our development of that resource and make a better use of it.

The situation isn't going to get better as we get more populated and more M&I uses, and so forth. It's just going to get more complicated, and we're going to be in court more often.

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Thank you very much.

CHAIRMAN GRAY: Mr. Crawford, why don't you stand for questions if the Board members have one.

MR. CRAWFORD: Sure.

CHAIRMAN GRAY: Mr. Hammes, do you have a question for Mr. Crawford?

MR. HAMMES: I have no questions.

CHAIRMAN GRAY: Mr. Rydalch?

MR. RYDALCH: I have none.

MR. CRAWFORD: It was a pretty general statement.

CHAIRMAN GRAY: I think pretty much what you had to say is what we're hearing all up and down the river. And we thank you very much.

Is there anyone else who would like to testify at this time?

Yes, sir?

MR. TUTCHER: I'm Paul Tutcher. I live at 1411 Prospect in Lewiston. My phone number is 743-6271.

I have some concern with the minimum flow restrictions. Idaho Power doesn't really give a damn what the minimum flow is down here below Hells Canyon Dam because it's of no benefit to them.

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What they do is, they cut the water off in the summer. In other words, you're out there in a boat or in a raft, and you don't have any water. You're -- they drop the water a foot, foot-and-a-half an hour, and you're sitting up on the beach, you're ten feet from the river.

It's inconvenient for people who are trying to use the river, and it's destroyed the fishing on the river. I've lived here all my life and been on the river all my life. And I've seen the bass fishing up there, just it's been devastated. The beaches are gone.

The thing is, the minimum average is not -- you know, it's not -- nobody is watching it. If they regulate themselves at Lime Point and at Johnson's Bar, it doesn't matter to them how much water comes by there because they've generated their power at Hells Canyon Dam.

I think there should be more concern, you know, as to what goes on down here. It's great that you have plenty of water in Southern Idaho, but I live -- I have a lot right across from Lime Point, and I can go out and I can see how fast it drops every night and how much it comes up every day. And it makes it, you know, very difficult to

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use the river for anything down here. I know it's a concern that I have.

Thank you.

CHAIRMAN GRAY: Mr. Hammes?

MR. HAMMES: I'll pass the question just --

CHAIRMAN GRAY: Mr. Rydalch?

MR. RYDALCH: I have no questions.

CHAIRMAN GRAY: Mr. Shawver?

MR. SHAWVER: I have nothing.

CHAIRMAN GRAY: What are you talking about fluctuations as far as elevations? Talking ten feet? Five feet?

MR. TUTCHER: I've seen it as much as 15 feet, for example, at Lower Granite. It's a fairly -- let's face it. When you drop it a foot, are you talking about the bank at a 45-degree angle from the river? Are you talking about ten percent? At a ten-percent angle, I've seen at Salt Creek you can lose 50 feet. At Lower Granite you can lose 12 feet. That happens every day. I mean, it isn't something that happens once in a while.

What happens is, they store the water, and during peak use during the day, they start dropping the river. At night it comes back up.

It's pretty well known that bass, when

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they spawn, go up in the rocky areas and the beaches and they'll spawn. Well, those eggs are exposed every day. Every 24-hour period they're exposed, and they die.

And it's -- you know, it just -- I ran float trips. I was on the river for two summers. I was on the river every day for six months. I slept on the river every night, and there wasn't one night that it didn't happen. You'd set up a kitchen on the beach, and the river would be from here to the wall, and in an hour you'd be up to your knees in water. Get up the next morning, the river would be from here to the street. I mean, it fluctuated that much.

And I don't think that -- I don't know who runs the gages at Lime Point and at Johnson's Bar, and I certainly don't have the means to measure the river myself. But I find it hard to believe that, if I get in at a certain time and they tell me, okay, the river is running at 8500 feet and I see the thing cut in half that it's being maintained at 5,000. I don't believe that. I just don't -- you know, I suppose with averages, if there's 70,000 coming down in the winter and 2,000 coming down in the summer, they can average

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it out and say, "Well, our minimum average is, we've maintained it at 5,000," when in essence, you know, it's jumping up and down like crazy.

I don't think there's a lot of concern for the minimum flow down here. I haven't seen it.

CHAIRMAN GRAY: Mr. Hammes?

MR. HAMMES: No, the question I was about to ask he made clear in supplementary remarks.

CHAIRMAN GRAY: Any further questions?

UNKNOWN SPEAKER: I have no questions.

CHAIRMAN GRAY: Mr. Shawver?

MR. SHAWVER: I have none.

CHAIRMAN GRAY: Thank you very much.

MR. TUTCHER: Thank you.

CHAIRMAN GRAY: Anyone else wish to testify at this time?

If not, we'll close the testimony part, and we would open it up for questions and answers. And we have Frank Sherman again with us from the department who can handle the technical questions for us.

MR. SHERMAN: Could I start off -- when I'm talking, I try not to listen to myself and I think I should.

(Laughter)

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MR. SHERMAN: The point I was trying to make about the adjudication that I didn't make is that, despite the excellent testimony supporting the concept of adjudication, we've been (inaudible) in this area. I think it's quite likely that the adjudication (inaudible). Specifying Lewiston forces the federal government under (unintelligible) and regulations that they participate in the adjudicating. Since the agreement itself only specifies actions above Swan Falls Dam, I think it's fifty-fifty that they would start there. I don't think anyone in water management would argue that they need the whole state adjudicated at some point.

In terms of dollars and cents, we may well -- we'll take the smallest chunk we can, still including the Fort Hall Reservation.

UNKNOWN SPEAKER: Are you talking about taking (unintelligible) and adjudicating one at a time?

MR. SHERMAN: Yeah, we can all -- we talk about -- the estimate is $28 million over ten years. And it's hard to judge, because, any adjudication the department has ever done before has basically taken ten or more years because

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they've been done out of the general fund. And usually three or four people, at most, have been hired to do them. So they stretch out over ten years. All the department really did was to extrapolate the increase in size in this one and say, "Okay, if you get it done in ten years (inaudible)."

As a non-Board member, I didn't ask a question, but the last testimony was quite interesting. And quite honestly, it's the only testimony supporting even the inclusion of the Lime Point and Johnson's Bar flow. As far as the state water plan -- and I judge, and I don't know if the gentleman will correct me today -- he not only would support giving those flows any more authority than they might have; he would support more in looking at fluctuations and perhaps (inaudible).

I would point out that in speaking of funding an adjudication, recreational interests, they are hard to pin down. But the state, where the Board has specified a minimum stream flow, has to pay on that water as part of the adjudication process. One of the concerns (inaudible).

I think, Mr. Gray, with that, I'll be seated.

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CHAIRMAN GRAY: Mr. Haas?
MR. HAAS: The concern over the river fluctuations, it's in the license which you're adding to the state water plan. And I just call your attention to the fact that we're used to talking about cfs, but there is, in this material adding to the state water plan, it talks about the maximum variation in river stage at the Johnson's Bar not to exceed one foot per hour. There is nothing in this language which you've put in to try out concerning Lime Point. And, of course, the one-foot-per-hour, how much riverbank is exposed or unexposed is different.
CHAIRMAN GRAY: If you look at the bottom of page 2, take your Currents and look at the bottom of page 2 on the left-hand side and go up, gosh, let's see, about five or six lines, now that's on Idaho Power's federal power license, that language.
MR. TUTCHER: That's what I'm getting at. Above the dam, Idaho Power's concern was to maintain minimum flows because they need the water to generate the power. Once it goes over Hells Canyon Dam, that's water that's lost to them and they have no more use for it. They don't care what -- in other words, what I'm saying is that, I

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guess in essence, if they're violating that, nobody's doing anything about that.
CHAIRMAN GRAY: Could we ask you to do one thing? We can't change the federal verbiage in the federal license as we've indicated it here. But we'll be accepting written testimony until February 22nd. And you can send that to the Statehouse, the Water Resource Board, Statehouse, 83720. If you might, just draft some language up for us of how you think it might fit or dovetail into Policy 32, we'd sure appreciate it.
MR. TUTCHER: All right.
CHAIRMAN GRAY: And anyone else here who hasn't testified today, if you don't want to testify up here, we will accept written testimony from everyone in the state until February 22nd regarding Policy 32.
Mr. Sherman?
MR. SHERMAN: I suggest, Mr. Chairman, that the Board might wish to entertain, or it may appear in different testimony, that at least one of these specified points (inaudible) at all, and that the Board should encourage the department to seek, as part of the underlying studies, better gages on a day-to-day basis at these points.

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CHAIRMAN GRAY: That's a good idea.
UNKNOWN SPEAKER: I have a question.
CHAIRMAN GRAY: Yes.
UNKNOWN SPEAKER: How does your plan fit, or have you had any comment whatsoever from the federal people about whether or not your water plan *actually meets the requirements* for water quality standards?
CHAIRMAN GRAY: Okay. The first thing that you have to realize, it is your plan, our plan.
UNKNOWN SPEAKER: Has it been submitted to the federal government?
CHAIRMAN GRAY: Oh, yes. We had testimony yesterday from the Bureau of Reclamation. We have not heard from the Forest Service; we have not heard from the Bureau of Land Management; we have not heard from any of the tribes.
UNKNOWN SPEAKER: Does the U.S. Fish and Wildlife Service have any jurisdiction whatsoever?
CHAIRMAN GRAY: Go ahead.
MR. SHERMAN: I guess I'll answer this in two parts. One, let me talk about the Fish and Wildlife Service. The Fish and Wildlife Service has not testified (unintelligible). They -- I have spoken to them (unintelligible). And they are

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pleased with the idea that the minimum flow is set by the plan to be raised. They are considering, if there is a systems-wide adjudication, participating in the (unintelligible) of the Snake, for example, (unintelligible) for wildlife purposes and (unintelligible) much higher.
In terms of water quality, the Nez Perce people -- not the Nez Perce.
UNKNOWN SPEAKER: The Sho-Bans.
MR. SHERMAN: -- the Sho-Bans, the Shoshone/Bannock people from Fort Hall, came to represent their (inaudible) water quality questions (inaudible). The Environmental Protection Agency has not commented principally (inaudible).
The concern over the existing language, there is really only one concern. I don't think anybody wants to see us use good water to dilute pollution (inaudible).
The Board and most of the people who talk to the issue feel that discharge should be part of the (inaudible) plan. There is some concern, however, that if the flows in the river were to be (inaudible) -- the intent is still to put the burden of any obligation (inaudible).
UNKNOWN SPEAKER: Well, I saw nothing in here

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that mentions the 208 code. And I found that --
MR. SHERMAN: -- hard to believe? I think it's -- the 208 program in Idaho, it's been run by the Health and Welfare department. And in the existing water plan, it's just not (inaudible).
CHAIRMAN GRAY: Mr. Sherman, excuse me. Would you briefly just describe 208 for those of us that are here that are not familiar with it?
MR. SHERMAN: Maybe the lady could do it better than I can. Coming from my point of view, 208 is a national effort funded by the Environmental Protection Agency to address and plan for water quality policy.
In Idaho it has principally been (inaudible) Policy 32.
CHAIRMAN GRAY: Now, one other thing. The governor has just established a water quality Board. And if you look on page 7 under -- right next to the box where we looked at all the things that must be taken into account, it shows as Exhibit 8. And if you'll go, it will appear -- if it's codified, it will appear as 42-1805. And drop down to paragraph 5. And that's about the only place in here that you'll find anything dealing with water quality. But it will be codified as

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42-1805.
UNKNOWN SPEAKER: I understood the specific plan of the 208 program was mandated to have been completed at a certain time, which I think may have already passed.
MR. SHERMAN: Yeah, it has. The existing Department of Health and Welfare rules and regulations (inaudible).
UNKNOWN SPEAKER: Well, I was particularly interested in your testimony about the aquifer and how that was -- but the fact was, that was the area that was most affected.
UNKNOWN SPEAKER: (Inaudible) yellow plumes.
(Laughter)
UNKNOWN SPEAKER: Well, it will definitely affect for many the taking of water.
MR. SHERMAN: Yes. I think the main concern in terms of reduced flow of the river because of increased consumptive use is that there is less good water in the river; therefore a waste discharger has less water to mix his effluent in to meet whatever standards. The intent of (inaudible) and the state Board is to require (inaudible).
The other concern, of course, is, if you defer water for agricultural uses, particularly, or

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industrial uses where it is used as cooling water or processed water and returned to the river and frequent use of (unintelligible). That's a major concern, but the position of the state is that they have to meet the existing discharge standards in order to do that or perhaps change the temperature. I don't see major water quality changes in that regard.
Now, the 208 program, except for some areas like sewage treatment lagoons and land surface disposal of industrial waste does not really address quality of water in the aquifer. The principal authority for that is the Water Board, the Department of Water Resources. And as I said, it's the principal in that they regulate waste disposal and injection wells. Those make a difference (inaudible).
The Water Board has rules and regulations for waste disposal and injection wells. They have applied to the EPA for primacy of the underground injection control program. We should hear this month, actually, whether we're going to get it or not.
The Board, in trying to add groundwater to the policies for the existing water plan, the

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nice blue colored thing I have up, they have been criticizing because it does not address groundwater in any fashion.
Had someone arbitrarily said, okay, when we started this process two years ago, before the whole Swan Falls thing broke out in our face, we're going to adopt groundwater quantity standards and then we're going to come right back with (inaudible). It's all involved with water quality, (unintelligible), sole source distribution, (unintelligible) aquifer, EPA not backing off of that and the state. Mr. Gray had mentioned they set up a special water quality task force or committee, advisory group, and they're going to address rules and regulations in the aquifer.
UNKNOWN SPEAKER: Is anyone from the group, may I ask, involved?
UNKNOWN SPEAKER: I'm just positive there is, but who it is, I don't know.
MR. SHERMAN: It's a fairly large committee, and in that regard I'm positive (inaudible). They're meeting today for the first time.
CHAIRMAN GRAY: If what I may be reading from you is you see a weakness possibly with 3211; would that be true? Could you possibly -- we see some

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weaknesses with it, also. Might you put something together in writing for us and submit it by the 22nd? We'd sure appreciate it. But it's -- everything that we can get is going to help.

This is not the final form; this is just a rough draft, so to speak, of what we hope to come up with when all the testimony is taken into account. So it would be important to us -- it's on page --

UNKNOWN SPEAKER: Yes, I have it.

CHAIRMAN GRAY: Okay. But we would really appreciate it.

One thing I might mention is, a member of the Idaho Water Resource Board is from Lewiston, Dick Wagner. And Dick couldn't be with us today. So any problems you have, why, you might get a hold of Mr. Wagner.

Any other questions we might answer for you? If not, again I'll reiterate that we will accept written testimony until February 22nd. And it can be sent to the Statehouse, Boise 83720. And we will meet again here tonight at 7:00 p.m. if you care to join us again.

Thank you for coming.

(Recess)

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LEWISTON, IDAHO

February 6, 1985, 7:00 p.m.

(Joke told about a cowboy and a reverend)

CHAIRMAN GRAY: My name is Gene Gray, and I'm chairman of the Idaho Water Resource Board. And on my right is Bob Hammes from St. Maries, a publisher, a newspaper man, book store owner, et cetera; Dave Rydalch who is a Committee of Nine which is an Upper Snake River irrigation conglomerate and also a farmer at St. Anthony; and over here is Jim Shawver who is the secretary of the Idaho Water Resource Board and a farmer in the Eden area; and we've got Wayne Haas from the Department of Water Resources; and Frank Sherman, geologist from the Department of Water Resources.

And we're here to talk to you about Policy 32, or some changes to Policy 32, of the state water plan. And if you've got your Currents -- did you get a copy of that? -- if you just kind of grab that, I'll just kind of thumb through it with you a little bit.

Page 1 kind of gives you an overview of the Water Resource Board, our function and a little bit about Policy 32 and the state water plan.

Page 2 and 3 deal directly with the revisions of Policy 32 of the state water plan.

If you go on over to page 4 and half of page 5, you'll find the entirety of the agreement that came about between the governor and his staff, the attorney general, their staff, and Idaho Power Company.

The rest of page 5 through page 7 is the legislative package which our legislators are presently working on at the State Capitol.

On page 7 on the right-hand side there are seven items which deal directly with the package, what we're doing with you as far as Policy 32 is concerned. And No. 1 is State Water Plan is Amended. And that's why we're here to talk about the amendment to Policy 32 of the state water plan.

No. 2, these all must take place by May 15 of this year. No. 2, the legislative package must be passed which you have before you.

Appropriate action taken by the Public Utilities Commission or the legislature as called for in the agreement between all parties.

Appropriate order by the Federal Energy Regulatory Commission kind of okaying this entirety.

No. 5 is the Public Utilities Commission will dismiss the lawsuit as filed by the ratepayers in 1977.

And No. 6, if required, the Oregon PUC must okay the package. And the reason for that is because of the Hells Canyon Complex for those bordering the state of Oregon. We don't know if that is going to be something that has to be had, but it's included anyway.

Then enactment of the legislature by Exhibit 7A and 7B as you see just to the left of this.

So what we'd like to do is, we'll have Frank give you kind of an overview and the changes of Policy 32 as we see them. And then we'll open it up to your statement, and close that, and then have questions and answers.

Frank?

MR. SHERMAN: There are five people up here who have heard this story once or twice or three times before. It reminds me of the time that I drove to Post Falls about two years ago to talk about groundwater. And two staff people from the Department of Water Resources and two citizens were

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there, and we gave them an hour and a half. We dumped a full load on them.

(Laughter)

MR. SHERMAN: I guess the best way to look at this -- and there is a lot of confusing things going on -- about the only place you don't have a compromise is to get things in court. And that was the whole reason behind the state and Idaho Power agreeing to sit down and discuss the whole Snake River Basin and try and settle it.

We've been to court, district court, the Supreme Court and back in district court. Whichever side won there, the other side was going to take it back to the Supreme Court. And that's the only way you don't get a compromise.

The state water plan, as it exists today in terms of Policy 32 which addresses the Snake River Basin, allocates water. It says the unappropriated waters of the state shall be used for this, this, this. There's nothing wrong with that. So when the Supreme Court said that Swan Falls Dam, Idaho Power had a water right that was not subordinated, it was a legitimate water right, they recognized the claim to be 8400 cfs. Most summers they didn't get anywhere near that. In

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fact, the lowest flow had been down to 4500 cfs.

Well, the original water plan was a compromise. I mean, there were -- the Fish and Wildlife interests produced studies that said you needed the flows up 5500 and higher. And the upstream irrigators said Swan Falls is subordinated, therefore we want to take all the water out of the river. And so the 3300 cfs at the Murphy Gage near Swan Falls represents a compromise.

The governor, the attorney general, and Idaho Power Company sat down and said, "Let's settle it out of court," basically. "Let's find a mutual ground that we can all agree on." And in October they signed two documents. October 1st they signed one that basically said they were willing to agree and these were the points that need to be addressed. They turned their lawyers loose on it on October 25th. They signed another one which put all that gentleman's agreement into legal terms, and put forth the stuff they wanted to send to the legislature. Told the lawyers what changes they felt had to be made to the water plan.

And that's sort of where we're at. I'll go -- the thing we have to remember is, there is a

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water plan in place that talks about certain things. The changes, as the Board is now presenting them, represent, one, what the agreement specifies they had to change and some other things that seemed reasonable to do at this time.

The whole legislative package, then, a lot of it passed one body or the other of the legislature today and will move on to the other as we go on very soon.

The agreement itself, things have changed even since October. We're trying to keep everybody happy (inaudible).

The proposed revisions of the water plan, things that these gentlemen are specifically concerned about, start off, and, instead of trying to allocate the waters in one little policy that says we allocate the waters hereby, and we have page after page of how the water is supposed to be used, the Board has chosen this time to say it is the policy. But it is the policy but highlight those things that they feel are really important.

Certainly, if you're going to try and manage the whole Snake River Basin at least above Murphy Gage and above Swan Falls, the dam just south of Boise, you need to have some guidelines.

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And the guidelines, as the agreement sets it and the Board has agreed to take it out to the public, changes the minimum flow at Murphy Gage to 3300 cfs year-round; to 3900 cfs in the summertime, 5600 cfs in the wintertime.

Not an unusual thing to specify certain periods of use for a water right (unintelligible), but different from the water plan as it stands today.

Why is it raised to 3900? Where did 3900 come from? Is it a magic number? It's going to be magic if the agreement is put in place and the water plan changes are adopted, but it's not magic in that it was arrived at by saying that the river had already been down to 4500 cfs. That's just sort of one point of view. The other point was that the water plan calls for 3300. If you really split the difference, that's where the 3900 comes from. So it's a compromise to start with.

5600 comes from two different attitudes. One, there's a lot more water going down the river in the wintertime. And in terms of what Idaho Power wanted out of any compromise, they certainly wanted to protect filling the Brownlee Reservoir. So that was the only storage they had in the Hells

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Canyon Complex, a key to their whole operation. They wanted more out of the wintertime cut. And if you take the 3900, stick it into a computer, to get it down to 3900 in the summertime, the Department of Water Resources projects that 5600 is about where it would be in the wintertime.

So those are how those numbers were arrived at. As I say, it's going to split waters in the river between two competing interests.

The Board at this time is proposing to include as specific water policy a couple of points in the river that have never been mentioned before, only peripherally mentioned in the past. They're going to continue the zero flow at Milner Dam. All the water in the Upper Snake in low water years can be appropriated; therefore, there is no requirement for the water to be dumped past Milner Dam. All the water that occurs in the river during those low flow periods basically is not a spring fishing area.

They're going to specify, continue to specify, that, at the Weiser Gage, 4750 cfs is appropriate. It's a minimum flow. Since this plan was adopted in '76, I think there's only been one day when the flow ever got below that. And that

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was because of some unusual operational procedures on the Payette River. So it's a reasonable flow, and it is designed to assure that Brownlee gets some water for Idaho Power purposes.

But they're adding Lime Point and Johnson's Bar. Now, the existing water plan just says the federal license for the Hells Canyon Complex specifies these flows at Hells Canyon. And the existing plan says that's a good idea. Those are necessary flows to protect the fish and wildlife and navigation and all the other things.

The Board is proposing to adopt those as part of the water plan specifically as the policy of the state the idea being that, if the license were ever changed at the Hells Canyon Complex, these flows would be guaranteed by the state water plan.

As I said, we try to keep everybody happy and protect those interests downstream of the Hells Canyon Complex. They should be assured something.

Policy 32A. And I'll say this is the case of spelling out what's policy and what's the explanatory text. Basically, it deals with several different things. It points out that Idaho Power

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has claimed this water, it's been put to beneficial use, and yet now Idaho Power is turning it back to the state so the state can give it to other users, at least a portion of it.

So this specifies certain portions of the Idaho Code that have to be satisfied before this Idaho Power water can be given to other people to use. These portions of the Idaho Code don't even exist today. We're sort of relying on the legislature to do what the legislative package and the intent of the negotiators was.

The key one, of course, is that, as appropriated water, the state can put new criteria or additional criteria on anybody who wants to use it. So a person who applies for some of this water that Idaho Power claimed and now given over to the state, in addition to having to satisfy the normal criteria of beneficial use -- non-speculative, public interest -- may now have to also satisfy an additional set of criteria which talks to general economics of the state, the impact of hydropower, the family farm tradition. A new set of criteria. And that's because this water had been appropriated, put to beneficial use, and the state now has it in its hands to re-allocate.

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Policy 32B, Domestic, Commercial, Municipal, and Industrial. The existing water plan, when they thought they could take the river down to 3300, allocated in terms of acre feet about 144 cfs on an average daily diversion for new municipal and industrial uses. The Board recognizes that the Supreme Court said that Idaho Power has a legitimate water right. The compromise says we won't take it below 3900 even in the summertime; therefore, there's less water available for these other competing uses.

The Board still proposes to reserve 150 cfs. Now, by including domestic uses, it really doesn't change the parameters because the human being doesn't really consume that much water. You drink some water, and there's wastes go out, and it sort of balances out. But they have changed the provisions for the proposed thermal power generation in the Snake River Basin.

Back in '76 everybody was concerned about energy, and that was the big thing. Right now Idaho Power generates more energy than what's consumed in the state. So it will change some of the different uses we perceive being made of this. But right now there's only about 100 -- no, 400 cfs

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are diverted for these kinds of uses in the Snake Basin. And that's total diversion.

The whole intent now is to try and manage the river and the aquifer that contributes to the river on consumptive use. If you think about total diversions from municipal water supply, the only consumptive use may be some small industry that uses some that goes up into the smokestack as steam. The watering of the lawn is probably the biggest consumptive user of municipal water.

A lot of the industry in Idaho is very non-consumptive in that it's cooling water, wash water. It gets back into the system. People who might come in and want to start a new industry, most of the land that's available for purchase, it would be relatively low cost. It's irrigated agricultural land. The amount of water that goes on per acre for Idaho may well compensate for all the consumptive uses that new industry ends up with.

We don't think that water (unintelligible) are necessary for (unintelligible). But 150 cfs, just as a guess, would probably provide for double the population of those living in the basin.

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The water plan gets revised every five years; therefore, if this number is a bad guess, it can be changed.

Policy 32C, Agriculture. If you talk about domestic, commercial, municipal, and industrial, the only other (unintelligible) consumptive use is agriculture. Therefore, the board's policy, as far as we can tell the intent of the negotiators of the agreement, is to reserve the rest of the water that's available now to be used for agricultural purposes. We have to use (inaudible) for DCMI, as I say, because you can change the DCMI. The amount that's available for new agriculture could change also.

It's hard to explain, I guess, but everyone always talks about Swan Falls because that's where the lawsuit took place. But Idaho Power claims a different amount of water at every one of their upstream facilities. In some cases it's 11, 12,000 cfs. As part of the compromise, Idaho Power said, "As long as 3900 cfs goes past the Murphy Gage in the summertime, we will not protest no matter how much water we're receiving at any of our other gages." So what people say, they took the water that was left in the river, split it

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in half, half for increased (inaudible) Swan Falls Dam at Murphy. That's only true in that reach for that (unintelligible) Swan Falls. Upstream the numbers change. The intent doesn't change, however.

Idaho Power has agreed that the state can use their water, they can reallocate it as long as the new legislative criteria are met, and as long as the flow at Murphy Gage never goes below 3900.

Policy 32D, Hydropower. It's already a beneficial use of water in Idaho to use water for hydropower purposes for generation of electricity. The water plan will now specifically recognize that, and they will further state that depletion of the flows below the 3900 and 5600 established at Murphy Gage are not in the public interest.

This is pretty clearly a protection for Idaho Power for giving up something. You know, they could go in court and argue, then, maybe their 8400 cfs claim was legitimate. Maybe they forfeited water down to the (unintelligible) flow, but they still had rights to all the water in the river. So they're giving up something. And in return, they're getting protected by the Water

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Board adopting 3900 in the state minimum flow. The intent is that it should never go below that.

32E, Navigation. This is basically the same language that's in the water plan today. And it's the policy of the Board in Idaho that, by setting these kinds of minimum flows, there's enough water in the river for recreational purposes. And there will be enough water coming through the Hells Canyon Complex for any commercial navigation that takes place.

Aquaculture, 32F. Particularly in the reach from about Twin Falls down to Bliss, most of the so-called trout farming or fish farming takes place. There are catfish and trout that are raised in that region. Most of the people rely on discharges from Thousand Springs.

If a person who is engaged in fish farming wants to get a water right to process fish -- clean it up before he packages it, or whatever is involved in processing trout -- that water should be regarded as commercial withdrawal, and it should come out of that water reserved for DCMI.

(End of Tape 2)

MR. SHERMAN: (Gap in testimony transitioning

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from Tape 2 to Tape 3) -- water forever. Probably, yes. But this probably points out specific facets of the state law which says that a water right insures that you have the ability to use water. It does not guarantee your need for diversion. If the spring flows have not been (unintelligible), a trout farmer may have to change (unintelligible) and a (unintelligible). If he's still entitled to use that water, it's going to priority date. It's just that state law will not necessarily guarantee (inaudible).

That's basically in the existing water plan, it's just brought out and highlighted here as an amended version.

Policy 32G, Fish, Wildlife, and Recreation. The existing water plan basically says that 3300, while not an optimal number for fish and wildlife purposes, will provide some minimum resource. Ford feels that 3900 is a better number in terms of protecting fish and wildlife. So they basically say, here 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

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River below Milner Dam.

The other thing that the Board has as sort of an ace-in-the-hole or going for it, or whatever language that you want to use, is that, in a different policy of the state, they provide and have had legislative approval and have been appropriating water for in-stream flow purposes. The Board is the only agency that can appropriate water for in-stream flow values.

Now, the thing that gets a little bit sticky here is that they may appropriate the unappropriated waters just like any citizen has the right to appropriate unappropriated waters of the state. And most of the reliable water in the Snake River system now is being held in trust by the state because Idaho Power already appropriated it once.

But on many of the tributary streams, and even on the main Snake where there are unappropriated waters, the Board has either applied for and gotten in-stream flows or are in the process of doing so.

So between these two different mechanisms, one, by establishing minimum flows through the water plan and having the ability to

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appropriate water, the Board feels that they are protecting some minimum value of fish, wildlife, and recreation.

Policy 32H, Water Quality and Pollution Control. In an area where we are water short, we can't satisfy Idaho Power's water right as well as legitimate competing water rights, it seems a bad idea to let somebody appropriate water for the purpose of diluting his wastewater. Anybody who gets a permit has to meet some certain standards. In the board's mind if this is adopted, it will not be the policy of Idaho that taking water and mixing it with bad water so you can dump it in the river wherever, it's not a beneficial use of water. You want to tighten up your pollution control mechanisms before you want to use good water just to dilute bad water.

Policy 32I, New Storage. This is called for in the agreement. There are several reasons for it, and you will find this in the (inaudible) policy. It's one that really -- I can't say definitely applies, because anything that happens on the Snake River applies. But it's more in terms of upstream from Murphy.

The very first part of this two-pronged

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policy is that, before new storage permits are approved, some kind of examination and determination should be made that we're doing the best job we can with the existing storage facilities in the system.

Now, the negotiators maintained -- and this may be reworded for (unintelligible) more directly -- but they maintained that there are legal barriers. There are federal rules and regulations in federal law and state law, that prevent the best use, the maximum use of the water, that's stored already in the river system.

Anybody who lives on the Snake or follows the flows in the Snake realizes that on October 1st every year the water master dumps a lot of water at Milner Dam to make room for next year's runoff. This year the flow was 12,000 cfs on October 1st.

That's where it's been held in storage all year long, and it's insurance water, and it's never used. It would be ideal if those waters could be moved around, made available to someone who wants to use it.

The state has what's called the water bank. The rules and regulations provide for these

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kind of water exchanges, a so-called willing seller to a willing buyer. The Committee of Nine where Mr. Rydalch is a representative or member provides using those authorities to actually move some water around within the system. But the barriers to making the most efficient use of that are really hard to overcome.

Let me start off with the federal barriers. Most federal dams when they're built have specific allocations that are often associated with them. And they have so much water that's supposed to be for fish and wildlife, so much for irrigation, so much for flood control. And those waters cannot be used for any other purpose.

The federal government also provides that, if you store water behind a federal reservoir and you want to sell it, you can only do that one year at a time. It's sort of a nice protection for the irrigator in the system in that nobody is going to come in and try and buy up the water right because they can only get it for one year at a time. It's not going to put much money into it, no bank is going to finance a new project when it's only got one-year's water supply storage. But it means that a farmer who had that (unintelligible)

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water can't sell if for more than a year at a time also.

So the other provision the federal government has is that you can't sell water from behind a federal dam at a profit. You can't make a profit on your water. It made sense when it was put in, in that, why should somebody whose father bought cheap storage in a dam and the feds paid for half or more for it, why should he be able to make a big windfall on selling this water. But there is certainly no incentive for somebody to sell his water and make a profit. It's not even worth going through the paperwork if you can't make any profit.

So that prevents the exchange of water in the system. The state also has barriers for more efficient use of water. And certainly one of these is that you can't expand a water right. You can have a full natural flow right for a piece of property. You can have a stored water right for the same amount of water for the same piece of property. If you only need that water once in ten years, it would seem logical that the best use would be to let you give it or sell it to somebody else. But if that other person is going to make a consumptive use of that water, that's an expansion

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of a water right. That water is designed to irrigate a certain piece of property, a certain acreage, and in essence, almost a certain crop or crop rotation. If you're going to sell it to another consumptive user, that may double the amount of consumption, basically. And if everybody did that, everything would be so out of control, and our water resource would be buried.

So that's a provision of state law. The only way you can sell that water now is basically sell it to a non-consumptive user. And that's basically Idaho Power. The state law provides that if you don't use your water once in five years, (inaudible). Now, that doesn't apply to stored water, but people are real concerned about what they feel obviously some other use for five years (inaudible).

So a lot of things that could be looked at might be changed so that we can make better use of the water that's already in the system. It's hard to stand up in public and say, "We're out of water. We can't satisfy Idaho Power; therefore, we got to take some of your water away," and 12,000 cfs comes past the river on October 1st, and that's just because the water runs through Murphy

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Gage.

So the negotiators specifically asked the Board to look into this problem, approach the federal government, approach water resources, the state legislature to see if more efficient use could be made of the water. One of the first steps, of course, is to rewrite the water bank rules and regulations so they are more flexible, and that's being done.

Whether the Board will ever be able to accomplish anything, changing federal law when it relates to water, (unintelligible) maybe Idaho by itself isn't going to (unintelligible). The Board is willing to explore the possibilities.

If the director had to make a determination now, are we doing the best we can with the water that's in the system, he'd have to say heck no because there's unallocated water in Ririe Reservoir right now that's up for sale for (unintelligible). Once that water is gone, and if we can't change the federal law, we can't change the state law, then it's certainly -- the director has to find that we're doing the best we can under the existing regulations in Idaho. But the intent is to make the Board, make the state, make the

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citizens aware that there are perhaps artificial barriers to better use of water.

The second part of this policy it talks specifically to the reach from Milner Dam to Swan Falls Dam or Murphy Gage, a few miles below it, nearest (unintelligible) gage. Idaho Power, of course, relies for the great extent their whole operation on the Hells Canyon Complex. To get their benefits out of it, they have to fill Brownlee Reservoir (inaudible).

So as part of the tradeoff, they have asked and the state has agreed that, for anyone who wants to apply to divert water from that reach of river, Milner Dam to Murphy Gage, for wintertime diversion for storage purposes, the effect of that diversion on Idahn Power's operation should he calculated. Some kind of mitigation should he supplied to the power company.

Now, the text underneath this policy specifically defines mitigation. The idea is we're not going to give Idaho Power or require someone to give Idaho Power dollar-per-dollar value. We're basically saying, if it's got a negative impact, we want to reduce that impact as best we can.

Quite honestly, the wording is vague at

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this point. The negotiators themselves couldn't agree on what was appropriate, and so they dumped it in the Water Board's lap. And when the Water Board gets the first flow proposal in front of it, they will go through and calculate it.

They can either set the rules and regulations, but that becomes very awkward in that they're going to have to look at each proposed project as an individual project: The timing of the diversion, the amount, when the wastewaters might come out of the river. All these things will be involved in it.

I guess when the time comes, the Board is going to have to scratch their hair, probably coming off of public hearings, and say, "These are what we think is appropriate for mitigation."

There's one very last policy, and it is not demanded by the agreement. It's sort of a new idea, something to take out to the public and see what kind of reaction there is to it. It's called Stored Water for Management Purposes. As I pointed out, there are at this time unallocated waters in Ririe Reservoir.

The intent of this policy is for the state to acquire at least a portion of those

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unallocated waters with the idea that, as they try and manage this whole river system down to 3900 cfs in the summertime and 5600 cfs in the wintertime, the state is not infallible. At some point, far from likely, but possibly they could screw up. And it sure would be nice if we had a place to recall that water and cover our mistake.

Now, the choices are really two. The department can be very conservative in issuing new permits. It can hold on to all the water that's in the river and never get it close to 3900. Or they can say, "Okay, if we screw up, there's water we can call. Let's see if we can run it down to 3900."

If the state were to have this water, I think the department would be much more liberal in issuing a permit. The intent would not be to hold it in storage forever. We're a long ways from 3900 cfs in Murphy Gage now, some 600 cfs in summertime flow. It could be sold to Idaho Power, it could go in the water bank. The water would not sit idle necessarily, but it would always be there when we could see that we were getting close to 3900.

Why does the state feel it needs

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insurance in trying to manage the river down to this magic number? I guess it's because of the Snake River Plain aquifer. If you can have zero flow at Milner Dam in the summertime -- and on the rare occasion it gets to that point -- most of the water in the river, by the time it gets to Murphy Gage is discharge water from Thousand Springs and (inaudible) the Snake River Plain aquifer dumping into the river.

Now, one of the best ways to probably use the remaining water that's so-called in the river going past Murphy Gage would be to allow groundwater pumpers to use it. A man can pump water in July and August on the Snake Plain aquifer. The effect of that pumping would not show up in the river until October, November, December. Admittedly we don't know enough about it to be exact. Certainly we know there's a delay time used on the aquifer to Thousand Springs discharge.

If we had to allocate these waters out to 600-or-so cfs we think we had that belonged to Idaho Power, and we found we made a mistake and we called for the junior people to be shut off, we could shut off 50, 100, 200 easy from the Snake Plain aquifer and see no effect at Murphy.

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It's not fair to shut off the junior surface water appropriator while some junior groundwater pumper keeps pumping merrily away. But you got to be trying to manage the whole thing to get that magic number that everybody will be -- so if we made a mistake, we'd like to have water available. Make sure Idaho Power gets theirs, that the fish and wildlife people are happy. the 3900 is still there, and scratch our heads and figure out who to shut off or hope we get a wet year the next year, whichever may come first.

The agreement specifically provides that Idaho Power will not take action against the person who is in place and can prove beneficial use by the signing of the agreement -- October 1st, actually -- the framework part of it. No matter what happens in the river, they won't take action against those people. Idaho Power has agreed that anybody who is in place is protected. They are recognizing that they made a mistake not protesting their use of the water.

But what they are saying is that anybody after that date who darn well knew there was a problem, and if the water isn't there, they're going to call for it. And as I tried to point out,

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calling for water from a groundwater user doesn't make much good sense if you need it in the river today or tomorrow.

The other thing the department some day may be faced with is, in Colorado, for example, when a person applies for a new groundwater permit, he has to prove in some of the restricted basins that he has surface water available to meet a river call as far as what he can pump. Now, if we get down close to 3900, the department probably would rather have that kind of insurance than this water sitting (inaudible).

But if we wait until we're down at that point, I don't foresee any unallocated water available in the river. If a groundwater user wants a permit and the state's going to say you got to prove you can guarantee us river water equal to the amount you're going to pump, it's going to have to go to the water bank, and he may well be faced with a year-to-year lease situation. If the state had some water, they wouldn't have to give it to the water bank to sell to Idaho Power; they can sell it to the groundwater guy who needed the insurance water.

So there are several aspects of this

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that might be beneficial. As I said, the agreement protects the existing user; it provides that anybody who wants water after October 1st or who cannot prove he used water beneficially before October 1st knows darn well the water shortage situation in that part of the Snake River Basin. He should have his eyes open when he goes in and asks for water rights. He may be shut off.

So those are the parts that -- of the agreement that specifically are being addressed by the water plan. Now, there are several other parts of the agreement, of course, that people in this part of the state are knowledgeable about. The adjudication clearly is one of them.

There are two reasons for the adjudication. Basically, one, if you're going to try and manage the water in the river down to some magic number, you're going to include groundwater, you darn well better know who has got what water and what (unintelligible) he makes out of that water (inaudible). It's important to have that kind of information on hand.

The other one, of course, is that the federal government, through the federal reserve water rights, the reserved rights held for Indian

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reservations has never quantified how much water they claimed in the basin. If you take in all the national forests, the INEEL facility near Idaho Falls, and the Fort Hall Indian Reservation, conceivably there's a lot of water that they might claim that we can't now account for. And if we're down to -- in a low flow year, we've only got about 600 cfs above what we claim is the minimum and these people want to come and take water in the future, we don't know what they really got.

The only way to force the federal government and the Indians to participate in an adjudication, the state court has to do a system-wide adjudication.

So the agreement as it's set today calls for -- and the legislation that's in the legislature calls for -- adjudication starting at Lewiston. Certainly we feel as the state agency and Board feels and negotiators felt that, by starting at Lewiston, there was no way that the feds could get out of it. Their own rules and regulations say in a system-wide adjudication they have to participate. Then they deal with the state court.

I think that on the part of the

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negotiators and perhaps the Department of Water Resources, they'd just as soon see it start at Swan Falls. That's where the controversy came from. That's where the original court case mentioned specifically. But it's important enough to get the Indians and the feds involved. The state is willing to do the whole thing if they have to.

If you kept track of what's happening in the legislature, the Shoshone/Bannock Indians at least, have got enough people to put in a piece of legislation which says let's exclude us from the adjudication, but we will sit down in the state (inaudible).

So what's going to happen on that aspect, no one knows. I would assume that, if the Indians, the Shoshone/Bannocks, can get their legislation through some negotiations, the adjudication may well start to crumble. That's also if the federal government recognizes the forest service, BLM, and all the rest of them from the state. If one of those federal agencies refuses, I think it will start (inaudible) so we can force them all.

This will be the first time the state has ever tried adjudication of this size. In the

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past adjudications have always been funded by the so-called general fund of the legislature. (Unintelligible) taxpayers of all the state have paid for every adjudication the department has done no matter how small it's been and how restrictive in the allocation.

Because the Snake River Basin is so big, even if you start at Murphy, the intent is to put in legislation that this adjudication and probably all future adjudications will be paid for by the people in the affected area.

$28 million for ten years to be paid is the best guess at this time. It's based on the fact that previously the legislature has funded three or four people, and it's taken us ten years to (inaudible). If we extend one (inaudible) for the whole Snake Basin and expand three or four people into whatever $28 million will buy, (unintelligible).

It's a real stumbling block. Negotiators, the Board, most of the legislature feels something had to be done at some time. Our staff at water resources, of course, would say the whole state should be adjudicated.

If you don't have a court decree, a

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water map is on shaky ground, and we might have to shut the light off. You really need the decree to function. And clearly bits and pieces of the Snake Basin have been done, but none that's been ever timed together.

Mr. Gray, I think I'll stop. There's a couple of other things I thought about, but kind of slipped me at the time.

CHAIRMAN GRAY: Thank you, Mr. Sherman.

MR. HAMMES: Mr. Chairman, I have a question for Mr. Sherman.

CHAIRMAN GRAY: Yes.

MR. HAMMES: You make only reference to the Shoshone/Bannocks. What about the other reservations?

MR. SHERMAN: Mr. Gray, Mr. Hammes, the Shoshone/Bannocks, because they are the group above Swan Falls are most directly involved. They have in fact been trying to work in quantifying their water rights for the last couple of years. And as part of the political gamesmanship, it could probably go to federal court and ask for water. So they are the particular tribe most directly affected, I think, by the whole Swan Falls issue.

Now, the Nez Perce, for example, if

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adjudication is started at Lewiston, would be involved. They're two years or more behind the Shoshone/Bannocks in that they haven't started trying to quantify their water rights. They are looking at the whole water rights question from a different point of view in that most likely Indian water rights on the Clearwater/Salmon are going to be for in-stream flow purposes, fisheries aspect, fish and wildlife aspect; whereas the Fort Hall people, based on previous adjudications and federal case law, could probably demand enough water to irrigate all the irrigable acres on their reservation, the priority date from the 1860s.

The thing that both Indian nations have going for them, I think, is that in the adjudication, every individual water user sits down with their representative of the Department of Water Resources and says, "This is what I claim. What do your records show?"

In the case of the Indian nations, it would probably take a full ten years that we're estimating for adjudication to resolve their water right. The advantage of the general adjudication of getting the Indians and the state court, is that, if after ten years of negotiation with the

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Department of Water Resources no compromise would be affected, Idaho state courts would set what their water rights are. And certainly most legal people would say better state court than federal court.

MR. HAMMES: Mr. Chairman, Mr. Sherman, is all of the Duck Valley outside the Snake?

MR. SHERMAN: No, I don't think it is. But I honestly don't know. It's certainly Owyhee (unintelligible) --

UNKNOWN SPEAKER: It's in a wide range.

UNKNOWN SPEAKER: All of it? I thought some of it drained into Nevada.

MR. SHERMAN: Oh, yeah, yeah. Well, the problem we had with that is the Owyhee comes into the state. That portion of the south fork of the Owyhee is not on the reservation. But as it goes into the reservation area, it comes back in the state. It's really out of Idaho.

Now, I think, the intent of the negotiators, and just as formal discussion, is to recognize whatever claim they might make and realize that they have to be approached. But they may better be served by acquiring water rights in Oregon.

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CHAIRMAN GRAY: The Owyhee comes back into the Snake system between Nyssa and Adrian. So it comes out of Idaho into Oregon and then back in again.

Thank you, Mr. Sherman.

We'll now open our meeting for public comment. And the Board would call Donald Satchwell. Don?

MR. SATCHWELL: Mr. Chairman, Fellow Board Members, thank you. I have followed the Swan Falls thing quite a little bit. I am fairly familiar with the package as it now stands.

I think my main thrust tonight would be to urge you to take a very serious look at changing the state water plan so that the minimum stream flow at Murphy Gage would reach 3900 in the wintertime -- I have the dates here, but -- and that 5600. I mean, 3900 in the summer and 5600 in the winter.

I think this is the key to the Swan Falls plan as far as the state water plan is concerned. If I am wrong in that, why, maybe you can correct me a little later on that. But I do believe that the package as a whole is probably the best solution, not only to the Snake River Plain,

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but I also believe that it sets a precedent as far as the rest of the state is concerned.

And one of my concerns is that, in talking with Pat Kole, I believe his name is, with the attorney general's office that in North Idaho we are sitting in a position with the Spokane River above the dam at Post Falls which could erupt into the very same thing. And therefore I would like to see a precedent set in the Snake River that we could fall back upon. I think that -- maybe that's not the correct wording, but it's sets a tone for where we could go.

As far as adjudication is concerned, I'm in very much agreement, if I understood him right. I would like to see the whole state adjudicated. I realize that that's probably a ways down the line. But I really believe that is the only way that you can really manage the whole state water plan. If we adjudicate part of the state and not the other part of the state, when a problem comes up, which way do you go? I just believe if we do the whole state, we'd be much better off.

I guess that's my main thrust for tonight. I can answer any questions that you might have.

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CHAIRMAN GRAY: Don, I forgot one thing. Would you give us your mailing address and your telephone number for the record?

MR. SATCHWELL: Okay.

CHAIRMAN GRAY: Can I ask you that?

MR. SATCHWELL: My name is Don Satchwell. My mailing address is North 4340 Idaho Road, Post Falls, Idaho. And my phone is area code (208) 773-5285.

CHAIRMAN GRAY: Thank you. Let's see if we have any questions from Board members.

Mr. Hammes?

MR. HAMMES: No questions.

CHAIRMAN GRAY: Mr. Rydalch?

MR. RYDALCH: No questions.

UNKNOWN SPEAKER: I have none.

CHAIRMAN GRAY: Okay. Is there -- that will do it. Thank you.

MR. SATCHWELL: Thank you.

CHAIRMAN GRAY: Art, would you like to testify on anything?

UNKNOWN SPEAKER: No, (inaudible).

CHAIRMAN GRAY: Okay. Thank you.

We'll close the official public testimony and open it for questions and answers

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now. Do you fellows have something you'd like to whip on the staff or us?
(Laughter)
UNKNOWN SPEAKER: (Inaudible) a fire load?
UNKNOWN SPEAKER: Not really. I guess maybe I would have maybe a question for the Board. And how many public meetings have you had on the Swan Falls issue so far?
CHAIRMAN GRAY: This is the 12th and final.
UNKNOWN SPEAKER: This is the 12th and final.
CHAIRMAN GRAY: Yes.
UNKNOWN SPEAKER: What has the general consensus been? Do they favor the package?
CHAIRMAN GRAY: I would say from Idaho Falls to Lewiston, in the six locations where we've held meetings, two meetings each day, one at 2:00 and one at 7:00 p.m., in general I would say that the state is in favor of the package. I think that people have had enough of seven years of litigation and arguing and trying to run things through the legislature, and they're ready for something to happen. And all indications are that, by gosh, maybe it will.
We will accept written testimony until February 22nd, if you fellows would care to write

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something to us. And something may not come to your mind this evening, but if you would like to write it, just send it to the Water Resource Board, Statehouse, Boise 83720, and we'd be glad to hear from you.
UNKNOWN SPEAKER: Just to clarify -- and I won't mind to get up -- really the key to this whole thing as far as -- all you're going to change at this particular time is the minimum stream flows, is it not?
CHAIRMAN GRAY: And in the items that you see in Policy 32. We've been taking input on these ten items that you'll find on page 2 and 3. And from the input that we have received, we'll take all that input, try to synthesize it, and put it back into a form what we think we've heard from the public. We will then submit that to the legislature, and that will be the kingpin to get this whole thing going.
UNKNOWN SPEAKER: Okay.
CHAIRMAN GRAY: Mr. Sherman?
MR. SHERMAN: I would respond also that this will be the only place that the concept of maximum use of reservoir storage in the system, mitigation (inaudible) diversions as far as below Milner and

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above Murphy, this is the only place that will appear. The Board is going also set aside 150 cfs of that water that used to be claimed by Idaho Power, some of it (inaudible).
CHAIRMAN GRAY: Anything else, gentlemen?
UNKNOWN SPEAKER: No.
CHAIRMAN GRAY: We would officially close the meeting.
(End of Tape 3 and end of proceeding.)

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REPORTER'S CERTIFICATE

I, Frances J. Morris Court Reporter, a Notary Public, do hereby certify:
That I am the reporter who transcribed the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and
That the foregoing transcript contains a full, true, and accurate record of the proceedings to the extent they were audible and intelligible in the above and foregoing cause, which was heard at Lewiston, Idaho.
IN WITNESS WHEREOF, I have hereunto set my hand this _ ___ day of _____ ____ 2007.

Frances J. Morris Court Reporter
CSR No. 696

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REPORTER'S CERTIFICATE

I, Frances J. Morris Court Reporter, a Notary Public, do hereby certify:

That I am the reporter who transcribed the recordings in the above-entitled action to the extent its contents were audible and intelligible; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at Boise, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand this 19th day of November 2007.

Frances J. Morris, Court Reporter
CSR No. 696

FRANCES MORRIS NOTARY PUBLIC STATE OF IDAHO

Orr Affidavit

Exhibit 17

"Currents," October 1985
(Idaho Department of Water Resources)

ORR AFFIDAVIT
EXHIBIT 52

Currents - Oct 1985

EXHIBIT 52

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 08
Kathy Spaulding

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Special Water Allocation Rules Edition | Statehouse, Boise, Idaho 83720 | October, 1985

Draft Rules Implement Water Laws

This particular edition of **Currents** provides the text of draft rules and regulations (rules) prepared by the Idaho Department of Water Resources for water appropriation.

The rules are proposed for adoption to implement the provisions of Section 42-203, Idaho Code which was amended during the first regular session of the 48th Idaho Legislature. The thrust of the draft rules is to define in more detail how the State of Idaho, through the Department of Water Resources, will consider applications to appropriate "trust water" made available through the Swan Falls settlement agreement signed in October 1984, as well as applications for unappropriated water.

To insure full public participation in the rule making process, the department is issuing the draft water appropriation rules and regulations and will conduct public information meetings.

The issuance of the draft rules is not one of the formal steps required in rule and regulation promulgation. For that reason, the format of the meetings will be to provide information to facilitate public review and comment. Formal testimony or formal statements will not be received at these meetings. The opportunity for formal comment has been tentatively planned for January 1986 as one of the steps in the required rule and regulation promulgation process.

As background, in October 1984, through joint efforts of the Governor's Office, the Attorney General's Office and Idaho Power Company, three documents were finalized. The documents included a framework for final resolution of Snake River Water Rights, an Agreement and a contract.

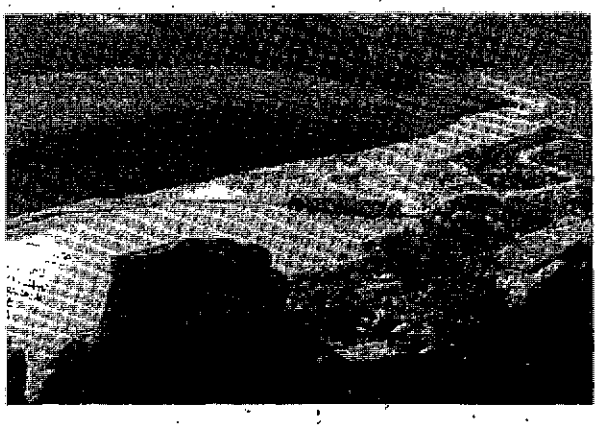
Implementation of certain of the agreement provisions included legislation to grant rule making and moratorium authority to the Department of Water Resources. In addition, changes were made to Section 42-203, Idaho Code which deal with appropriation of water. The code section, as amended, is described in four parts.

Section 42-203A, Idaho Code now includes provisions for statewide publication of applications proposing to appropriate a rate or volume over a certain amount.

Section 42-203B, Idaho Code provides for subordination of hydropower uses and authorizes a term of years through which a hydropower water right is valid.

Section 42-203C, Idaho Code describes public interest criteria to be considered prior to approving a permit for trust water which would significantly reduce the amount of water available to a hydropower user.

Section 42-203D, Idaho Code requires a review of outstanding permits for which development was not complete by July 1, 1985.



Swan Falls Dam, a 24-foot run-of-the-river power plant on the Snake River near Murphy, was the focal point of the hydropower v. upstream development controversy that started in Idaho in 1977. Originally built to provide power for the Owyhee County mines, the dam is now owned by Idaho Power Co. *(Photo by Kay Weaver)*

The draft rules and regulations address some general procedures to be followed by the Department, but primarily are intended to implement the provisions of Section 42-203C, Idaho Code and Section 42-203D, Idaho Code.

Public comments received in the past by the Department at information meetings held in May 1985 provided guidance for preparation of the draft rules.

Information meetings on the draft water appropriation rules shown in this edition are scheduled as follows:

October 15, 1985, Lewiston
Lewis & Clark State College
Meriwether Lewis Hall,
Science Bldg. Rm. 100
2:00 P.M.

October 16, 1985, Coeur d'Alene
City Council Chambers,
City Hall,
8th and Mullan Ave,
1:00 P.M.

October 21, 1985, Boise
Hall of Mirrors,
West Conference Room,
700 W. State St.,
1:00 P.M. and 7:00 P.M.

October 22, 1985, Burley
Burley Inn,
800 N. Overland Ave.,
1:00 P.M. and 7:00 P.M.

October 23, 1985, Idaho Falls
Elks Lodge,
640 E. Elva,
7:00 P.M.

October 24, 1985, Idaho Falls
Elks Lodge,
640 E. Elva,
1:00 P.M.

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Proposed Rules For Water Allocation

Rule 1. General Provisions

1.1. Background and Purpose

The 1985 Idaho Legislature authorized reallocation of certain hydropower water rights to new upstream beneficial uses. The reallocation is to be accomplished using statutes designed to provide for the appropriation of unappropriated public water supplemented by a public interest review of those reallocations which significantly reduce existing hydropower generation. These rules and regulations provide the procedures for obtaining the right to divert and use unappropriated public water as well as water previously appropriated for hydropower use which has been placed in trust with the State of Idaho and is subject to reallocation. Guidelines are provided for the filing and processing of applications, and criteria are established for determining the actions to be taken by the director.

Note: Rules which are applicable only to the reallocation of trust water are printed in bold type set.

1.2. Scope and Applicability

These rules and regulations are applicable to appropriations from all sources of unappropriated public water in the State of Idaho under the authority of Chapter 2, Title 42, Idaho Code. Sources of public water include rivers, streams, springs, lakes and ground water. The rules and regulations are also applicable to the reallocation of hydropower water rights held in trust by the State of Idaho. The rules and regulations are applicable to all applications to appropriate water filed with the Department of Water Resources prior to the effective date of these rules upon which an action to approve or deny the application is pending and to all applications filed subsequent to adoption of the rules and regulations. In addition, the rules and regulations are applicable to all existing permits to appropriate water to the extent that such permits were not developed prior to July 1, 1985.

1.3. Authority

The director of the Department of Water Resources adopts these rules and regulations under the authority provided by Sections 42-1805(7) and 42-1805(8), Idaho Code.

1.4. General Description of the Procedure to be Used for Allocation of Unappropriated Water and Reallocation of Trust Water

1.4.1. Applications to appropriate unappropriated water will be evaluated using the criteria of Section 42-203A, Idaho Code which requires an assessment to be made of the impact of the proposed use on water availability for existing water rights, the adequacy of the water supply for the proposed use, whether the application is filed for speculative purposes, the financial ability of the applicant to complete the project, and the effect of the proposed use on the local public interest.

1.4.2. Appropriations of trust water made available by Section 42-203B, Idaho Code, will be evaluated using a three-step analysis.

1.4.2.1. First, the proposed use must be evaluated under the criteria of 42-203A Idaho Code.

1.4.2.2. Second, if the proposed use satisfies the criteria of Section 42-203A, Idaho Code, then Section 42-203C, Idaho Code requires a determination of whether the proposed use will significantly reduce, individually or cumulatively with other uses, the amount of water available to the holder of a water right used for power production whose rights are held in trust by the state and are subject to subordination and depletion by future beneficial users whose rights are acquired pursuant to state law. Because any application proposing a consumptive use when considered along with the cumulative effects of all other allocations of trust water will reduce the flows available to downstream hydropower rights, all applications proposing consumptive uses of trust water are considered for purposes of the rules and regulations as causing a significant reduction in flows available for hydropower generation.

1.4.2.3. Third, based upon a finding of significant reduction, the proposed use must be evaluated in terms of the public interest criteria of Section 42-203C(2), Idaho Code. Unprotested applications proposing DCMI uses, as herein defined, are herein determined to satisfy the public interest criteria.

1.5. Location and Nature of Trust Water

1.5.1. The Snake River water rights agreement between the State of Idaho and Idaho Power Company places in trust a part of the flows available to Idaho Power Company under its previously unsubordinated hydropower water rights in the Snake River basin at and upstream from Swan Falls Dam. The flows subject to the trust water provisions as a result of the agreement and the legislation which implemented it are as follows:

1.5.1.1. Trust water flows are located in the Snake River upstream from Swan Falls Dam located in Section 18, Township 2 South, Range 1 East, Boise Meridian (B.M.) and all surface and ground water sources tributary to the Snake River upstream from Swan Falls Dam.

1.5.1.2. Ground water existing within the geographic area shown in Figure 1 shall be considered tributary to the Snake River upstream from Swan Falls Dam unless the director determines otherwise.

1.5.1.3. Trust water flows are those occurring in the Snake River and tributaries in the geographic area designated in Rule 1.5.1.1. which exceed the established minimum stream flows and are less than the water rights for existing and proposed hydropower generating facilities in the Milner Dam to Swan Falls Dam reach of Snake River, to the extent such rights were unsubordinated prior to the Snake River water rights agreement. Minimum average daily flows have been established by action of the board and legislature at the U.S. Geological Survey gauging station located near Murphy (Section 35, Township 1 South, Range 1 West B.M.) in the amount of 3900 cfs from April 1 to October 31 and 5600 cfs from November 1 to March 31, and at Milner gauging station located in Section 29, Township 10 South, Range 21 East, B.M. in the amount of zero (0) cfs from January 1 to December 31.

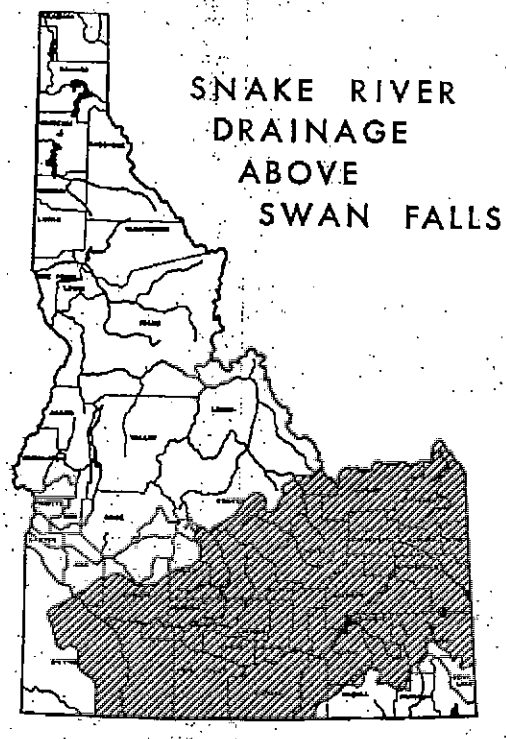


Figure 1

1,5,2. **Applications to divert water to storage from the Snake River and tributaries upstream from Milner Dam are not subject to the public interest review for trust water of Section 42-203C, Idaho Code. (Reference: Policy 32 I, State Water Plan).**

1,5,3. **For purposes of these rules and regulations, water made available for reallocation due to subordination conditions placed on hydropower permits or licenses issued on or after July 1, 1985, as authorized by Section 42-203B(6), Idaho Code, shall be treated as trust water.**

1,5,4. For purposes of clarification, the following sources of public water are not trust water and are not subject to the public interest provisions of Section 42-203C, Idaho Code.

1,5,4,1. Sources or tributaries to sources upon which no hydropower generating facilities are located downstream within the State of Idaho are not trust waters (Example - Salmon River).

1,5,4,2. Sources or tributaries to sources which have hydropower generating facilities located within the State of Idaho for which the hydropower water right permit or license or Federal Energy Regulatory Commission license have not been subordinated, and the State of Idaho has not entered into an agreement with the holder of the hydropower water right pursuant to Section 42-203B(2), Idaho Code, and the State of Idaho has not established a minimum stream flow for purposes of protecting hydropower generation, are not trust waters. Such sources are considered appropriated to the extent of the existing water rights on the source including the amount of all unsubordinated hydropower water rights (Example - Bear River).

1,5,4,3. Sources or tributaries to sources which have hydropower generating facilities located within the State of Idaho for which the hydropower water right permit or license that was issued prior to July 1, 1985, or the Federal Energy Regulatory Commission license for such facility included a subordination condition are not trust water. Such flows are considered to be public waters subject to appropriation under the provisions of Section 42-203A, Idaho Code (Example - Snake River downstream from Murphy gauging station).

1,5,4,4. Flows in excess of established rights and rights used for hydropower purposes are unappropriated waters subject to allocation under Section 42-203A, Idaho Code.

Rule 2. Definitions

Unless the context otherwise requires, the following definitions govern these rules and regulations:

2,1. Acre-foot (AF) is a volume of water sufficient to cover one acre of land one foot deep and is equal to 43,560 cubic feet.

2,2. Advertisement is the action taken by the director to provide notice, usually by publication of a legal notice in one or more newspapers, of a proposed appropriation or other notice required in administration of his duties and responsibilities.

2,3. Applicant is the person, corporation, association, firm, governmental agency or other entity, or the holder of a permit being reprocessed pursuant to Section 42-203D, Idaho Code, who initiates an appropriation of water or related water matter for the director's consideration.

2,4. Application for Permit is the request to the department proposing to appropriate the public waters or trust waters of the state.

2,5. Board means the Idaho Water Resource Board.

2,5. Beneficial Use is one or more of the recognized beneficial uses of water including but not limited to, domestic, municipal, irrigation, hydropower generation, industrial, commercial, recreation, stockwatering and fish propagation uses for which permits to appropriate water can be issued as well as other uses which provide a benefit to the user of the water as determined by the director. Industrial use as used for purposes of these rules and regulations includes, but is not limited to, manufacturing, mining and processing uses of water. Dilution of flows for pollution abatement is not a beneficial use.

2,7. Cubic foot per second (cfs) is a rate of flow approximately equal to 448.8 gallons per minute and also equals 50 Idaho miner's inches.

2,8. **DCMI is an acronym for domestic, commercial, municipal and industrial. In these rules and regulations it designates certain classes of these uses determined to satisfy public interest requirements. Domestic use, for purposes of this term, is water for one or more households and water used for all other purposes including irrigation of a residential lot in connection with each of the households where the diversion to each household does not exceed thirteen thousand (13,000) gallons per day. Also for purposes of this term, commercial, municipal and industrial uses are any such uses which do not deplete the system containing the trust water more than two (2) acre feet per day.**

2,9. Department means the Idaho Department of Water Resources.

2,10. Director means the director of the Idaho Department of Water Resources.

2,11. Legal subdivision is a tract of land described by the government land survey and usually is described by government lot or quarter-quarter, section, township and range. A lot and block of a subdivision plat recorded with the county recorder may be used in addition to the quarter-quarter, section, township and range description.

2,12. Permit or water right permit is the water right document issued by the director authorizing the diversion and use of unappropriated public water of the state or water held in trust by the state.

2,13. Priority, or priority of appropriation, or priority date is the date of appropriation assigned to a water right. The priority of a water right for public water or trust water is used to determine the order of water delivery from a source during times of shortage. The earlier or prior date being the better right.

2,14. Project works is a general term which includes diversion works, conveyance works, and any devices which may be used to apply the water to the intended use. Improvements which have been made as a result of application of water, such as land preparation for cultivation, are not a part of the project works.

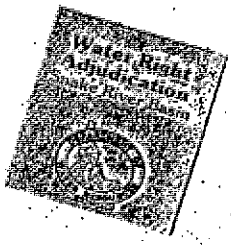
2,15. Single family domestic purposes is water for household use

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A. Kenneth Dunn,
IDWR Director

Norman C. Young,
Division Administrator

L. Glen Saxton,
Operations Bureau Chief

or livestock and water used for all other purposes including irrigation of up to one half (½) acre of land in connection with said household where total use is not in excess of thirteen thousand (13,000) gallons per day.

2,16. Subordinated water right means a water right used for hydropower generation purposes that is subject to depletion without compensation by upstream water rights developed later in time.

2,17. **Trust water is that portion of an unsubordinated water right used for power purposes which is in excess of a minimum flow established by the director in compliance with applicable law (reference: Chapter 15, Title 42, Idaho Code) or by the board through adoption or amendment of the State Water Plan. For purposes of these rules, trust water also includes water available because of subordination conditions applicable to water right permits or licenses for hydropower purposes issued on or after July 1, 1985.**

2,18. Unappropriated water is the public water of the state of Idaho in streams, rivers, lakes, springs or ground water in excess of that necessary to satisfy prior rights.

Rule 3. Application Requirements

3,1. General Provisions

3,1,1. No person shall commence the construction of any project works or commence the diversion of the public water or trust water of the State of Idaho from any source or change the point of diversion, place, period or nature of use of any existing water right without first having filed an application for permit to appropriate the water or other appropriate form with the department and received approval from the director, unless exempted by these rules or by statute.

3,1,2. Any person proposing to commence a diversion of the public water or the trust water of the State of Idaho from a ground water source for single family domestic purposes is exempt from the application and permit requirements of Rule 3,1,1. Any person proposing to add a single family domestic use to an existing ground water diversion including one used for single family domestic purposes is exempt from the provisions of Rule 3,1,1.

3,1,3. Any person watering livestock directly from a natural stream without the use of a constructed diversion works is exempt from Rule 3,1,1.

3,1,4. All applications for permit to appropriate public water or trust water of the state of Idaho shall be on the form provided by the department entitled "Application for Permit to Appropriate the Public Waters of the State of Idaho" and shall include all necessary information as described in Rule 3,3. An application for permit that is not complete as described in Rule 3,3. will not be accepted for filing and will be returned along with any fees submitted to the person submitting the application. No priority will be established by an incomplete application. Applications meeting the requirements of Rule 3,3. will be accepted for filing and will be endorsed by the department as to the time and date received. The acceptability of applications requiring clarification or corrections shall be determined by the director.

3,1,5. The department will correspond with the applicant concerning applications which have been accepted for filing by the department which require clarification or correction of the information required by Rule 3,3. If the additional or corrected information is supplied after thirty (30) days, the priority date of the application will be determined by the date the additional or corrected information is received by the department unless the applicant has requested within the thirty (30) day period additional time to provide the information, has shown good reasons for needing additional time, and the director has granted additional time.

3,1,6. Failure to submit the additional or corrected information is cause for the director to void the records of the application.

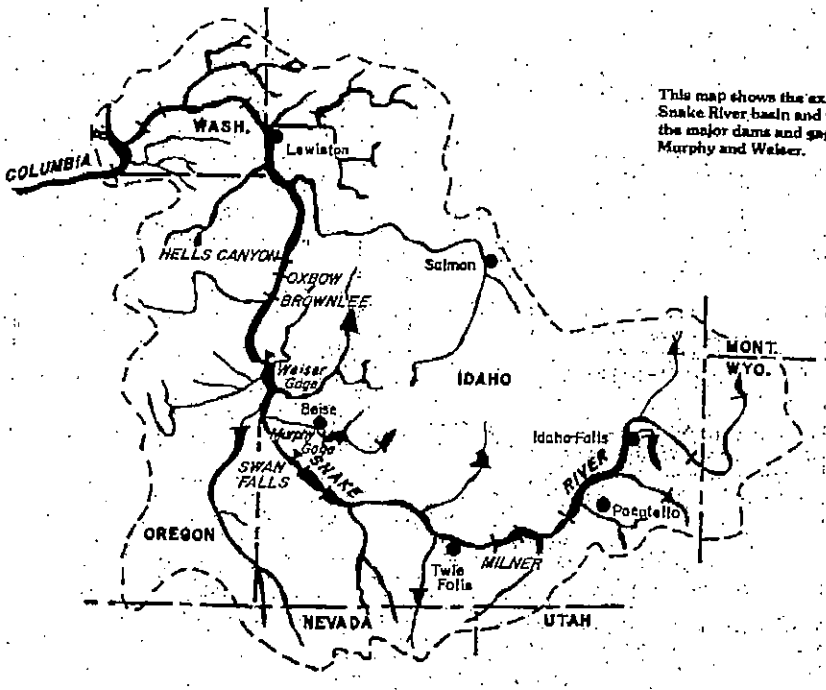
3,2. Effect of an Application

3,2,1. **Any application, whether filed before or after promulgation of these rules, which seeks to appropriate water from a source upon which the state holds trust water shall be considered an application for reallocation of trust water unless the applicant indicates in writing that the application is for unappropriated water and provides information necessary to demonstrate that unappropriated water is available.**

3,2,2. The priority of an application for unappropriated or trust water is established as of the time and date received in complete form along with the statutory fee in any official office of the department. The priority of the application, remains fixed unless changed by action of the director in accordance with applicable law.

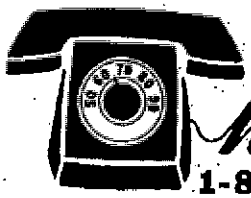
3,2,3. An application for permit to appropriate water is not a water right and does not authorize diversion or use of water until approved by the director in accordance with statutes and regulations in effect at the time the application is approved.

3,2,4. An applicant's interest in an application for permit to



This map shows the extent of the Snake River basin and the locations of the major dams and gaging stations at Murphy and Weiser.

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appropriate water is personal property. An assignment of interest in an application creates a rebuttable presumption that the application was filed for speculative purposes.

3,3. Requirements for Applications to be Accepted for Filing

3,3,1. The department form entitled "Application for Permit to Appropriate the Public Waters of the State of Idaho" (hereafter termed "application for permit form") is the required form to apply for either unappropriated water or trust water.

3,3,2. The following information shall be shown on an application for permit form and submitted together with the statutory fee to an office of the department before the application for permit may be accepted for filing by the department.

3,3,2,1. The name and post office address of the applicant shall be listed. If the application is in the name of a corporation, the names and addresses of its directors and officers shall be provided.

3,3,2,2. The name of the water source sought to be appropriated shall be listed. For surface water sources, the source of water shall be identified by the official geographic name listed on the U.S. Geological Survey Quadrangle map, or if no official name has been given, by the name in local common usage. If the source has not been named, it can be described as "unnamed", but the system or river to which it is tributary shall be identified. For ground water sources, the source shall be listed as "ground water". Only one source shall be listed on an application unless the application is for a single system which will have more than one source.

3,3,2,3. The legal description of the point of diversion and place of use shall be listed. The location of the point(s) of diversion and the place of use shall be described to the nearest 40-acre subdivision or U.S. Government Lot of the Public Land Survey System. Springs shall be shown to the nearest 10-acre tract. Subdivision names, lot and block numbers and any name in local common usage for the point of diversion, or place of use shall be included in the comments section of the application form. If irrigation is listed as a purpose of use, the number of acres in each 40-acre subdivision of the place of use shall be listed.

3,3,2,4. The quantity of water to be diverted shall be listed as a rate of flow in cubic feet per second and/or as a volume to be stored in acre-feet per year for each purpose of use requested.

3,3,2,5. Impoundment (storage) applications shall show the maximum acre-feet requirement per year which shall not exceed the storage capacity of the impoundment structure unless the application describes a plan of operation for filling the reservoir more than once per year.

3,3,2,6. Every offstream storage impoundment application shall show a maximum rate of diversion to storage as well as the total storage volume.

3,3,2,7. The nature of the proposed beneficial use or uses of the water shall be listed. While the purpose may be described in general terms such as irrigation, industrial or municipal, a description sufficient to identify the proposed use or uses of the water shall also be included.

3,3,2,8. The period of each year during which water will be diverted, stored and beneficially used shall be listed. The period of use for irrigation purposes shall coincide with the annual periods of use shown in Figure 2, unless it can be shown to the satisfaction of the director that a different period of use is necessary.

3,3,2,9. The proposed method of diversion, conveyance system and system for distributing and using the water shall be described.

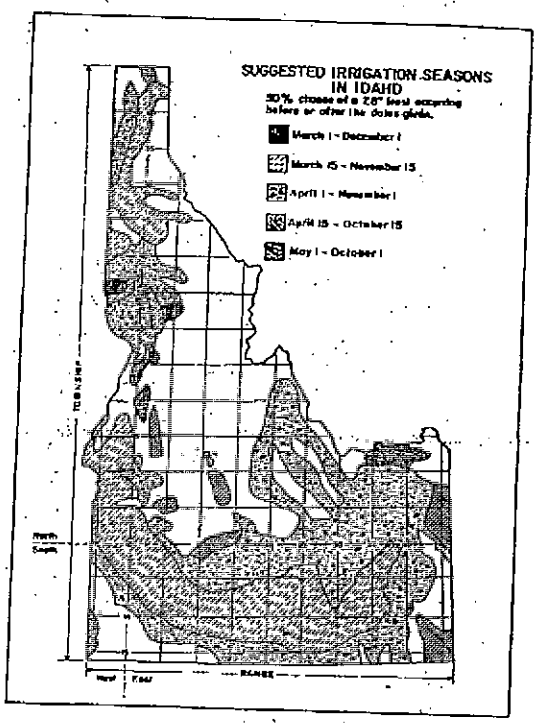


Figure 2

3,3,2,10. The period of time required for completion of the project works and application of water to the proposed use shall be listed. This period of time shall not exceed five (5) years.

3,3,2,11. A map or plat of sufficient scale (not less than two inches equal to one mile) to show the project proposed shall be included. The map or plat shall agree with the legal descriptions and other information shown on the application.

3,3,2,12. The application form shall be signed by the applicant listed on the application or evidence must be submitted to show that the signator has authority to sign the application. An application in more than one name shall be signed by each applicant unless the names are joined by "or", or "and/or".

3,3,2,13. Applications by corporations, companies or municipalities or other organizations shall be signed by an officer of the corporation or company or an elected official of the municipality or an individual authorized by the organization to sign the application. The signator's title shall be shown with the signature.

3,3,2,14. Applications may be signed by a person having a current "power of attorney" authorized by the applicant. A copy of the "power of attorney" shall be included with the application.

3,3,2,15. An application signed by a mark or "X" must have the signator's name printed or typed nearby and the mark must have been witnessed and the application signed by the witness.

3,3,2,16. The application form shall be accompanied with a fee in the amount required by Section 42-221A, Idaho Code.

3,4. Amended Applications

3,4,1. Applications for permit shall be amended whenever significant changes to the place, period or nature of the intended use, method or location of diversion or proposed use or uses of the water or other substantial changes from that shown on the pending application are intended. An application shall be amended if the proposed change will result in a greater rate of diversion or depletion (see Rule 3,4,3.), if the point of diversion, place of use, or point of discharge of the return flow are altered, if the period of the year that water will be used is changed, if the purpose of the use is changed, or if the change will, in the judgment of the director, otherwise adversely affect the rights of other water users or the local public interest.

3,4,2. An application can be amended to clarify the name of the source of water but may not be amended to change the source of water.

3,4,3. An amendment which increases the rate of diversion, increases the volume of water diverted per year or the volume of water depleted, lengthens the period of use, or adds an additional purpose of use shall result in the priority of the application for permit being changed to the date the amended application is received by the department.

3,4,4. An application for permit may be amended by endorsement by the applicant or his agent on the original application for permit form which endorsement shall be initialed and dated. If the changes required to the information on the application are, in the judgment of the director, substantial enough to cause confusion in interpreting the application form, the amended application shall be submitted on a new application for permit form to be designated as an amended application.

3,4,5. An amended application shall be accompanied by the additional fee required by Section 42-221A, Idaho Code, if the total rate of diversion or total volume of storage requested is increased and by the fee required by Section 42-221F, Idaho Code, for readvertising if notice of the original application has been published.

3,4,6. If the applicant changes his name or mailing address, an amended application need not be submitted, but the department shall be notified by the applicant in writing.

Rule 4. Processing Applications for Permit and Reprocessing Permits

4,1. General

4,1,1. Unprotested applications, whether for unappropriated water or trust water, will be processed using the following general steps:

4,1,1,1. Advertisement and protest period;

4,1,1,2. Department review of applications and additional information, including department field review (optional);

4,1,1,3. Fact finding hearing (optional);

4,1,1,4. Director's decision;

4,1,1,5. Section 42-1701A, Idaho Code, hearing, if requested; and

4,1,1,6. Director's decision affirmed or modified.

4,1,2. Protested applications, whether for unappropriated water or trust water, will be processed using the following general steps:

4,1,2,1. Advertisement and protest period;

4,1,2,2. Hearing and/or conference;

4,1,2,3. Department review of applications, hearing record and additional information including department field review (optional);

4,1,2,4. Proposed decision (unless waived by parties);

4,1,2,5. Briefing or oral argument (optional); and

4,1,2,6. Director's decision accepting or modifying the proposed decision.

4,1,3. The director's decision rejecting and denying approval of an application for permit filed for diversion from a source previously designated as a critical ground water area or upon which a moratorium has previously been entered may be issued without advertisement of the application.

4,1,4. An applicant may request in writing that commencement of processing of his or her application be delayed for a period not to exceed one (1) year or that processing be interrupted for a period not to exceed six (6) months. The director at his discretion may approve the request unless he determines that another person will be injured by the delay or that the applicant seeks the delay for purpose of speculation, or that the public interest of the people of Idaho will not be served by the delay. The director may approve a request for delay for a shorter period of time or upon conditions, and may renew the approval upon request.

4,2. Public Notice Requirement

4,2,1. Applications for permit which have not been advertised

4,2,1,1. Advertisement of applications for permit proposing a rate of diversion of ten (10) cfs or less or storage of 1000 AF or less shall comply with provisions of Section 42-203A, Idaho Code.

4,2,1,2. Advertisement of applications for permit in excess of the amounts in Rule 4,2,1,1. shall comply with provisions of Section 42-203A, Idaho Code, and shall be published in a newspaper or newspapers to achieve statewide circulation.

4,2,1,3. Statewide circulation with respect to Section 42-203A(2), Idaho Code, shall be obtained by publication of a legal notice at least once each week for two (2) successive weeks in a newspaper, as defined in Section 60-106, Idaho Code, of general circulation in the county in which the point of diversion is located and by publication of a legal notice at least once each week for two (2) successive weeks in at least one daily newspaper, as defined in Section 60-107, Idaho Code, published in each of the department's four administrative regions and determined by the director to be of general circulation within the department's region within which it is published. The administrative regions of the department are identified on Figure 3. The names of newspapers used for statewide publication are available from any department office.

4,2,2. Applications for permit which have been advertised

4,2,2,1. Notice of applications for permit for water from the Snake River and tributaries, including ground water

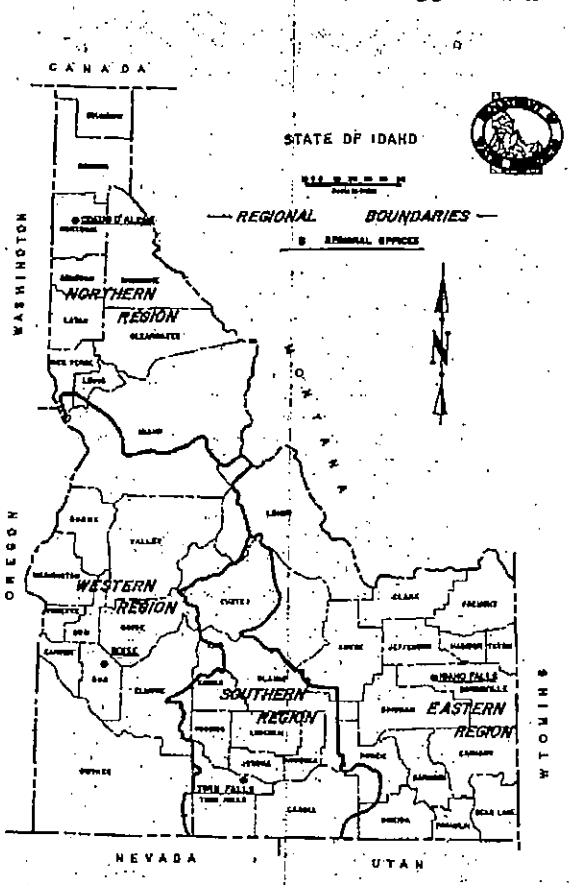


Figure 3

upstream from Swan Falls Dam located in Section 18, Township 2 South, Range 1 East, B.M., which have been held without action pending the resolution of the Swan Falls matter shall be readvertised by the director in accordance with Rule 4,2,1,1. or Rule 4,2,1,2. as appropriate to allow opportunity for protests to be entered with respect to the public interest criteria of Section 42-203C(2), Idaho Code.

4,2,2,2. The applicant shall pay the readvertisement fee provided in Section 42-221F, Idaho Code, prior to the advertisement.

4,2,3. Notice of existing permits

4,2,3,1. All existing permits, issued prior to July 1, 1985, unless exempted by Rule 4,2,3,2. shall be subject to the review requirements of Section 42-203D, Idaho Code, and shall be readvertised in accordance with Rule 4,2,1,1. or Rule 4,2,1,2. as appropriate.

4,2,3,2. Permits exempt from the provisions of 42-203D, Idaho Code include:

4,2,3,2,1. Permits appropriating water from sources or segments of sources upon which the state does not hold water in trust;

4,2,3,2,2. Permits for DCMI uses;

4,2,3,2,3. Permits named in but dismissed from the legal action entitled "Idaho Power Company vs Idaho Department of Water Resources, et al, Ada County Civil No. 81375";

4,2,3,2,4. Permits for stockwater uses; and

4,2,3,2,5. Permits for which an acceptable proof of beneficial use submittal was received by the department prior to July 1, 1985, or permits for which an acceptable proof of beneficial use was submitted after July 1, 1985, if evidence satisfactory to the director has been received to show that the permit was fully developed and put to beneficial use prior to July 1, 1985.

4,2,3,3. Holders of permits subject to the review requirement of Section 42-203D, Idaho Code, shall pay in advance, upon the request of the director, the readvertising fee required by Section 42-221F, Idaho Code.

4,2,3,4. Failure to pay the readvertising fee within 30 days after the applicant is notified to do so is cause for the director to cancel the permit.

4,2,4. Provisions for receiving notice of application for permit by mail

4,2,4,1. Pursuant to Section 42-203A(3), Idaho Code, the department will provide upon written request by regular mail, postage prepaid, the notices for all applications for permit of the classes requested. Mailings will be made on a periodic basis to include all notices of a specific class for which advertisements were prepared for publication during the previous period.

4,2,4,2. Notice of the advertisement of application as described in Section 42-203A(3) may be represented by an abstract, summary or other such representation which includes all the information required by Section 42-203A(1), Idaho Code, for a notice of an application for permit.

4,2,4,3. The annual mailing fee as described in Section 42-203A(3), Idaho Code, shall include all costs incurred by the department in preparation of mailing of the notices of application to those requesting them.

4,2,4,4. The annual fee for receiving notice of all classes will be determined by the director and shall be paid to the department in advance on an annual basis (July 1 to June 30). The annual mailing fee shall be prorated by the department for requests encompassing less than a full year and will be increased for the additional cost the department incurs for requests encompassing fewer than all classes of notice.

4,2,4,5. A request for a specific class of notice may be fulfilled by the mailing of notice of all applications for permit received by the department unless the additional cost to the department of preparing the requests for a specific class of notice is paid in advance.

4,2,4,6. A request to receive a class of notice of applications shall be effective not later than thirty (30) days after receipt by the department of the request together with the annual fee.

4,2,4,7. The notice published in the newspaper of an application or of a permit being reprocessed as required by Rule 4,2,1., Rule 4,2,2., and Rule 4,2,3. is the official notice required by Section 42-203A, Idaho Code. Errors or omissions in the notices of applications received by mail as provided by Rule 4,2,4., or the failure of the notices to be delivered by mail does not invalidate the notice.

4,3. Protests, Intervention, and Hearings

4,3,1. Protests

4,3,1,1. Protests against the issuance of permit on an application or against a permit being reprocessed shall comply with the requirements for pleadings as described in Rule 3 of the department's adopted Rules of Practice and Procedure.

4,3,1,2. Protests against issuance of a permit on an application or a permit being reprocessed will only be considered if received by the department after receipt of the application for permit being protested and prior to the expiration of the protest period announced in the advertisement unless the protestant successfully intervenes in the proceeding.

4,3,1,3. General statements of protest (blanket protests) against appropriations for a particular class of use or from a particular source of water will not be considered as valid protests by the director.

4,3,2. Intervention

4,3,2,1. Requests to intervene in a proceeding pending before the department shall comply with Rule 6 of the department's Rules of Practice and Procedure.

4,3,3. Hearings

4,3,3,1. Hearings will be scheduled and held in accordance with Rule 9 of the department's Rules of Practice and Procedure.

4,4. Burden of Proof

4,4,1. Burden of proof is divided into two parts: first, the burden of coming forward with evidence to present a prima facie case, and second, the ultimate burden of persuasion. The person who has the burden of presenting a prima facie case has the responsibility of making the initial evidentiary showing; the person who has the burden of persuasion must ultimately produce the greater weight of evidence.

4,4,2. The burden of coming forward with evidence is divided between the applicant and the protestant as follows:

4,4,2,1. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criteria (a) through (d) of Section 42-203A(5), Idaho Code;

4,4,2,2. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criterion (e) of Section 42-203A(5), Idaho Code, as to any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear the initial burden of coming forward with evidence of those factors relevant to criterion (e) of Section 42-203A(5), Idaho Code, for which the protestant can reasonably be expected to be more knowledgeable than the applicant.

4,4,2,3. The protestant shall bear the initial burden of coming forward with evidence for the evaluation of the public interest criteria of Section 42-203C(2), Idaho Code, except that the applicant shall provide details of the proposed design, construction, and operation of the project and directly associated operations to allow the impact of the project to be evaluated.

4,4,3. The applicant has the ultimate burden of persuasion for the criteria of Section 42-203A, Idaho Code, and the protestant has the ultimate burden of persuasion for the criteria of Section 42-203C, Idaho Code.

4,4,4. For unprotested applications or permits to be reprocessed, the director will evaluate the application, information submitted pursuant to Rule 4,5,3. and information in the files and records of the department, and the result of any studies the department may conduct to determine compliance with the appropriate criteria.

4,4,5. In protested matters the director will take official notice of information as described in Rule 9,16. of the department's adopted Rules of Practice and Procedure, and will, prior to considering, circulate to the parties information from department studies and field examinations concerning the protested application or permit being reprocessed, if such information has not otherwise been made a part of the hearing record.

4,5. Additional Information Requirements

4,5,1. For unprotested applications and permits being reprocessed, the additional information required by Rule 4,5,3. shall be submitted within 30 days after the director notifies the applicant that the application or permit is being reviewed for decision. The director may extend the time within which to submit the information upon request by the applicant and a showing of good cause.
Failure to submit the required information within the time period allowed will change the priority date of the application or permit being reprocessed to the date of receipt of the information and is sufficient cause for the director to void the record of the application or cancel the permit. The director will provide opportunity for hearing as provided in Section 42-1701A, Idaho Code.

4,5,2. For protested applications or protested permits being reprocessed, the information needed to respond to Rule 4,5,3. shall be made a part of the record of the hearing held to consider the protest or shall be made available in accordance with any pre-hearing discovery procedures.

4,5,3. Information to be submitted
The following information shall be submitted for applications to appropriate unappropriated water or trust water and for permits being reprocessed for trust water.

4,5,3,1. Information relative m the effect on other water rights, Section 42-203A(5)(a), Idaho Code, shall be submitted as follows:

4,5,3,1,1. For applications appropriating springs or surface streams with 5 or fewer existing users, either the identification number, or the name and address of the user, and the location of the point of diversion and nature of use for each existing water right shall be submitted.

4,5,3,1,2. For applications appropriating ground water, a plat shall be submitted locating the proposed well relative to all existing wells and springs and permitted wells within a one-half mile radius of the proposed well.

4,5,3,1,3. Information shall be submitted concerning any design, construction, or operation techniques which will be employed to eliminate or reduce the impact on other water rights.

4,5,3,2. Information relative to sufficiency of water supply, Section 42-203A(5)(b), Idaho Code, shall be submitted as follows:

4,5,3,2,1. Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year.

4,5,3,2,2. Information shall be submitted oo the quantity of water available from the source applied for, including, but not limited to, information concerning flow rates for surface water sources available during periods of peak and average project water demand, information concerning the properties of the aquifers that water is to be taken from for ground water sources, and information on other sources of supply that will be used to supplement the applied for water source.

4,5,3,2,3. For applications appropriating more than 25 cfs or 10,000 acre-feet of storage, or to generate more than 500 horse power (HP), the required information submitted shall be certified by a registered professional engineer or geologist.

4,5,3,3. Information relative to good faith of the applicant, Section 42-203A(5)(c), Idaho Code, shall be submitted as follows:

4,5,3,3,1. The criteria requiring that the director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant at the time the filing is made. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. A person taking the actions necessary to carry through with a project can be determined by the director to be proceeding in good faith as long as there are no obvious constraints which make the project impossible to successfully complete.

4,5,3,3,2. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use. Speculation does not imply that the applicant cannot pursue a project with the intent of subsequently selling the developed project lor a profit or of making a profit from the use of the water.

4,5,3,3,3. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to do so. Applicants for hydropower purposes shall also submit the information required by Section 42-205, Idaho Code.

4,5,3,3,4. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of these applications and any subsequent approvals or denials.

4,5,3,4. Information Relative to Financial Ability, Section 42-203A(5)(d), Idaho Code, shall be submitted as follows:

4,5,3,4,1. The applicant shall submit a current financial statement certified to show the accuracy of the information contained therein by the applicant and the financial institution preparing the statement, or a binding financial commitment along with the financial statement of the lender.

4,5,3,4,2. The applicant shall submit plans and specifications along with estimated construction costs for the project facilities. For applications proposing to divert more than 25 cfs or store more than 10,000 AF pr generate more than 500 horsepower (HP), the plans, specifications and cost estimates shall be prepared by a licensed professional engineer.

4,5,3,5. Information Relative to Local Public Interest, Section 42-203A(5)(e), Idaho Code, shall be submitted as follows:

4,5,3,5,1. The applicant shall seek comment and shall submit all letters of comment on the effects of the construction and operation of the proposed project from the governing body of the city or county within which the point of diversion and place of use are located, the Idaho Department of Fish and Game, the Idaho Department of Health and Welfare, Division of Environment, and any irrigation district or canal company within which the proposed project is located.

4,5,3,6. Information Relative to the Public Interest Criteria of Section 42-203C(2), Idaho Code, shall be submitted by the applicant as follows:

4,5,3,6,1. A project design and estimate of cost of development shall be submitted. For applications appropriating more than 25 cfs, or 10,000 AF of storage, or generating more than 500 HP, the information shall be prepared and submitted by a licensed professional engineer.

4,5,3,6,2. If the project proposes development for irrigation purposes, information shall be submitted so crop rotation, including acreages, for lands when newly developed and for long-term operation.

4,5,3,6,3. Information shall be submitted concerning the number and kinds of jobs that will be created or eliminated as a direct result of project development including both the construction and operating phases of the project. If jobs are seasonal, the estimated number of months per year of employment

shall be submitted.

4,5,3,6,4. For applications or permits being reprocessed for more than 25 cfs, or more than 10,000 AF of storage, or more than 500 HP, information shall be submitted concerning the changes to community services that will be required during the construction and operation phases of the project including, but not limited to, changes to schools, roads, housing, public utilities and public health and safety facilities, if any.

4,5,3,6,5. Information shall be submitted concerning the source of energy for diverting and using water for the project, the estimated instantaneous demand and total amount of energy that will be used, the efficiency of use, and energy conservation methods.

4,5,3,6,6. Information shall be submitted concerning the location, amount, and quality of return flow water, and any water conservation features of the proposed project.

4,5,3,6,7. If the project proposes irrigation as a use, information shall be submitted concerning the relationship of the operator of the land to be irrigated by the project to the applicant, the location and acreage of other irrigated lands owned, leased, or rented by the applicant, the names, addresses and number of shares held by each shareholder if the applicant is a corporation, evidence of tax-exempt status if a corporation is so claiming, a soil survey prepared in accordance with the U.S. Soil Conservation Service irrigable land classification system, and a schedule for bringing into production the project lands.

4,5,3,7. The additional information submittal requirements of Rule 4,5,3. are waived for applications appropriating 10 cfs or less or 1,000 AF or less unless the director specifically requests submittal of information on one or more of the criteria.

Rule 5. EVALUATION CRITERIA

5,1. Criteria Used to Evaluate All Applications to Appropriate Water.

The director will use the following criteria in evaluating whether an application to appropriate unappropriated water or trust water should be approved, denied, approved for a smaller amount of water or approved with conditions. If the director determines that a proposed use will not comply with one or more of the criteria of Section 42-203A(5), Idaho Code, the application will be denied.

5,1,1. Criteria for Determining Whether the Proposed Use Will Reduce the Quantity of Water Under Existing Water Rights.

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

5,1,1,1. The holder of an existing water right will be unable to continue to operate at the same level of production from the lands or facilities that rely upon the existing water right without an unreasonable modification to his existing method of application of water or to his use facilities; or

5,1,1,2. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right; or

5,1,1,3. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.

5,1,1,4. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses to the holder of an existing water right, as determined by the director.

5,1,2. Criteria for Determining Whether the Water Supply is Insufficient for the Proposed Use.

The water supply will be determined to be insufficient for the proposed use if:

5,1,2,1. Water is not available for an adequate share of the time in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are nonconomic factors that justify application approval. In assessing such nonconomic factors, the director will also consider the impact on other water rights if the project is abandoned during construction or after completion, the impact on public resource values, and the cost to local, state and federal governments of such an abandonment.

5,1,3. Criteria for determining whether the application is made in good faith.

An application will be found to have been made in good faith if:

5,1,3,1. The applicant shall have legal access to the property necessary to construct and operate the proposed project, is exercising eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in federal ownership, all applications for a right-of-way shall have been filed; and

5,1,3,2. The applicant shall be in the process of obtaining other permits needed to construct and operate the project; and

5,1,3,3. There are no obvious impediments that prevent the successful completion of the project.

5,1,4. Criteria for Determining Whether the Applicant has sufficient financial resources to complete the project.

5,1,4,1. An applicant will be found to have sufficient financial resources if his net worth equals or exceeds the estimated cost of the project or if binding financial commitments acceptable to the director have been secured at the time the information required by Rule 4,5,3. was submitted or at the time the hearing provided by Rule 4,3,3. is conducted.

5,1,4,2. A governmental entity will be determined to have satisfied this requirement if it has the taxing or bonding authority necessary to raise the funds needed to commence and pursue project construction in accordance with the construction schedule.

5,1,5. Criteria for Determining Whether the Project Conflicts with the Local Public Interest.

The director will consider the following, along with any other factors he finds to be appropriate, in determining whether the construction and operation of a project will conflict with the local public interest:

5,1,5,1. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;

5,1,5,2. The effect the project will have on fish and wildlife resources in the local area affected by the proposed use; and

5,1,5,3. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local, state or federal government jurisdictions.

5,1,5,4. An application which the director determines will conflict with the local public interest will be denied unless the director determines that an over-riding state or national need exists for the project or that the project can be approved under conditions to resolve the conflict with the local public interest.

5,2. Criteria for evaluating whether a proposed use of trust water will significantly reduce water available to the holder of a water right used for power purposes (herein after termed "significant reduction"). Reference: Section 42-203C(1), Idaho Code.

5,2,1. All applications and permits being reprocessed, except as provided in Rule 5,2,2. which propose a use which will deplete trust water will be presumed by the director to cause a significant reduction in water available to hydropower rights because of the cumulative effect when each proposed use is considered in combination with all other proposed uses. Therefore, all such applications will be evaluated under Rule 5,3.

5,2,2. Applications for permit proposing to change or add a source of water for irrigation of lands having an exist-

ing adequate water supply shall not be considered to cause a significant reduction.

5,3. Criteria for Evaluating Public Interest. If the director determines that a proposed use of trust water will significantly reduce water available to the holder of a power right, he will consider the criteria of Section 42-203C(2), Idaho Code, before acting on the application or permit being reprocessed. The director shall consider and balance the relative benefits and detriments for each factor required to be weighed under Section 42-203C(2), Idaho Code, to determine whether a proposed reduction of the amount of water available for power production is in the public interest. If the total benefits associated with the new use of water proposed by the application for permit outweigh the total detriments, the proposed use shall be determined to be in the public interest. In evaluating the public interest criteria, the director will use the following guidelines:

5,3,1. The director will consider the potential benefits both direct and indirect, that the proposed use would provide to the state and local economies. The economic appraisal shall be based upon generally accepted economic analysis procedures which uniformly evaluate the following factors within the State of Idaho and the county or counties directly affected by the project:

5,3,1,1. Direct project benefits.

5,3,1,2. Indirect benefits including net revenues to the storage, processing, transportation, supply, service and government sectors of the economy.

5,3,1,3. Direct project costs, to include the opportunity cost of previous land use.

5,3,1,4. Indirect project costs, including verifiable costs to government in net lost revenue and increased regulation costs, verifiable reductions in net revenue resulting from losses to other existing instream uses, and the increased cost of replacing reduced hydropower generation from hydropower generating facilities located in Idaho from the least costly source. Indirect project costs do not include the cost of foregoing other potential projects which could have used the land, water, and other resources involved in the proposed project.

5,3,2. The director will consider the economic impact the proposed use would have upon the electric utility rates in the State of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact. These evaluations shall be based upon the following guidelines:

5,3,2,1. Projections of electrical supply and demand for Idaho and the Pacific Northwest made by the Bonneville Power Administration and the Northwest Power Planning Council; and

5,3,2,2. The degree to which the applicant is able to reduce or mitigate the power reduction impacts.

5,3,3. The director will consider whether the proposed use will promote the family farming tradition in the State of Idaho. For purposes of this evaluation, the director will use the following factors:

5,3,3,1. If the total land to be irrigated by the applicant, including currently owned and leased irrigated land and land proposed to be irrigated in the application and other applications and permits of the applicant, do not exceed 960 acres of Class 1 equivalency as defined by U.S. Bureau of Reclamation regulations, the application will be presumed to promote the family farming tradition;

5,3,3,2. If the requirement of Rule 5,3,3,1. is not met, the director will consider the extent the applicant conforms to the following characteristics:

5,3,3,2,1. The farming operation developed or expanded as a result of the application is operated by the applicant or a member of his family (spouse, parents or grandparents, lineal descendents, including those that are adopted, lineal descendents of parents; and spouse of lineal descendents);

5,3,3,2,2. In the event the application is filed in the name of a partnership, one or more of the partners shall operate the farming operation; and

5,3,3,2,3. If the applicaton is in the name of a corporation, the number of stockholders does not exceed fifteen (15) persons, and one or more of the stockholders operates the farming operation.

5,3,4. The promotion of full economic and multiple use development of the water resources of the State of Idaho shall be considered. In this regard, the director will consider the extent to which the project proposed complies with the following factors:

5,3,4,1. Promotes and conforms with the adopted State Water Plan;

5,3,4,2. Provides for mitigation and coordination of proposed and existing uses of water to maximize the beneficial use of available water supplies;

5,3,4,3. Utilizes the best technology economically available to enhance water and energy use efficiency;

5,3,4,4. Provides multiple use of the water, including multipurpose storage;

5,3,4,5. Allows opportunity for reuse of return flows;

5,3,4,6. Preserves or enhances water quality, fish, wildlife, recreation and aesthetic values;

5,3,4,7. Provides supplemental water supplies for existing uses with inadequate supplies; and

5,3,4,8. Utilizes the best economically developable soils available for the proposed crops, if for irrigation.

5,3,5. The director will consider whether a proposed use, which includes irrigation, will conform to a staged development policy of up to twenty thousand acres per year or eighty thousand acres in any four-year period in the Snake River drainage above Murphy gauge. In applying this criteria, the director will consider the following:

5,3,5,1. "Above Murphy gauge" is the Snake River and any of its surface or ground water tributaries upstream from Murphy gauge which gauge is located on the Snake River approximately four miles downstream from Swan Falls Dam;

5,3,5,2. Twenty thousand acres per year or eighty thousand acres per four (4) year period is a four (4) year moving average of 20,000 acres/year of permits issued during a calendar year for irrigation development. If permits for development of less than 20,000 acres are issued in a year, additional development in excess of 20,000 acres can be permitted in succeeding years. Likewise, if more than 20,000 acres is permitted in one year (recognizing that a single large project could exceed 20,000 acres) the permitted development in succeeding years must be correspondingly less to maintain no greater than a 20,000 acres/year average for any four year period;

5,3,5,3. The criteria of Rule 5,3,5. applies to multiple-use projects with irrigation as a principal purpose. Projects which use irrigation as only an incidential purpose, such as the land treatment of waste, shall not be included within this policy; and

5,3,5,4. An application determined by the director to be otherwise approvable but found to exceed the acreage limitations, when considered with other applications approved for development, may be approved with conditions providing for the construction of project works and beneficial use of water to be commenced in a future year.

5,3,6. No single public interest criterion will be entitled to greater weight than any other public interest criterion.

5,3,7. Applications to divert water to surface storage or ground water recharge from the Snake River and surface tributaries upstream from Milner Dam shall be deemed to satisfy the public interest criteria of Section 42-203C(2), Idaho Code.

5,3,8. Applications for permit for trust water sources filed prior to July 1, 1985, for projects for which diversion and beneficial use was complete prior to October 1, 1984, are deemed to satisfy the public interest criteria of Section 42-203C(2), Idaho Code.

5,3,9. Applications or permits to be reprocessed proposing a direct diversion of water for irrigation purposes from the Snake River between Milner Dam and Swan Falls Dam or from tributaries, including ground water, within four miles of the nearest edge of the Snake River are not in the public interest as defined by Section 42-203C, Idaho Code. Such proposals, would if allowed to develop, prevent the full economic and multiple use of water in the Snake River basin and would have an adverse effect on hydropower availability and electrical energy rates.

5,3,10. Proposed DCMI uses which individually do not have a maximum consumptive use of more than two acre-feet/day will be considered to meet the public interest criteria of Section 42-203C(2), Idaho Code, unless protested.

Rule 6. Conditions of Approval

6,1. The director may issue permits with conditions necessary to meet the criteria of Section 42-203A, Idaho Code, and to meet the requirements of Section 42-203C, Idaho Code, to the fullest extent possible including conditions to promote efficient use and conservation of energy and water.

6,2. Applications approved to appropriate water from the main stem of the Snake River between Milner and Murphy gauging station for diversion to off-stream storage during the period November 1 to March 31 shall include requirements to mitigate the impact of flow depletions on downstream generation of hydropower at facilities located in Idaho in accordance with Policy 32 I of the State Water Plan.

6,3. Applications approved for hydropower generation shall be subordinate to later in time upstream beneficial depletionary uses authorized in accordance with applicable law and shall contain a term condition in accordance with Section 42-203B(6), Idaho Code.

6,4. Applications approved for on-stream storage reservoirs will, unless specifically waived by the director, require permanent measuring facilities both upstream and downstream from the reservoir.

6,5. Applications approved for diversion of ground water may include conditions requiring well spacing and well construction requirements.

6,6. Permits reprocessed pursuant to Section 42-203D, Idaho Code, may be cancelled, modified or conditioned by the director to make the permit comply in every way with any permit that would be issued for the same purpose based upon a new application processed under these rules.

6,7. The director may condition permits to require commencement of construction of project works within a designated time not to exceed one year and completion of construction of project works and beneficial use of water within a time not to exceed five years.

6,8. Permits may be conditioned to authorize the director to void the approval of the permit if he determines that the applicant submitted false or misleading information on the application or supporting documents.

6,9. The director may condition a permit to retain jurisdiction to insure compliance with the design, construction and operation provisions of the permit.

6,10. The director may condition a permit to insure that established minimum stream flows and prior rights are not injured.

Rule 7. Moratorium

7,1. Applications for Permit

7,1,1. The director may cease to approve applications for permit in a designated geographical area upon finding a need to:

7,1,1,1. Protect existing water rights;

7,1,1,2. Insure compliance with the provisions of Chapter 2, Title 42, Idaho Code; and

7,1,1,3. Prevent reduction of flows below a minimum stream flow which has been established by the director or the board pursuant to applicable law.

7,1,2. Notice of the director's action to cease application approval will be by:

7,1,2,1. Summary Order served by certified mail upon the affected applicants; and

7,1,2,2. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area affected.

7,1,3. Objections to the director's action shall be considered under the department's Rules of Practice and Procedure and applicable law.

7,2. Permits

7,2,1. To the extent a permit has not been developed, the director may cancel, or modify permits for which proof of beneficial use has not been submitted in a designated geographical area as an extension of Rule 7,1.

7,2,2. Notice of the director's action to cancel or modify permits shall be by:

7,2,2,1. Summary Order served by certified mail upon the affected permit holders in the designated area.

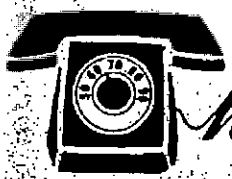
7,2,2,2. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area.

7,2,3. Objections to the director's action shall be considered under the department's Rules of Practice and Procedure and applicable law.

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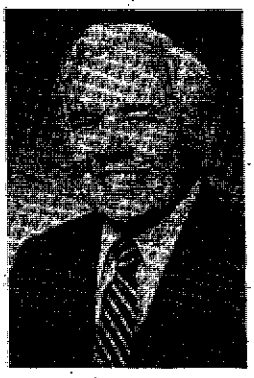
From the Idaho Department of Water Resources

IDWR Seeks Comments On Draft Rules

The draft rules and regulations issued by the Idaho Department of Water Resources are, according to A. Kenneth Dunn, director, the first comprehensive procedures developed for considering allocation of water in Idaho. The Gem State has operated the water permitting process since 1903, using a combination of statutes, legal precedent, and department policy. The action of the 1985 legislature made adoption of the comprehensive rules necessary to allow application of the additional public interest review criteria to the evaluation of water allocation decisions of the department.

Dunn emphasized that the regulations do not mark the introduction of a new program emphasizing water development. The rules, however, implement legislation that puts greater control over the management of the state's valuable water resources, particularly when development proposals seek to appropriate water presently used for hydropower generation.

Dunn indicated that a number of the rules proposed in the draft will have a significant effect on the amount, type and location of water development in Idaho, and he encouraged the public to review and comment upon them. Dunn noted the following provisions of the rules as particularly significant:



A. Kenneth Dunn
IDWR Director

1. Trust water provisions are determined to apply to flows in the Snake River Basin above Swan Falls, including tributary ground water and flows upstream from Milner Dam. Proposed new diversions to storage upstream from Milner Dam are defined as in the public interest and will not be reviewed under the new criteria.
2. Unsubordinated hydropower rights on streams for which minimum flows have not been established (i.e.: Bear River hydropower rights) are not subject to the trust water provisions with the flows for these rights considered as appropriated water.
3. Power rights subordinated by the department prior to passage of the Swan Falls legislation are not subject to the trust water provisions, but the flows are considered to be unappropriated waters (i.e.: Hells Canyon Dam complex). However, the effect of reducing flows to such facilities and the effect on electric power rates is made a part of the public interest review for new applications.
4. The reprocessing of undeveloped permits is limited to just those for non-DCMI (domestic, commercial, mining, industrial) uses seeking trust water to the extent the permits have not been developed prior to July 1, 1985.
5. The rules state that all non-DCMI uses will produce a significant impact on hydropower rights unless the filing is for lands that have been previously irrigated with a full water supply.
6. The rules provide a balancing test for the public interest review as opposed to the previously discussed numerical rating scale approach.
7. Direct diversions for irrigation purposes from the Snake River between Milner Dam and Swan Falls Dam or from tributaries, including ground water, within four miles of this reach of Snake River are determined not to be in the public interest.

"When final rules are adopted, processing of applications delayed by the Swan Falls controversy can continue," Dunn said. Applications for DCMI uses, unless protested, will be expedited, while those for irrigation purposes and other uses proposing significant depletions of trust water will be subject to a more thorough review.

Comments concerning the draft rules and regulations will be received until November 8, 1985. Address comments to:

Department of Water Resources
450 West State Street
Boise, Idaho 83720

Attn: Water Allocation Rules

Space For Notes At Public Meeting

This foregoing is a true and certified copy of the document on file at the department of Water Resources
Signed this 4th day of January 2008

Orr Affidavit

Exhibit 18

Memoranda from Norm Young of IDWR to Director Ken Dunn regarding water appropriation rules (1985-86)

Fourth Orr Affidavit
Exhibit 91:

Memoranda from Norm Young to Ken Dunn (June 14, 1985; January 21, 1986; February 5, 1986)

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 15th day of May, 2008

MEMORANDUM

TO: Ken Dunn
FROM: Norm Young NCY
DATE: June 14, 1985
SUBJ: Legal Issues Associated with Senate Bill 1008

Drafting rules and regulations for water right processing will require addressing or avoiding several issues associated with S1008 and the Snake River Water Rights agreement. This memo is intended to identify and briefly describe these issues, discuss alternatives and suggest the alternative that will be chosen as the rules are adopted. It is not now my intention to ask for a legal opinion on any of these issues unless you believe it is necessary.

Issue 1 - Are flows at hydropower dams previously subordinated by conditions on permits or licenses issued prior to the effective date considered to be trust waters and are applications proposing to appropriate these waters to be processed under the public interest criteria of 42-203C?

This issue arises because of the language in 42-203C(1) which requires that "If an applicant intends to appropriate water which is or may be available for appropriation by reason of a subordination condition ...." (emphasis added). This language could be considered as also referring to subordination conditions attached to hydropower permits and licenses issued prior to passage of S1008 and would thus require a public interest review for applications upstream from those hydroplants.

However, the Idaho Supreme Court recognized the validity of subordination conditions attached to permits and licenses in its November 19, 1982 decision on Swan Falls. The legislature in its statement of intent on S1008 made no reference to broadening the scope of the reviews to require public interest reviews for previously subordinated flows.

Alternatives:

1) Draft rules with a provision recognizing that the public interest reviews apply to flows through all hydropower facilities.

2) Do not address the issue.

3) Draft rules stating that previously subordinated hydro flows are not subject to public interest reviews.

I propose to draft rules using alternative 3. I believe the issue needs to be addressed and it can be clarified in this matter if the legislative committees concur.

SCANNED
JAN 05 2007

SF369

Issue 2 - Are the flows passing Milner Dam exempt from the trust water provisions?

The adopted minimum flow of zero cfs at Milner has been construed by some as exempting any water passing Milner from the trust water provisions. This interpretation would mean that the flows of the Thousand Springs and other sources entering below Milner would have to be relied upon to supply the flow in the main stem Snake River hydropower facilities. A simple reading of S1008 (Section 42-203b(2)) indicates that all waters in excess of an established minimum flow up to the amount of the established hydropower right are to be considered trust waters. Actually, the zero minimum flow at Milner could have the opposite effect of increasing the flows that are to be considered trust waters rather than to exempt the flows from public interest considerations. The unsubordinated hydropower permit held by Twin Falls Southside for diversion at Milner also could establish a trust situation without regard to the Snake River Water Rights agreement.

Alternatives:

1) Assume all flows passing Milner as surface water are not trust waters.

2) Assume all surface flows, but not groundwater inflow, entering above Milner are not trust waters.

3) Assume all flows passing Milner as surface water are trust waters.

4) Do not address issue in the rules.

I propose to draft the rules recognizing all flows tributary to Snake River above Swan Falls including water passing Milner as trust waters unless the main hydro rights at Swan Falls and all other hydropower facilities up to Milner (with the exception of C.J. Strike) are satisfied.

Issue 3 - Are applications filed on developments completed prior to October 1, 1984 to be processed for trust water using the public interest criteria of 42-203C?

Assuming that the Snake River Water Rights agreement is ratified and paragraph 7 becomes effective, Idaho Power Co. will have subordinated the rights at its hydro plants to any development diverting and beneficially using water prior to October 1, 1984 if a claim or application is filed prior to June 30, 1985 (see paragraph 7d of the agreement).

Because Idaho Power Co.'s rights will then be subordinated to these uses, the applications could be considered as not seeking trust water and would not be subject to the additional public interest criterion of 42-203C. However, the new provisions of

42-203C do not provide an exception for such applications and if the appropriation doctrine of first in time is to be followed, the subordination could perhaps be considered as attaching to undeveloped but earlier in priority applications and permits. Obviously this would be technically impossible to administer.

This issue is further compounded by HB71 which allows expanded development associated with existing rights to be claimed as part of the existing water right in a basin wide adjudication.

Alternatives:

1) Draft rules requiring all applications whether for developed or undeveloped projects to be subject to review under 42-203C.

2) Draft rules requiring only those projects not developed prior to October 1, 1984 are to be reviewed under the requirements of 42-203C. This exempts projects developed prior to October 1, 1984 as long as an application or claim was filed prior to June 30, 1985.

I believe this procedural matter must be addressed and clarified in the rules. I also believe both Idaho Power Co. and the legislature intended to recognize all existing uses. For these reasons, I propose to incorporate alternative 2 into the draft rules. However, distribution of water in times of scarcity should be simply by priority.

Issue 4 - Does Section 42-203D require reprocessing of all undeveloped permits including those not on trust waters?

Section 42-203D requires all permits to the extent they have not been developed prior to June 30, 1985 to be reprocessed under the provisions of Chapter 2, Title 42, Idaho Code. This could be interpreted as requiring permits in all areas of the state to be reviewed and reprocessed. However, such a requirement would be meaningless if the criteria for evaluating the permits had not been revised. Since the criteria has only been revised for filings proposing to take trust water, it would be redundant to reprocess other permits.

Alternatives:

1) Do not address issues in the rules.

2) Draft rules requiring all undeveloped permits to be reprocessed.

3) Draft rules requiring reprocessing only for undeveloped permits proposing to use trust waters.

I propose to draft rules using alternative 3.

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 15th day of May, 2008
Dan Steenson

Issue 5 - Must the trust waters be reallocated by priority of application?

All pending applications and undeveloped permits needing to be reprocessed were filed for unappropriated water recognizing first in time - first in right. However, the trust waters are actually appropriated flows that are being reallocated. The Snake River Water Rights agreement cuts across the appropriation doctrine by recognizing all existing uses whether a legal water right had been obtained or not. Thus the reallocation of trust water may not require processing and approving rights by priority of filing.

This is an issue for which we are seeking public input before the rules and regulations are drafted. There are obviously many possible alternatives for the order of processing. My thinking at this time is that priority must be a principle criterion; however, the rules must also allow timely processing of recently filed applications for non-trust waters, non-consumptive uses on any water source and for expedited processing of those applications meeting the contrast definition of DCMI. In addition, applications for projects developed prior to October 1, 1984 should also be processed out of sequence.

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 15th day of May, 2006

MEMORANDUM

TO: Ken Dunn

FROM: Norm Young

DATE: January 21, 1986

RE: Issues Raised in Hearings on Water Allocation Rules

1. Trust water should not extend above Milner, especially surface water. Concern that high water use above Milner could be affected by trust water determination.

2. "Greater" public interest standard must not undo first in time.

3. Longer irrigation season in Mud Lake - Hamer - Dubois area.

4. Appeal procedure should be detailed in rules.

5. Constitutional preference for agriculture should not be reversed by DCMI presumed to be in public interest.

6. Rules refer to mitigation--not the intent of legislature. Intent was to make significant water readily available for irrigation

7. Burden of proof has been reversed from legislative intent; i.e.,
   a. Significant reduction—"significant" is not defined.
   b. Ground water above Murphy tributary to Milner.
   c. Presumption of not in public interest to pump direct from river and from tributaries within four miles (arbitrary and capricious).

8. Ground water above Milner should not be tributary -- IPCo. demarcation line was just east of Minidoka.

SCANNED
JAN 04 2007

SB193

9. Economic impacts are considered more than once in the evaluation criteria--(too much emphasis on economics in rules).

10. Don't consider economic impact and electric rate changes because of loss of power at Hells Canyon. If Hells Canyon impacts are considered, no irrigation can show positive economic impacts.

11. Application and permit readvertisement should be at cost of department.

12. Application and information requirements are burdensome on small applicants.

13. Geologists should not be authorized to design projects.

14. Rule 6.1.1.1. appears to allow department to reduce water to existing rights if reviews show inefficient use--department has no authority to do so--could allow department to force switch to sprinklers.

15. Does Rule 5.3.9 apply only to trust water or also to unappropriated water? If only trust water, then will the significant amount of unappropriated water between Bliss and Swan Falls be subject to the ban on direct pumping.

16. Rules discourage consumptive use of water even though such uses are a benefit to state.

17. P.E. requirement is too severe.

18. Director's discretion is too great.

19. Catch 22 on rule 5.1.3.1. -- Eminent domain - vs - permit to appropriate.

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 15th day of May, 2008
Gary Spackman

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 15th day of October 2008
Gary Spaulding

MEMORANDUM

TO: Ken Dunn

FROM: Norm Young

DATE: February 5, 1986

RE: Additional Issues Raised in the Written Comments on the Water Allocation Rules

My memo of January 21, 1986 listed the issues raised during the public hearings. Since that time, six letters have been received, containing some additional issues:

- Trust waters are created by legislation not the agreement
- DWR should continue to recognize blanket protests already on file
- The waiver of additional information on projects smaller than 1 cfs or 2000 acre feet (Rule .4,6,3,7) releases too many projects.
- The 1/3 stream presumption is too liberal--should be 300 acres
- Trust waters should not include water from rights abandoned in the future
- Rules should create a presumption that public interest is [illegible] taking water from storage as well as putting it into
- Burden of proof for local public interest should not be on [illegible]

SCANNED
JAN 04 2007

8. Period of time required for ground water to reach surface sources should determine whether it is tributary.

9. Don't assume applications are for trust water--(Rule 3,2,1.).

10. Farmers cannot commit to a long-term rotation (Rule 4,5,3,6,2.).

11. Applicants should not be required to determine Class I equivalency (Rule 5,3,3,1.).

12. Mitigaton allows some criteria to have a greater weight (5,3,6).

13. Trust waters exist only if 42-203(A) cannot be satisfied (1,0,2,2).

14. Legislature did not intend "cumulative" to be interpreted literally (1,4,2,2).

15. Ground water entering river below Milner may not be trust water.

16. 42-203B(6) water is not trust water and Hells Canyon preservation is not affected.

17. Define irrigation, commercial, industrial and power uses.

18. Redefine "subordinated water right" (2,16).

19. IDWR does not have authority to stop construction until application for appropriate is filed (Rule 3,1,1.).

20. Rebuttable presumption is arbitrary (Rule 3,2,4).

21. Burden of proof is ambiguous (Rule 4,4).

22. Information requirements are excessive.

23. Add diligence concept to speculation (Rule 4,5,3,3,2).

24. 42-203C criteria interpreted too broadly.

25. Cite federal regulations for Class I equivalency.

26. Rules should be more comprehensive.

27. Separate applications for hydropower projects.

28. Small irrigation projects are discriminated against relative to BOR.

Additional comments in letters subsequent to this memo:

1. Rewrite rules 1,5,4,1 through 1,5,4,4 to be readable.

2. Add to Rule 3,3,2,1, a requirement to list names and addresses of partners.

3. Add to rule 3,3,2,9, a requirement to describe project works and their cost.

4. Add to rule 4,1,1,4, a requirement that director make a written finding of fact on each criteria of 42-203 in his decision on unprotested filings.

5. Notice provisions agree with statute but are inadequate.

6. Rule numbering system is not good.

The foregoing is a true and certified copy of the document on file at the department of Water Resources
Signed this 15th day of October 2002
Gary Pedersen

Orr Affidavit

Exhibit 19

Letter from attorney John A. Rosholt to Norman C. Young, Administrator of the Resource Administration Division of the Idaho Department of Water Resources (Oct. 12, 1988);

and

Idaho Power Company's Memorandum in Support of Motion to Re-Consider and Amend Summary Judgment (*Idaho Power Co. v. State,* Case No. 62237) (Fourth Jud. Dist., Ada County) (Feb. 19, 1980)

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RECEIVED
OCT 13 1988
Department of Water Resources

October 12, 1988

Norman C. Young, Administrator
Resource Administration Division
Idaho Department of Water Resources
1301 N. Orchard, Statehouse Mail
Boise ID 83720

RE: Draft Policy and Implementation Plan -- Swan Falls Area Water Rights Processing

Dear Mr. Young:

Please include this letter as written comments on the above referenced policy and plan of the Department dated September 1, 1988. The comments are submitted on behalf of the Twin Falls Canal Company ("TFCC"), the North Side Canal Company ("NSCC") and the American Falls Reservoir District ("AFRD").

The Department is aware of petitions jointly filed by TFCC, NSCC and AFRD. One petition seeks the enlargement of Water District 01 so as to effect conjunctive management of ground and surface water diversions. The other is a petition seeking a moratorium on the development of some 400 applications for consumptive uses in the non-trust water area where the groundwater is tributary to the Snake River between Blackfoot and Milner Dam.

The Department's comments at page 9 of the document indicate that it is the present intention of the Department to deny the petition to expand Water District 01. That page also suggests that the Department would apply a moratorium in the non-trust water area, but that the moratorium would not provide an absolute prohibition against further consumptive use, but would only provide for persons potentially affected to protest and provide information concerning the effect of the development. The subparagraphs thereunder suggest that anyone who had developed by March 10, 1988, would not be further reviewed. As we understand the "window" provided in the moratorium, other filings would not be authorized unless "the

director issues a permit allowing the project under conditions the director determines necessary to protect prior rights and the public interest."

Oral comments at the October 5, 1988, hearing in Twin Falls indicate that it would be the Department's intention to require a protestant to prove direct interference by each individual applicant, rather than considering the cumulative effect of the 400 applications which pend.

While I recognize the state's dilemma in following the constitutional mandate of "the right to appropriate shall never be denied . . .", the Swan Falls dilemma has pointed up some realities for Idaho. One is that water resources of the State of Idaho are finite. The other is that ground and surface water are interdependent.

TFCC and NSCC have been diverting under state water rights since near the turn of the century. They have developed and established irrigation systems and communities and their shareholders have consistently paid their taxes and their dues for over 80 years within the State of Idaho. In our judgment, the Idaho Department of Water Resources should be more concerned about protecting the economy that is already established, under water rights with early priorities. In essence, the September 1 document suggests that the people who have prior rights to non-trust water must now venture into the administrative arena of protests and petitions to protect their rights against 400 to 800 applicants who seek the appropriation of non-trust water from groundwater sources which are tributary to the Snake River below Blackfoot. Should not the Idaho Department of Water Resources make an independent investigation to determine whether or not the development of any applications could adversely impact existing water rights as opposed to requiring those with the existing and prior water rights to come forth and prove those impacts? Not one positive thing is accomplished by the implementation of the proposal if the eventual and net result is the drying of one acre in Magic Valley for the benefit of an irrigated acre above Blackfoot.

To say that so long as water flows past Milner Dam, the upper Snake Basin is not fully developed is not realistic. The water that flows past Milner in ordinary years is either not storable in a reservoir for existing rights holders or comes during flood stage in the early spring on a regulated river. In either case, the water is not practically available for new groundwater or surface water development for new irrigated acres until a new reservoir is constructed. The fact

is that if the Department determines that a new applicant can divert 10 cubic feet of water to develop new ground, then he should only be able to divert it at a time that the impact of his pumping will only decrease the flows past Milner at a time that the prior water right holders are not impacted. To require a payback in storage water merely changes the nature of the prior water right without permission.

In the drought years, water will not be available in the water bank. Is it fair to lull a new developer into a situation where he can irrigate except in drought years? Until all pumpers are brought into a water district that provides for conjunctive management of the water and the effects of more development are known, there is no one to police the new pumper. Consequently, the prior right holder can't call up the watermaster and ask for relief. He can call the Department of Water Resources that is undermanned, underfunded and overwhelmed, and obtain no immediate relief. Once again the burden falls upon the prior right holder to go forward and to seek judicial relief to protect a senior applicant from injury from a right that should not have been granted in the first place.

In our opinion, the same mistake is made by the IWRB in seeking the allocation of water in federal reservoirs to the state. These reservoirs were constructed by the United States for the benefit of the lands in the Minidoka Project. The purpose was not to insure flows at Swan Falls so as to allow the development of groundwater in a trust water area. The Congress of the United States did not put the water in federal reservoirs in the upper Snake Basin to benefit an irrigator at Mud Lake. Water in upper Snake Basin reservoirs is here for the benefit of the area and is not a panacea for the solution of the state's water administration problems. In fact, the same water may well be necessary to satisfy Indian and federal claims within the Minidoka Project so as to preserve the status quo for the entryman who bought and paid for those benefits. Does the state have a greater interest in land development at Mud Lake than it has in protecting the status quo in the upper Snake Basin?

In our view, the whole document is slanted toward facilitating new applications for new development at the expense of existing development and prior water rights. There is absolutely no benefit to be gained by the owner of an existing irrigated acre from the development from any more irrigated acres in Idaho at this point and time.

In a state where thousands of farm foreclosures have occurred and approximately 10 percent of the previously irrigated acres are now in foreclosure or set aside programs, it seems folly to facilitate the development of new irrigated acres. Anyone interested in farming an irrigated farm should stop by the Federal Land Bank or the Production Credit Association and select the area of the state in which he wants to live and he can acquire a farm with the water right. In this case the price would be substantially less than that paid for the development of a new acre. It seems to us that the state should exert their efforts in attempting to better understand the interrelationships of ground and surface water in Idaho and develop a method of predicting impacts which can be specifically measured. There is no great crisis to get more irrigated land into production so as to facilitate existing farm surpluses. Let's know what the impacts are of granting an application for permit before we consider the same. For all practical purposes, the upper Snake Basin above Milner Dam is totally appropriated. No one can make a crop from utilization of the flows past Milner unless they construct an upper basin reservoir, which at this point in history appears not only unrealistic, but impossible.

In our view the Department's primary responsibility is to protect and administer the rights already in place. Idaho does not need a Robin Hood administration that takes from the rich to give to the poor. What's wrong with our state the way it is now?

Respectfully submitted,

John A. Rosholt

JOHN A. ROSHOLT
Attorney for TFCC, NSCC & AFRD

JAR:dcb
00741

Fourth Orr Affidavit
Exhibit 24:

Plaintiff's Memorandum in Support of Motion to Re-Consider and Amend Summary Judgment," *Idaho Power Co. v. State*, Case no. 62237 (Fourth Jud. Dist., Ada County) (Feb. 19, 1980)

John A. Rosholt
NELSON, ROSHOLT, ROBERTSON,
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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. STATE OF IDAHO, acting by and through the Department of Water Resources, et al., Defendants.	Case No. 62237 PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER AND AMEND SUMMARY JUDGMENT

* * * * * * * * * * *

I. THE COURT SHOULD DECIDE THE ISSUES PRESENTED RELATIVE TO CHAPTER 3 of TITLE 61, IDAHO CODE.

The Court has declined to rule on issues relating to the applicability of §§ 61-327, 61-328 and 61-329 to this case, deferring to the Public Utilities Commission under the doctrine of primary jurisdiction. Plaintiff respectfully suggests that the primary jurisdiction doctrine is inapplicable for the following reasons:

A. The Administrative Agency Involved Seeks The Declaratory Judgment.

In this case, the Public Utilities Commission itself seeks the decision of the Court on a matter of statutory interpretation. The PUC here seeks judicial guidance on a matter of first impression. The request of the agency effected for a ruling would seem to fulfill the basic purpose

IPC014947

of the primary jurisdiction doctrine, to determine whether the courts or the agency should take the initial action. The PUC has here requested that the court take initial jurisdiction of the issue.

B. The Doctrine of Primary Jurisdiction Has No Application Where The Issue Is A Wholly Legal One.

The rule is thus stated in 2 Am.Jur.2d Administrative Law §793, pages 696-697.

> "The primary jurisdiction doctrine has no application where only a question of law is involved. That is, the doctrine does not apply in relation to a question which, while properly determinable by an administrative tribunal, does not involve a question of fact, but one of pure law, is determinable apart from the exercise of administrative discretion, and the requisite uniformity of determination is attainable otherwise than by confining determination of the question to the administrative tribunal."

The issue presented by the PUC falls squarely within this statement. Only a legal question is involved, no administrative expertise or discretion is required, and there is no risk of non-uniformity since the agency itself seeks the ruling.

C. The Court Should Decide The Issue, Since the PUC Has Already Taken A Position.

The Court quoted from Grever v. Idaho Telephone Company, 94 Idaho 900, 499 P.2d 1256 at page 45 of the Memorandum Decision. As noted in that case, the doctrine "is not an inflexible mandate but rather is predicated on an attitude of judicial self-restraint..." In this case, Plaintiff believes that deferring the decision to the PUC will put both Plaintiff and the PUC in an awkward, if not untenable, position. The PUC has stated its position on the interpretation to be given the statute in question. If the Court defers the interpretation to the PUC, it seems obvious how the PUC would be inclined to rule, and just as obvious that an appeal would be taken by Plaintiff. The Court's decision in this case is

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clearly destined for the Supreme Court. Since the case is going there anyway, considerations of basic fairness and judicial economy would seem to dictate that Plaintiff get a decision from a tribunal which has not taken an adversary position on the matter, and that the PUC not be put in the position of having to try to decide an issue on which it has taken a position. Bifurcation of the issue brought forward by the PUC also presents a potential for an incomplete resolution of the appeal by the Supreme Court, or a delay while a PUC decision can be obtained, appeeled and consolidated with the appeal of this case.

The Court has everything before it which it needs to decide the issue concerning the applicability of §§ 61-327 through 329 to this case. Plaintiff strongly urges the Court to decide that issue and believes, on the basis of conversations with counsel for the PUC, that the PUC agrees that the Court should decide the issue.

This issue was briefed by Plaintiff at pages 26-37 of the August 30, 1979 Response Brief.

II. THE SUBORDINATION ISSUE SET OUT IN PARAGRAPH 3 OF THE SUMMARY JUDGMENT ORDER DOES NOT SUBORDINATE IDAHO POWER COMPANY TO NON-IRRIGATION DIVERSIONS TO OFFSTREAM STORAGE FOR IRRIGATION PURPOSES.

Since this action was instituted, several proposals have surfaced in Idaho for the irrigation season diversion to offstream storege for irrigation season use of water that otherwise flows down Snake River in the winter time. Most recent of these proposals is that of the Idaho Water Resource Board which filed an application on behalf of the Bruneau Plateau project for diversion at Milner Dam in the nonirrigation season. The project contemplates the offstream storage of 1,738,000 acre feet. Although the application for permit does not designate a facility for conveyance of the water in the off season, it does state that up to 1,738,000 acre feet

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can be stored between January 1st and December 31st of each year and used between March 15th and November 15th. See Exhibit "A" hereto.

Proposals for other than irrigation exist to skim waters as available from Snake River and deprive Plaintiff of wintertime powar generation. Other than for late spring flood flowe, the river is generelly dry at Milner Dam duriog the irrigation season. Proposals now exist to form re-charge districts in accordance with statutory authority given by the 1978 Idaho Legislature through Idaho Code §42-232 and §42-234. Those sections would enable the diversion of flows that would otherwise be available for power generation. The water would be spilled onto the Snake plain and presumably would percolate to re-charge tha aquifer. While the purpose is to continue to enhance the groundwater table throughout all of the Snaka plain as well as enhance the spring flows in Hagerman Valley, much is unknown about the immediate effects of such a re-charge proposal. It ie possibla and likely that ra-charge in some areas would take years to be felt in tha spring flows in Hagerman which constitute the primary water supply for the hydro plants of Idaho Power located between Upper Salmon and Hells Canyon on the Snake River.

Hydrologic records would show that on the averago an excese of a million acre feet goes past Milner Dam. That winter water supply is critical to winter power generation within Idaho Power's service area and for storage at the Helis Canyon project for meeting peak summer demands. The loss of this water, or other wintertime diversions below Milner Dam to offstream storage were not comtemplated at the time of the subordination provisione. While the subordination provisione suggeot that Plaintiff may not object to diversione for consumptive uses in the Snake River watershed,

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it is likely that Idaho Power's position would have been different in the Hells Canyon proceedings had winter diversion for summer irrigation purposes been then contemplated. The practical fact was then that all the surface water above Milner Dam was essentially appropriated during the irrigation season and there was no flow below that point. The practical fact also was that in the early 1950s there were but two remaining feasible reservoir storage sites in the Upper Snake basin that could be constructed "on stream" to further deprive Idaho Power of wintertime flows.

Because of these recent events and the likelihood that future conflicts will develop in regard to nonirrigation season diversions to off-stream storage, we ask this Court to limit its decision herein, so as to leave open for specific decision in an adversary proceeding involving the parties proposing an off-stream storage project, the question of the applicability of the subordination to that project.

DATED this 19 day of FEB, 1980.

NELSON, ROSHOLT, ROBERTSON, WALKER, TOLMAN & TUCKER

By: John A. Rosholt
John A. Rosholt

IPC014951

CERTIFICATE OF MAILING

I hereby certify that on the 19 day of Feb., 1980, I served a copy of the foregoing PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER AND AMEND SUMMARY JUDGMENT, by depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

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John A. Rosholt

John A. Rosholt

IPC014952

Form 262
3/78

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
Ident. No. 01-

APPLICATION FOR PERMIT

To appropriate the public waters of the State of Idaho

1. Name of applicant Idaho Water Resource Board Phone 384-2215

Post office address Statehouse, Boise, ID

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

3. Location of point of diversion is SW ¼ of NW ¼ of Section 28 Township 10S

Range 21E B.M. Twin Falls County, additional points of diversion if any: _____

NW¼SW¼, Sec. 28, T10S, R21E (Milner Dam)

4. Water will be used for the following purposes:

Amount 1,738,000 (cfs or acre-feet per annum) for Irrigation Storage for purposes from Mar. 15 to Nov. 15 (both dates inclusive)

Amount _____ (cfs or acre-feet per annum) for Irrigation purposes from Jan. 1 to Dec. 31 (both dates inclusive)

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

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

5. Total quantity to be appropriated:

a. _____ cubic feet per second and/or b. 1,738,000 acre-feet per annum.

6. Proposed diverting works:

a. Description of ditches, flumes, pumps, headgates, etc. existing Milner Dam, with gravity flow canals to off stream storage sites.

b. Height of storage dam _____ feet, active reservoir capacity _____ acre-feet; total reservoir capacity _____ acre-feet, materials used in storage dam: _____

Period of year when water will be diverted to storage Nov. 15 (Month/Day) to June 15 (Month/Day) inclusive.

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

7. Time required for the completion of the works and application of the water to the proposed beneficial use is 5 years *(minimum 1 year — maximum 5 years).*

8. Description of proposed uses: N/A

a. If water is not for irrigation:

(1) Give the place of use of water: _____ ¼ of _____ ¼ of Section _____ Township _____ Range _____ B.M.

(2) Amount of power to be generated: _____ horsepower under _____ feet 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 _____

(5) If water is to be used for other purposes describe: _____

EXHIBIT "A"

IPC014953

SEE ATTACHED LAND LISTS

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

TWP	RANGE	SEC.	NEX				NWX				SWX				SEX				TOTALS
			NEX	NWX	SWX	SEX	NEX	NWX	SWX	SEX	NEX	NWX	SWX	SEX	NEX	NWX	SWX	SEX	
					see attached land lists														

Total number of acres to be irrigated 327,140

c. Describe any other water rights used for the same purposes as described above. None for the new land. The land presently irrigated is with Snake River and Salmon Falls Creek source.

8. a. Who owns the property at the point of diversion U.S. Bureau of Reclamation

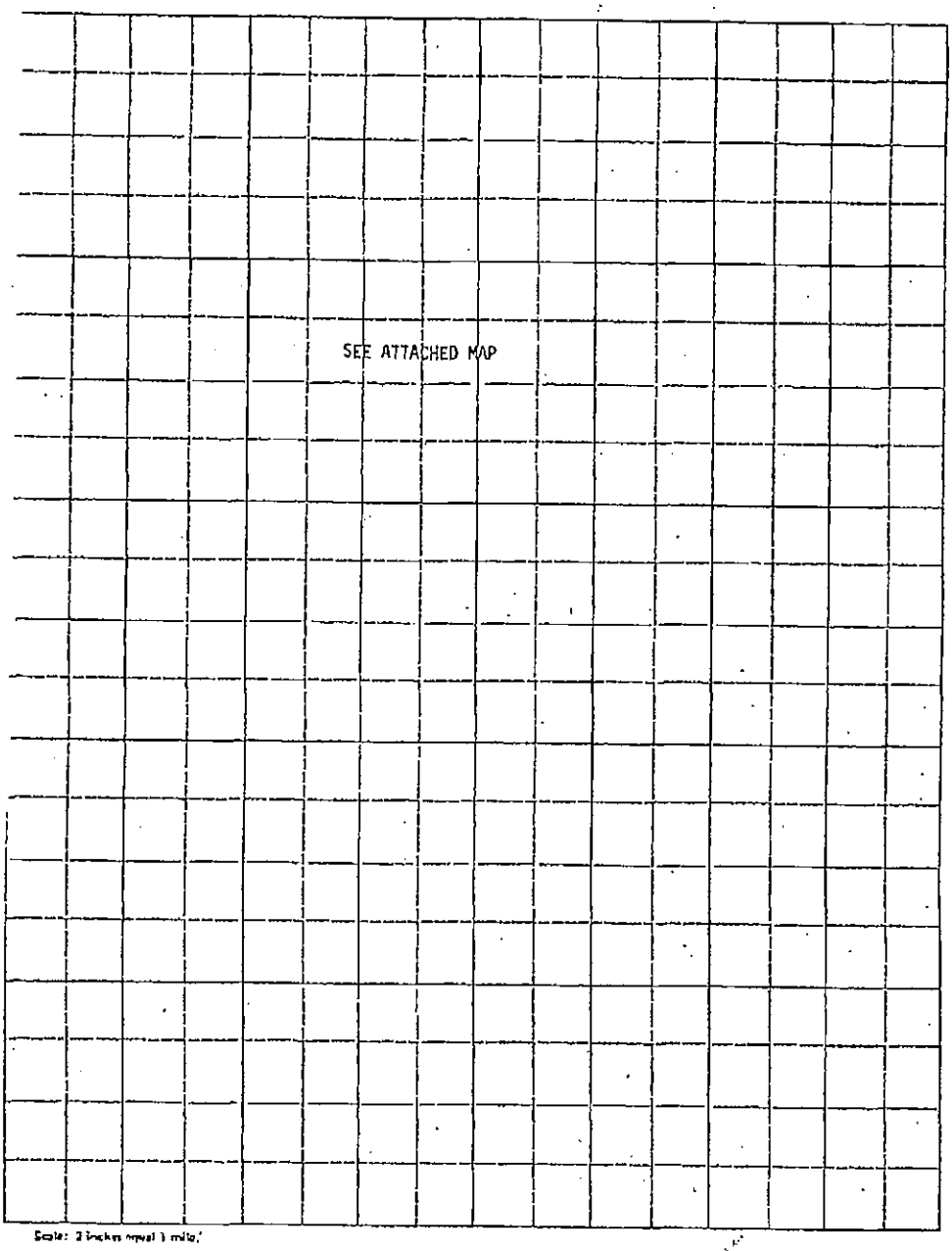
b. Who owns the land to be irrigated or place of use public land and private land

c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing

10. Remarks Off stream storage sites include Grindstone Butte site also known as Deadman Reservoir in Sec. 36, T7S, R10E, Sailor Creek site in Sec. 7, T8S, R10E, Rosevear Gulch Site in Sec. 8, 9, 15 & 16, T6S, R10E, and Blue Butte site in Sec. 32, T8S, R9E, and Sec. 5 & 6, T9S, R9E. (Estimated total storage capacity is approximately 2,198,000 acre feet).

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11. Map of proposed project: show clearly the proposed point of diversion, place of use, section nur township and range number.



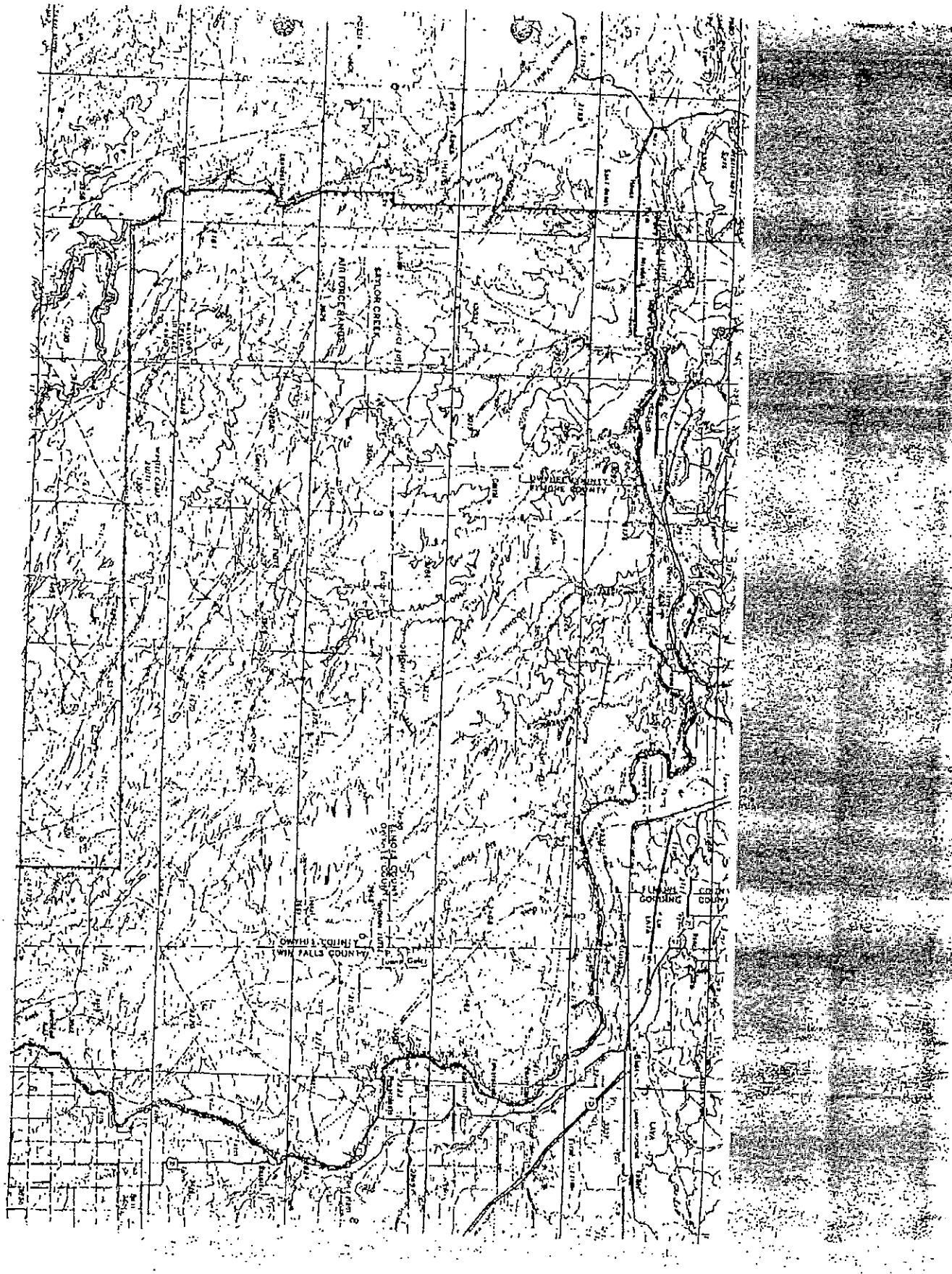
Scale: 2 inches equal 1 mile.

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.

Idaho Water Resource Board

By George R. Yost
(Applicant) Chairman

IPC014955



IPC014956

Orr Affidavit

Exhibit 20

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

Fourth Orr Affidavit
Exhibit 69:

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

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RECEIVED
NOV 4 1985
Department of Water Resources

October 30, 1985

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

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 15th day of May 2008

RE: Proposed Rules

Dear Ken:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

John A. Rosholt

JOHN A. ROSHOLT

JAR:kk

The foregoing is a true and certified copy of the document on file at the department of Water Resources
Signed this 15th day of May, 2008

Orr Affidavit

Exhibit 21

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

Third Orr Affidavit

EXHIBIT 41

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

NEWS RELEASE

FOR IMMEDIATE RELEASE JANUARY 29, 1986

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

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

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

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

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

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

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

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

E N D

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

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

B. Specific Comments:

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

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

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

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

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

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

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

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

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

> Irrigation use means the application of water to the production of irrigated agricultural crops or commercial nurseries.
>
> Power use means using water for hydroelectric or hydromechanical power.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IBID, at § 338.

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

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

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

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

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

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

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

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

This definition is not in accordance with applicable law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Orr Affidavit

Exhibit 22

Letter from John W. Keyes III, Assistant Regional Director, Bureau of Reclamation, to IDWR Director Ken Dunn (Jan. 27, 1986)

Fourth Orr Affidavit
Exhibit 74:

Letter from John W. Keyes III to Kenneth Dunn, Director, Idaho Department of Water Resources (Jan. 27, 1986)

United States Department of the Interior

BUREAU OF RECLAMATION
PACIFIC NORTHWEST REGION
FEDERAL BUILDING & U.S. COURTHOUSE
BOX 048-550 WEST FORT STREET
BOISE, IDAHO 83724

IN REPLY
REFER TO:
PN 760
832.

JAN 27 1986

RECEIVED
JAN 27 1986
Department of Water Resources

A. Kenneth Dunn, Director
Idaho Department of Water Resources
450 West State Street
Boise, Idaho 83720

Dear Ken:

Subject: Water Allocation Rules

We appreciate the opportunity to comment on the proposed rules and regulations. Even though we have disagreed with some of the interpretations of Idaho Code, we commend the Department in their effort to clarify and enlarge upon areas of interpretation and definition. Through our review of these rules we find differing opinions on certain points, even among our experts in the field. We would recommend anything that can be done to clarify, simplify, and condense these rules should be undertaken by the Department. We would further encourage regular review of the rules to evaluate their effectiveness as tools in the permitting process.

Our specific comments that follow deal with sections in the rules and regulations that from our viewpoint lack definition, clarity, proper interpretation, or have implied incorrect presumptions:

Rule 1,4,2,2--This rule considers all permits using trust water as having a significant impact on hydropower generation. The generality of this presumption is questionable since it may be impossible to prove hydrologically the basis of this premise.

Rule 1,4,2,3--This rule places DCMI uses in advance of irrigation rights which is inconsistent with Idaho Constitution stating the hierarchy of uses.

Rule 1,5,1,1--The rule extends trust water to include surface waters upstream of Milner. The Idaho Statute containing this information may be interpreted in two ways. However, since it is further stated that the minimum flow at Milner is zero, meaning no surface flow is required past Milner for any downstream uses, it would appear to be a misinterpretation to include surface water above Milner. The presumption that all ground water above Swan Falls is tributary to the Snake may be challenged on the issue of significance. The

The foregoing is a true and certified copy of the document on file at the department of Water Resources
Signed this 10th day of October 2008
Gary Spackman

demarcation of travel time between ground and surface water and the accurate description of travel time within the aquifer may well place ground-water effects beyond the scope of reasonableness. Permits for ground water must be evaluated on an individual basis prior to making the determination of being tributary in a reasonable timeframe or nontributary.

Rule 1,5,2--This rule covers diversions to storage and it would be our understanding that the same public interest would apply to diversions from storage.

Rule 3,2,1--The rule presumes, that all unappropriated water (surface and ground) are trust waters. A further presumption that all proposals to appropriate trust waters would constitute a significant reduction in water available for power production is without hydrologic basis as it affects hydrogeneration facilities upstream from Swan Falls.

Rule 4,4,2,2--This rule places additional burdens upon the applicant, which could very easily discourage the use of a resource now made available for upstream users.

Rule 5,1,1,1--This rule might easily undermine the security of senior right holders and would place the determination of "reasonableness" without any specific direction on the director. It is conceivable that an existing right holder could be forced to change from existing methods to new ones simply by a challenge from an applicant seeking a new permit. There are serious overtones on instability of rights which have historically been preserved by the Department.

Rule 5,3--The presumption of a significant reduction of water available for power production must be analyzed on a case-by-case basis before making such a statement. Each application should be analyzed for individual, measurable or estimated, effects before being determined to reduce water available for power production.

Rule 5,3,2,2--The implied mitigation may be in direct conflict with the statute promoting the continuation of the family farming practice. The value of water for hydrogeneration is generally higher than for irrigation uses so future agricultural uses may be severely curtailed.

Rule 5,3,7--It is our understanding that this rule would insure no reprocessing of permits for our Teton storage project.

Rule 5,3,9--This rule seems highly discriminatory since there are no hydrologic or geologic reasons for the arbitrary selection of the 4 mile limit. This should be analyzed in future studies.

Rule 6,2--This rule appears to direct its focus on hydro facilities downstream of Swan Falls. To be consistent with other rules it should be limited to the Swan Falls reaches.

It is hoped that these comments will be of help to you. If we can be of assistance to the Department as they proceed with this effort please advise.

Sincerely yours,

John W. Keys, III

Assistant
Regional Director

The foregoing is a true and certified copy of the document on file at the department of Water Resources.

Signed this 10th day of October, 2008

Doug Parkman

Orr Affidavit

Exhibit 23

Transcript of IDWR public hearing on proposed rules and regulations for water appropriation (Jan. 14, 1986)

Fourth Orr Affidavit
Exhibit 55:

Transcript of the Idaho Department of Water Resource's Public Hearings on Proposed Rules and Regulations for Water Appropriation January 14, 1986, 2:20 p.m.

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

- x
RE: WATER ALLOCATION RULES AND REGULATIONS HEARINGS. :
- x

TRANSCRIPT OF PROCEEDINGS REQUESTED BY ATTORNEY GENERAL LAWRENCE WASDEN OF AUDIOTAPES HELD AND MAINTAINED BY THE DEPARTMENT OF WATER RESOURCES

January 14, 1986, 2:20 p.m.

BONNEVILLE COUNTY COURTHOUSE
IDAHO FALLS, IDAHO

Transcribed by
Frances J. Morris
CSR No. 696

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APPEARANCES

BLAIR GROVER
LEO AVERY
DON CHINTEN
ELDRED LEE

******

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

----------x
RE: WATER ALLOCATION RULES AND REGULATIONS HEARINGS.
----------x

TRANSCRIPT OF PROCEEDINGS REQUESTED BY ATTORNEY GENERAL LAWRENCE WASDEN OF AUDIOTAPES HELD AND MAINTAINEO BY THE DEPARTMENT OF WATER RESOURCES

January 14, 1986, 2:20 p.m.

BONNEVILLE COUNTY COURTHOUSE
IDAHO FALLS, IDAHO

Transcribed by
Frances J. Morris
CSR No. 696

APPEARANCES

BLAIR GROVER
LEO AVERY
DON CHINTEN
ELDRED LEE

******

IDAHO FALLS, IDAHO
January 14, 1986, 2:20 p.m.

THE HEARING OFFICER: (Tape begins in mid sentence) is to provide an opportunity for formal testimony or statements, either oral or written form, relative to the department's proposed rules and regulations for allocation of water within the state of Idaho. These are the first rules and regulations to be adopted in the history of this state regarding the procedures for the appropriation of water in the state.

This hearing is required by the provisions of the Administrative Procedures Act, Title 67, Chapter 52, Idaho Code, and will be conducted pursuant to the department's rules and regulations for practice and procedure.

Cross examination or questioning of witnesses will not be permitted. All those who wish to testify will be allowed to do so before anyone will have an opportunity to be heard a second time. The rules will implement provisions of Section 42-203, Idaho Code, which were amended during the last session of the Idaho legislature. Authority for adoption of the rules is provided by

Section 42-1805(8), Idaho Code.

Briefly what the department has done regarding these rules is that, in May of 1985, we sought input from water users on suggestions as to what should be contained in the rules and regulations by holding several meetings throughout the state. Then in October of 1985, we conducted some public information meetings with draft copies of rules and regulations, again, seeking comments to what we had at that time proposed. We received several comments, and the rules that are before the hearing today reflect some 32 significant changes that were made in that initial draft.

This hearing has been advertised on December 5th, 12th, and 19th in the Post Register, the Idaho Statesman, the Times News, and the Coeur d'Alene Press. Notice was provided to all those people who requested notice of rule adopting, and I've mailed over 6,000 copies of the rules to various people who are on our mailing list.

After this hearing and the other hearings throughout the state, the record will remain open until January 27th of 1986 for any written information that you may wish to submit.

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The rules and regulations are available here today and also available in any of our offices or in the format you see here, newspaper-type format, and will be a part of the record for today's hearing.

A general procedure for adopting is to hold this hearing under the Administrative Procedures Act which is required by law. Then, based on the testimony I receive here and at other meetings, we will revise the rules as appropriate and then adopt final rules. I expect to have that completed by February 10th of this year. Then I'll file the rules in the central office of the department and also submit copies to the law library who will then forward them to the legislature for the legislative review and hopefully approval during this session of the legislature.

It's important, I think, to get these adopted during this session of the legislature so we are not faced with another year of not having rules and regulations, especially given the settlement to the Swan Falls agreement and the public interest criteria that all water rights have to now come under. I think it's important that the rules and regulations be in place.

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Today is January I4, 1986. The time is 2:20. This hearing is being conducted in the courthouse in the city of Idaho Falls.

There is a roster that has been sent around, and we have asked you to sign that for two purposes: One, if there are significant changes that we make in these rules when they are reprinted, if your name is on the list you will be certain of receiving a copy of those; and, two, if you wish to make formal testimony today, I need to have some indication on the register.

Reviewing the sign-up sheet, I don't see anybody who specifically said they wanted to testify. Some of you may want to and just did not put a check, or I can't find it. So absent that, is there anybody here that does want to provide some formal testimony today?

Mr. Grover, do you want to come forward and be the initial person? And if you would state your name when you begin your testimony that will help my secretary sort out the comments.

MR. GROVER: My name is Blair Grover. I am an attorney from Rigby, Idaho, and I am appearing today on behalf of the Protective Union which is an organization of canal companies located in the

Page 7

Upper Valley between Blackfoot and Rexburg.

I suspect that most of what I say you have heard before, but I think it probably should be a matter of record here. Obviously, there has been a lot of discussion about whether or not the rules should apply; particularly, the public interest criteria should apply above Milner. And The Protective Union, I think, wants to be on record of opposing application of these rules above Milner.

I am aware that the department's view of the legislation is that it cannot fill that kind of a request believing that the legislation as passed requires the rules to apply to the entire stretch of the river. I guess my position would be on behalf of The Protective Union, it doesn't say that, doesn't say that it has to apply above Milner. On the other hand, it doesn't say that it does not apply above Milner.

It's my understanding that several of Eastern Idaho legislators believed, when the legislation was passed, that they were not passing it for application above Milner. And perhaps legislative effort should be made to clarify the legislation so that it does not apply above

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Milner. But we want to be on record, I think, of opposing the application of, particularly the public interest criteria and the trust doctrine water, above Milner.

One of the reasons for that, in talking with people who have knowledge of water rights, applying that doctrine above Milner really creates some problems that I don't think were anticipated nor intended by the legislation. Even with flood waters, we get into difficult problems if we apply trust doctrine above Milner, because technically, the way water has been delivered and flood waters have been treated, we are going to be treating -- procedure that's been followed will be dealing technically with what, I guess, are trust waters and will not be able to continue even with the use of flood waters the way we have in the past. And I don't think that the legislation was intended to upset the procedures that have been followed in the practice that's been followed here.

A second thing that bothers me with regard to the rules is that Rule 5,3 where we talk about the department considering many, many . . . factors and then determining, I think the language is, "the greater public interest" in grant or

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denial of an application. And I am aware that the department's view is that that's required by the language in the Trout-Co case or the holding in the Trout-Co case. I guess I disagree that the court intended that kind of a result from their holding in the Trout-Co case. We have, as everyone knows, well established in this state a doctrine of first in time, first in right established not only by legislation, I think, and case law, but also by constitutional provision. And I don't think that the supreme court, even if they had intended to interfere with that doctrine could lawfully do so. I don't think that they interfere with the first in time, first in right doctrine. And if we adopt a greater public interest criteria, the kind of thing where the department's going to weigh three or four applications instead of taking the one that was first filed and consider it and say if that meets all the criteria the water right is granted, rather than doing that, if it considers three or four applications on file and maybe deciding the third one is in the greater public interest and therefore that's the one that receives the water right, I think that's a significant change from

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the practice and procedure that we have had in the past and do not believe that that is required by the decision in the Trout-Co case.

THE HEARING OFFICER: If I might ask, Mr. Grover, on the trust water above Milner, are you talking only of surface water?

MR. GROVER: Yes. Well, I guess I am talking about all the water, but primarily I think we are talking about surface water.

THE HEARING OFFICER: I was wondering how you would handle the groundwater where it comes in below Milner, and it does create a problem.

MR. GROVER: We'd like to see it apply across the board, but we would certainly be happier with just surface water.

THE HEARING OFFICER: Thank you very much. Anybody else? Yes.

MR. AVERY: I am Leo Avery, water manager for Rudy Canal, Rigby Canal, Harrison Canal, Clark Edwards Canal. I will talk on behalf of theirs. I'm wishing for more of a clarification of whether flood waters is what -- or relationship flood waters has with trust waters. Now, in the past, when we have been having flood waters, we use those flood waters, we could use all we could take

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care of in the canal system. Now, then, if it was changed to the point where flood waters was -- instead of using flood waters over any decreed water we have, if there is any change in that, then we would be using stored water at the time when the Bureau of Reclamation or the Water Resource Board was advertising on the radio there is flooding down around Shelley, Blackfoot, and so forth, use all the water you can.

So this is why we would like to have a clarification on that because flood waters is very, very important to the canal systems, not only the ones that I am talking and mention I was managing, but all canal companies, due to the fact we need these flood waters to help string along and make it so that they are decreed water and stored water will last the full season. In other words, the longer that the flood waters can last for us, the more chances we have got of going through our growing seasons in the Upper Snake River Valley without running out of stored water or decreed water.

And so I'd like to make my formal protest or clarification of what flood waters is in relation to the trust waters. And if it was

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going to change anything that we have been doing in the past 30 or 40 years, it would be detrimental to our canal systems.

THE HEARING OFFICER: If I might summarize, Mr. Avery, what you would like to see is the unrestricted use of water while the spills are going past Milner --

MR. AVERY: Yes.

THE HEARING OFFICER: -- which would mean water that would be in excess of --

MR. AVERY: The same as we have had in the past. Now, then, I kind of got the idea that, if this particular thing went through, then even though there was water going and spilling over Milner, if we were using over our decreed water, we would be charged with stored water for that. And that would be what would be really damaging in killing canal systems.

THE HEARING OFFICER: Thank you.

Someone else wish to testify? Don Chinten?

MR. CHINTEN: I really just had a comment to make, Ken. My name, however, is Don Chinten. I am a water master for Water District No. 31 and 32C.

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I am somewhat embarrassed today because I got down here without the piece of paper I had my marks on and without my glasses. So I can't get my glasses out to see what number I want to refer to or what page.

THE HEARING OFFICER: I have a pair you can borrow.

MR. CHINTEN: However, I think I can get my point across here, or hopefully I can.

I noticed in there that somewhere in there that you give a frost date. And along with a frost date, you restrict the irrigation time on the use of water. And this concerns me because, with my experience in the field of distributing water in the areas in which I distribute it, this is absolutely just backwards.

Now, it looks to me like that you have got Medicine Lodge and the Beaver Creek -- I can't tell exactly on your map because it don't show counties -- but you restrict them to usage starting May 1 instead of April 1. And it looks like the justification is frost date. But the people that use the water first on all these tributaries are the higher elevation peoples for a number of reasons. Usually it's because of the

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gravel, the condition of the soil or something, and they are never caught up. They are always behind. And a lot of these people use this water even April 15th in this area where you're trying to limit this to May 1. And that's a concern to me.

THE HEARING OFFICER: In the use of that water, do you distribute that water on a priority basis that early, or do they just take it and use it?

MR. CHINTEN: Both. They take it and use it, but I distribute it always on May 1, unless it's a year that's like two years ago. But the daily record books are kept May 1, and there is a high consumptive use on these streams of Beaver and Medicine Lodge, Camas, even before the Mud Lake area which is at a later frost date. And they also use it later into the year.

THE HEARING OFFICER: But you don't distribute it on a priority basis after -- before May 1 or after November?

MR. CHINTEN: Not normally. I have been called on an April on a short year.

THE HEARING OFFICER: Sure, when there isn't sufficient water need --

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MR. CHINTEN: But I distribute it, yeah, on May 1. Very definitely. The daily record books will bear that out --

THE HEARING OFFICER: Sure.

MR. CHINTEN: -- year after year. So that's a concern of mine.

THE HEARING OFFICER: Our intent is not to say that nobody can use the water. We were putting that in for distribution purposes. I think it's potentially saying that that's when the system comes online in most years in terms of the water master.

MR. CHINTEN: Well, that's not true in this area. I think, also, in relationship, another thing that concerned me a little bit -- I wish I could just refer to it; I apologize for that -- but it says something in there that it could be changed at the director's discretion or like wordage, does it not?

THE HEARING OFFICER: Yes, yes.

MR. CHINTEN: Okay. But that don't really say too much to me. I mean, you may want to be conservative and Norm might want to be liberal, you know, if one or the other, if he was the director.

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THE HEARING OFFICER: Well, that's right. And that's one of the reasons for adopting these is, up until now, it's been the total discretion of the director to set those. But, yeah, we will look at that and see if we can get --

MR. CHINTEN: I'd like to ask that it be moved up to May 1 as practice has been.

THE HEARING OFFICER: Sure. I would appreciate, when you get home and find your glasses, if you would jot something down so that we make sure we have all the comments that you wanted to bring in case you've forgotten any. I appreciate that. Thank you.

MR. CHINTEN: Thank you.

THE HEARING OFFICER: Mr. Lee?

MR. LEE: My name is Eldred Lee. I am the secretary of the Great Feeder. I just have a couple of comments. I agree with those that have been made. In my memory -- and I can't verify this -- it appears to me that I've been at two meetings in which I specifically asked the question of whether the Swan Falls agreement would affect the flow above Milner. And I was assured that under no circumstances would the Swan Falls agreement affect any of the diversion of water

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under any circumstances above Milner.
If I read the regulations correct, that the regulations applied to all waters in the Snake River rather than just from Milner down. Is that not correct?
THE HEARING OFFICER: Correct.
MR. LEE: Then just a comment. The water users that I have talked to feel as if they have been deceived by action -- and I don't know who is responsible. If it is the department, then I think we should be notified of that; and if it's the governor's office and those who drew those bills, then I think that should be clarified so that a person would know what appropriate action to take. There is really -- you know, after being promised one thing and here we come and we find that all of our water rights may be in jeopardy -- or some of them, at least -- or that new development may be minimized because of the rules and regulations and the laws that are now made, it appears to us that it's pure deception. And I think, in my opinion, that that should be corrected and clarified. And I'd like to see the department propose legislation that would clarify that principle. Because if not, then there is

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going to be a lot of fault-finding, unrest, dissatisfaction with the whole procedure that we are now attempting to set up and clarify.
I don't think you realize how the farmers feel, how the people feel, about that very principle. Now, I don't know whose fault that is, and I'm not laying fault to anybody. But in the procedures that have been set up, it has come to pass.
Another thing that I just jotted down, in reading those rules and regulations -- and you would correct me if I have read them wrong -- there is no opportunity or procedure for appeal from your decision.
THE HEARING OFFICER: You are wrong.
MR. LEE: I am wrong?
THE HEARING OFFICER: You are wrong.
MR. LEE: Okay. Then I missed it.
THE HEARING OFFICER: Without question, any decision of the director is appealable.
MR. LEE: But it has to be done by the courts and not through -- where is the procedure in here for appeal?
THE HEARING OFFICER: The statutes provide that, if there has not -- if you have not had a

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hearing, and I make a decision, you're entitled to an administrative hearing. If there has been an administrative hearing and you're not satisfied with the results of that, then you can appeal it to the courts --
MR. LEE: Now --
THE HEARING OFFICER: -- in every decision.
MR. LEE: Since all of the authority is given to you as the director, then, after the administrative hearing, then who makes the decision?
THE HEARING OFFICER: After the administrative hearing, the appeal is to the district court. And that's the way it has been for a hundred years.
MR. LEE: Well, I didn't read --
THE HEARING OFFICER: Please don't change that.
MR. LEE: But that's a court procedure.
THE HEARING OFFICER: Yes.
MR. LEE: That is the next --
THE HEARING OFFICER: Oh, yes.
MR. LEE: Well, I realize that you can always go to court, but I felt somewhere that -- and I'm not faulting you or anything, but one

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person should not have the responsibility of determining who should have a water right. I mean, there should be other procedures available to the common layperson. Sometimes it isn't worth it to go to court.
THE HEARING OFFICER: Can I ask this? Have you been satisfied in the past the way it's worked?
MR. LEE: Well, I haven't had anything to do with this since -- so I can't say whether I am satisfied or not. But that's the thought that came to me that everybody ought to have an opportunity to appeal any decision that is made by one individual --
THE HEARING OFFICER: And that's --
MR. LEE: -- whether it's you or anybody.
THE HEARING OFFICER: The reason I asked that is because the procedures that we would follow after these rules are the procedures that we followed since the Department of Water Resources has been administering water law. And that is, if you're not satisfied with the decision, there is an administrative hearing held by the director. And if you're not satisfied with that, you can go to court. And that system has

served us for nearly a hundred years, and I would be reluctant to change it right now.

MR. LEE: If it's worked, that's the thing I didn't get out of this. I couldn't read anywhere where there is an opportunity for appeal. As far as I am concerned, it should be clarified. I mean, it would be perfectly all right to write those procedures in here so that everybody knew that they had an opportunity.

THE HEARING OFFICER: Sure. We will do that. I just wanted to clarify where we were going.

MR. LEE: No, I'm not -- that's all that I have. Thank you.

THE HEARING OFFICER: Thank you.

Is there anyone else who wishes to testify today? Last chance.

Well, hearing no other people coming forward to provide testimony, I'll again remind you that we will hold hearings in Twin Falls tomorrow and in Boise on January 16th and an additional hearing here in Idaho Falls tonight at 7:00 p.m. Beyond that, the hearing record will be kept open until January 27th for anyone wishing to submit written testimony. And you can submit that

to any office of the Department of Water Resources: The one here in Idaho Falls, Twin Falls, Coeur d'Alene, or Boise. And I urge you, if you do have comments, do that.

There are no further people wishing to testify. This hearing is closed.

(End of proceeding.)

-o0o-

REPORTER'S CERTIFICATE

I, Frances J. Morris, Court Reporter, a Notary Public, do hereby certify:

That I am the reporter who transcribed the proceedings in the form of digital recording in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings to the extent they were audible and intelligible in the above and foregoing cause, which was heard in various cities at Idaho Falls, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of _____ 2008.

Frances J. Morris, Court Reporter
CSR No. 696

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REPORTER'S CERTIFICATE

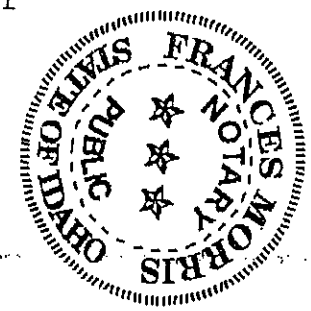
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That I am the reporter who transcribed the proceedings in the form of digital recording in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings to the extent they were audible and intelligible in the above and foregoing cause, which was heard in various cities at Idaho Falls, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of October 2008.

Frances J. Morris, Court Reporter
CSR No. 696



Orr Affidavit

Exhibit 24

Transcript of IDWR public hearing on proposed rules and regulations for water appropriation (Jan. 16, 1986)

Fourth Orr Affidavit
Exhibit 58:

Transcript of the Idaho Department of Water Resource's Public Hearings on Proposed Rules and Regulations for Water Appropriation January 16, 1986, 2:17 p.m.

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

- x
:
RE: WATER ALLOCATION RULES AND :
REGULATIONS HEARINGS. :
:
:
- x

TRANSCRIPT OF PROCEEDINGS REQUESTED BY

ATTORNEY GENERAL LAWRENCE WASDEN OF AUDIOTAPES HELD AND

MAINTAINED BY THE DEPARTMENT OF WATER RESOURCES

January 16, 1986, 2:17 p.m.

before NORMAN YOUNG, HEARING OFFICER

LEN B. JORDAN BUILDING
BOISE, IDAHO

Transcribed by
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When excellence is an obligation

ORIGINAL

SENATOR TOM LOWRY(phonetic)
SENATOR MIKE CRAPO

* * * * * *

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

----------x

RE: WATER ALLOCATION RULES AND REGULATIONS HEARINGS.

----------x

TRANSCRIPT OF PROCEEDINGS REQUESTED BY ATTORNEY GENERAL LAWRENCE WASDEN OF AUDIOTAPES HELD AND MAINTAINED BY THE DEPARTMENT OF WATER RESOURCES

January 16, 1986, 2:17 p.m.

before NORMAN YOUNG, HEARING OFFICER

LEN B. JORDAN BUILDING
BOISE, IDAHO

Transcribed by
Frances J. Morris
CSR No. 696

SENATOR TOM LOWRY(phonetic)
SENATOR MIKE CRAPO

* * * * * *

BOISE, IDAHO
January 16, 1986, 2:17 p.m.

THE HEARING OFFICER: My name is Norman Young from the state office of the Department of Water Resources in Boise. I will serve as the hearing officer in this matter.

The purpose of this hearing is to provide an opportunity for formal testimony for statements, either orally or in written form, concerning the department's proposed rules and regulations for water allocation in the state of Idaho.

This hearing is required by the provisions of Administrative Procedures Act, Title 67, Chapter 52, Idaho Code and will be conducted pursuant to the department's rules of practice and procedure.

Cross examination or questioning of the witness, other than clarifying questions by the hearing officer, will not be allowed. All who wish to testify will be allowed to do so before anyone will be heard a second time.

The rules implement the provisions of Section 42-203, Idaho Code, which were amended

during the last legislative session. Authority for adoption of these rules and regulations is provided by Section 42-1805(8), Idaho Code.

I have given a brief background prior to going on record as to the department's actions and holding public meetings concerning draft rules. The proposed rules were prepared and distributed in December with notice of this hearing given on December 5th, 12th, and 19th in the Post Register, the Idaho Statesman, the Times News, and the Coeur d'Alene Press. Notice was provided to all those asking to be provided with notice of rule-making, and over 6,000 copies of the rules and regulations were mailed in The Currents tabloid. I have indicated that this record will remain open for written comment through January 27, 1986. A copy of the rules as proposed in The Current's tabloid will be made a part of the hearing record.

After the last date for written comment, the rules will be revised as appropriate. Rules adopted will be -- adoption target date being February 10, 1986. When those rules are filed in the central office of the department and with the law library and transmitted to the

legislature, there will be an opportunity for legislative review.

Today is January 16, 1986. The time is 2:17 p.m. This hearing is being conducted in the Len B. Jordan building in Boise, Idaho.

The roster of attendance has been circulated, and no one has indicated a desire to testify or present any testimony.

Is there anyone who has entered the room that would like to make a statement for the record to give to the director about this adoption?

Senator Tom Lowry(phonetic)?

SENATOR LOWRY: I would like to ask a question for my information.

THE HEARING OFFICER: That would be fine. Won't you come to the table and -- Senator, while I'm willing to answer questions, this is really for expository statement. So I may be a little brief with my answer. Once we are off the record, we will just discuss it fully.

SENATOR LOWRY: Just for question, my question to my answer is, how many people have participated in the hearing process so far?

THE HEARING OFFICER: I'd have to add that

up for you, but it's been like six citizens at Moscow; I believe we had probably 30 to 35 total in Idaho Falls; maybe 25 to 30 total in Twin Falls last night; and then I haven't counted today. That's total attendance. I believe we bave had a total of nine people make statements at this point. Ten counting you. Some of these statements have been extremely detailed and very helpful.

Senator Crapo?

SENATOR CRAPO: Yes, I'd like to make a brief statement, if I could.

THE HEARING OFFICER: We'd appreciate that.

SENATOR CRAPO: Should I sit here and speak into this microphone?

THE HEARING OFFICER: Yes, all of these are live. So...

SENATOR CRAPO: My name is Mike Crapo. I am senator from District 32A from Idaho Falls, Idaho. And I realize that the senate will have an opportunity to go into more detail on this as the rules are submitted to the legislature, but I wanted to give some input at this point just in generalities for the department to consider in establishing the proposed rules with some concerns

that I have.

I apologize that I don't have specifics -- I can't identify specific sections on some of my comments, but I am going to talk to topics that I think they should concern themselves with.

There are three things that I'd like to discuss. The first is, as I understand the proposed rules -- and please correct me if I have a misunderstanding here -- they establish a presumption that all consumptive uses are going to have a significant impact on trust waters. And I may not have stated that accurately, but I believe there is a presumption in the regulations.

As a senator who was very involved last year in the negotiations of this settlement and of the legislation which these rules are implementing, I do not believe that it was at all the intention of the legislators who supported the legislation that there be any kind of a presumption of a significant impact. In fact, I think if it had been assumed there would be a significant impact, we wouldn't have put that into the legislation.

I believe and I know very strongly,

from the perspective of the people who were coming at it from my point of view last year, that we perceived the requirement of proof of a significant impact to be a very significant safeguard from the point of view of water users who wanted to develop the water such as cities, farmers, and people from industry. And it appears to us that these rules essentially take away that first safeguard which we felt was very significant. I don't believe that it can be presumed that every use, when coupled with all other uses, therefore constitutes a significant impact. I think that particularly is true above Milner given the fact that zero flow at Milner was very heavily discussed and was the basis upon which the legislation was passed. And certainly with regard to surface flow, there are no trust waters above Milner, as my understanding of it goes.

And with regard to groundwater, the proof of a significant impact, it would seem to me, would be a very significant factor.

So the first comment that I would like to make is that I am very concerned about the presumption relating to significant impacts.

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The second comment relates to --
THE HEARING OFFICER: Senator, could I ask a clarifying question on that?
SENATOR CRAPO: Yes, you may.
THE HEARING OFFICER: Do you recall from any of the discussions, was there any kind of definition of "significant impact" that was presented in any of the discussions?
SENATOR CRAPO: I was going to go back through and check the minutes from the senate hearings, because right now you're asking for my recollection from a year ago, and I do have a recollection, but I'm not sure if it's accurate. We did tape those hearings, and I have not had an opportunity to go back and see, first, whether the quality of tapes is good, and, secondly, whether the tapes reflect my understanding. But my understanding is that on the senate side we specifically asked about "significant impact," and we didn't get a very clear definition.
So to answer your question, I guess I would say, first, no, I do not think that the senate hearings established some specific criteria as to how to define what a significant impact was. But I do specifically recall questions being asked

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about it, and I recall it being made very clear, with regard to representatives from the department and from Idaho Power and from the other negotiators, that a process must be gone through whereby geologically or hydrologically it was established somehow that there was a significant impact before the necessity for going to the remainder of the four criteria was required. And I guess perhaps what we may need to do as a legislature is to define "significant impact" even further. But I don't think that it was at all the intent of the legislature that it just be defined away by a presumption.
THE HEARING OFFICER: Thank you.
SENATOR CRAPO: The second aspect of my concern relates to figure 1 which shows in the darked-out areas the trust water flows, as I understand the regulations. And it talks about trust water flows in the Snake River upstream from Swan Falls.
I guess what I am saying is, I understand figure 1 to be stating that all of the groundwater and surface water in the darked-out area would be trust water flows. My first concern about that is that, as far as surface flows, I

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think that is directly contrary to the legislation. Because it was the understanding of everyone last year that the flow at Milner was zero, and there was no trust water in the flow above Milner. And I don't even think that Idaho Power would take the position that above Milner they are entitled to any trust water in the flow of the river.
My second concern is that, as to groundwater, although an argument could be made that that water above Milner in the groundwater is theoretically connected to trust water, or if some hydrologic connection could be established to the river below Milner from a groundwater use above Milner, then perhaps you could get into the area of getting into the remaining criteria. But I am concerned that we just have a map here that seems to blanketly include all of these trust waters or all of these waters above Milner. And I think that needs to be addressed very carefully. And at least it needs to be made explicitly clear that surface flow above Milner is not trust water.
My third concern is that last year another of the safeguards that we put into the legislation was that the burden of proof was to be

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placed on the protestant. And I realize that these regulations do not specifically change that in that they do recognize that the burden of proof is on the protestant. However -- and this is where I'm not at this point prepared to go through all these specific sections, but I think at a later date I could or at a subsequent time I could note this -- but it seems to me that there are a number of places in the regulations where additional burdens are placed upon the applicant to provide information which is not now necessarily required to obtain a permit and which was not contemplated by the statute, which, in effect, places an additional burden on the applicant which was not there before, and, which, again, in effect, has the result of making the applicant carry a burden of proof that pertains to these trust waters which was not intended by the legislature.
And, again, I apologize for not having the specific sections here. I got busy today. I was going to get those together because I do have some notes of my own. But I just -- I had to rush over here, and I was late. But, again, I would just encourage the department, as they go through

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the regulations, to be sure that the applicant does not have to prove anything more to obtain a water permit now than the applicant had to prove before, other than the significant impact as a first step. And, then, if the significant impact problem is reached, then the four remaining criteria, but that the burden of proof on a challenge based on those criteria still remains with the protestant.

THE HEARING OFFICER: Okay. Thank you. I will try and formulate a question relative to the burden of proof.

SENATOR CRAPO: Yes.

THE HEARING OFFICER: Do you recall, as the legislation was debated, how an application was to be treated if it was not protested? There is where the department is having a bit of trouble interpreting the statute. Was it simply to be assumed it was in the public interest, or was the director to consider those factors?

SENATOR CRAPO: It was my understanding that, if there was no protest, then the department was still to make the determination as to whether there was a significant impact. But it was understood pretty much in all of the discussions

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we had, at least from my perspective, that, unless there was some pretty solid evidence, the department was probably not going to find a significant impact. In other words, unless there was something pretty solid indicating to the department that they had a concern there that they needed to face and no one protested it, that the application would proceed. If the department, however, determined from its own understanding of the aquifer that there would be a significant impact, then the department on its own was to evaluate the criteria and to make a determination.

So I guess the answer is, my understanding is that a protest is not necessary to trigger the evaluation of significant impact and the criteria. But by the same token that, absent a protest, the department was to be quite flexible in not placing all kinds of burdens and roadblocks in the way of an applicant. It was the specific intent of this legislation that trust water would be liberally available, in my opinion, and that that the department and legislation was not intended to place roadblocks in the way of development of that water. Rather it was intended to protect Idaho Power's rights to utilize this

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trust water for power purposes subject to the understanding that, any application that did not cause a significant impact, or, that, if it did cause a significant impact, was still in the public interest would be permitted to proceed.

THE HEARING OFFICER: Okay. Thank you.

SENATOR CRAPO: Thank you.

THE HEARING OFFICER: Appreciate the testimony.

Senator?

SENATOR LOWRY: Shall I call you Mr. Hearing Officer or Mr. Young?

THE HEARING OFFICER: Either one. Both of them sound real good.

SENATOR LOWRY: Mr. Young and Hearing Officer Person, I'd like to thank for the ability to be able to come today. I am also like Senator Crapo. I have a lot of notes scribbled down and nothing in final form. And I also, too, have the ability to have legislative overview in the Senate Resource and Environment Committee, and so I will hold my comments to a basic couple of points that I saw. And hopefully, if I still see those kinds of problems later in the rules and regulations, I will bring up more specific points on the

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different parts of the rules and regulation.

I agree with Senator Crapo on most of these points. Another thing that I think he failed to stress was that, in the rules that are being promulgated right now, I think he believes -- and I do, too -- that the assumption is that any consumptive beneficial use of water is not of a benefit to the state. And I would tend to disagree with that, that any beneficial use of water does bring business and jobs and everything of that nature to the state of Idaho. And there should be more of an emphasis placed upon that beneficial use.

The other that I saw that I had some problems with or a great difficulty with is, usually there was no recourse or chance for appeal of a director's decision once it's been made other than going to the courts. If the director asked for a lot of expensive hydrologic information or other information that's very expensive to get and then the applicant is turned down, then the only recourse that person has is to go to the courts and start that process all over which makes it twice as expensive for the applicant to do again. And so I was wondering if there was a possibility

of being able to put an appeal process, either to the water resource board or to some other person also, to make that claim without having to go through that expensive process of going through the court system to make an appeal for that process.

It might not be possible. It might take a judge to be able to do that. But I feel that, if a person spends enough money in trying to get his permit through and spends a lot of money on studies and information he should have some outlet of appeal if there is decision -- if the person thinks it's just an arbitrary decision and not a decision made on hard facts and information.

With that, again, I will say I will have more information when the senate will have a chance to overview the rules and regulations at another time.

THE HEARING OFFICER: Thank you, Senator

SENATOR LOWRY: Thank you.

THE HEARING OFFICER: Appreciate your comments.

Anyone else like to make a statement for the record?

Okay. Apparently no one else desires

to do so. So we would simply note that the hearing will be held again this evening at 7 o'clock in this room. The hearing record will stay open for written input, and I would encourage the senators, if possible, to give that information to us so we could incorporate that into the rules as they are promulgated so we don't have to make another round if you find it necessary to reverse the director on the rules.

So the record will stay open until the 27th, and then these comments will be used to revise and adopt the rules.

So thank you for coming, and we will be happy to stay here and answer any questions that you do have.

(End of proceeding.)

-o0o-

REPORTER'S CERTIFICATE

I, Frances J. Morris, Court Reporter, a Notary Public, do hereby certify:

That I am the reporter who transcribed the proceedings in the form of digital recording in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings to the extent they were audible and intelligible in the above and foregoing cause, which was heard in various cities at Boise, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of_____ 2008.

Frances J. Morris, Court Reporter
CSR No. 696

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REPORTER'S CERTIFICATE

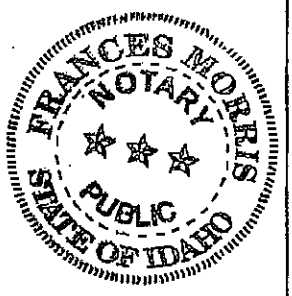
I, Frances J. Morris, Court Reporter, a Notary Public, do hereby certify:

That I am the reporter who transcribed the proceedings in the form of digital recording in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings to the extent they were audible and intelligible in the above and foregoing cause, which was heard in various cities at Boise, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of October 2008.

Frances J. Morris, Court Reporter
CSR No. 696



Orr Affidavit

Exhibit 25

1986 Idaho Senate Bill 1358

ORR AFFIDAVIT EXHIBIT 60

1986 Senate Bill 1358 & SOP

EXHIBIT 60

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature — Second Regular Session — 1986

IN THE SENATE

SENATE BILL NO. 1358

BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT

RELATING TO TRUST WATERS ON THE SNAKE RIVER ESTABLISHED PURSUANT TO AGREEMENT; AMENDING SECTION 42-203B, IDAHO CODE, TO PROVIDE THAT A USER OF WATER FOR POWER PURPOSES SUBORDINATED BY AN AGREEMENT OR BY A PERMIT ISSUED AFTER JULY 1, 1985, OR BY A LICENSE ISSUED AFTER JULY 1, 1985, MAY CONTINUE USING THE WATER PENDING APPROVAL OF DEPLETIONARY FUTURE BENEFICIAL USES, TO CLARIFY APPLICATION TO CERTAIN WATERS OF THE SNAKE RIVER OR A SURFACE OR GROUND WATER TRIBUTARY TO THE SNAKE RIVER UPSTREAM FROM MILNER DAM, TO PROVIDE APPLICATION TO CERTAIN WATERS OF THE SNAKE RIVER OR A SURFACE OR GROUND WATER TRIBUTARY TO THE SNAKE RIVER DOWNSTREAM FROM MILNER DAM REGARDING THE DETERMINATION AND ADMINISTRATION OF RIGHTS TO THE USE OF CERTAIN WATERS OF THE SNAKE RIVER, AND TO PROVIDE REFERENCES TO IDAHO CODE CITATIONS; AMENDING SECTION 42-203C, IDAHO CODE, TO PROVIDE IF AN APPLICANT INTENDS TO APPROPRIATE WATER WHICH IS HELD IN TRUST BY THE STATE OF IDAHO PURSUANT TO CERTAIN LAW, THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL CONSIDER WHETHER THE PROPOSED USE INDIVIDUALLY OR CUMULATIVELY WITH OTHER EXISTING USES OR USES REASONABLY LIKELY TO EXIST WITHIN TWELVE MONTHS OF THE PROPOSED USE WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF TRUST WATER AVAILABLE TO THE HOLDER OF THE WATER RIGHT USED FOR POWER PRODUCTION, WHICH IS DEFINED BY AN AGREEMENT PURSUANT TO IDAHO LAW; AND AMENDING SECTION 42-203D, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL REVIEW ALL PERMITS ISSUED PRIOR TO JULY 1, 1985, WHICH PROPOSE TO DIVERT WATER HELD IN TRUST BY THE STATE OF IDAHO PURSUANT TO CERTAIN STATE LAW, TO DETERMINE WHETHER THEY COMPLY WITH CERTAIN STATE LAW, TO PROVIDE IF THE DEPARTMENT FINDS THAT PROPOSED USE IS ALLOWED UNDER CERTAIN STATE LAW, THEN THE DEPARTMENT SHALL ENTER AN ORDER CONTINUING THE PERMIT, TO CLARIFY LANGUAGE AND TO PROVIDE CORRECT CITATIONS; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-203B, Idaho Code, be, and the same is hereby amended 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. (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 <u>subordinated by an agreement or by a permit issued after July 1, 1985, or by a license issued after July 1, 1985,</u> 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; provided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. 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. 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, including compliance with the requirements of section 42-203C, Idaho Code.

(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.

(4) The user of water for power purposes as beneficiary of the trust established in subsections (2) and (3) of this section 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 under subsection (2) of this section. Such agreements shall be subject to ratification by law. The contract entered into by the governor and the Idaho Power Company on October 25, 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.

(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.

(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 policy 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 purpose;
(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.

SECTION 2. That Section 42-203C, Idaho Code, be, and the same is hereby amended to read as follows:

42-203C. HYDROPOWER WATER RIGHT -- CRITERIA FOR REALLOCATION -- WRIGHT -- 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~~ held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B, Idaho Code, the director shall consider, prior to approving the application, the criteria established in section 42-203A, Idaho Code, and whether the proposed use would ~~significantly reduce~~, individually or cumulatively with other existing uses, or uses reasonably likely to exist within twelve (12) months of the proposed use, would significantly reduce the amount of trust water available to the holder of a the water right used for power production that is defined by agreement pursuant to subsection (5) of section 42-203B, Idaho Code, and, if so, whether the proposed reduction is in the public interest.

(2) (a) The director in making such public interest 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;
(iii) The promotion of the family farming tradition;
(iv) The promotion of full economic and multiple use development of the water resources of the state of Idaho;
(v) In the Snake River Basin above the Murphy gauge whether the proposed development conforms to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period.

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 the provisions of this section shall be on the protestant.

SECTION 3. That Section 42-203D, Idaho Code, be, and the same is hereby amended to read as follows:

42-203D. REVIEW OF PERMITS -- OPPORTUNITY FOR HEARING. (1) The director of the department of water resources shall review all permits issued prior to ~~the effective date of this section~~ July 1, 1985, which propose to divert water held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B, Idaho Code, 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~~ section 42-203C, Idaho Code. If the department finds that the proposed use is allowed under section 42-203C, Idaho Code, then the department shall enter an order continuing the permit. If the department finds that the proposed use ~~does not satisfy the criteria of chapter 2, title 42~~ is not allowed under section 42-203C, 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~~ section 42-203C, Idaho Code. ~~If the department finds that the permit satisfies the criteria established in chapter 2, title 42, Idaho Code, then the department shall enter an order continuing the permit.~~

(2) The department shall provide an opportunity for hearing in accordance with section 42-1701A, Idaho Code, and sections 67-5209 through 67-5215, Idaho Code, for each holder of a permit that is proposed either to be cancelled or made subject to new conditions.

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.

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature — Second Regular Session — 1986

IN THE SENATE
SENATE AMENDMENT TO S.B. NO. 1358

AMENDMENT TO SECTION 1

On page 1 of the printed bill, delete lines 41 through 43, and insert: "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".

CORRECTION TO TITLE

On page 1 of the printed bill, delete lines 4 and 5, and insert: "POWER PURPOSES SUBORDINATED BY A PERMIT ISSUED AFTER JULY 1, 1985, OR BY AN AGREEMENT, MAY CONTINUE".

STATEMENT OF PURPOSE

RS12550

This bill contains revisions of the Swan Falls legislation passed last year. IDWR proposed regulations implementing the Swan Falls legislation raised a number of issues concerning the interpretation of the legislation. Some of the important aspects of this proposed bill include: (1) clarification that trust waters do not extend to the Snake River or tributary ground or surface water above Milner, (2) clarification of those agreements to which the criteria in I.C. 42-203C apply, (3) clarification of the application of the "significant reduction" criterion of I.C. 42-203C, (4) clarification of the review of existing permit applications, and (5) clarification that only trust waters are subject to the criteria of I.C. 42-203C.

FISCAL IMPACT

NONE.

S1358

Orr Affidavit

Exhibit 26

Minutes of Senate Resources and Environment Committee (Feb. 19, 1986)

ORR AFFIDAVIT EXHIBIT 62

SRE Minutes
2/19/86

EXHIBIT 62

MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

FEBRUARY 19, 1986 — Rm 433, 1:30 pm

PRESENT: All members were present except Senators Ringert and Horsch.

Chairman Noh called the meeting to order.

Senator Little moved and Senator Sverdsten seconded the minutes of the previous meeting be adopted. Motion carried.

Chairman Noh advised the Committee of what was going on with the proposed sale of BPA. He has asked some people to monitor current and future activity and in a few weeks they will report back to the Committee. They will be working with Senator McClure's office. The people involved are: Dick High, Ray Rigby, Jack Peterson, Fred Christensen, Bud Tracy, Jim Wrigley and Jim Collar.

SB 1358 *TRUST WATERS ON THE SNAKE RIVER ESTABLISHED PURSUANT TO AGREEMENT*

Senator Crapo explained the bill contained revisions of the Swan Falls legislation passed last year and is intended to merely clarify the agreement. IDWR proposed regulations implementing the Swan Falls legislation raised a number of issues concerning the interpretation of the legislation. As a result, negotiations were entered into by all interested parties and this bill is the result and seems to be acceptable to the concerned parties. He again pointed out, nothing was changed in the agreement, but this is merely clarification. He said he would like to send the bill to the 14th order as there was a change to be made on lines 42-43, page 1.

Sherl Chapman, Water Users, said this organization supported the legislation and concur in the proposed amendment.

Tom Nelson, attorney for Idaho Power, agreed with Senator Crapo on the legislation and said they too supported the bill and the change.

MOTION Senator Crapo moved and Senator Beitelspacher seconded the bill be sent to the 14th order. Motion carried.

SCR 110 MINIMUM STREAM FLOW ON THE PAHISIMEROI

The legislation would be approving an application to appropriate water for the minimum stream flow on the Pahisimeroi. No discussion took place on the legislation.

MOTION Senator Kiebert moved and Senator Beitelspacher moved the bill go out with a "do pass" recommendation. Motion carried.

SB 1285 LAND DEPARTMENT: DEFINE "SALABLE MINERALS"

Stan Hamilton, Director, Dept of Lands, explained the bill would amend the Idaho Code to include and define "salable minerals" for purposes of reserving and leasing such products. The bill had been before the Committee at an earlier date and more information had been requested by some members and Mr. Hamilton said that had been supplied to them. Mr. Hamilton stated the bill is to try and make a clear policy for the future and effects nothing in the past and would take effect July 1.

There was general discussion but mainly centered around the definition of "salable minerals" which was to include "common earth minerals" and also the "what if" situations and the reservation in the bill. Senator Budge and Little expressed concern with the legislation perhaps causing some problems to an individual who buys land and then later finds he has some "salable minerals." Some discussion also about "fossils." Were they a "salable mineral?" Mr. Hamilton said he was unsure about that and would be something the legal department would have to decide.

Chairman Noh said it was his understanding that the state has lost some court cases because the statutes were not clear. This bill would merely make the statuatory language clear. He pointed out the mining industry has shown no opposition to the bill.

MOTION Senator Crapo moved and Senator Sverdsten seconded the bill be sent to the floor with a "do pass" recommendation. The motion carried.

Time for the Committee to meet was over, and no further business was possible and the meeting adjourned.

Laird Noh, Chairman

Bev Mullins, Secretary

Orr Affidavit

Exhibit 27

"Resolution 19," Committee of Nine (Mar. 4, 1986)

COMMITTEE OF NINE MINUTES
ANNUAL MEETING

Elks Lodge, Idaho Falls, Idaho
March 4, 1986

The annual meeting of Water District 1 was preceeded by a legislative report by Sherl Chapman. Some of the legislation of special interest to upper Snake water users included:

HB 369 which would, among other things, provide that using stored water on more land does not represent an expansion of the water right.

HB 433 which would reduce liability for canal board members.

SB 1260 would confirm the tax exempt status of water districts.

SB 1358 would clarify that trust water only exists below Milner.

SB 1394 would create a State Wild and Scenic River System.

Elmer McDaniels then presented the Education Committee Report. Elmer said that during 1985 the Otto Otter Program was shown to 10,500 third graders. Because of the liability benefits of this program the insurance industry contributed $2,000 for the program. Elmer said that last year the IWUA held two law seminars and several workshops.

At 9:50 a.m. Ronald Carlson called the meeting to order and called for nominations of a temporary chairman. Bob Reichert was nominated and elected temporary chairman. Reed Murdock was then nominated to be temporary secretary. Reed was elected by acclamation.

Reed Murdock then read the minutes from the 1985 annual meeting. The minutes were approved as read.

At 10:12 a.m. the chairman designated the meeting places for the various areas and adjourned the meeting for caucus. The result of the caucus votes is attached. The committees on Credentials and Order of Business were excused and Lyle Swank read the results of the roll call taken at the door. Ronny Ard reported for the Committee on Order of Business. After the report for the Committee on Credentials was given, it was moved and seconded that both reports be accepted for the annual meeting. The motion carried.

Next it was moved and seconded that those nominated to serve on the Committee of Nine should be elected by unanimous vote. The motion passed by acclamation.

Next on the agenda, Max Van Den Berg introduced Assistant Regional Director John Keyes. John announced that Dale Duval has been selected to replace Broadbent as the Commissioner of Reclamation. John next discussed the status of the Jackson Dam replacement. He indicated that everything is on schedule and if that continues, Jackson will be ready to start filling in 1988. John indicated that the BOR has appointed two people to review the reserved water rights claim of the Shoshone-Bannock Indians. John said the Bureau of will support rebuilding Teton Dam if they have adequate local support. They would also support building Lynn Crandall if there is adequate local support.

The time was then turned over to Earl Corliss who reported on the water supply outlook for 1986 and reservoir operation. Ron Golus then reported on the upper Snake storage evaluation study being conducted by the BOR. The meeting was adjourned for lunch at 11:30 a.m.

The meeting was reconvened at 1:00 p.m. Chairman Robert Reichert presented the report of the Committee of Nine. Bob spoke about the benefits that water users have received from the water bank and the 2.44 million dollars in direct return to spaceholders since the bank was established in 1978. Bob emphasized the importance of having water user participation in the negotiations of federal and Indian reserved water rights.

John Rosholt then reported that the Indians had recently filed the irrigation portion of their reserved water right claim. John said the Indians were claiming water for 198,000 acres. He explained that the review of this claim was going to require hiring technical experts and that meant the water users were going to have to put up some significant sums of money to get the necessary expertise.

Dave Shaw, of the IDWR, said that the necessary legislation to provide for general adjudication has been worked out and has been introduced in the House. Dave reported that the rules and regs for processing water rights have been prepared and will be ready for distribution shortly after the legislature decides on how far upstream trust water must be considered.

Next on the agenda was the report of the watermaster. Ron Carlson warned that the settlement of the reserved water rights issue could embroil water users in protracted litigation that could sap their resources for many years. He cautioned that if this happens water users could support half of the lawyers in the state to protect their individual interests unless they can stick together and agree upon common representation. Ron said that he sees the unity provided through the Committee of Nine and their representation of collective interest of water users during the negotiations process as an invaluable water user asset.

Ron then read the resolution changes for 1986. All resolutions passed by acclamation. All special resolutions passed. These resolutions included: support of the changes for the adjudication statutes, opposition to the requirement of an economic impact statement before state agencies could adopt rules and regulations, endorsement of the Committee of Nine to act on behalf of the water users of Water District 1 in the Indian negotiations, opposition to the establishment of a Federal Wild and Scenic River designation for the Henrys Fork, support for legislation limiting "trust water" to waters arising below Milner, and a resolution supporting the Committee of Nine's allocation of $75,000 to be used for acquiring technical experts.

Dale Rockwood moved that Ron Carlson be elected watermaster for the coming year. The motion was seconded and passed by acclamation.

Finally plaques for their services were presented to Bob Reichert and Reed Murdock.

The meeting was adjourned at 2:00 p.m.

Reed D. Murdock
REED MURDOCK, Secretary

WATER DISTRICT NO. 1 ANNUAL MEETING

Elks Lodge, 640 East Elva, Idaho Falls
March 4, 1986

9:00 a.m.	Snake River - Man, History & the Environment, Slide Show
9:20 a.m.	Sherl Chapman - Idaho Water Users Legislative Committee Report
9:35 a.m.	Elmer McDaniels - IWUA Education Committee Report
9:45 a.m.	Welcome by Mayor Tom Campbell
10:00 a.m.	Call to Order
	Election of Temporary Chairman Election of Temporary Secretary
	Reading of Minutes of 1985 Meeting
	Selection of Committees Henrys Fork Dist. No. 1 (Main River abv Lorenzo) Lower Valley Dist. No. 2 (Feeder Canals) Dist. No. 3 (Lorenzo to Shelley) Dist. No. 4 (Below Shelley)
	Report on Committees & Elections
	Committees Excused: Order of Business, Credentials Roll Call
	Report on Committee on Order of Business
	Election of Committee of Nine
11:45 a.m.	LUNCH BREAK (No Host Luncheon - $5.00 Chicken Malibu or Salad Bar)
	<u>REPORTS</u>
1:00 p.m.	Annual Report of the Committee of Nine
1:15 p.m.	Bureau of Reclamation Reports Leo Busch - Chief of River Operations Bill Lloyd - Regional Director
1:30 p.m.	Reed Oldham, Negotiations Committee Report
1:45 p.m.	Ken Dunn - IDWR
2:00 p.m.	Watermaster's Report - Ron Carlson
2:20 p.m.	Resolutions Election of Watermaster Unfinished Business New Business
	Adjourn

The 1986 Report of the Committee on Organization and Order of Business:

"We recommend that the temporary organization be made permanent and the following be adopted as the Order of Business of this meeting:

1. Roll Call of canals.
2. Appointment of a temporary organization.
3. Reading of minutes of previous meeting (omitting the resolutions.)
4. Recess for caucus and selection of committees.
5. Report of committees.
6. That the temporary organization be made permanent.
7. Election of Committee of Nine.
8. Financial Report of the District.
9. Resolutions.
10. Election of Watermaster.
11. Unfinished business.
12. New business.
13. Committee of Nine shall serve as a permanent resolution committee and anyone desiring to present a resolution is requested to present it to the Committee of Nine on or before their last meeting prior to Water District No. 1 general meeting.

RESOLUTION 19

WHEREAS, it has been agreed by all parties involved in the Swan Falls negotiations that it was never their intent to force water arising above Milner Dam to be released to fill downstream water rights; and

WHEREAS, the upper Snake has always been managed separately from the lower Snake; and,

WHEREAS, the trust water provisions of the Swan Falls settlement would adversely affect both natural flow and storage supplies of existing users and could actually reduce the amount of water available for hydropower generation below Milner Dam during the summer months.

NOW, THEREFORE, BE IT RESOLVED by the Committee of Nine and the water users of Water District 1 meeting in regular annual session the 4th day of March, 1986, that the Idaho State Legislature be encouraged to enact into law Senate Bill 1358.

Dated this 4th day of March, 1986.

Dale Lockwood
CHAIRMAN, Committee of Nine

Reed D. Murdock
SECRETARY, Committee of Nine

Orr Affidavit

Exhibit 28

"Report and Recommendations to the Federal Power Commission" by W.G. Swendsen, Idaho State Commissioner of Reclamation (Oct. 28, 1922)

Fourth Orr Affidavit
Exhibit 6:

Report and Recommendation to Federal Power Commission by W.G. Swendsen, Commissioner of Reclamation, representing the State of Idaho (Oct. 28, 1922)

IDAHO STATE HISTORICAL SOCIETY

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Governor of Idaho

Janet L. Gallimore
Executive Director

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Boise, Idaho 83702-7264
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Historic Preservation Office
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Fax: (208) 334-3198

Oral History
Office: (208) 334-3863
Fax: (208) 334-3198

I certify that this is a true copy of material found in the collections of the Idaho State Historical Society Public Archives and Research Library.

W. G. Swendsen, Commissioner, Department of Reclamation State of Idaho, to Executive Secretary, Federal Power Commission, October 26, 1922; Folder:Reclamation; Folder Department of Reclamation, 1919-1922; No Box; AR 2/12, Governor Papers -- Gov. D. W. Davis, 1919-1923; ISHS.

Amy E. Vecchione, Librarian
1-5-2008

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Exhibit G.

COPY

October 28, 1925.

Re: Project E-Idaho, Oregon, Washington
No. 293. Pacific Power and Light Company.

Executive Secretary,
Federal Power Commission,
Washington, D. C.

Dear Sir:

In connection with the application of the Pacific Power and Light Company for preliminary power permits, filed with your Honorable Commission and designated as Project No. 293, I have been requested by the Honorable H. C. Davis, Governor of Idaho, to prepare a statement of facts and recommendations looking to a protection of the State's interests, all for the consideration of your Honorable Commission in connection with the said application No. 293.

In conformity with this request, the attached report is herewith submitted for your consideration.

Very truly yours,

Commissioner of Reclamation

WGS:P

Report and Recommendations to the
FEDERAL POWER COMMISSION, by
V. C. Gutknecht, Commissioner of
Reclamation, representing the
State of Idaho.

Re: Project K-Idaho Oregon and Washington
No. 288. Pacific Power and Light Company.

A consideration of the application of the Pacific Power and Light Company, designated as Project K-Idaho, Oregon, Washington No. 288, discloses the fact that the permits in question cover perhaps the greatest and most important potential power resource in Idaho, if not in the northwest. A reference to Exhibit A accompanying and attached to this report, upon which is shown the boundary lines of the State of Idaho, with portions of adjacent states, the Snake River and the boundary line of the Snake River water shed, at once discloses the importance of this application for permit, to Idaho.

The Snake River drainage basin comprises 108,000 square miles, approximately three-fourths of which is located in the State of Idaho. In fact, approximately nine-tenths of the State of Idaho is given over to Snake River drainage basin. It is safe to say that 60% of the water available for power at the sites in question, originates in Idaho.

The basic resource throughout this part of the state is agriculture, and because of the arid climate and soil conditions the artificial application of water or irrigation, is essential to the growth of profitable agricultural crops. Any development that relates to the use of Snake River water is therefore of supreme and vital importance to the state. Indeed, if it were not for the agricultural development that has heretofore been had through a use of Snake River water for irrigation, approximately three-fourths of Idaho, which is, under present existing conditions, partly developed, would still be given over to non-inhabited desert wastes.

The major portion of this development has been accomplished by diverting the natural flow of the Snake River and its tributaries and through the use of a comparatively small amount of the flood or winter flow after the same has been impounded in storage reservoirs.

A careful consideration of the available water supply for arid lands leads to the conclusion that when the total flow of Snake River and its tributaries are completely controlled in the interest of irrigation, through the construction of storage reservoirs and otherwise, the water supply will be inadequate to accommodate all of the lands susceptible of irrigation.

Thus, in the interest of a necessary protection to the State's potential agricultural resource, its water supply must be conserved for and dedicated to irrigation uses. Future development, looking to a use of this water resource for irrigation, power or other purposes, must in the interest of the State, follow a carefully matured general plan, having for its purpose the co-ordination of the various uses to which this water supply may be put, and where complete co-ordination can not be had, power must necessarily give way to irrigation, thus permitting a maximum agricultural development.

The proposed use of Snake River water at the power sites for which permits are requested can, if the State's interest is to be adequately protected, only be developed after such plans, and with the contemplated use of such water as will permit the maximum irrigation expansion.

Agricultural development is necessarily slow and some of the lands which are susceptible of irrigation may not, under present existing conditions, produce sufficient value to warrant the construction of irrigation works. With the increase in population and the consequent added demand for farm products, these lands however, must and will ultimately be developed. It is not sufficient, therefore, to consider merely the present development, under present conditions, practicable or feasible projects, but a protection must also be provided for potential irrigation and agricultural resources.

A broad study of the State's potential water power possibilities indicates that the greatest irrigation expansion may be permitted and still leave an aggregate potential water power far in excess of the State's estimated future needs.

Because of the foregoing conditions, it is extremely important that any power permits granted in connection with these applications shall be conditioned upon the State's present and future right to divert, use and impound as much water as may be necessary for a complete development of its agricultural resources, both for irrigation, domestic and other consuming uses.

Owing to lack of time within which to present this showing and because of a shortage of funds for such work, nothing but a general study of the State's irrigation possibilities in the Snake River drainage basin has been possible. The following general outline is therefore confined to the more apparent possibilities and is offered herewith largely in support of the foregoing representations.

Irrigation works now in process of planning in the Upper Snake River drainage, contemplate storage reservoirs, including the present government storage reservoir at American Falls, which when completed, will provide regulation of the stream flow in the interest of irrigation. While the present tentative plans of the United States Reclamation Service contemplate the release of a small quantity of water at American Falls during the non-irrigating period for power and other purposes, storage

facilities are so sufficient and favorable, and desirable arid agricultural lands are so readily accessible and available, that ultimate plans must necessarily contemplate a dry stream immediately below American Falls dam, except when water is being released for irrigation uses.

Reservoir sites and the various areas of land upon which this water may be used are thought to be so well known that it is deemed unnecessary to verify this conclusion by any further reference to them herein.

In the stretch of stream between American Falls and Milner dam, irrigation diversions will completely exhaust the stream flow, including storage reservoir water. The complete development must, therefore, necessarily contemplate a dry river immediately below Milner dam at all seasons of the year except for such small quantities of water as may find its way into the stream below Lake Walcott, a forebay created by Minidoka dam, it being probable that any water finding its way into the stream between American Falls and Lake Walcott dam and will be conserved in such lake, where a considerable storage capacity now exists.

Almost immediately below Milner Dam, Snake River enters what ultimately becomes a rather deep rock gorge, from which water can not be diverted by gravity for irrigation uses.

Immediately below Milner dam and particularly below Shoshone Falls and extending down river approximately sixty miles, or to the lower end of Hagerman valley, the inflow to the stream is considerable, amounting to approximately 6,000 cubic feet per second of fairly continuous and uniform discharge. To inconsiderable portion of this flow is water that is lost by deep percolation in the Twin Falls North Side and Twin Falls South Side projects, where a total of about 600,000 acres are irrigated. Definite information is not available from which we may determine the exact amount of water contributed to the stream from return irrigation flow. In finally computing or determining the flow available in the lower Snake for power purposes, it should be kept in mind that the return flow from irrigation in these projects may be materially decreased in the future through improvement by concrete lining or otherwise in the canal systems themselves to prevent losses, and through improved methods of irrigation on the farms, which will result in a more uniform and proper use of water. Before final plans for power development are matured and final permits granted, this matter should receive careful consideration.

Idaho's outstanding use of Snake River water in diversions between the lower end of the Hagerman valley and the proposed point of use of this power development is limited to rather a small quantity of water which is pumped for irrigation uses. It is thought that no extensive areas can ultimately be reached by pumping in this stretch of river, since most of the available land is on benches that are too high to make pumping feasible. There are, however, some limited areas which, if they can not under present conditions, be reached, may after land becomes more valuable, be developed by pumping. 150,000 acres will probably cover all such areas. The ultimate plan of power development on down the river should recognize the possibility

of a water demand for these lands in the future and appropriate reservations should be made in the permit.

The first important tributary below American Falls which is not already practically fully developed for irrigation use, is Boise River. This stream is already utilized for irrigation purposes until under present conditions, during the irrigation season or period of low summer flow, it contributes little or no water to Snake River. During the non-irrigating season and particularly the period of flood flow, a considerable amount of water finds its way to the Snake from this stream. The construction of known feasible reservoirs in this drainage, together with possible future diversions of flood flow without storage, will act to consume the entire flow, so that from the standpoint of down stream Snake River power, Boise river should not be counted upon as a contributing stream, except to the extent that water lost on the irrigated lands through deep percolation, will ultimately find its way directly to the Snake River.

The following undeveloped storage reservoirs are known to exist on the Boise River and in addition to these, other storage possibilities thus far unexplored may exist.

Name	Location	Capacity
Coy	South Fork Boise River	115,400 acre feet
Carey	" " " "	64,600 " "
Bascum	" " " "	64,000 " "
Smoky Creek	" " " "	40,000 " "
Twin Springs	Middle Fork Boise River	55,000 " "
Alexander	" " " "	23,000 " "
North Fork	North Fork Boise River	34,000 " "
	Total	386,000 " "

The new desert lands susceptible of reclamation from Boise River are far in excess of what the surplus water supply will accommodate. Down Snake River power permits should, therefore, contain reservations protecting the State's right to ultimately use the entire Boise river discharge for irrigation or other consuming uses.

Under existing conditions the Payette river supplies a considerable contribution to the flow of Snake river except during the period of low summer stream flow, when practically all of the discharge is now used for irrigation purposes.

Feasible storage sites, including Big and Little Payette Lakes, Little Valley, etc. afford an aggregate capacity sufficient to completely control the discharge of Payette river in the interest of irrigation. The largest undeveloped single project which is under contemplation from this water shed is known as the Black Canyon project, covering an aggregate area of 70,000 acres. There are sufficient additional arid lands susceptible of irrigation from this source of supply, upon which to beneficially use the entire surplus discharge of the stream.

The entire flow of Payette river should, therefore, be reserved in the interest of irrigation.

Weiser river contributes nothing to Snake river during periods of low summer flow, but during the non-irrigating season does contribute quite a considerable amount of water. A consideration of this drainage basin discloses the existence of sufficient storage reservoirs to practically control the entire stream discharge for irrigation uses.

The following is an estimate of the undeveloped storage possibilities in this drainage.

Crane Creek	20,000 Acre Feet.
Price Valley	30,000 acre feet.
Pine Creek	6,000
Mann's Creek, Alexander site	10,000
Mann's Creek, Brown's site	2,000
Barton Dam, Monroe Creek	2,000
Johnson Park	1,000
Big Flat Reservoir, South Crane Creek	1,000
Beaver Creek	2,000
S. Fork	1,000
Middle Fork	4,000
Other Miscellaneous small sites	6,000
Lost Valley reservoir addition	30,000
Total	120,000 Acre Feet.

When these sites are fully developed Weiser river drainage will contribute little or nothing to Snake river except such water as finds its way to the stream in the way of irrigation waste.

Appropriate reservations should, therefore, be incorporated in any power permits that are granted dedicating the entire supply of this stream to ultimate irrigation uses.

The feasibility of using considerable flow from Salmon river for irrigation in Idaho has been urged by various engineers and persons familiar with its possibilities. The State has thus far been unable to make a dependable or definite study of this possibility, except to the extent that conclusions may be drawn from a study of the United States Geological Survey topographic maps and stream flow data, together with data filed with the State by individuals.

The feasibility of irrigating approximately 800,000 acres of land in what is known as the Mountain Home Project at a cost of approximately $64.00 per acre has been urged. The water supply for this project would, according to present tentative plans, be diverted from upper Salmon river drainage by means of tunnels and aqueducts to the drainage basin of the South Fork of the Boise, from which it would be diverted to the lands in question.

This scheme contemplates the construction of storage reservoirs and a diversion of direct flow from the upper Salmon river watershed aggregating 1,500,000 acre feet.

The State is not in possession of sufficient data to even approximate the probable cost of this development. Its immense importance to the State is at once apparent, when it is considered that if the project can be developed, 500,000 acres of reclaimed land will increase the State's taxable wealth, using present low land values as a basis, at least $150,000,000, by the use of a resource that will otherwise be wasted, except to the extent that the stream flow may be used for power purposes.

Other possible irrigation development in the Salmon river watershed is not known, but is regarded as comparatively small, owing to the rough character of the country.

The feasibility of impounding water in what is known as Bear Valley on a tributary of the Salmon river for use in Snake river drainage basin by diversion to the Payette is urged in a report by the United States Forest Service, which indicates that 115,000 acre feet may be made available for irrigation from this tributary.

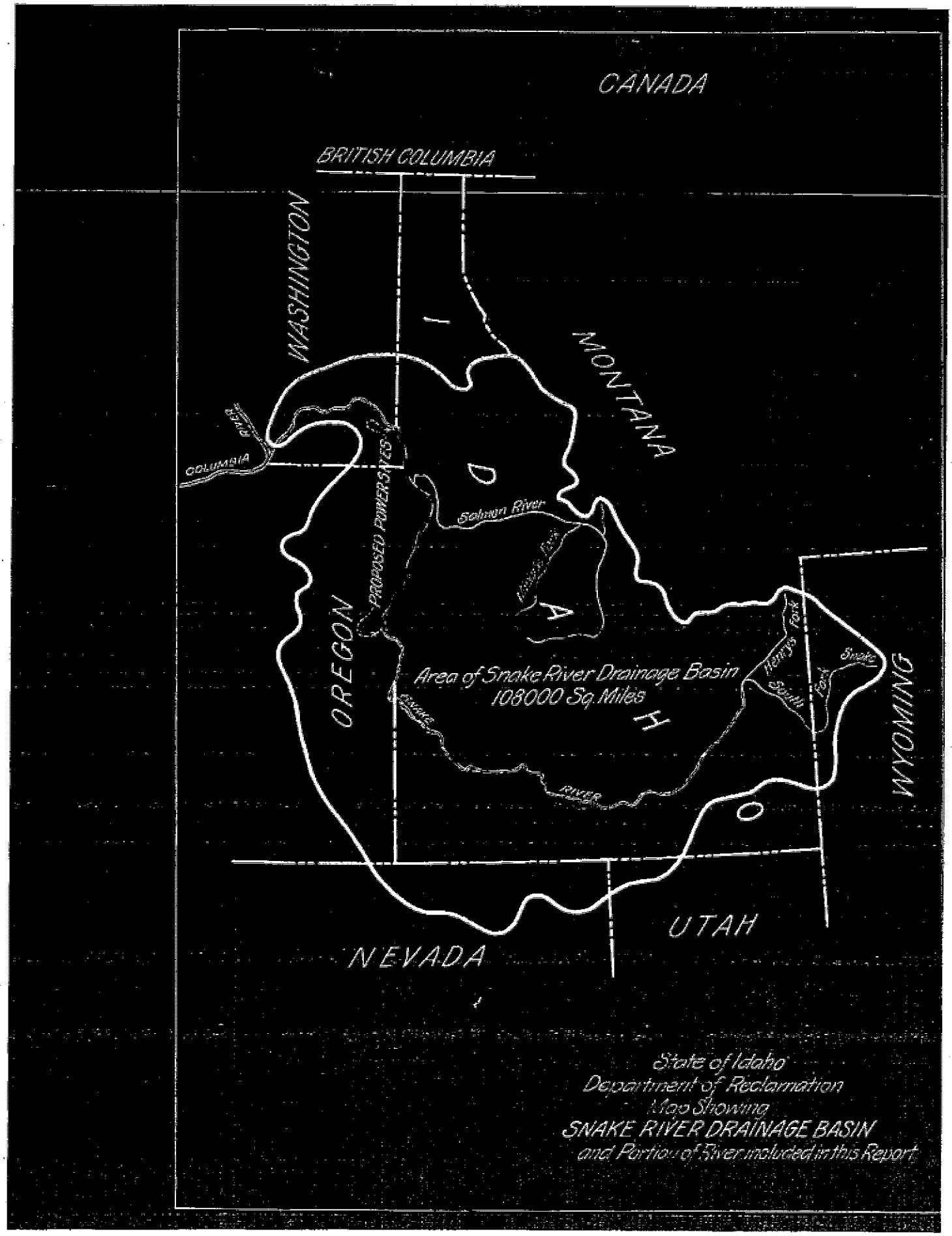
Because of the importance of utilizing Salmon river water supply for irrigation purposes if possible, no permanent power permits should be granted on the Snake river below its confluence with Salmon river until careful investigations have been made of the foregoing and other possibilities and when such permits are granted, appropriate reservations for a protection to irrigation and other consuming uses should be incorporated therein.

The foregoing should not be considered a final analysis of this problem by the State in so far as irrigation is concerned. A limit in time and money has prevented to date a more exhaustive consideration of the subject. It is thought, however, that the foregoing may serve as a guide in considering the granting of preliminary permits, with the understanding that before final permits are granted, the State will again be given an opportunity to present more complete and additional data.

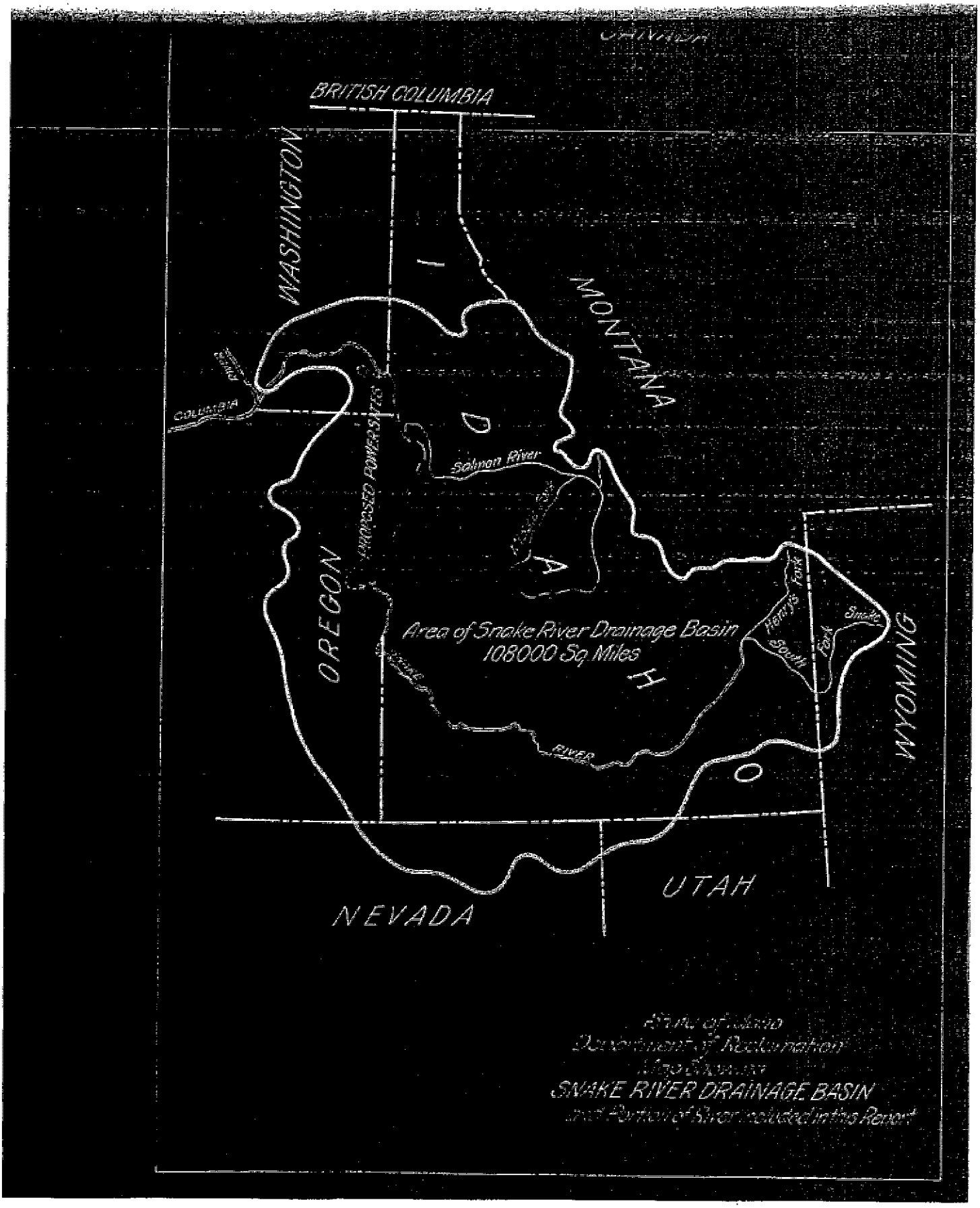
In addition to the question of the State's probable future need and right to Snake river water for consuming purposes, the attention of your Honorable Commission is invited to the fact that approximately 80% of the water supply available for power at the proposed sites originates in Idaho and that 75% to 80% of the drainage area of the stream in Idaho is above these sites; that the power sites in question are on a portion of the river which forms the boundary line between the states of Idaho, Oregon and Washington. The potential power resources in these sites should, therefore, be regarded as largely an Idaho resource. In so far as natural or topographical conditions permit, generating stations and power equipment should therefore be placed on the Idaho side.

Respectfully submitted,

Commissioner of Reclamation



State of Idaho
Department of Reclamation
Map Showing
SNAKE RIVER DRAINAGE BASIN
and Portion of River included in this Report



State of Idaho
Department of Reclamation
in Cooperation with
SNAKE RIVER DRAINAGE BASIN
Joint Portion of River Control Planning Report

Exhibit 2.

Undeveloped Power sites on Salmon River between Salmon, Idaho and its mouth
(estimates of power based on over all efficiency of 70 per cent)
with minimum interferenoe with railroad location.

No.	Name	Miles down stream from Salmon	Head	With existing flow				With 800,000 acre-ft storage, Bruno site.			
				Discharge		Horsepower		Discharge		Horsepower	
				Q 90	Q 50	90 per cent of time	50 per cent of time	Q 90	Q 50	90 per cent of time	50 per cent of time
			Feet	Sec.ft.	Sec.ft			Sec. ft.	Sec.ft.		
12JC 1	Mile 28	28.	105	1,600	2,040	13,400	17,200	2,100	2,540	17,600	21,300
12JC 2	Shoup	40.8	95	1,640	2,070	12,500	15,800	2,140	2,570	16,300	19,500
12JC 3	Mile 45	45	80	1,670	2,110	10,700	13,500	2,170	2,610	13,900	16,700
12JC 4	Long Tom	59.4	178	1,880	2,380	26,800	34,000	2,380	2,880	34,000	41,000
12JE 1	Pinnacle	62.		2,720	3,450	a	a	3,220	3,950	a	a
12JE 2	Proctor Falls	65.1	78	2,720	3,450	17,000	21,500	3,220	3,950	20,100	24,700
12JE 3	Horse Creek	73.4	105	2,780	3,520	23,400	29,600	3,280	4,020	27,600	33,800
12JE 4	Mile 78.3	78.3	60	2,800	3,540	13,500	17,000	3,300	4,040	15,800	19,400
12JE 5	Black Canyon	89.7	128	2,920	3,690	30,000	37,800	3,420	4,190	35,000	43,000
12JE 6	Dillinger Creek	96.2	107	2,940	3,720	25,200	31,800	3,440	4,220	29,400	36,000
12JE 7	Rattlesnake	99.6	40	2,950	3,740	9,450	12,000	3,450	4,240	11,000	13,600
12JE 8	Growler	111.	165	3,010	3,810	39,700	50,300	3,510	4,310	46,500	57,000
12JE 9	Painted Rock	118.	95	3,020	3,820	23,000	29,000	3,520	4,320	26,800	32,800
12JG 1	Castle	127.6	105	3,500	4,420	29,400	37,000	4,000	4,920	33,400	41,000
12JG 2	Crooked Bar	136.5	60	3,580	4,540	17,200	21,800	4,080	5,040	19,600	24,200
12JG 3	Rheims	146.4	80	3,640	4,610	23,300	29,500	4,140	5,110	26,500	32,700
12JG 4	Crevice	160.	135	3,720	4,700	40,200	50,800	4,220	5,200	45,600	56,100
	Total		1,616			354,750	448,600			419,100	512,800
		Below Riggins									
12JJ 1	Poodle Dog b	14.	140	3,800	5,300	42,600	59,400	4,300	5,800	48,200	65,000
12JJ 2	Rhett b	20.	45	3,800	5,300	13,100	18,200	4,300	5,800	14,800	20,000
12JJ 3	Red Canyon	41.7	190	3,800	5,300	57,800	80,600	4,300	5,800	65,500	88,200
12JJ 4	Green Canyon	53.5	112	3,800	5,300	34,000	47,500	4,300	5,800	38,500	52,000
12JJ 5	Snow Hole	63.5	95	3,900	5,500	29,600	41,800	4,400	6,000	33,400	45,500
12JJ 6	Section Line	72.	62	3,900	5,500	19,400	27,300	4,400	6,000	21,400	29,800
12JJ 7	Lower Canyon	83.	115	3,900	5,500	35,800	50,600	4,400	6,000	40,500	55,200
	Total		757			232,300	325,400			262,300	355,700
	GRAND TOTAL		2,373			587,050	774,000			681,400	868,500
	Salmon Snake Tunnel scheme c					173,000	242,000			196,000	265,000

a. Site does not fit in with feasible scheme of development. b. Used as power dams. c. Developed by means Poodle Dog diversion dam into Snake, would destroy power value of sites 12JJ 1 to 12JJ 7.

UNDEVELOPED POWER

On Snake River from American Falls to Oxbow Inclusive
(Estimate of Power based on static head and over all plant efficiency of 70%)

SITE	AVAILABLE HEAD Q 90	AVAILABLE HEAD Q 50	WITH EXISTING FLOW DISCHARGE Q 90	WITH EXISTING FLOW DISCHARGE Q 50	WITH EXISTING FLOW HORSE POWER 08HQ90	WITH EXISTING FLOW HORSE POWER 08HQ50	WITH REGULATED FLOW DISCHARGE Q 90	WITH REGULATED FLOW DISCHARGE Q 50	WITH REGULATED FLOW HORSE POWER 08HQ90	WITH REGULATED FLOW HORSE POWER 08H 50
Am. Falls - Increase (a)	50	90	4500	6500	-	6000	2000	10000	-	52000
Eagle Island (a)	46	46	4500	6500	16500	24000	2000	10000	7400	36800
Milner to head of Twin F. (c)	300	300	300	5000	7200	120000	350	400	8400	9600
Twin Falls	205	205	515	5600	8420	92000	660	800	10800	13000
Pillar & Augur Falls	155	155	850	5800	10500	72000	850	950	10500	11800
Mile 165 above Enterprise	25	25	1650	6650	3300	13300	1700	1800	3400	3600
Devil's Wash Board	30	30	1710	7500	4100	18000	1750	3900	4200	7000
Kanoka Rapids	35	35	2360	8200	6600	23000	2400	2500	6700	7000
Upper Salmon Falls	80	80	5000	10000	32000	64000	5000	5500	32000	35000
Lower Salmon - Increase	20	20	5500	10900	8800	17500	5500	6000	8800	9600
King Hill to Bliss - 3 sites	230	230	6500	11400	120000	210000	6500	6800	120000	125000
Crane Falls	25	25	6700	11700	13400	23400	6700	6900	13400	13800
Walls Ferry	25	25	6800	11900	13600	23800	6800	6900	13600	13800
Crocker Site	20	20	6900	12200	11000	19500	6900	7200	11000	11500
Cuffey Site (d)	35	35	6900	12500	19300	35000	6900	7200	19300	20000
Mile 154-168 above Lewiston	90	70	8000	16500	57600	92500	6900	11200	49700	62800
Site #1- 145.3 mi. above "	25	20	8000	16500	16000	26400	6900	11200	13800	17900
Site #2- 143.3 mi. " "	25	20	8000	16500	16000	26400	6900	11200	13800	17900
Site #3- 135.7 mi. " "	30	25	8000	16500	19200	33000	6900	11200	16500	22400
Oxbow	50	45	8000	16500	32000	59400	6900	11200	27600	40300
Total					415520	999200			390900	530800
Springs combined (b)	-	-	-	-	25000	25000	-	*	25000	25000
GRAND TOTAL					440520	1024200			415900	555800

(a) All capacities except Eagle Island and American Falls are from Geological Survey Papers and Reports.
(b) Includes several sites such as Clear Lakes, Box Canyon, Malad Springs and others.
(c) First 200 feet off all below Milner assumed to have no power possibilities because of low flow.
(d) Head for Cuffey site and those above would vary somewhat with stream flow, but these variations are not stated in Geological Survey Reports.

UNDEVELOPED POWER SITES

Snake River between Homestead, Oregon, and Lewiston, Idaho.
(Estimate of power based on static head and over all plant efficiency of 70 per cent.)

LOCATION	MI. UP-STREAM FROM LEWISTON	MAXIMUM HEAD Q90	MAXIMUM HEAD Q 50	WITH EXISTING FLOW DISCHARGE Q90	WITH EXISTING FLOW DISCHARGE Q50	WITH EXISTING FLOW HORSEPOWER 08HQ90	WITH EXISTING FLOW HORSEPOWER 08HQ50	WITH REGULATED FLOW DISCHARGE Q90	WITH REGULATED FLOW DISCHARGE Q50	WITH REGULATED FLOW HORSEPOWER 08HQ90	WITH REGULATED FLOW HORSEPOWER 08HQ50
Site 12HK #4	123.2	50	45	8,000	16,500	32,000	59,400	6,900	11,200	27,600	40,300
#5	120.8	65	60	8,000	16,500	41,600	79,200	6,900	11,200	35,900	53,800
#6	118.7	75	70	8,000	16,500	48,000	92,400	6,900	11,200	41,400	62,700
#7	112.2	150	140	8,000	16,500	96,000	185,000	6,900	11,200	83,000	125,000
#8	101.0	280	270	8,000	16,500	179,000	356,000	6,900	11,200	154,000	242,000
#9	97.2	275	265	8,000	16,500	176,000	350,000	6,900	11,200	152,000	237,000
#10	95.7	350	340	8,000	16,500	224,000	450,000	6,900	11,200	193,000	305,000
#11	83.5	475	460	8,000	16,500	304,000	608,000	6,900	11,200	262,000	412,000
#12	77.4	540	530	8,000	16,500	345,000	700,000	6,900	11,200	298,000	475,000
#13	52.7	190	180	8,000	16,500	122,000	238,000	6,900	11,200	105,000	161,000
Site 12HN # 1	50.7	220	210	8,000	16,500	140,000	277,000	6,900	11,200	121,000	187,000
# 2	41.5	260	250	15,000	21,500	312,000	430,000	12,200	16,300	254,000	326,000
Salmon Snake Tunnel Site	77.4	530	530	3,800	5,100	161,000	216,000	3,800	5,100	161,000	216,000
TOTAL						818,000	1,346,000			713,000	1,017,000

NOTE: Total includes only those sites which will utilize full fall of river, namely, Nos. 12 HK 12/ and Salmon-Snake Tunnel Site.
12 HN 2

Orr Affidavit

Exhibit 29

Excerpted pages of the "Report Of Board Of Engineers To Consider Projects In Snake River Valley Which May Affect The Proposed American Falls Reservoir" (Apr. 10, 1920)

REPORT OF BOARD OF ENGINEERS

to consider Projects in Snake River Valley which may affect the proposed AMERICAN FALLS RESERVOIR and the Available Water supply therefor.

Prepared by Board of Engineers, composed of:

Mr. I. W. McConnell
Mr. F. W. Hanna
Mr. E. B. Darlington
Mr. W. G. Swendsen
Mr. J. C. Wheelon
Mr. James Munn

April 10, 1920

JRP000098

REPORT OF BOARD OF ENGINEERS

to consider Projects in Snake River

Valley which may affect the proposed

AMERICAN FALLS RESERVOIR, IDAHO

Prepared by Board of Engineers, composed of

Mr. I. W. McConnell
Mr. J. W. Hanna
Mr. E. B. Darlington
Mr. W. G. Swendsen
Mr. J. C. Wheelon
Mr. James Munn

April 10, 1920

APR 1920 11059

JRP000099

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APPENDIX

Chief of Construction's letter of March 30, 1920 instructing Board of Engineers. . . . . Exhibit "A"

Map of Snake River Basin. . . . . Exhibit "B"

Relation of Irrigation Draft to Reservoir Capacity (blue print) . . . . . Exhibit "C"

Shortages and Wastes for assumed Irrigation drafts and storage for period of 1896 to 1918 based on Snake River records at Neeley (tabulation) . . Exhibit "D"

Paul S. A. Bickel's report on Shelley Canal . . Exhibit "E"

Map of Brunean Project. . . . . Exhibit "F"

- - - - -

JRP000101

DEPARTMENT OF THE INTERIOR

UNITED STATES RECLAMATION SERVICE

Burley, Idaho, April 10, 1920.

Chief of Construction,
U. S. Reclamation Service,
Denver, Colorado.

Dear Sir:

There is transmitted herewith a report of the Board of Engineers called to consider projects in the Snake River Valley, which may affect the proposed American Falls Reservoir. The conclusions of the Board are set out in detail in the body of the report, which may be briefly summarized as follows:

The Board convened at Burley, Idaho, on April 5 to consider matters referred to it by the Chief of Construction of the U. S. Reclamation Service, and related problems which subsequently developed. The studies of the Board have covered:

(a) Water supply of Snake River

(b) The lands irrigable from Snake River

(c) Storage capacity required for the utilization of the waters applicable to irrigation.

(d) The relation of the proposed American Falls reservoir to the storage problem.

(e) The substitution of power rights which will be destroyed at American Falls by the construction of American Falls Reservoir.

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(f) Shelley Canal as proposed by Mr. Paul S. L. Bickel.

(g) The Bruneau project and its relation to the general irrigation program.

(h) Storage in Yellowstone Lake.

The board is of the opinion that all of the water of Snake River susceptible of economical diversion should be dedicated to irrigation. The lowest point on the river at which diversion is practicable in large amounts is Milner Dam. The unappropriated water of Snake River can be made available by the development of approximately 5,900,000 acre-feet of storage capacity. In addition to the draft already prevailing for the existing irrigation enterprises in the upper valley, there will be provided a draft of 5,720,000 acre-feet which will supply (a) supplementary rights for existing enterprises above American Falls Dam, (b) total present requirements including supplementary rights for all existing enterprises below American Falls Dam, (c) water necessary for the development of about 450,000 acres of new land.

The available water supply is not sufficient for the irrigation of all the land which can be reached from the river. New areas above American Falls amount to about 400,000 acres; areas below American Falls amount to

JRP000103

approximately 6 million acres. There is insufficient information available to pass upon the relative feasibility of various projects. It is pointed out however that extensive development above American Falls will preclude extensive development below American Falls and vice versa.

The American Falls reservoir will be essential to a complete development of the irrigation resources. In the plans for irrigation discussed in the report, which are used as illustrations only, the storage requirement at American Falls reservoir would vary from 1,400,000 acre-feet to 4,000,000 acre-feet. Manifestly any storage not provided in American Falls reservoir must be provided in other sites. The Board recommends the early construction of the American Falls reservoir as a progressive step in the final development of irrigation resources. In the absence of any other definite plan the present plan for development proposed by the Reclamation Service should be supported and advanced by all interests involved.

The construction of American Falls reservoir will destroy developed power to the amount of 6000 horse power, more or less and a partially developed site for a power

JRP000104

capacity of about 30,000 horse power. As a substitution for American Falls power, the Board recommends the development of some suitable site to be subsequently determined, which will eliminate any loss of irrigation water.

The construction of American Falls reservoir involves no loss of power for irrigation pumping since the flow in the river during the irrigation season will be ample for all pumping requirements.

The Shelley Canal as proposed by Mr. Paul S. A. Stokel is not regarded as a practicable source of power or substitution at American Falls.

The Shelley Canal may be feasible as an irrigation enterprise for watering lands between Shelley and American Falls; information available on this point is not sufficient to form a basis for conclusion. For the irrigation of lands in the proposed Minidoka Pumping Project and lands to the westward thereof, the Shelley Canal is not considered feasible.

The unappropriated water supply of the Snake River is sufficient for the development of the Bruneau Project provided that development is undertaken prior to the inauguration of

JRP000105

other similar enterprises of large extent. If the Bruneau Project is initiated however, it will absorb a large portion of the unappropriated waters and will preclude the development of large projects in other portions of the river. The development of the Bruneau Project would not necessarily interfere with the supply of supplementary rights to existing enterprises and the development of the Minidoka Pumping Project. The Board expresses no opinion as to the feasibility of the Bruneau Project.

The Board makes no recommendation as to the feasibility of diverting water from Yellowstone Lake into the Snake River drainage.

Very truly yours,

J. W. McConaughy

Chairman, Board of Engineers

JRP000106

DEPARTMENT OF THE INTERIOR

UNITED STATES RECLAMATION SERVICE

Burley, Idaho, April 10, 1920

From: the Board of Engineers to consider projects in the Snake River Valley which may affect the proposed American Falls Reservoir

To: the Honorable D. W. Davis, Governor of Idaho, and the Chief of Construction of the U. S. Reclamtiom Service.

1. In conformity with an understanding had between the Director of the U. S. Reclamation Service and the Governor of Idaho, a joint Board of Engineers was designated to consider projects in the Snake River Valley, particularly those affecting the proposed American Falls Reservoir.

2. Under date of March 30, 1920, the Chief of Construction of the U. S. Reclamation Service directed the designated Chairman of the Board as to the matters to be considered. Copy of this letter is attached hereto as Exhibit "A".

3. The instructions cover specifically the following points:

(1) The examination of a project proposed by Mr. I. B. Perrine contemplating a diversion near Shelley, Idaho, the canal line extending thence to the vicinity of American Falls, where the water carried during winter is to be turned back into the reservoir above the

JRP000107

American Falls dam for the purpose of producing power. By a proposed extension this canal could also cover the lands of the Minidoka Pumping Project and other lands to the westward thereof.

(2) The consideration of a proposal by Mr. Perrine for the Bruneau project.

(3) The consideration of the various proposals for power to replace the power developed and undeveloped now controlled by the Idaho Power Company at American Falls.

4. In addition to these specific instructions the Board was directed to consider any other matters which might be presented by the Governor of Idaho, or Project Manager Dibble, having a bearing on the construction of the American Falls Reservoir.

5. This board convened at Burley, Idaho, on April 5 with the following members present:

I. W. McConnell, Chairman

W. G. Swendsen, State Commissioner of Reclamation

E. B. Darlington, Chief Engineer, Twin Falls North Side Land and Water Co.

J. C. Wheelon, General Manager, Twin Falls Canal Co.

James Munn, Consulting Engineer, U. S. Reclamation Service

F. W. Hanna, Consulting Engineer " " "

6. At the first session, it was pointed out by Mr. Swendsen that the State officials believed the time had come for the formation of a definite plan for the

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development of the remaining resources of the Snake River water supply on a broad and comprehensive basis which would insure to the state the maximum utility of the possibilities of the stream.

7. Mr. Paul S. A. Bickel presented a plan for the utilization of the waters which might be available for irrigation; said plan involving the construction of the American Falls reservoir; the Shelley Canal, with its extension to the Wood River country, and the irrigation of the Bruneau tract.

8. It became apparent from preliminary consideration of the subject that no one of the principal problems involved could be properly considered without taking into account its effect upon the general problem of the conservation of the waters of Snake River. The Board has therefore given consideration to the following questions:

(1) The total water supply available in the Snake River basin for irrigation.

(2) The quantity of storage required for the utilization of the water supply and the relation of that supply to the size of the American Falls Reservoir and other reservoirs which may be necessary.

(3) The power rights to be lost at American Falls thru the appropriation of all waters available for irrigation and the possible substitution by which such loss of power rights can be compensated.

JRP000109

(4) The Shelley Canal as proposed by Mr. Bickel.

(5) The various irrigation projects which can be developed in the Snake River Valley.

(6) Storage in Yellowstone Lake.

9. The Board spent two days in examination of the field conditions in connection with the Shelley Canal. The study of data available was then taken up at the Burley Office. On April 9th Governor Davis came to Burley and discussed the situation with the Board.

10. The Board has had access to a large number of reports and estimates and has had the advice of the officials of the Reclamation Service at Burley who have studied the problems involved for a number of years past. Most of the maps, tabulations, graphic curves, and other information introduced into this report as exhibits were obtained from the records of the Burley office, including reports by Mr. A. J. Wiley, or from Reports furnished by the State Engineer of Idaho, and from the report by Mr. Bickel in connection with his proposal for the Shelley Canal and the Bruneau project. Specific acknowledgment is made of valuable assistance rendered the Board by Project Manager Dibble, Engineer Banks, and Engineer Phelps.

JRP000110

11. The Board expresses the opinion that the greatest use of the water of Snake River will be found in the dedication of the entire flow of the stream to irrigation in so far as the water can be economically appropriated. The physical conditions surrounding the problem render it possible to divert from the stream at numerous points in its course, and with the requisite storage to utilize a very large percentage of all the waters originating in the watershed above Milner dam. It is demonstrated by the data available to the Board that the amount of water available in the river is the limiting factor. There is an excess of land for the amount of water which can probably be brought upon it. The net effect of this condition will be to dry up the river below Milner Dam during the irrigation season, also to as great an extent as possible below American Falls Reservoir, during the non-irrigation season. The waters flowing in the stream below Milner Dam are not susceptible of diversion to any considerable amount, and therefore become of primary use in connection with the production of power. The principle involved therefore is to secure as nearly as possible a total use of the waters for irrigation above Milner Dam, and to secure the greatest possible use for power below Milner Dam. To a moderate extent these

JRP000111

interests conflict with each other but fortunately on account of the large accretions to the stream below Milner Dam the power resource is restored at Upper Salmon Falls and the injury to that resource which would be susceptible of future development is relatively not very great.

AMERICAN FALLS RESERVOIR

12. The American Falls Reservoir is clearly a necessity for the maximum utilization of the waters of the Snake River. This point is generally conceded, and the efforts of all interests involved should be concentrated and directed towards the commencement of work upon this facility at the earliest possible date. The Reclamation Service now has under consideration a contract to be entered into by the various water users concerned, wherein these water users agree to provide funds for the early development of the reservoir. This plan, contemplating as it does the eventual completion of the reservoir to full capacity of approximately 3,000,000 acre-feet, offers a definite basis for early progress. In the absence of any other definite proposal looking to the same end, it is believed that the interests of all parties concerned will be best advanced by concentrating support behind the Reclamation Service proposal with a view to securing the early completion of the entire reservoir in order that this very essential facility may be available as rapidly as enterprises can be initiated to bring additional lands under cultivation.

JRP000112

Table 5

Power Possibilities on the Snake River from American Falls to Swan Falls, inclusive.

SITE	Head: Feet	Low delivered H.P.	Firm Power at site under present conditions H.P.	Firm Power at site under proposed conditions H.P.	Power at site for Irrig. Pumping H.P.
American Falls	45	6,000	18,000	0	35,000
Eagle Rock	45		18,000	0	35,000
Minidoka	45	10,000	15,000	0	35,000
Milner	45			0	0
Cedar Rapids	90			0	0
Dry Creek Falls	325			0	0
Twin Falls	125		5,000	5,000	Firm Power
Shoshone Falls	200	1,500	8,000	8,000	" "
Auger Falls	120		7,000	7,000	" "
Upper Salmon Falls	85		38,000	38,000	" "
Lower Salmon Falls	50	4,000	20,000	20,000	" "
Crane Falls	27		13,000	15,000	" "
Swan Falls	25	13,500	10,500	10,500	" "

*Proposed Conditions: All flow stopped at American Falls in non-irrigation season, all flow except waste waters to be diverted at Milner Dam or above in all seasons.

JRP000128

37. It is recognized generally that the establishment of the American Falls Reservoir is essential to the further development of dependable irrigation possibilities on the Snake River, also that the development of that reservoir will shut off the winter flow at that point which will thereby to a very large extent deprive the remaining power sites of the winter water which now passes American Falls. This condition is complicated however, by the fact that the diversions for irrigation at Minidoka Dam and at Milner Dam are prior rights over any of the power rights lower down and consequently under natural flow conditions the power sites below Milner Dam reach the condition of lowest flow and therefore their period of least firm power production in the summer season, when practically all water is taken from the river at Milner Dam. It is well understood however, that accretions from springs and return flow accrue to the stream to a slight extent between Milner Dam and Twin Falls, which is the next lower power site, and to a very large extent below Shoshone Falls and above Upper Salmon Falls.

38. It will appear therefore from an analysis of the situation that the stoppage of winter flow at American Falls Reservoir will to a large extent eliminate the flow of the power sites above Salmon Falls, but will not materially modify the value of that site and sites lower down from the standpoint of the production of firm power.

JRP000129

power value or the cost of substitution from other sources. From the standpoint of this report, it is believed that dependable information as to return flow and other accretions to the stream usable for power above Upper Salmon is not sufficient to permit the prediction of value as to reasonable expansions to be expected in that field, and the opinion is expressed that the best position at this time is to lay out future development on the basis of the dedication of all water to irrigation use. Under this proposal commercial power plants from American Falls to Shoshone Falls inclusive, would require adjustment for the near future with subsequent development as circumstances permit.

45. There will be an abundant power resource at American Falls, Eagle Rock and Minidoka Dam for all probable demands for irrigation pumping. This resource will arise from the waters turned down the river to be diverted at Minidoka Dam and Milner.

46. Since the complete utilization of the Snake River water supply above Milner Dam for irrigation purposes will, under normal conditions require a considerable length of time, it is possible that power plants constructed in the near future for pumping purposes may, until such time as irrigation developments are completed, be used to supply

JRP000136

commercial winter power, and by reason of such possible use winter power rights might initiate which would mitigate later against a complete use of this water resource for irrigation purposes. In granting power rights in the future the Federal Government and the State should so far as possible provide restrictions requiring its eventual surrender when and as the waters are required for application to the land.

SHELLEY CANAL

47. Mr. Bickel's proposal is to construct a diversion dam at Shelley and a lined canal 84 miles long with capacity of about 6700 second-feet from that point to a point west of American Falls, where a drop, for the development of power, is contemplated, at the same time returning the water into the proposed reservoir at American Falls. From the power drop an extension is contemplated to carry a sufficient supply of water to serve 240,000 acres, including 120,000 acres on the proposed North Side Minidoka Extension project and other lands beyond; the purpose being to eliminate pumping to the Minidoka tract. The maps indicate that the length of this extension would be about 120 miles, or a total length of about 200 miles of Main canal. He estimates the cost of construction for 387,000 acres at $26,560,000, which with

JRP000137

Orr Affidavit

Exhibit 30

Excerpted pages of the "Report Relative To Application of Idaho Power Company for Preliminary Permit to Develop Upper Salmon Falls Site on Snake River," by U.S. Geological Survey Hydraulic Engineer W.G. Hoyt (July 1921)

REPRODUCED AT THE NATIONAL ARCHIVES

D-100, 12-9-44

REPORT RELATIVE TO APPLICATION OF IDAHO POWER COMPANY FOR A PRELIMINARY PERMIT TO DEVELOP UPPER SALMON FALLS SITE ON SNAKE RIVER, IDAHO.

Permit No.19, Federal Power Commission

Idaho 26643

By

W. G. Hoyt

Hydraulic Engineer, U. S. Geol. Survey

July, 1921.

Idaho
Fed. # 26643
Ida. 26643

12 S.
Snake River

REPRODUCED AT THE NATIONAL ARCHIVES

INTRODUCTION

This application was referred to Mr. C. G. Paulsen, District Engineer, U. S. Geol. Survey, at Boise, Idaho, on February 12, 1921, for an examination and report. Later it seemed desirable to secure additional data and this report has been delayed pending the collection thereof. The writer visited the site on June 4, 1921, accompanied by Mr. T. A. Purton, Office Engineer, Idaho Power Co., and during July in connection with general power investigations along Snake River, accomplished considerable work, aided by Warren Oakey, assistant engineer U. S. Geol. Survey, at the site and at smaller possible sites lying upstream from the site in question. Special attention was also given to the protests as registered by the Wendall Chamber of Commerce, Gooding Chamber of Commerce, and the County Commissioners of Gooding County. This report is being written prior to the holding of the public hearings relative to these protests. There is included such engineering data as will have a bearing on the protests and at the hearing, which will be held undoubtedly in October, 1921, additional facts will no doubt be brought out which should be considered in connection with this report. Considerable data as prepared for the report on the Twin Falls application (Project No.18, Idaho 26642) has been included in this report, they being applicable to both cases.

REPRODUCED AT THE NATIONAL ARCHIVES

Brief Description of Proposed Project.

The Idaho Power Co. state that they contemplate the construction of a concrete dam 8 feet high and about 1,000 feet long across Snake River at the head of Upper Salmon Falls, running from a point approximately N.W.¼ of N.E.¼ to the S.W.¼ of N.E.¼ in sec.2, T. 8 S., R. 13 E., B. M., Water to be diverted into a canal on the south bank and carried in this canal a distance of about 8,000 feet to proposed power house in probably the N.W.¼ of N.W.¼, sec. 3, T. 8 S., R. 13 E., Elevation of the water at the head of the falls to be approximately 2885 feet above sea level; elevation of water at the foot of the falls, between 2804 and 2805 feet, which would give a gross head on the wheels of about 80 feet. Blue print exhibit E submitted with the application shows also a canal on the north bank extending from the north end of the proposed dam to a point of use in about Lot 3, sec.34, T. 7 S., R. 13 E., B. M., elevation of tail water at the proposed power house not given. Energy generated will be distributed through the general transmission system of the company, a new transmission line to be constructed, running from the proposed plant to their existing Lower Salmon Falls plant, a distance of about 5½ miles.

Description of the Water Shed.

Very briefly, Snake River may be described as having its source near the continental divide in the southern part of

REPRODUCED AT THE NATIONAL ARCHIVES

Yellowstone Park. It flows southerly through Jackson Lake, which is now used as a storage reservoir, continues 125 miles south and southwest to a point in T. 3 S., R. 46 E., where it enters Idaho, flows northwest 71 miles to the junction with Henrys Fork between St.Anthony and St.Anthony Falls, turns southwest 100 miles and then generally west and northwest 270 miles to the boundary between Oregon and Idaho, 50 miles south of Weiser. The river then turns north and for about 200 miles forms the boundary between Idaho and Oregon, and for 30 miles the boundary between Idaho and Washington. At Lewiston it joins Clearwater River, and flows west 120 miles to its confluence with Columbia River. The total drainage area is approximately 108,000 square miles. In general the river may be divided into two main sections. First, that portion upstream from Milner, and second, the portion downstream from Milner. In the portion of the river upstream from Milner the use of water for irrigation will predominate over the power use, while in the section downstream the use of water for power purposes will undoubtedly predominate, since the larger portion of the land adjacent to the river is at such an elevation that it cannot feasibly be irrigated by water pumped or diverted below the Milner dam.

Description of the Site.

Beginning at Milner, or perhaps more properly, at American Falls, Snake River begins cutting through successive layers of lava which go to make up the Snake River plains.

Orr Affidavit

Exhibit 31

Leonard J. Arrington, *Irrigation In The Snake River Valley: An Historical Overview*, IDAHO YESTERDAYS, Spring/Summer Issue, 1986 (Vol. 30, Numbers 1-2)

IDAHO YESTERDAYS

Spring/Summer Issue, 1986: Volume 30, Numbers 1-2

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COVER

Photograph taken in the Mann Creek area by John Burch. Courtesy Snake River Regional Studies Center, College of Idaho.

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IRRIGATION IN THE SNAKE RIVER VALLEY
AN HISTORICAL OVERVIEW

by Leonard J. Arrington

Today two-thirds of Idaho's farmlands are located along the fertile crescent of the Snake River, with as many as thirty-five main reservoirs on the river and its tributaries, furnishing more than six million acre-feet of water for 3.6 million acres of cropland. The following article describes the ways in which irrigation came to the Snake River Valley. Its author, an economic historian, is Lemuel Redd Professor of Western History at Brigham Young University.

IT IS TEMPTING to make this an autobiographical essay. My parents rode a freight train from Oklahoma to the Twin Falls area shortly after the tract was opened in 1905. The Arringtons have been there ever since. My father raised sugarbeets, potatoes, beans, and of course wheat and alfalfa in rotation. Irrigation was a way of life with us. I well remember the many times that my father took me with him as he irrigated his land and showed me how to assure a steady flow in the corrugates—not too strong or too weak—when to cut off the water, and how to adjust the headgates. I became aware of some of the conflicts over water rights, even as a little boy. I remember one occasion when I was about seven, when my father took me to Heyburn to visit my aunt. It was a long trip in a model T Ford, and we had to stop in Burley to use the bathroom. The sign at the Burley comfort station that we visited said: "Please flush; Twin Falls needs the water!"

By the time I was in junior high I was helping my father manage the water on a sixty-acre farm not far from my home. When I was ten, my mother gave me a notebook as a birthday present and suggested that I keep a record of what went on. I have recently reread the three entries from 1927. The first mentions Lindbergh crossing the Atlantic, the second describes the Jack Dempsey-Gene Tunney heavyweight fight. The third mentions the completion of the dam that created the American Falls Reservoir. Our home was just a mile and a half from Shoshone Falls, and on Sundays we used to walk down there to marvel at the immensity of the supply of water flowing down the gorge and on to the Columbia and the Pacific Ocean. It was a thing of power and beauty. But as boys we also dreamed of what it might do for the Salmon tract and the Bruneau project.

In reading over my youthful journal, I even found a joke that mentioned water. In the summer of 1930, when I was thirteen, my father had to go to Hollister to give a talk to a church group. I went with him. According to my record, my father told the people: "All this place needs is good people and lots of water." To which someone in the congregation shouted back with glee: "That's all Hell needs!"

THE FIRST DIVERSIONS of mountain creeks for irrigation purposes in Idaho were not from the Snake River. The Spaldings diverted the Clearwater in 1836; the Mormon colony at Lemhi turned a tributary of the Lemhi into a ditch in 1855; the settlers of Franklin used the waters of Maple Creek as early as 1860; part-time miners diverted the Boise River to water crops in 1862; and the Bear Lake colonists dammed Paris Creek to irrigate in 1863. All of these canals, except that used by the Spaldings, continued to water crops in the years that followed their first use.[1]

[1] I must first acknowledge the immense pleasure I derived from having the opportunity, in preparing this essay, of reading once more the valuable chapters in the *History of Idaho* by Merle Wells and Sam Beal, the bicentennial history of Idaho by Ross Peterson, and the exciting doctoral dissertation of Darrell Gertsch on the Upper Snake River Project. Any merit in what I have written is due to their scholarly ploughing of the source material. See Merrill D. Beal and Merle W. Wells, *History of Idaho*, 2 volumes (New York: Lewis Historical Publishing Company, 1959), esp. I:119-191; F. Ross Peterson, *Idaho. A Bicentennial History* (New York: W. W. Norton Co., 1976), esp. 115-138, 188-192; and William Darrell Gertsch, "The Upper Snake River Project: A Historical Study of Reclamation and Regional Development, 1890-1930" (Ph.D. dissertation, University of Washington, 1975). I have also profited from reading M. D. Beal, *A History of Southwestern Idaho* (Caldwell, Idaho: The Caxton Printers, 1942); Kate B. Carter, editor, *Pioneer Irrigation: Upper Snake River Valley* (Salt Lake City: Daughters of Utah Pioneers, 1955); Bill Guhck, photography by Earl Roberge, *Snake River Country* (Caldwell, Idaho: The Caxton Printers, 1971); and many articles in issues of *Idaho Yesterdays*.

The first diversions from the Snake itself were, it appears, in the 1880's, when Mormon colonists in the Upper Snake River Valley put in dams, dug canals, established villages, and began to farm. In the region north of present-day Idaho Falls, the Snake had a gentle westerly slope along a broad fertile plain that could easily be watered by simply dug short canals. Beginning with a settlement at Menan by John R. Poole and associates in 1879, settlement spread during the next few years north to Rexburg and south to present-day Blackfoot. Some fifteen settlements were estahlished during the 1880's, and the area became literally honeycombed with cooperative canal systems.

Such things do not happen without organizers, and a strong organizer of these projects was Thomas E. Ricks.[2] Born in southwestern Kentucky, near the Tennessee border, Ricks was one of a farming family of eight children. The Ricks family, whose members had long been Quakers, had settled in Virginia, then North Carolina, then Kentucky, and finally southern Illinois. An accident in 1844, when Thomas E. was sixteen, caused one of his legs to be much shorter than the other, thus making him a partial cripple the rest of his life. This did not stop his pioneering activity. He and his family became Mormon converts, and they assisted with the building of the Mormon community of Nauvoo, Illinois. They crossed the Great Plains in 1848; on the trip Thomas Ricks was shot three times by Indians and left to die. The family eventually helped to colonize Centerville, Farmington, and Cache Valley, Utah; participated in the exploration of southern Utah in 1849-1850; and helped to establish a colony at Las Vegas in 1856. From Las Vegas, Thomas Ricks went to the Salmon River Mission at Lemhi, Idaho, in 1858, and served as a sheriff in Logan, Utah, in the 1860's and as assessor and collector of taxes in the 1870's. He served as a contractor building the grade for the Utah Northern Railroad from Franklin, Idaho, to Butte, Montana, during the late 1870's and went on to supervise grading for the Northern Pacific Railroad in Montana, northern Idaho, and eastern Washington in the early 1880's.

After spending five years in the Upper Snake River Valley, Thomas E. was asked by Mormon authorities to direct the burgeoning Mormon settlements there. He was the first Mormon bishop of the region and the first stake president, and he was also Idaho's official delegate to the National Irrigation Congress in the 1890's. His biggest achievement was the drive to construct the Great Feeder Dam on the Snake River during the winter of 1894-95. The dam was built during the winter by men and teams from several small companies that hauled rock and cottonwood timber from nearby canyons. By 1895 the Great Feeder system was the largest single irrigation project in the world. Built and owned by small farmers, it was a testimony to the favorable topography, the previous experience of the farmers and organizers with irrigated agriculture, and the kind of cooperation for which the Mormons were famous.

THE SECOND STAGE in Snake River irrigation history features the Magic Valley enterprise of the early years of the twentieth century. The passage of the Carey Act, the vision of a small group of private entrepreneurs, and the assistance of eastern capital made possible the irrigation of some 300,000 acres of highly productive sagebrush land in south-central Idaho. This is an area in which, John C. Fremont wrote, "does not occur . . . a fertile spot of ground sufficiently large to produce . . . pasturage enough to allow even a temporary repose to the emigrant."[3]

Because previous federal land laws had failed to facilitate the settlement of arid western agricultural land, Congress in 1894 passed the Carey Act as an inducement to settlement. The government would cede up to

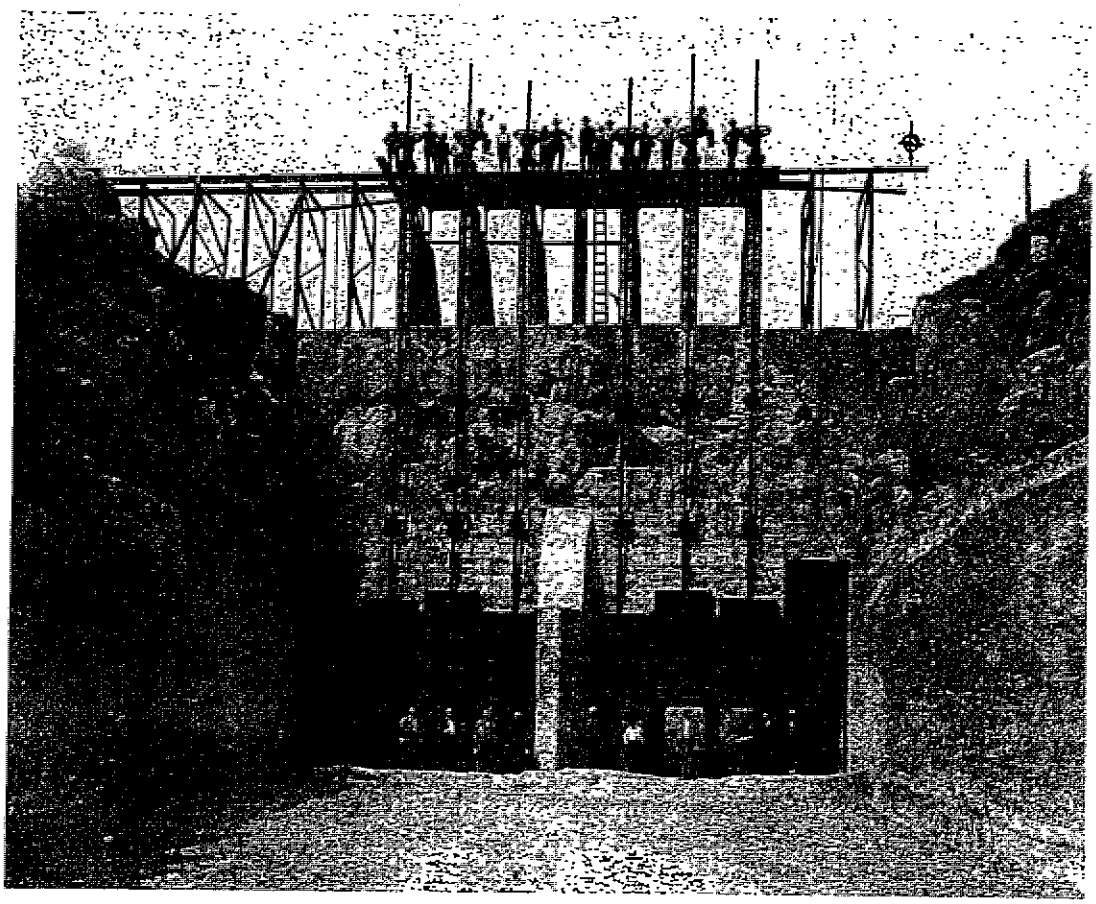
[2] "Ricks, Thomas Edwin," in Andrew Jenson, *Latter-day Saint Biographical Encyclopedia*, 4 volumes (Salt Lake City: Andrew Jenson History Company, 1901-1936), 2:455-457; Noble Warrum, *Utah Since Statehood*, 4 volumes (Salt Lake City and Chicago: S. J. Clarke Publishing Company, 1919-1920), 4:228-233; Special Edition of the *Fremont Journal*, May 30, 1900; Orson F. Whitney, *History of Utah*, 4 volumes (Salt Lake City: George Q. Cannon and Sons, 1892-1904), 4:156-157; David L. Crowder, *Rexburg, Idaho: The First One Hundred Years, 1883-1983* (Caldwell, Idaho: The Caxton Printers, 1983), passim.

[3] John C. Fremont, *Report of the Exploring Expeditions to the Rocky Mountains in the Year 1842, and to Oregon and North California in the Years 1843-'44* (Washington, D.C., 1845), 163.

one million acres to any western state willing to undertake the reclamation of lands under the grant. Several men envisioned the successful development of south-central Idaho. There was Frank Riblett, a surveyor for Cassia County, who ran lines for possible reclamation projects; John Hansen, also a Cassia surveyor and farmer, who had a similar vision; Paul Bickel, chief engineer of the Twin Falls project; John E. Hayes, his young assistant; Stanley Milner, a Salt Lake City banker who put up the money for the initial surveys; Frank Buhl, a Pennsylvania iron and steel manufacturer, who furnished additional funds; and others. But the single personality who dominated the project was Ira B. Perrine.

A native of Indiana, Perrine had come to Idaho in 1883, when he was twenty-two. He first worked in the Wood River mines near Hailey; after many months he rode across the desert to Idaho Falls, where he bought forty dairy cows and drove them back to the mines to furnish milk, butter, and meat to the miners. During the fall of 1884, in need of winter pasture, Perrine moved his herd south to the Snake River Canyon, where he located a few miles below Shoshone Falls, in a deep alcove within the canyon walls. There he found abundant grass watered by two clear emerald lakes fed by underground springs—the Blue Lakes, as they came to be known. He planted trees and grew wheat, fruits, vegetables, and

The tunnel gates at Milner Dam, shown when the tunnel work was completed. Standing at the bottom are Mark Murtaugh, Peter Kimberly, Frank Buhl, Stanley Milner, Robert McCollum, Elizabeth Murtaugh, Walter Filer, and Ira Perrine.



berries, which he marketed in mining camps and in the various villages of Cassia County. "Being successful with irrigation at Blue Lakes," as one reporter indicated, he was "ready in 1900 to water 500,000 acres by taking water out of the Snake at a point known as 'The Cedars,'" the site of Milner Dam.[4] Appreciative of the work of the surveyors and engineers, he took on the task of raising the money to fashion an agricultural empire.

Getting $30,000 from Stanley Milner, Perrine incorporated the Twin Falls Land and Water Company in 1900, secured money from a Chicago bonding house, filed notice for the diversion of water on both the north and south sides of the Snake, contracted with Idaho to develop 270,000 acres under the Carey Act, and began to sell land at 25 cents an acre and water rights at $25 per acre. The dam was completed by 1905 and water diverted into a canal 10 feet deep and 80 feet wide at the bottom and 120 feet at the top. Water was immediately made available to 60,000 acres of Magic Valley farmland. By 1905, Twin Falls had its first bank, doctor, attorney, dentist, barber, school, newspaper, restaurant, and roominghouse. In addition, new towns in the valley sprang up: Hansen, Kimberly, Filer, Buhl. The project included 240,000 acres watered by gravity flow of the Snake.

Ultimately, Perrine was able to obtain financial support from Pennsylvanians W. S. and J. S. Kuhn to complete the north-side project as well, and the project came to encompass Jerome, Hazelton, Eden, and Wendell. This project, enlarged over the years to 185,000 acres, was slower in becoming successful but nevertheless reflects Perrine's leadership and influence in building the Magic Valley empire.

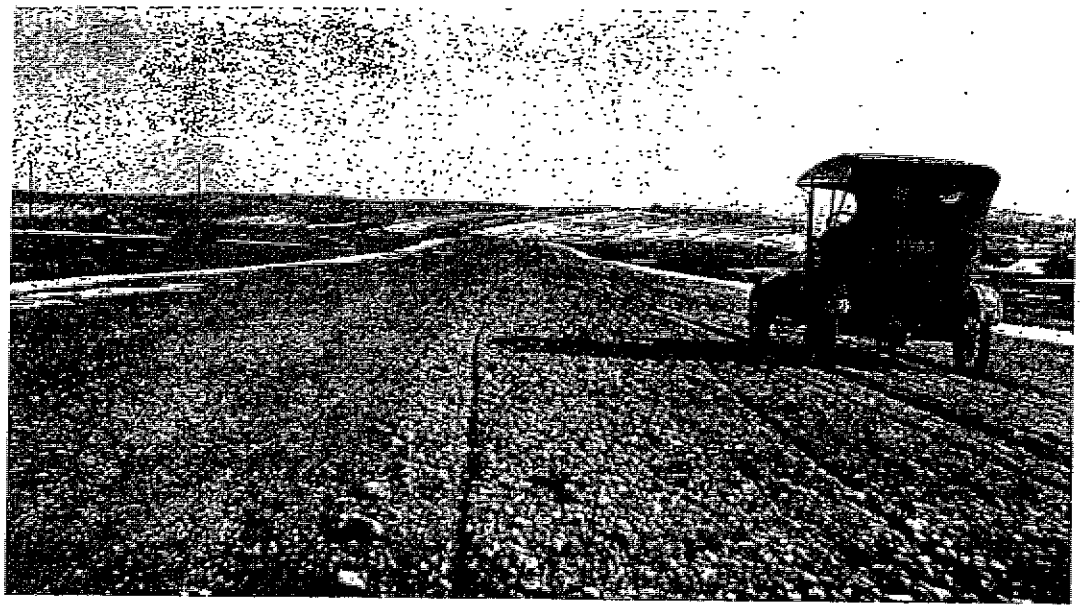
The third important development along the Snake was the Minidoka Project, which was made possible by the passage of the National Reclamation Act in 1902. The first federal project in Idaho, Minidoka Dam provided water to 120,000 acres on both sides of the Snake near the Minidoka rapids, about thirty-five miles above the Miiner Dam site. The canal and distributing system, completed in 1907, irrigated Heyburn, Paul, Acequia, and Rupert. It represented the first irrigation water provided by the U.S. Reclamation Service and was the first in a whole series of projects in which the Reclamation Service emerged as a full partner with private and state interests in the development of the water resources of the Snake. The chief engineer of the Reclamation Service in charge of the project was Arthur Davis, a man of whom it was said that he was so interested in water that he had it on the brain. He later became director of the service's successor, the Bureau of Reclamation.

THE AMERICAN FALLS project is in many respects the most important Snake River project of all, because it represented a means of furnishing ample late-season water for dozens of the small cooperative companies on the Upper Snake River, the thousands of farmers under the Twin Falls and North Side canal company ditches, and the Minidoka settlers. Its success required the cooperation of federal, state, and local governments and private interests, and both corporate and individual proprietorships. It is said to have been the brainchild of Ira Perrine.

Several factors were involved in the project. Farmers had learned that the annual supply of mountain runoff is not constant but goes through periodic cycles. The year 1919 was the driest year in Idaho's history. The Twin Falls Canal Company, for example, reported on July 1 that it would be able to furnish only 30 percent of the normal supply of water. There were altercations along the river. The desperate farmers in the upper valleys of the Snake sometimes made illegal use of water at night, broke the locks on headgates, and in some cases organized vigilante committees. Farmers on the north side of the Snake in Magic Valley were unable to provide water for their livestock and poultry and were forced to haul it in just to furnish water for washing, cooking, and drinking. Such was the sympathy with their plight that the farmers on the south side, who had a prior right, voluntarily gave up water to make possible a run for the people on the north side. In doing so, they suffered a $25

[4] O. A. Kelker, "The Story of I. B. Perrine," Twin Falls *Times-News*, June 27, 1971.

Congressional Record
June 8, 1954
Pages A4230-37



By February 14, 1924, when this picture was taken, gravel had been laid for Idaho Street in the new town of American Falls.

million crop loss, but they felt that in the interest of humanity they should do it. It became obvious to all that additional storage facilities had to be built to provide water when short supplies occurred in the future.

The accord was not simply arrived at. There would have to be agreement among some thirty water districts and forty irrigation companies along a 300-mile stretch of the river; organizations would have to be developed to promote the project (these included the Idaho Irrigation Congress and the Western States Reclamation Association, both established in 1919); eastern and southern congressmen had to be persuaded that the project was necessary and economical; a national political figure like Senator William E. Borah had to be enlisted in the cause; the entire town of American Falls had to be purchased, since its existing location would be submerged by the projected reservoir; and the federal government had to acquire 70,000 acres of land, over half of which belonged to the Bannock-Shoshone tribe on the Fort Hall Indian Reservation.

An editorial in the Pocatello *Tribune* for July 12, 1919, exemplifies the arguments used to persuade reluctant eastern and southern congressmen to support the project:

> Some of the erudite brethren of the South and East should consider that sagebrush will not always be the decorative portion of Western scenery. The East has forgotten its hush days, and the South its tanglewood and skunkbush. Both have rain, but neither understands irrigation nor conservation of water. They know that it will float a steamboat and is reasonably fair for baptismal purposes, but they don't comprehend canning it for crops.

Despite the collapse of farm prices after World War I, despite the obstinacy of Secretary of the Interior Albert B. Fall, despite the opposition of important absentee landowners and certain business interests, the project was assured in November, 1924. A contract to construct the large dam was let and in 1925 its cornerstone was laid. For two years an average of 400 men worked around-the-clock shifts. The gates of the dam were lowered into place in October, 1926, and the reservoir was filled to its maximum capacity of 1.7 million acre-feet on July 1, 1927. The date was important enough to a ten-year-old boy on a farm near Twin Falls to record in his diary as one of the great events in the history of his world. With the backwater of

the reservoir extending up the Snake twenty-five miles, the project provided directly for the reclamation of 115,000 additional acres of public land to the north and west of the Minidoka project—what is known as the Gooding division—and provided supplemental water for over one million acres above and below the facility.

Other dams primarily for storage and control of irrigation water have been built on the Snake and its tributaries since the completion of the American Falls project. Palisades Dam, a few miles west of the Idaho-Wyoming border, was finished in 1959. Various other projects connected with tributaries of the Snake include the Arrowrock, Anderson Ranch, and Boise Diversion dams on the Boise River; the Dworshak on the North Fork of the Clearwater; and the Teton on the Teton River.

ONE OF THE most interesting developments in irrigation of the Snake River plain is the use of underground waters that probably have their original source in the Snake. The explanation of this development lies in the story of Julion Clawson, who operated out of Rupert during the years immediately following World War II. A great-grandson of Brigham Young, "Duke" Clawson served in the navy during World War I; operated a building and loan company; and invested in a sheep ranch at Nounan, in Bear Lake Valley. In 1946 he purchased a large tract of sagebrush land in Minidoka and Lincoln counties, north of Rupert. He intended to begin a dry-farming operation there but soon discovered nine culinary wells on the property, which had been abandoned thirty years earlier by German immigrants who had come from eastern Washington and the Dakotas to homestead the land. He studied geological reports indicating that there were enormous lakes of water under the vast lava plain of the Snake. "They thought I was after oil when I bought drilling equipment here from Oklahoma," he told friends. "They thought I was crazy. They were even more convinced of it when they learned I was drilling for water."[5]

Clawson found abundant water in the three deep twenty-inch wells he had drilled by the summer of 1947. He arranged with Idaho Power Company for electricity from Minidoka Dam to supply the needs of large, specially ordered pumps to water more than 3,800 acres of wheat, potatoes, and beans in 1948. His irrigation layout was engineered so as to prevent erosion and undue loss of water through evaporation.

The first year of his deep-well irrigation was successful. The Portneuf silt loam of the area, with the addition of proper fertilizer and water, seemed ideal for the production of potatoes and sugar beets. And seventy days of uninterrupted pumping brought no drop in the water table. Local farmers were quick to catch on, and it was not long before some 30,000 acres of private land in the vicinity were under pump-based irrigation. The Bureau of Reclamation also drilled test wells on land adjacent to Clawson's property, which had long ago been set aside for irrigation but had never been provided the promised water. The bureau confirmed Clawson's contention that the entire area had a fine supply of underground water. During the 1950's more than 50,000 acres of land in the area, administered by the Bureau of Reclamation, were opened for homesteading.

This was the effective beginning of pump-based irrigation in the Snake River Valley, which has spread as far down the river as Nyssa, Oregon, and it constitutes one of the most significant postwar changes in Idaho agriculture. Hundreds of thousands of acres of good farmland were opened up in the years that followed. While there had been pump-based irrigation elsewhere, particularly in the Imperial Valley in California, it was Clawson's success that generated the action which has done so much to bolster Idaho's agriculture. He had concentrated on deep wells, but the Snake River itself also became an important source of water as enterprisers pumped its water to plateaus high above the river. Clawson's willingness to think big and his fearlessness in going heavily into debt to take advantage of

[5] *Salt Lake Tribune*, October 3, 1948. Further information on the life and agricultural efforts of Julion Clawson is in clippings from the *Minidoka County News*, *Salt Lake Tribune*, and other newspapers collected by Clawson's secretary, Anona Kunz Clawson, LDS Church Archives, Salt Lake City; and oral history interviews with Irwin Clawson, Yale Holland, and Rodney Hansen, by Richard L. Jensen, James Moyle Oral History Program, LDS Church Archives.

the best available technology in pumps and sprinkling systems made it possible for him to take the lead in setting a pattern of change that was soon followed by many smaller farmers in the Snake River country.

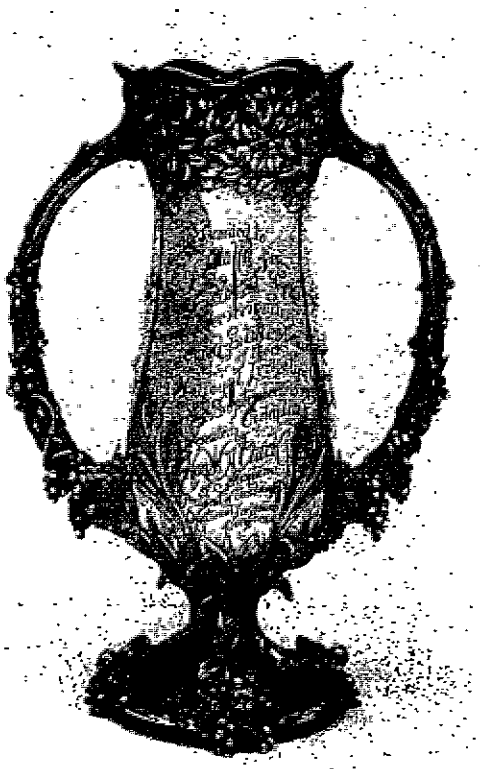
WE HAVE KNOWN for a long time that extensive and complicated irrigation systems depend on an advanced sense of community. The mutual dependencies of all those involved are so crucial that the system will not function unless there is an overriding presiding authority—as in the case of the Mormon settlers in the Upper Snake River Valley—or a predisposed willingness to cooperate—as among the settlers along the river who acknowledged that their own desires must be balanced by the needs of others to achieve desirable and necessary ends. While there are exceptions, the history of the Snake River Basin provides many examples of this willingness to subordinate immediate personal and group interests to those of the larger community. The generosity of the Twin Falls Canal settlers in relinquishing some of their water in 1919 to the residents of the north side is one illustration. Another is the willingness of the upper-valley users in 1924 to help those lower downstream, on the north side, during a subsequent drought.

Perhaps the most arresting example of the sense of community is the behavior of the region's residents after the disastrous failure of the Teton Dam in 1976.[6] On June 5, 1976, the

[6]See Bruce D. Blumell, "The Latter-day Saint Response to the Teton, Idaho Flood, 1976," *Task Papers in LDS History*, Number 16 (Salt Lake City: Historical Department of the Church of Jesus Christ of Latter-day Saints, 1976); F. Ross Peterson, *The Teton Dam Disaster: Tragedy or Triumph* (Logan, Utah: Utah State University Faculty Association, 1982).

Teton Dam, three days after its collapse. Photo by Boyd Norton.





An ornate silver cup was awarded to Idaho at the 1905 National Irrigation Congress.

dam broke, releasing eighty billion gallons of water. A tidal wave fifteen feet high, running faster than a horse, quickly expanded to a width of four miles and headed down the general direction of the Teton River until it joined the Snake. At that point the wave rushed pell-mell down that unruly river toward the American Falls Reservoir, eighty-five miles from the shattered dam. As it progressed, the speeding torrent created a traveling lake eight miles across and twenty miles long. The communities of Wilford, Sugar City, Salem, and Hibbard were carried away; about two-thirds of Rexburg, a city of about ten thousand, was washed away; and considerable portions of Annis, Menan, Roberts, Firth, and Blackfoot were flooded. The crushing force of the water knocked out irrigation-canal headgates everywhere along the river, filled canals well beyond their capacity, and spread out over the countryside. The rampaging river damaged or destroyed two hundred fifty businesses, thirty-five hundred farm buildings, and about four thousand homes. Total property loss was estimated at approximately $500 million. Fifteen thousand head of livestock were killed and fourteen thousand people left homeless.

Less than three hours after flood reports reached regional centers, truckloads of supplies were leaving Mormon welfare headquarters in Salt Lake City; contractors from Idaho Falls and Pocatello were moving heavy equipment into the area; and officials both of voluntary organizations like the Red Cross and of federal and state agencies were arriving on the scene to direct a massive relief effort. Local and regional church and civic leaders met with representatives of volunteer and government agencies the evening of the disaster and every evening for several weeks thereafter. Their coordinated efforts assured enough food, housing, clothing, medical supplies, and other assistance for the fourteen thousand left homeless and for the cleaning and repairing of salvageable homes left in the wake of the flood. Ricks College, standing on a hill in Rexburg, was in spring recess; untouched by the disaster, it was able to serve an average of thirty thousand meals per day and house several thousand people.

In the days that followed, like the flocks of seagulls that rescued the pioneers of the Salt Lake Valley from an invasion of crickets in 1848, hundreds of yellow busses entered the valley every day bringing men and women from towns in Idaho, and from Utah and Wyoming as well, to help with the cleanup. About three thousand volunteers came each day, contributing more than half a million hours of donated labor over the next three months. Within a month, the afflicted communities were so far recovered, at least in spirit, that they held a special July the Fourth "Thank You, America, Day" in Rexburg. "We just wanted everyone to know we are proud to be Americans and proud of our heritage," said the chairman of the parade.

Less than four years later, visitors to the region, hearing about the catastrophe, asked: "What flood?" Four thousand new homes had been erected. The businesses were all rebuilt. No visitor would suppose the Snake River valley had ever been anything but a network of prosperous, progressive communities. The population of the region today is greater than before.

Throughout the tragedy and suffering, observers noted a prevalence of the Idaho spirit—a confidence that things would turn out all right. One of those afflicted, whose sense of humor remained intact, commented: "We weren't flooded; we were just over-irrigated." The inundated valley enjoyed powerful support from the agencies of Idaho churches, the Red Cross, the federal government, and—most important—the farmers and businessmen up and down the line. As one person said: "They literally lifted us out of the mud and set us on our feet again. Without everybody's help we never would have made it."

I hope that we maintain the same sense of community as we face the future problems of the Snake River Basin. Local interests understandably want reclamation of additional lands—the Bruneau project, for example. Municipalities and new industries create a demand for additional water uses. Environmental groups are concerned for the preservation of wild-animal sanctuaries, feed ranges, and spawning grounds, and for the preservation of the spectacular canyons still remaining on the Snake.

It would be improper for me to try to impose a particular point of view on this story. But I am an Idahoan born and bred, who still holds title to a highly productive sixty-acre farm and who wishes only the best for the new and old residents of his native state. I have tried to keep in mind the reasons why our early settlers saw the need to replace the old doctrine of riparian rights, which had long characterized eastern and midwestern use, with the indigenous doctrine of prior appropriation, which all felt was better adapted to regions of limited rainfall like the Snake River Basin. That doctrine, it seems to me, has guaranteed to the owners, over the years, a definite quantity of water and at the same time has permitted them to sell or transfer that use when owners are not injured. Despite growing criticism of some decisions, Idahoans have remained basically loyal to the appropriation right because it provides the security that is desirable in a property right, and because it has the kind of flexibility that allows for change in economic use, permitting expanding cities to acquire augmented sources of water supply and encouraging recreational enthusiasts to claim that their use is also beneficial. As Robert Dunbar contended in his recent study, *Forging New Rights in Western Waters*: "The appropriation right is not a static institution.... it continues to be shaped by Western needs and pressures."[1] That seems a fair and sound judgment. I hope we will not surrender the doctrine of prior appropriation but work at adapting it to future needs.

Our homegrown poet Vardis Fisher celebrated Idaho's agricultural pioneers who have brought honor to the state and to land we love. Although the poem was written about his father, it also describes many surveyors, engineers, farmers, and financiers who have helped to redeem the waste lands of the Snake River Basin:

> Time built a pioneer and set him down
> Upon the grayest waste of Idaho.
> He clubbed the desert and made it grow
> In broad and undulating fields of brown.
>
> He laid his might upon it, stripped its frown
> Of drought and thistles; till by sweat and glow
> He left the aged and barren hills aglow
> With color—and its flame was his renown ...
>
> [He] poured his great dream into golden wheat;
> Until his gnarled and calloused hands had wrought
> A deep and quiet holiness of work.[2]

May all of us, in deep and quiet holiness, work toward a society that is compassionate, productive, and mutually respectful and beneficial. ■

[1] Robert G. Dunbar, *Forging New Rights in Western Waters* (Lincoln and London: University of Nebraska Press, 1983), 217.

[2] Reprinted in Dorys C. Grover, *A Solitary Voice: Vardis Fisher* (New York: Revisionist Press, 1973), 52-53.

Orr Affidavit

Exhibit 32

Excerpted pages of the "Report Relative to Water Power Resources of Snake River and Status of Public Lands Between Milner and Weiser, Idaho," by W.G. Hoyt (August 1922)

REPRODUCED AT THE NATIONAL ARCHIVES

II-100, 12-6-67

Report relative to Water Power Resources of Snake River and Status of Public Lands between Milner and Weiser, Idaho.

NOV 10 1922

See W.S.P. 657

by

W. G. Hoyt,

Hydraulic Engineer, U. S. Geol. Survey

August, 1922.

Indexed
12GS
Snake River
Indexed G.T.B.

REPRODUCED AT THE NATIONAL ARCHIVES

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DEPARTMENT OF THE INTERIOR

8

UNITED STATES GEOLOGICAL SURVEY

WASHINGTON

October 25, 1922.

OFFICE OF THE DIRECTOR

Mr. N. C. Grover,
Chief Hydraulic Engineer,
United States Geological Survey.

Dear Sir:

As requested in your letter of May 6, 1921, I made a field examination during June and July, 1921, of that stretch of Snake River between Milner and Weiser, Idaho. In making this examination I was assisted by Dr. Arthur C. Spencer, geologist; Warren Oakey, assistant engineer, and F. D. Ramsey, field assistant.

The accompanying report presents studies relative to the geography of Snake River basin, descriptions of the springs and their flow, history of the development of water power, and descriptions of both the developed and undeveloped sites and a plane-table map of each undeveloped site.

Considerable time has been spent in interpreting the power-site lands, the descriptions of which have been most puzzling owing to the inaccuracies of the original cadastral surveys. The power and approximate agricultural values of the power-site lands are shown in tabular form and also by means of colors on maps inclosed.

Yours respectfully,

W. J. Hoyt

Hydraulic Engineer.

(5)

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could be transformed into a highly productive region. Meetings and irrigation congresses were held throughout the West and in 1900 all political parties incorporated reclamation planks in their party platforms. In 1901 President Roosevelt, in his first message to Congress, urged the conservation of our natural resources, recommending suitable laws under which irrigation works might be constructed and maintained. In 1894 the Carey act was passed which aided the States in irrigation work. In 1902 the Government Reclamation law was passed and in the period 1900 to 1910 the Snake River plains, as well as large areas in other public land States, experienced a revolutionary change.

In this period the Boise United States Reclamation projects, King Hill and Minidoka, were put into operation. The North Side and South Side Twin Falls projects, and large irrigation districts in the valley west of Boise, were constructed. Towns sprang up which, unlike the boom mining towns, have kept up a continual growth. As nearly as can be estimated, the irrigated area in southern Idaho increased from less than 200,000 acres in 1890 to well over 1,200,000 acres at the present time, and the increase in population was over 200,000. With the growth of population naturally came a demand for power; each local community endeavored to supply its own demands by development of local plants, both small hydroelectric and steam. Between 1907 and 1912 these local plants were superseded by central hydroelectric stations constructed and operated by different companies. This was a period of exceptionally rapid [redacted] economic development. The various operating

Orr Affidavit

Exhibit 33

Excerpted pages of the "Report Covering Water Measurements and Studies of Stream Flow of Snake River Between Milner and Shoshone Falls," by C.E. Tappan (Idaho Power Company 1923)

12-G-S-K

DEPARTMENT OF THE INTERIOR
UNITED STATES GEOLOGICAL SURVEY

WATER RESOURCES BRANCH

615 Idaho Building,
Boise, Idaho, May 2, 1924.

RECEIVED
JUN 10 1924
GEOLOGICAL SURVEY

Mr. J. G. Hoyt,
Hydraulic Engineer, U.S.G.S.,
Washington, D. C.

Dear Mr. Hoyt:-

I am sending under another cover a copy of the Idaho Power Company's report covering hydrometric investigations conducted during 1923 by C. E. Tappan of that section of Snake River which lies between Milner and Shoshone Falls. Copy of this report has been furnished by Mr. T. A. Purton for your files at my request.

Yours very truly,

C. G. PAULSEN
District Engineer.

H

12 QR
Snake River

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B-100, 12-C-54

IDAHO POWER COMPANY

Report Covering Water Measurements and Studies of Stream Flow of Snake River between Milner and Shoshone Falls.

C. E. Tappan

- 1923 -

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D-100, 12-G-54 1

LAND CLASSIFICATION BOARD
RECEIVED
MAY 29 1924
GEOLOGICAL SURVEY

IDAHO POWER COMPANY

Report Covering Water Measurements and Studies of Stream Flow of Snake River between Milner and Shoshone Falls

---

C. E. Tappan

- 1923 -

12-G-R
Snake River

U.S.G.S.

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Mr. F. J. Rankin, Chief Engineer
Idaho Power Company
Boise, Idaho.

Boise, Idaho.
March 1, 1924.

Sir:

I am pleased to hand you herewith my report on the inflow to Snake River between Milner, Idaho and Shoshone Falls, for the irrigation season of 1923. There is included with this, a study of high water above Upper Salmon Falls, and a description of the new gaging station on Snake River at Oxbow, Oregon, with the results of all measurements made there during 1923.

Where the addition of data, other than was procured in the field, would amplify the present study or convey stronger evidence of the reliability of inflow than is available from a single season's observation, the Water Supply Papers as published by the United States Geological Survey were freely drawn upon.

The writer desires to express his appreciation of the hearty cooperation extended by all departments, particularly the operation and construction departments, whenever it was possible for them to render any aid, and Mr F. A. Purton, for invaluable suggestions offered during the compilation and preparation of this report.

Very respectfully yours,

C. E. Tappan

-s- ASSIS[illegible]

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MILNER DAM AND GAGING STATION

The Milner Dam was completed and water was diverted through the Twin Falls South Side Canal in the year of 1905, and after that time the Twin Falls North Side Canal was constructed. During the irrigation season only water enough is delivered at Milner to fulfill the irrigation rights of these two canals, the water being measured to the canals as their rights require. There is a small amount of leakage through the gates during the low water season, although considerable effort is made to stop all leakage possible. During flood season all water in excess of requirements is allowed to pass Milner and often amounts to a considerable quantity.

The Milner gaging station is located 800 yards below the dam and was established May 10, 1909. It is a standard gaging station equipped with automatic register, a cable and car. Continuous records are available and are published by the United States Geological Survey in the Water Supply Papers. This station is maintained and operated by the United States Geological Survey, although some cooperation is furnished by the Twin Falls South Side Canal Company and the Twin Falls North Side Canal Company.

Plate 2 is a hydrograph of this station for the period January 1st, 1923 to September 30th, 1923.

Orr Affidavit

Exhibit 34

Excerpted pages of the State of Idaho Response to Federal Energy Regulatory Commission Request for Additional Information (FERC Docket no. EL85-38-000) (Jan. 30, 1987)

Fourth Orr Affidavit
Exhibit 2:

Excerpted Pages of State of Idaho Response to Federal Energy Regulatory Commission Request for Additional Information (FERC Docket No. EL85-38-000)

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

CERTIFICATION

I herby certify that the attached 220 pages are true and correct copies of a document on the file with the Commission.

8-31-07
Date

Norma L. Anderson
Custodian

I herby certify that the Custodian or his designee, which signature appears above, is the official custodian of the records of the Federal Energy Regulatory Commission which certification is made and was such official custodian at the time of executing the above certification.

Kimberly D. Bose

SECRETARY

ORIGINAL

OFFICE OF THE GOVERNOR
STATE CAPITOL
BOISE

CECIL D. ANDRUS
GOVERNOR

May 18, 1987

FILED MAY 20 PM 1:35 FEDERAL ENERGY REGULATORY COMMISSION

Mr. Richard T. Hunt, Director
Office of Hydropower Licensing
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

E.85-38-000

Dear Mr. Hunt:

Enclosed please find the State of Idaho's response to your request for information of January 30, 1987.

Sincerely,

Cecil D. Andrus

Cecil D. Andrus
Governor

CDA:pco

cc: Idaho Congressional Delegation w/enclosure
Service List w/enclosure

8705220306

FERC - DOCKETED
MAY 20 1987

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

IN THE MATTER OF PETITION FOR DECLARATORY ORDER BY IDAHO POWER COMPANY	DOCKET NO. EL85-38-000

STATE OF IDAHO RESPONSE TO FEDERAL ENERGY REGULATORY COMMISSION REQUEST FOR ADDITIONAL INFORMATION

On October 25, 1984, Idaho Power Company (IPCo) and the state of Idaho (Idaho) entered into an agreement (Exhibit 1) to settle a controversy that has existed for decades concerning the nature of hydropower water rights relative to additional upstream consumptive uses in the Snake River Basin. The controversy which had cast an ominous shadow over state water management policies, company operations and existing water rights seemed destined for a long and costly court battle with an uncertain outcome. The agreement resolved the issues to the satisfaction of all parties and for the benefit and well being of Idaho's citizens.

One of the terms of the agreement called for both parties to seek recognition by the Federal Energy Regulatory Commission (FERC) to protect IPCo from legal challenges. On November 27, 1984, IPCo petitioned FERC for a declaratory order recognizing the agreement. On December 21, 1984, Idaho intervened in the proceeding in support of IPCo's petition. On January 30, 1987, FERC requested additional information from IPCo and Idaho on the need for the agreement and the effect of implementing it. This document and the attached exhibits constitute Idaho's full and complete response to that request. IPCo is submitting a separate response to the questions addressed to the

company. The state and IPCo responses have been coordinated.

FERC is requested to expedite its review and approve the petition to allow the issue to be finally resolved.

Background

Idaho's Snake River, its tributaries and associated aquifer are the natural resource which more than any other factor has shaped and determined the location, nature and extent of economic development in southern Idaho. Competition for this valuable resource has existed since the early years of Idaho's development. A map is attached (Exhibit 2) showing the features significant to this discussion.

Irrigators were the first to divert and use significant quantities of the Snake River Basin's water resource. Early irrigation development first occurred in eastern Idaho where the river flows across the broad Snake River Plain making diversion of water relatively easy by means of low check dams and canal systems. The reliable natural flow during the summer month period was fully developed by the end of the 19th Century. Additional irrigation development on the Snake River Plain was encouraged by construction of upstream dams, most built and operated by the U.S. Bureau of Reclamation. The first irrigation storage reservoir completed was Jackson Lake Dam in 1906. Additional major irrigation reservoirs have since been constructed with a total storage capacity of 4,600,000 acre feet(A-F).

Below Milner Dam, located between Burley and Twin Falls, the river enters a deep canyon which made significant irrigation development below that point impractical by surface diversion methods.

Significant irrigation development did not occur in this reach of the Snake River and on lands overlying the Snake River Plain Aquifer until the 1950's when modern pumping equipment became available. During the period between the early upstream irrigation development and the recent period of irrigation development using pumping equipment, the river has been harnessed to produce electrical power at a number of dams. Most of these dams are located in the reach downstream from Milner Dam.

The Snake River regenerates itself below Milner Dam mainly through spring inflows fed by the Snake River Aquifer. It is primarily this spring flow which has furnished the summertime flows in the Snake River between Milner and Swan Falls thereby providing a reliable base flow for power generation. Surface irrigation on the plain has increased the flow of the springs.

The first hydropower development on the Snake River occurred at Swan Falls Dam south of Nampa. The power plant was expanded in stages to its present hydraulic capacity of 8400 cfs. Water rights priority dates for the facility range from 1903 to 1920. Nine other hydropower dams have been added in the reach below Milner Dam, culminating in the major three-dam Hells Canyon project on Idaho's western border downstream from Swan Falls Dam.

Because Idaho water law is governed by the "first in time is first in right" prior appropriation doctrine, the potential for large non-consumptive hydropower projects to appropriate all the water from the Snake River has been a concern to Idaho's citizens since the early 1900's. The entire river could be fully locked up by one large

downstream hydropower project if a hydropower right is allowed the same priority in time protection as other diversionary, consumptive rights. Water would not be left for development of cities, industries or agriculture. Recognizing this threat to future development, Idaho citizens amended the state's Constitution in 1928 to provide for hydropower rights to be treated differently to prevent a lock up of the needed water.

This same issue was addressed again in the 1950's when Idaho's political leaders agreed to allow the construction of the Hells Canyon project only after agreement that the use of water in the project would be subordinate to future upstream uses. State and federal licenses for the Hells Canyon project were issued with subordination conditions, preserving southern Idaho's future ability to develop all of its resources.

The present controversy arose from concerns about the dual impact of rapid development of irrigated lands using high lift pumping from the river below Milner Dam. Reduced river flows decreased hydropower production, while new irrigation was bringing about an increase in electric power demand. At this same time, the Pacific Northwest region was thought to be entering a period of power deficits. Legal action by rate payers was brought against IPCo. IPCo responded by asserting that its claimed water rights at Swan Falls (predating the 1928 constitutional amendment) were unsubordinated and fully protected under the appropriation doctrine. The state of Idaho argued that the Swan Falls water rights were not fully protected under several doctrines of law including forfeiture, abandonment and

estoppel. The only issue fully litigated was whether the Swan Falls FERC license was subordinated by IPCo's acceptance of subordination at the Hells Canyon project. In November 1982, the Idaho Supreme Court ruled that the Swan Falls license had not been impliedly subordinated by the subordination condition in the Hells Canyon project license.

IPCo and Idaho recognized the need for a balanced use of the water resources of the state, and were able to negotiate a settlement to the controversy. The alternative facing the parties was years of litigation with an uncertain result and enormous cost.

The Swan Falls Agreement protects the hydropower base but allows for new development when found to be in the public interest. It includes the following key provisions to provide for judicious management of Idaho's water:

1. The minimum stream flows in the Milner to Swan Falls Dam reach measured at Murphy gauging station below Swan Falls Dam were increased from 3300 cfs (year around) to 3900 cfs April 1 to October 31 and to 5600 cfs from November 1 to March 31. The increased minimum flows provide an assured base of protection for hydropower generation and other instream uses. This provision has been implemented by revision of the State Water Plan by the Idaho Water Resource Board and ratified by the Idaho legislature. Reference is made to Policy 5A of the Idaho State Water Plan (Exhibit 3).

2. New development which significantly reduces the flow available to hydropower rights will not be allowed unless found to be in the public interest. In evaluating the public interest, the effect on hydropower generation capability and cost of electricity must be

considered. This provision has been implemented by enactment of Sections 42-203B, C, and D of the Idaho Code (Exhibit 4) and Rule 5.3 of the Department of Water Resources Rules and Regulations for Water Appropriation (Exhibit 5). Rule 5.3 provides for full consideration of all economic, social and environmental factors in evaluating an application to appropriate water.

3. The agreement recognizes the need to identify and quantify present uses of water in the Snake River and tributaries to facilitate management of the resource. This provision has been implemented by enactment of Section 42-1406A, Idaho Code providing for adjudication of the Snake River and tributaries including ground water. Pertinent sections of the Idaho adjudication statutes are included in Exhibit 6. The statutes provide for consideration of all federal reserved rights including those of Indian tribes and those resulting from reservations for federal agencies in accordance with the federal McCarran Amendment, 43 USC Section 666. The Snake River adjudication is set to begin July 1, 1987, and is expected to take 10 years and cost $27 million. The cost is to be funded from claim filing fees.

The "legislative program" of Section 6 of the Swan Falls Agreement and all "conditions of effectiveness" of Section 13 of the agreement have been fully met with the exception of the FERC declaratory ruling. Failure or refusal of FERC to issue an acceptable declaratory ruling are grounds on which the agreement can become inoperative. Without the agreement Idaho, IPCo, a multitude of water right holders, and other interested citizens will again be forced to

litigate the amount and nature of IPCo's water rights in the Milner to Swan Falls reach. Litigation would again place in jeopardy water rights for some existing development, casting a shadow over property rights for the lengthy period of the litigation and could eliminate the established minimum stream flow protection. Further economic progress in Idaho would be stymied. Refusal of FERC to recognize the agreement would be contrary to traditional FERC policy as reflected by licenses issued for the Hell's Canyon project and C. J. Strike Dam.

FERC Question #1

> In his letter dated March 18, 1983, the former Governor stated that restoring flows to meet the Swan Falls water right of 8,400 cfs would require the owners of about 200,000 acres of existing irrigated lands to stop diversions, and that at a low flow of 5,500 cfs about 60,000 acres developed since 1977 would go out of production. What is the current estimate of irrigated lands that would be adversely affected at minimum flows of 8,400 cfs, 5,500 cfs, and 3,900 cfs? Please identify the type of crops affected and the market value of the commodities produced on the affected lands.

Response to Question #1

Idaho has not conducted studies for the specific purpose of refining the earlier estimates of the number of acres potentially adversely affected by maintaining particular minimum stream flows at Swan Falls. Efforts have been focused on reaching and implementing an agreement. Studies and evaluations conducted in support of the agreement provided additional information on the impact of the particular minimum flows on existing irrigated land.

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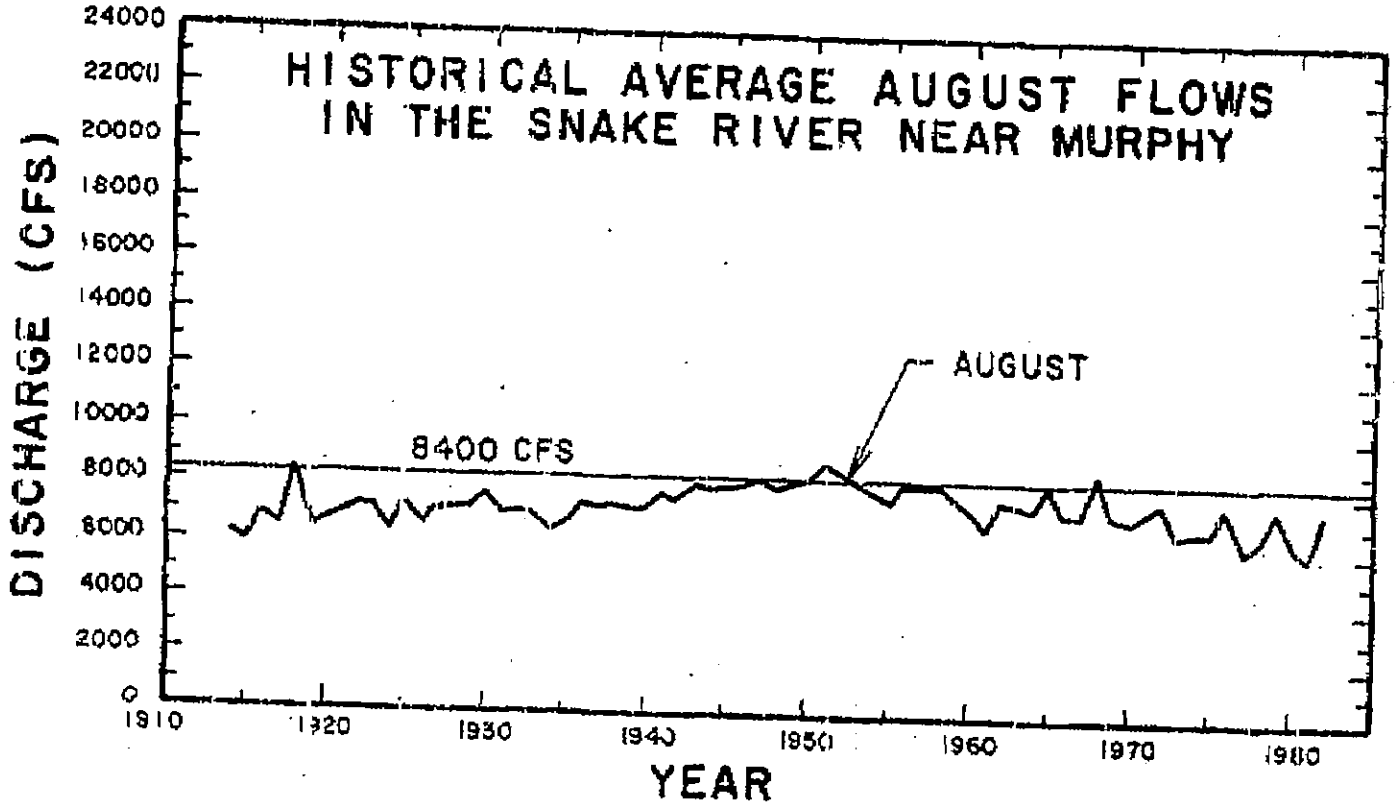
Response to Question #1

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1. Establishing a minimum average daily flow of 8400 cfs at Swan Falls Dam is not practical. Historically observed flows at Swan Falls Dam were much less than 8,400 cfs during the summer months of most years at the time Swan Falls Dam was built. Historical average monthly flows for the month of August for the Snake River near Murphy, the U.S. Geological Survey gauging station located just downstream from Swan Falls Dam, are shown on Figure 1 for the years 1914 to 1982. Average monthly flows for August were less than 7,000 cfs during dry years before 1920, gradually increased to about 8,000 cfs by the 1940's and 1950's and have gradually declined since.

Because the minimum flows established as a result of the Swan Falls Agreement are expressed as average daily flows, it is appropriate to compare these flows to historically observed average daily flows. Because of variability of flow, average daily flows are lower than are the corresponding average monthly flows. An analysis of flow records for Murphy gauging station and other upstream gauging stations for the period 1909 to 1981 is presented in the document entitled a "Review Of Flow At Swan Falls In Relation To Its Power Rights" included in Exhibit 6b. This analysis shows that minimum average daily flows at Murphy gauging station were less than 5,000 cfs at the time Swan Falls Dam was being constructed to its full hydraulic capacity, and have not exceeded 8,000 cfs during summer months of dry years to the present time.

2. Nearly 50 percent of the approximately 3.2 million acres of land irrigated above Swan Falls have water right priority dates junior to the Swan Falls hydropower rights. As noted in the previous



MEAN MONTHLY AUGUST FLOWS IN THE SNAKE RIVER NR. MURPHY
1914 to 1982

section, establishment of an assured flow of 8,400 cfs at Swan Falls will not occur even if the irrigation is stopped on all of the land having junior priority water rights.

The Senate Bill 1180 contract entered into between IPCo and Idaho at the same time as the Swan Falls Agreement was signed grandfathers all uses beneficially using water under valid water rights as of November 19, 1982, and all uses for which a substantial investment had been made by that date pursuant to a valid water right permit. The Senate Bill 1180 contract served to remove the legal cloud from most of the water rights which would have been found by the courts to have been grandfathered under legal doctrines such as forfeiture, adverse possession, waiver, and estoppel.

3. The amount of irrigation development adversely affected by establishment of any particular minimum stream flow rate at Swan Falls depends upon the location of the development, source of water supply and other factors specific to the land irrigated. Accurate determinations of the total acreage affected can only be determined upon completion of the basin wide adjudication of water rights slated to begin July 1987.

4. Establishment of a minimum daily average flow of 3,900 cfs at Swan Falls will not adversely affect any presently irrigated lands and will allow some additional development if it is determined to be in the public interest. Average monthly flows at Swan Falls during the summer months of dry years with present development are about 5,400 cfs. Because of the variability between average daily flows and average monthly flows, minimum daily flows that would occur

in dry years under existing levels of development are estimated at 4,500 cfs.

The above discussion demonstrates that the impact on existing irrigated lands is affected more by legal considerations than by the particular rate of minimum flow established at Swan Falls. The number of acres potentially affected by various minimum flow levels cannot be determined without going through the lengthy litigation which the Swan Fall Agreement is intended to avoid. The estimate of 200,000 acres given by former Governor Evans in his 1983 letter is, however, representative of the magnitude of existing irrigated land that might be adversely affected if the Swan Falls Agreement is not recognized. Using this "representative" estimate, an analysis of the impact of removing 200,000 acres of irrigation is presented in Exhibit 7. The analysis shows that removal of 200,000 acres from irrigation would reduce farm market receipts by nearly $75 million per year and result in secondary impacts of $128 million per year in other sectors, for a total decrease of $203 million per year along with a net loss of 3660 jobs. Obviously, Idaho's economy cannot absorb this impact without major repercussions.

FERC Question #2

> Provide information sufficient to indicate the potential, as predicted by the state of Idaho, for development of 450,000 additional acres of agricultural land in the Snake River Basin. The information must include the following:
> (a) a characterization of historical changes in the quantity of agricultural land that has been developed in the basin and an analysis of

the impacts these changes have had on the flow regime of the river;

(b) all data and calculations used to provide a basis for the predicted increased in agricultural development;

(c) the location of the land areas that would be developed and an evaluation of whether the soils in these areas could support the planned agricultural development; and

(d) an estimate of the type, quantity, and market value of crops that would be produced from these lands.

General Response To Question #2

Question #2 appears to be based upon information submitted to FERC by former Governor Evans in the letter of March 18, 1983. The 450,000 acres of development were based upon the minimum stream flow of 3300 cfs established at Murphy gauge just downstream from Swan Falls. The Swan Falls Agreement provided for increasing the minimum flow as described above. Policy 50 of the State Water Plan (Exhibit 3) has been revised to remove references to rates of development of irrigated land. Development for irrigation will occur as it is determined, pursuant to statute and rule, to be in the public interest.

The response to this question will be based upon a possible future development scenario prepared by the Swan Falls Technical Advisory Committee after the Idaho Supreme Court's Swan Falls decision. This committee, composed of state and federal agencies, IPCo and a private consulting firm, estimated that a reasonable acreage growth assumption above Swan Falls for the next approximate twenty year period would be 195,000 acres (Exhibit 8). The acreage estimate included 48,000 acres of new pumped diversions below Milner.

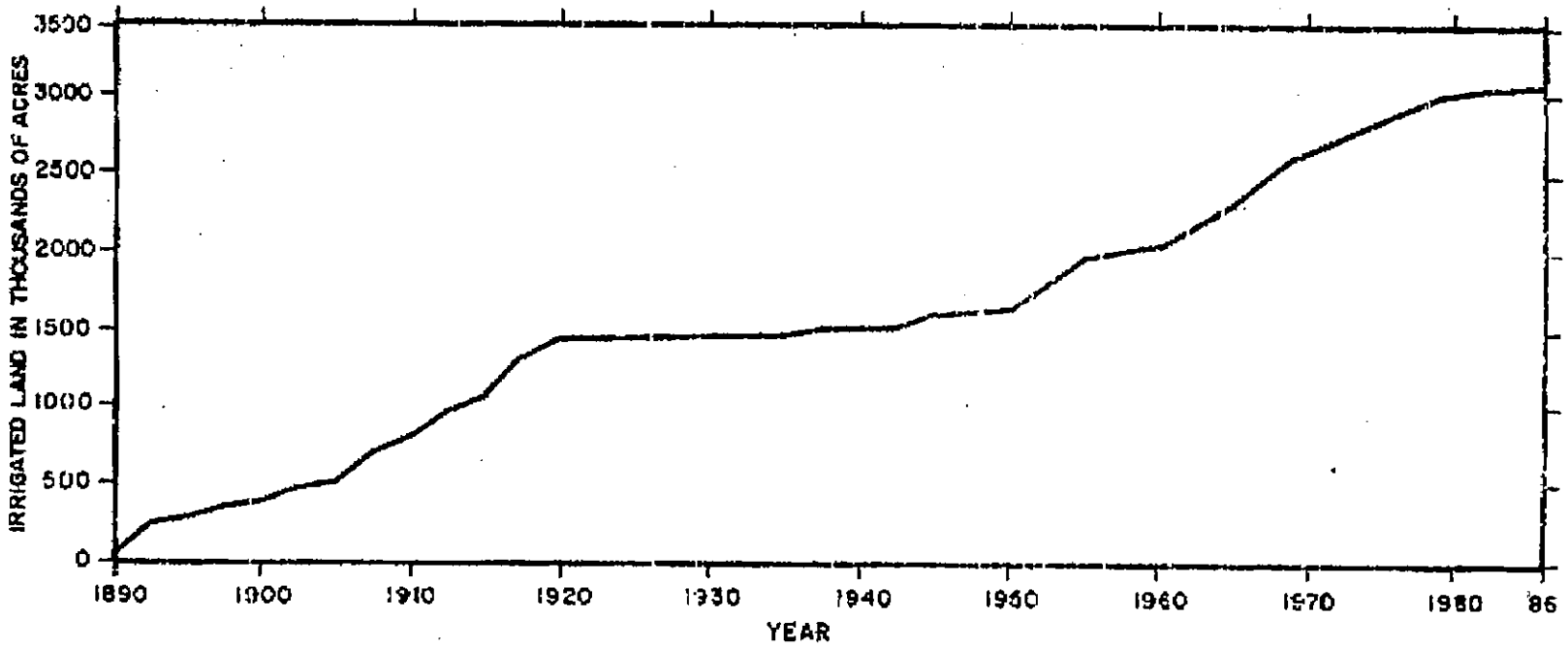
which is now precluded by the recently adopted water allocation rules and regulations (Exhibit 5, Rule 5.3.7.). For the purpose of this response, these 48,000 acres have been deleted so that the studies are based upon 125,000 acres of development using ground water and 22,000 acres using surface sources (principally storage) upstream from Milner Dam.

The Technical Advisory Committee predicted this level of development within a 20 year period. The current agricultural economic crisis suggests the committee's scenario should be viewed as potential development and not tied to a predicted term of years. Responses to questions 1 through 7 are based upon that premise.

Response to Question 42(a)

Figure 2 shows a history of irrigation growth in the Snake River Basin above Murphy. There has not been a systematic measurement program for documenting irrigated area. Figure 2 was compiled from several studies and estimates made at various times by several agencies including the U.S. Geological Survey, University of Idaho, U.S. Department of Agriculture and the Idaho Department of Water Resources. These estimates are not based on consistent definitions of "irrigated land" and are of varying degrees of precision. Nevertheless, Figure 2 does provide a good general representation of the growth rate.

The early years of development were primarily based on direct diversion of surface streamflows. Most of the development occurred in tributary valleys and along the Snake River far upstream from the



IRRIGATED ACREAGE, SNAKE RIVER BASIN UPSTREAM FROM SWAN FALLS

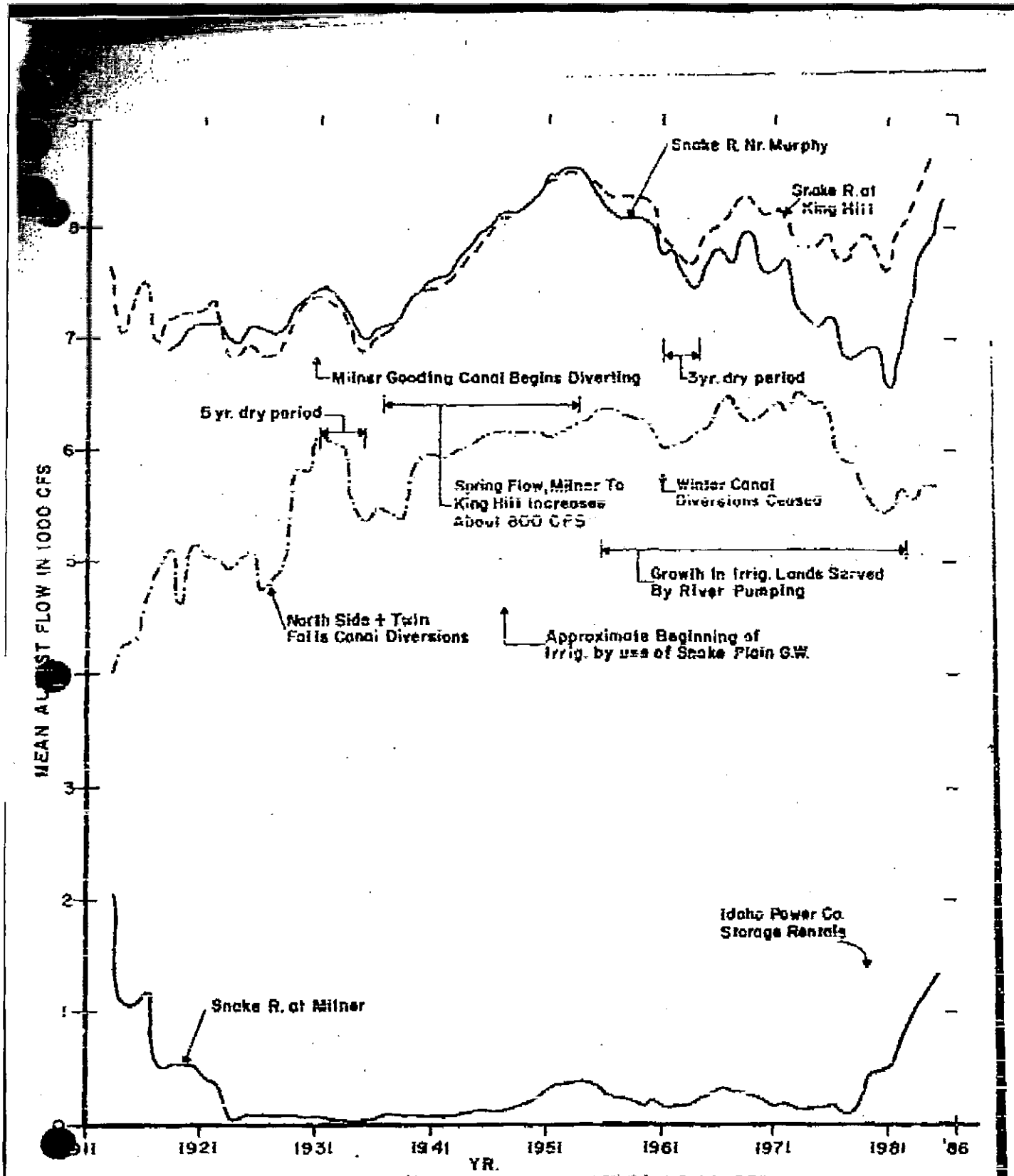
FIGURE 2

Murphy gage. Beginning about 1907, major diversion and storage projects at and above Milner Dam brought about a rapid increase in the rate of development in areas which could capture streamflow not previously developed. After 1920 the acreage leveled out, partly because summertime natural flows were nearly all committed.

Growth resumed in the late 1940's when some federal reclamation projects were built and with the advent of ground water pumping. Ground water has since been the major water source for sustaining growth of new irrigation.

In the mid-1960's a major new type of irrigation development began; that of pumping to the plateau lands from the Snake River in the canyon below Thousand Springs. In this area a large dependable water supply was available, and when combined with a vast area of good quality irrigable land, enabled the private construction of numerous projects. Most of these lands were made available to individuals by the federal government. Approximately 150,000 acres of newly irrigated land were developed by 1980. Increasing power costs, farm economic problems and changing federal land policies had virtually halted these projects by 1982 when the Idaho Supreme Court's Swan Falls decision was issued. In 1986 the Department of Water Resources adopted water right rules and regulations which contain a presumption (Rule 5.3.9 of Exhibit 5) that further direct diversion between Milner Dam and Swan Falls Dam is not in the public interest, thus effectively preventing additional projects in this area.

The impacts of irrigation growth on Snake River flow are complex because of the acreage locations and water sources. Figure 3



TRENDS IN SUMMER FLOWS AND INDICATORS OF CAUSES
SNAKE RIVER NEAR MURPHY (SWAN FALLS)
AS ILLUSTRATED BY FIVE YEAR RUNNING AVERAGES OF AUGUST FLOWS

FIGURE 3

has been prepared to provide an overview of some of these effects. All hydrographs on Figure 3 are five year running average of the mean August flows. A running five year average was chosen to eliminate year-to-year variations in order to show general trends. August was selected to show summertime effects at Murphy without the occasional wet year spills past Milner which occur in earlier months.

Flow of Snake River below Thousand Springs (at King Hill and near Murphy) began rising in the late 1920's, dipped back in the early 1930's, then resumed rising in the early 1950's. This rise was due primarily to two causes: increasing discharge from the springs and increasing irrigation return flow. Aquifer levels and outflows had been rising for a number of years in response to the earlier recharge from irrigated land overlying the Snake River Plain.

August flows near Murphy reflect this trend in ground-water discharge. As shown on Figure 3, the running average increased from about 7000 cfs in 1935 to 8500 cfs in 1953. Only about 300 cfs of this rise was water passing Milner.

Ground water flow began declining in the early 1950's and as a result, the flow at Murphy was also reduced. The decline in ground-water flow was apparently in response to the use of ground water for irrigation which was just beginning to occur. It appears to have been accelerated by the termination of winter diversions through the canals for farmstead domestic water supplies which first occurred in 1961. By the mid-1970's, summer diversions had also begun declining as illustrated on Figure 3 by the sum of the North Side and Twin Falls canals which divert out of Milner Dam.

Response to Question #2(b)

No estimates have been made to determine a rate of future agricultural development. While the agreement and resulting legislation provide a "cap" on the amount of development that can occur in any one year or four year period, the agreement specifically and deliberately avoids establishing a scheduled rate for agricultural development. Recent revisions of the State Water Plan recognize that factors outside the control of the state, such as federal policies, power rates, international trade agreements, and energy/oil prices will influence the need and feasibility for further development. The present economic climate for agriculture makes it unlikely that significant additional irrigation development will occur in the foreseeable future. Also the need for crops that are now in surplus is a factor in determining the public interest of allowing new irrigation development at this time.

The Swan Falls Agreement preserves the opportunity for making additional use of the Snake River water resource when such uses are in the public interest. Thus, development will not be forced to occur simply to meet a planned schedule but will only occur as needed and prudent when all factors are considered.

Response to Question #2(c)

Tables taken from the Idaho Water Resource Board Summary Report No. 1, "Potentially Irrigable Lands in Idaho", published in July, 1970, demonstrate that land suitable for irrigation far exceeds any potential water supply for such development (Exhibit 8).

The location of lands suitable for irrigation development above Swan Falls is shown on the map contained in Exhibit 8. While these lands have characteristics which are adaptable to irrigation, the actual location of lands developed will be determined as citizens submit proposals to appropriate water and these proposals are evaluated in compliance with state law. The criteria for making this evaluation are described in Rule 5 of Exhibit 5 which include a review of the economic viability of the project.

Response to Question #2(d)

An analysis of the type, quantity, and market value of crops that would typically be produced from newly developed irrigated lands is presented in Exhibit 9. This analysis is based upon 147,000 acres of irrigation development distributed on the Snake River Plain. The analysis shows that agricultural market receipts would exceed $55 million per year with a total increase in overall income estimated to be $149 million per year, and an increase in employment of 2691 jobs.

A crop rotation weighted more heavily to potatoes produces $69 million dollars per year of agricultural market receipts and $182 million increase in overall state income with an employment gain of 2624 jobs.

FERC Question #3

> Provide information sufficient to characterize impacts to the flow regime of the Snake River and major tributaries associated with the increased agricultural development. The information must include the following:

(a) estimates of changes in the mean, maximum and minimum monthly flows of the river and major tributaries at ten year intervals extending from the present until the full 450,000 acres of agricultural land is developed. These monthly flow estimates should be produced for the reaches of the river located in the Swan Falls, Milner, Hells Canyon, American Falls, Idaho Falls, and Lower Granite Lock and Dam areas; and

(b) data sufficient to indicate changes in the recharge, discharge and retention times of the Snake River Plain Aquifer that would be associated with the increased agricultural development.

Response to Question #3(a)

An evaluation of the impact of developing 147,000 acres (as discussed in the general response to question 2) has been made using a river simulation model.

A brief description of the river simulation model and the base (1985 condition) study is contained in the open-file report included as Exhibit 10. Base study flow tables contained in the report are repeated herein expressed in mean monthly cfs units as tables 1-6 of Exhibit 11.

Tables 7-12 (Exhibit 11) show flows at the same sites after full development of the 147,000 additional acres. For the purpose of this study, the Snake Plain Aquifer outflow has been adjusted to equilibrium conditions following the new development. Due to the very large storage effects of the aquifer, equilibrium conditions would not be reached for many years after the new development occurred. Thus, actual flow reductions below the springs would be much less than the differences between tables 1-6 and corresponding tables 7-12 for a considerable period of time.

Estimates have not been prepared by ten year intervals because no timetable for development exists. Included in the tables are long term effects of the development on each year of record, which includes low and high runoff years and an average. For example, the study indicates that the long term effect of developing the 147,000 acres is a reduction of 179 cfs in flows at Murphy gauging station just downstream from Swan Falls Dam during the low flow month of July during a dry year.

Response to Question #3(b)

A preliminary evaluation of the impact of the possible future condition scenario described under question 3(a) was made using a ground water model developed by the Idaho Department of Water Resources and the University of Idaho. Model results showed that ten years after installation of the new ground water withdrawals, aquifer outflows would be depleted by about thirty percent of the new depletion amount. By the twentieth year about sixty percent of the new depletion would be reflected in aquifer outflows.

FERC Question #4

> Provide an assessment of impacts to the fish resources of the Snake River and major tributaries associated with the reduction in stream flow that would result from the subordination of water rights at the Swan Falls project. The assessment must include the following:
> (a) An evaluation of impacts to the quantity of fish habitat available to fish species indigenous to the free flowing reaches of the river and major tributaries, and
> (b) An assessement of the impacts of reducing the storage at and flow releases from main stem reservoirs on Salmon migration which is currently provided for by the Fish & Wildlife

Program of the Northwest Power Planning Council.

Response to Question #4(a)

The reduction in flow in the river allowed by the Swan Falls Agreement will not cause a significant impact on fish habitat. The minimum daily average flow at the Murphy gauge was 4,530 cfs on June 28, 1981 which was 1230 cfs greater than the protected minimum flow rate existing at that time. Minimum flows have been increased by the state as a part of the Swan Falls Agreement to protect minimum flows of 3,900 and 5,600 cfs (Exhibit 3, Policy 5A). This does not mean that additional development cannot occur and still protect fish habitat.

The rating table for the Murphy gauge can be used to determine the change in stage of the river for changes in flow at that location. This stage change is indicative of the change in stage that would occur in the vicinity of the Deer Flat National Wildlife Refuge. The relative stage change diminishes as other large tributaries enter the river downstream from Swan Falls. Reducing the actual minimum daily average flow of 4,530 cfs the full amount to 3,900 cfs, would produce a reduction in stage at the Murphy gauge of about 0.24 feet or less than three inches.

Since, under the terms of the agreement, 150 cfs of the flow the Murphy gauge has been reserved by the state for DCMI uses, the letion for other uses will be limited to 450 cfs using the same nario as described above. The reservation of 150 cfs for DCMI ibit 3, Policy 5C) is vital to southern Idaho but the actual

depletion of this flow is not likely to occur for many years. The depletion of the 460 cfs is also dependent on many factors outside of Idaho's control. Were it to occur, the reduction in stage at the Murphy gauge would be only about two inches below that of June 28, 1981. It must also be noted the agreement provides for minimum flows that produce a stage about three inches higher than the old minimum flow in the summer and over ten inches higher during the winter.

The minimal stage changes that can occur as a result of the Swan Falls Agreement from existing conditions will not significantly change the available fish habitat.

Instantaneous low flow rates are dependant upon the operation of upstream hydropower facilities. Operation of the hydropower facilities to comply with the established minimum flows will insure that minimum flow under the agreement will not be as low as observed in the past.

Response to Question #4(b)

There is no evidence to support any measureable impact on the Northwest Power Planning Council's (NWPPC) Salmon migration storage.

The average annual discharge of the Snake River at the Idaho border at Lewiston is almost 37 million acre feet. If the 600 cfs reduction discussed above is applied year around, the total depletion would be about 434,000 acre feet. This is only slighrly more than one percent of the average annual discharge of the Snake River at Lewiston.

There is no reason to expect this small reduction, will be measurable in the NWPPC's Fish and Wildlife Program when considered in

total with flows in the Columbia River Basin. It is also important to consider that peak irrigation pumping does not occur during the April 15 to June 15 time period when flows are most needed to aid migration of anadromous fish smolts.

IPCo and Idaho are cooperators in providing the water flows needed for the NWPPC's water budget. IPCo has entered into an agreement this year with Bonneville Power Administration to provide releases from Brownlee Reservoir for the water budget. Dworshak Reservoir on the Clearwater River drainage in Idaho is also used to supply water. Idaho is involved in developing the Galloway Dam on the Weiser River drainage to provide flows for the budget. This statewide approach to assisting in the water budget allows full multi-purpose development of the state's water resources.

FERC Question #5

> Provide an evaluation of the impacts to the water quality of the reservoirs located on the main stem of the Snake River and tributaries associated with the increased loading of nutrients and decreases in flow that would result from the development of additional agricultural lands in the basin. The evaluation should include a determination of the potential for formation of algae blooms in the reservoirs and the reduction in the dissolved concentration of reservoir discharges.

Response to Question #5

The partial subordination of IPCo's water rights at the Swan Falls project and the corresponding recognition on the FERC license will have no effect on the water quality of the upper Snake reservoirs. The subject hydropower water rights are natural flow

rights and do not affect the operation of upper Snake reservoirs. Irrigation development of 147,000 acres as described in the response to question #2 is less than 5 percent of the irrigation development that now exists in the Snake River Basin above Swan Falls. Most new development will be from ground water sources with sprinkler or other efficient types of application methods. Runoff to surface sources will be minimal.

Algae bloom is directly related to available phosphate in the water. Significant steps are being taken to reduce nutrient loading in the Snake River. The Rock Creek project near Twin Falls is an example of the ongoing effort taking place to improve water quality in the Snake River. It is anticipated that water quality in the Snake River will continue to improve whether or not additional development takes place as a result of the Swan Falls Agreement.

The total change in the quantity of water is very small as described in question 4 above and will not result in a measurable change in downstream reservoir water quality. The year to year variations in water availability are far in excess of the average reduction that will occur under the Swan Falls Agreement.

FERC Question #6

> Provide an assessment of the probable impacts of the flow reductions associated with subordination of water rights on recreational use of the free-flowing sections of the Snake River with particular emphasis on canoeing, floating, and whitewater boating.

Response to Question #6

Prior to the Swan Falls Agreement the established minimum flow rate for Swan Falls was 3,300 cfs average daily flow. The increased minimum flows established as a result of the agreement will provide additional protection for recreational uses.

An analysis of the impacts of a maximum 600 cfs reduction in flow at Swan Falls below the minimum average daily flow which occurred on June 28, 1981 demonstrates the flow reduction will not have a perceptible impact on recreational uses. With the establishment of the 3,900 cfs minimum flow at the Murphy gauge, flows in this reach of the river will be adequate to preserve existing recreational uses.

Also as described in responses to questions 4 and 5, the total hydraulic impact on the river will be small under the agreement. The fluctuations caused by operation of existing hydroelectric facilities are greater than the change in average flows that will result from the Swan Falls Agreement.

FERC Question #7

> Provide an assessment of the impacts to nesting water fowl on Deer Flat National Wildlife Refuge that would occur as a result of the reductions in river flow. The assessment should address the effects of increased access by mammalian predators to the islands that would occur when river flows decrease.

Response to Question #7

No perceptible impact on the nesting water fowl at the Deer Flat National Wildlife Refuge are likely to occur as a result of the

reductions in flow below historical levels as a result of the Swan Falls Agreement. Idaho does not agree, however, that this is the proper forum to determine the merits or extent of river flows or any reserved water right that might protect water fowl in the refuge. The Department of Interior has been invited to join other federal agencies in negotiating with Idaho to determine any reserved rights held by Interior in preparation of a McCarran Amendment, 43 U.S.C. Section 666, water right adjudication soon to be initiated in Idaho. Included as Exhibit 12 are copies of letters to Secretary Hodel dated May 24, 1985 and June 19, 1985 along with Secretary Hodel's reply dated July 22, 1985. The State has been actively working with other federal agencies and the Shoshone Bannock Tribes in efforts to identify and quantify federally reserved water rights through negotiations. The State continues to desire to negotiate with the Department of Interior to determine any reserved water rights held by that department.

The long-term effect of the Swan Falls Agreement will be an improvement in conditions at Deer Flat National Wildlife Refuge since the minimum flow at Murphy was increased from 3,300 cfs to 3,900 cfs during the summer and to 5,600 cfs during the winter.

The issues raised by questions 4 through 7 have been discussed with National Marine Fisheries Service and the U.S. Fish and Wildlife Service. Both agencies have entered into stipulated agreements with IPCo and Idaho requesting FERC to issue the requested order recognizing the Swan Falls Agreement upon the understanding that the agreement is not presented as a comprehensive plan under Section

10(a) of the Federal Power Act, (16 U.S.C. Section 803(a)). FERC is asked to take note of these stipulations filed in this proceeding.

Conclusion

The Swan Falls issue has been a long and costly episode in Idaho's history. The agreement entered into by Idaho and IPCo has been structured to recognize and preserve the valuable instream uses of water while providing a procedure for allowing development of every type to proceed when such development meets the public interest. FERC recognition of the agreement will allow IPCo and Idaho to implement the provisions of the agreement and reduce the possibility of further argument. FERC is urged to issue an order recognizing the agreement in accordance with the pending petition for declaratory order.

Dated this 18th day of May, 1987.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That I have this day served the foregoing document, upon each person designated in the attached service list.

DATED at Boise, Idaho this 18th day of May, 1987.

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

February 7, 1984

REVIEW OF FLOW AT SWAN FALLS
IN RELATION TO ITS POWER RIGHTS

Swan Falls rights were developed progressively as follows:

	cfs	Accum cfs	
17 Jan 1900	1840	1840	
18 Apr 1900	1460	3300	
2 Apr 1907	2150	5450	
9 Jul 1919	4000	5450	(hydraulic cap'y reported to be 8000 cfs or 8400 cfs)

Prior to July 1919 only 5450 cfs were required to satisfy the Swan Falls rights. Flow records for the Snake River near Murphy exist from September 1913. Between that time and July 1919 the lowest daily flow was 5440 cfs.

Records at King Hill began May 13, 1909. The lowest daily flow observed there between May 1909 and September 1913 was 4760 cfs on July 7-9 and August 15-16, 1910. During the summer of 1910 flow at King Hill varied between 4760 cfs and 5200 cfs for nearly two months. The Bruneau River which enters the Snake between King Hill and Swan Falls was flowing at less than 100 cfs. Swan Falls lowest flow was probably less than 4800 cfs on August 15 and 16 and prohably ranged up to 5300 cfs between mid-July and mid-September.

There are insufficient data to estimate Swan Falls flow prior to July 1909. Data for Montgomery Ferry near Minidoka indicates the river was low enough in August 1908 that there was at least

a possibility that the flow at Swan Falls was less than 5450 cfs. There is virtually no chance that flows were ever less than 3300 cfs between 1900 and 1907.

In summary, prior to 1919 there probably were only two or three occasions when actual flow at Swan Falls was less than the rights which had been established at that time.

After 1919, when the Swan Falls rights increased to 8000 cfs or more, regulation by priorities would generally not have provided sufficient summertime flow to satisfy the total right. After 1919 there has been essentially no flow past Milner after mid-summer. An examination of WD-36 annual reports shows that by mid-summer priorities earlier than 1919 were being cut every year. Thus, the Swan Falls rights could not have called water from above Milner. Since actual flows were as much as 2000 cfs less than needed, regulation would not have resulted in meeting the Swan Falls rights.

Beginning about 1928 summertime flows at Swan Falls began to increase. This was apparently caused by increased aquifer discharge and return flow from irrigation. The Snake Plain aquifer began receiving more recharge resulting from completion of the Milner Gooding Canal in 1932 and from greater diversions as a result of completion of American Falls Reservoir in 1927. By the mid-1940's July flows at Swan Falls had increased to about 7800 cfs and August flows were over 8000 cfs. During this period regulation by priorities would not significantly have increased

flow because groundwater and river pumping was only just beginning. The rise continued into the early 1950's then reversed to a decline which continued to 1981. An upward trend since 1982 has resulted from Milner spills and water rented by Idaho Power Company for downstream generation.

The decline which began in the 1950's was caused by reduced groundwater recharge on the lower plain resulting from the winter water savings program, increasing groundwater withdrawals and pumped diversions from the river below Thousand Springs. Groundwater discharge (average annual) declined about 800 cfs in this period. Since about 1960 July flows at King Hill in years of no significant Milner spills have generally ranged between 6500 cfs and 7500 cfs and roughly 1000 cfs less at Swan Falls. Regulation of the river pumpers and groundwater users to satisfy the Swan Falls rights would probably not have resulted in raising the river flow to 8400 cfs. Summertime flow in the river appears to be as sensitive to change in management of the Milner canals as to the effect of groundwater withdrawals.

Orr Affidavit

Exhibit 35

Letter from A.P. Davis, Director of the U.S. Reclamation Service, to Idaho Power Company (Nov. 2, 1920)

REPRODUCED AT THE NATIONAL ARCHIVES

Nov. 2, 1920.

The Ideho Power Company,
71 Broadway,
New York City.

Gentlemen:

As a result of the recent conference with the officers of your company in New York City, the following propoeal ie eubmitted as a baeie for a contract Between the United Statee and your company for all or part of your power property and righte at American Falle, Idaho.

It ie a well recognized fact that the welfare and growth of the etate ie dependent primarily upon the development of additional lande by irrigation and no part of the etate offere better or larger possibilities in this respect than the Snake River Valley.

The water resources of this river are, however, entirely inadequate to water all of the lands susceptible of irrigation and very large fertile areas of southern Idaho will have to remain forever in a desert state due to lack of water. The time has already paeeed when the natural flow of the river was sufficient to irrigate the lands under cultivation along its ehores and storage reservoirs have been recognized as a neceeeity for many years past.

Hydrometric etudiee indicate that the water eupply of the Snake River when adequately controlled by reeervoire, will furnish a reliable supply to all lande now under cultivation and about 400,000 ecres additional, but without additional etorage no new areae at all can be made productive and habitable and even the preeent projects will suffer occasional serious loeeee. The power righte claimed by your company at American Falle will, if perfected and maintained, prevent absolutely the development of further storage resources on Snake River, and consequently irrigation in southern Idaho. As ie quite natural, irrigation development has followed the course of least resistance until a time has come when it is no longer possible to reach land with elementary eystems, ae in the past, and it now becomes necessary to resort either to pumping systems or extremely long gravity canale or other heavy construction work, depending upon the nature and topography of the country.

One of the most desirable projecte yet to be undertaken in the state, is what is known ae the Minidoka North Side Pumping Unit, an area of about 115,000 acree of excellent land lying to the north and west of the present Minidoka project and already supplied with traneportation facilities. The method of irrigating this tract would be very eimilar to that employed on the succeseful Minidoka South Side Pumping Unit where electrically operated pumps lift water to a maximum height of 90 feet for the irrigation of about 50,000 acres. For the operation of this new unit, or project, there will be required the production of about 40,000 horse power of electrical energy.

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The purchase or condemnation of the entire winter power right at American Falls is necessary to the complete development of the irrigation resources of of the state in order to enable us to store and save the winter flow, which would otherwise go down to the Snake River Canyon and be wasted so far as irrigation is concerned. Each second-foot of water allowed to pass the American Falls Reservoir and waste down Snake River during the non-irrigation season, means that about 80 acres of land in the Snake River Valley will be deprived of irrigation and condemned to remain perpetually arid and to that extent would restrict the future growth of the state, and also the market of your company for power.

There are many points, however, both above American Falls and below Thousand Springs, and also on other nearby streams where a large additional amount of power could be developed without requiring the waste of any water that could be used for irrigation. We are convinced that the ultimate development of irrigation in the Snake River Valley will require the elimination of the entire winter power right at American Falls and the storage of the entire winter flow and any plan that contemplates the purchase of less than the entire right is merely a temporary expedient.

We hoped to be able to agree on a contract for the purchase of the entire right at this time, but understand that your objections to this plan are much more serious than they would be if we took at the present time only that part of the right over 2500 second-feet. We have suggested a provision of the following effect:

> "That after 5 years from the date of this contract the United States may during the non-irrigation season, or any part thereof, at its option, upon giving 30 days' written notice to the contractor, deliver to the contractor at the contractor's American Falls power plant, or at such other point as may be mutually agreed upon by the parties, 192,000 kilowatt hours of electric energy per day in lieu of the contractor's said reserved water right of 5000 acre-feet per day, which amount of electric energy will be accepted by the contractor as the equivalent of the contractor's said reserved right and the United States may then store the said reserved 5000 acre-feet of water per day in any available reservoir or reservoirs or may store part of said water and use the balance thereof for generating electric power. It is understood that the non-irrigation season during which electric energy may be substituted for water extends from October 1st of any year until May 1st of the succeeding year. Should the United States be ready and willing to deliver the said 192,000 kilowatt hours of electric power per day but the contractor be unable or unwilling to receive the full amount thereof, the obligation of the United States will be discharged by the delivery of such lesser amount as the contractor is able and willing to receive. In order to meet daily peaks in the contractor's load, the contractor may draw power during such periods of substitution of power for water at a maximum rate up to but not exceeding

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15,000 kilowatts provided the total amount taken in any period of 24 hours does not exceed the said 192,000 kilowatt hours."

If the foregoing provision is included in the contract, we are willing to limit our purchase or condemnation for the present to that part of the power right over 2500 second-feet or over 5,000 acre-feet per day but without such a provision we would not feel justified in agreeing to take less than the full right.

Without such a provision a contract leaving 2500 second-feet of the American Falls right to the company might result in the construction of additional power plants at points where it would later become necessary to condemn and close down the plants in order to save the water for irrigation, which would be an economic waste and would place a great additional burden on the irrigators of future reclamation projects, without any benefit to the consumers of power or any one else.

We expect to construct a large power plant at American Falls to create the necessary power during the irrigation season for pumping water on the proposed North Side Extension of the Minidoka project. This plant we expect will be connected with our storage dam and will, therefore, have a much higher head most of the time than is available at your American Falls plant, so by operating our plant in the winter we could deliver to you an equivalent amount of power with very much less water and this would offer an opportunity to save water when additional storage capacity becomes necessary to the further development of the large areas of arid land available in the Snake River Valley.

If the provision above quoted is included in the contract we are willing to limit the contract to the purchase of that part of the right over 2500 second-feet or 5000 acre-feet per day, allow you to participate in the reservoir to the extent of 25000 acre-feet of storage capacity in part payment and pay you $250,000 in cash, and with the consent of the Federal Power Commission, are willing to allow you to connect your penstocks with our dam so that you can utilize the increased head and generate a much larger amount of summer power than would otherwise be possible.

The privileges of connecting with our dam and of participating in the storage capacity of the reservoir are ones which we would not be justified in allowing unless we have a contract including the provision quoted above.

This connection would give a largely increased summer capacity to your American Falls plant and materially increase the value of the plant and the storage can be used by the company to fill in numerous small depressions in the water supply at a number of different power plants and

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ie likely to enhance the value of the various power plants in the aggregate many times more than the cost of the storage and we could not become a party to an arrangment which might add greatly to the value of property which we later might have to condemn unless we had some provision which would give us an opportunity to save the water without danger of being obliged to condemn additional power plants.

Under the offer made in this letter we would take over the company's land under the proposed dam and reservoir and the two small obsolete plants known as the Island plant and the Westside plant, the western portion of the present dam and spillway up to and including the intake to the Island plant, and would build our plant on the west side of the river. This would leave you the East side plant and the foundations for increasing the plant to several times its present capacity.

We are willing to regulate your daily peaks by providing for purchasing your right above 5,000 acre-feet per day instead of 2500 second-feet and will allow you to draw the water to which you are entitled as best suits your requirements, provided you do not exceed the 5,000 acre-feet in any one calendar day.

Very truly yours,

A. P. DAVIS

Director.

Approved:

JOHN BARTON PAYNE

Secretary of the Interior.

Orr Affidavit

Exhibit 36

Excerpted pages of "Supplementary Water For Irrigation In Idaho, With Particular Reference To Boise And Snake River Valleys," by R.W. Faris, Idaho State Commissioner of Reclamation, (Oct.15, 1934)

SUPPLEMENTARY WATER FOR IRRIGATION IN IDAHO, WITH PARTICULAR REFERENCE TO BOISE AND SNAKE RIVER VALLEYS

——oOo——

By

R. W. FARIS,

State Commissioner of Reclamation

(Revised)

October 15, 1934

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SUPPLEMENTARY WATER FOR IRRIGATION IN IDAHO, WITH PARTICULAR REFERENCE TO BOISE AND SNAKE RIVER VALLEYS

By
R. W. FARIS,
State Commissioner of Reclamation

(Revised)

—o—

Idaho has approximately two and one-half million acres of irrigated land, being third in area in the United States and exceeded only by California and Colorado. Farming by irrigation is Idaho's greatest industry. Over one-half of the people of the State depend upon irrigation, directly or indirectly, for their livelihood. The limit of the development of the irrigation resources of the State from the natural flow of streams has long since been reached, and resort has been had to storage, pumping from lakes and streams, and the development of subterranean water to supplement and augment the supply necessary to irrigate the lands under cultivation.

In years of normal precipitation and runoff, the supply has been reasonably adequate to meet all demands, except in some isolated sections; but during the past few years, and particularly the last three years, precipitation and runoff has been so meager as to create a deficiency in many districts.

We have just passed through the most serious and disastrous drouth in the history of the State. Reports from reliable sources indicate a crop loss of approximately $25,000,000.00 in the Snake River Valley this year, due to shortage of water for irrigation, to say nothing of the appalling losses to the livestock industry and human suffering and distress involved, most of which could have been avoided had provision been made

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for the conservation and utilization of our water supply. The situation is acute and disaster confronts many heretofore prosperous and self-sustaining communities unless supplementary and additional water can be provided to afford relief.

In certain sections of the State, supplementary water is available from various sources, but in some cases at a cost that is prohibitive, under existing conditions. In cases where no supplementary water supply is obtainable the cultivated acreage must be reduced to conform to the available water supply. Among the many localities where there is no possibility of obtaining an additional or supplementary water supply are the Big and Little Lost River projects, the Salmon River, Oakley, Raft River, Mud Lake, and many other projects similarly situated. In most cases the land owners in the projects where no additional water supply is available are taking steps to eliminate marginal lands to reduce the cultivated area to conform to the water supply. Considerable progress has already been made in that direction, but to accomplish the end, funds must be obtained from some Governmental agency such as the United States Bureau of Reclamation, the Public Works Administration, Reconstruction Finance Corporation, or from private sources.

As a condition precedent to securing such relief, surveys, examinations and investigations must be made to determine the feasibility and cost of affording relief to the various projects in distress. Few, if any, of these projects in this State have financial resources to enable them to make the necessary investigations, and if such investigations are to be made funds must be secured from some of the Governmental agencies now engaged in rehabilitation work, to cover the expense.

Among the projects requiring additional and supplementary water, where there is a possibility of securing such water, the SNAKE RIVER VALLEY

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above the Milner dam and the BOISE VALLEY are outstanding because of the large acreage and vast interests involved, covering as they do more than half of the irrigated area of the State. These projects are remote, geographically, from each other, but in the consideration of some of the plans suggested for relief they become very intimately related. In what is generally referred to as the "Upper Snake River" or "Fall River section," there is a shortage of about 150,000 acre feet of water per annum under normal conditions, and on the main river above Blackfoot, something like 300,000 acre feet. If and when the Fort Hall Indian Reservation project is extended to cover Michaud Flats, between Pocatello and American Falls, as proposed, an additional 100,000 acre feet of water will be required, making a total shortage of 550,000 acre feet in Snake River Valley above Milner dam.

The United States Bureau of Reclamation, during the past two years, has made surveys and investigations in an effort to discover ways and means of relieving this situation by providing storage on the upper reaches of both the North Fork and the South Fork of Snake River. No report has been made disclosing the results of these investigations, but it is understood that a satisfactory reservoir site has been found on the North Fork, in the vicinity of Trude, Idaho, with a capacity sufficient to take care of that area. Investigations are now being made on the South Fork in the hope of being able to locate a site for a dam to form a reservoir of sufficient capacity to supply the deficiency on the main river. However, the American Falls reservoir has filled but twice since it was placed in operation, in 1926, so unless some plan or arrangement can be made to release or transfer some of the rights on the lower river at and below American Falls, under normal conditions, to say nothing of the extreme shortage of recent years, there is no water available for storage in such reservoirs. The rights that might be looked to to supply

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this deficiency are those of the Idaho Power Company, with a primary storage right of 45,000 acre feet of water in the American Falls reservoir, and a secondary right of 255,000 acre feet to be drawn upon under certain limitations and restrictions, the right of the Minidoka project to divert something like 2,000 second feet, continuously, for the operation of its power plant at the Minidoka dam, and that of the canals diverting water at the Milner dam for domestic purposes during the non-irrigation season.

The runoff of Snake River for the climatological year, October 1, 1930 to September 30, 1931, inclusive, was the lowest of record, covering a period of thirty years, being only about 54 per cent of the average for the period.

During the non-irrigation season, from October 15, 1930, to April 15, 1931, the several canals heading at the Milner dam diverted 519,827 acre feet of water from Snake River for domestic and stock watering purposes, and during that time 644,108 acre feet passed over Milner dam to the Pacific Ocean and was wasted, making a total of 1,163,935 acre feet, of which amount 80,835 acre feet was gain between the Minidoka dam and Milner which could not have been recaptured for storage, leaving a net loss of 1,083,100 acre feet.

There was approximately 550,000 acre feet of water in American Falls reservoir at the close of the irrigation season of 1930, and it lacked about 150,000 acre feet of filling in 1931, so that, even though the reservoir had been empty at the close of the irrigation season of 1930, it would have filled in 1931, and there would have been a surplus of over 400,000 acre feet for storage on the upper river, which, in addition to the normal flow, would have been sufficient to meet all requirements.

JRP014644

Orr Affidavit

Exhibit 37

Excerpted pages of "Water Utilization In The Snake River Basin," by W.G. Hoyt (1935)

UNITED STATES DEPARTMENT OF THE INTERIOR
Harold L. Ickes, Secretary
GEOLOGICAL SURVEY
W. C. Mendenhall, Director

Water-Supply Paper 657

WATER UTILIZATION IN THE SNAKE RIVER BASIN

BY
W. G. HOYT
WITH A PREFACE
BY
HERMAN STABLER

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Construction of the reservoir to this altitude would necessitate the partial relocation of the Oregon Short Line Railroad and the Oregon Trail Highway, both of which cut across the extreme upper end of the site. Observed and estimated run-off records for 1904 to 1925 indicate that the annual run-off at the site has varied from 65,600 to 347,000 acre-ft.

WALLOWA RIVER BASIN

Wallowa Lake Reservoir, Oreg. (12HO 1).—Storage of 39,760 acre-ft. is obtained at the 25-ft. level in Wallowa Lake, in T. 3 S., R. 45 E. The lake, formed by a glacial moraine, is about 3¼ miles long and 1 mile wide and is widely famous as one of the beauty spots of the Northwest. The dam is a concrete structure of the gravity type, at the outlet of the lake, in sec. 5, T. 3 S., R. 45 E. The lake fluctuates several feet. Dam constructed and reservoir operated by the Associated Ditch Cos. of Wallowa Valley.

Minam Lake Reservoir, Oreg. (12HO 2).—Minam Lake, in T. 4 S., R. 44 E., is utilized for storage of about 1,000 acre-ft. through the construction in 1916 by the Minam Lake Reservoir Co. of two earth dams, one 10 ft. high at the south end of the lake and one 5 ft. high at the north end. The stored water is diverted into the Lostine River through a headgate in the north end and a ditch about 500 ft. long. It is used to supplement water for irrigation of about 6,500 acres in Wallowa Valley in the vicinity of Lostine.

SALMON RIVER BASIN

Goose Lake Reservoir, Idaho (12JH 1).—In 1926 the Goose Lake Reservoir Co. built an earth dam 1,100 ft. long and 18 ft. high in sec. 13, T. 20 N., R. 2 E., at the outlet of Goose Lake on Goose Creek. The dam impounds about 3,500 acre-ft., used for storage.

CLEARWATER RIVER BASIN

Moores Lake Reservoir, Idaho (12KD 1).—In 1924 the Grangeville Electric Light & Power Co. constructed a timber-crib dam in sec. 1, T. 26 N., R. 4 E., at the outlet of Moores Lake, a tributary to John's Creek, which in turn is a tributary to the South Fork of the Clearwater River. The dam is 68 ft. long and 17 ft. high. The lake has an area of about 72 acres, with a range in stage of 11 ft., which provides a capacity of 750 acre-ft. The reservoir has not been used for several years. Drainage area, about 2 square miles, between altitudes of 6,700 and 8,300 ft. Estimated mean annual run-off, between 800 and 1,000 acre-ft. Stored water used to augment the low summer flows at developed sites on the South Fork of the Clearwater River. License from Federal Power Commission in connection with South Fork Clearwater plant (Idaho project 204).

Soldier Meadow Reservoir, Idaho (12KD 2).—In 1924 the Lewiston Orchards Irrigation District constructed an earth-fill dam 530 ft. long, 57 ft. high, in sec. 29, T. 33 N., R. 3 W., across Sweetwater Creek. The dam impounds about 2,000 acre-ft., used for irrigation.

UNDEVELOPED STORAGE

SUMMARY

Irrigation development has reached a point in the Snake River Basin beyond which there can be no large increase in acreage without the construction and utilization of additional storage reservoirs or through the development of additional water supply by pumping. Moreover, the recurrence of years of abnormal low run-off has demon-

strated the desirability of holdover storage for irrigated areas which under normal climatic and run-off conditions have a reasonably adequate water supply. In addition to present irrigated areas there is at least 1,300,000 acres of arable land in the Snake River Basin which may eventually be irrigated, only a small part of which can be developed without the use of storage. Storage, either for flood prevention or for power regulation, may also be desired eventually in certain localities. To meet these possible future requirements this report describes 97 sites having a combined capacity of 7,746,000 acre-feet located by basins and States as follows:

	Number	Capacity
By basins:		*Acre-feet*
Snake River direct	4	3,363,000
Snake River tributaries	93	4,252,000
By States:		
Wyoming	5	848,350
Nevada	2	62,600
Idaho	64	5,714,000
Oregon	21	592,000
Washington	5	398,000

It is impossible to predict which of the storage sites described will be developed first or when the development will take place. It seems reasonably certain, however, that activities in connection with additional storage will be increased as a result of the continued recurrence of years of low run-off. Future storage development is so closely allied with future irrigation development that no definite scheme of development can be outlined. An attempt has been made in the complete report, however, to describe all known sites and to discuss briefly the water and storage requirements necessary for more complete utilization of the present water supply.

On the Snake River above Milner between 1,000,000 and 1,500,000 acre-feet of additional storage will be required eventually for new lands. Storage primarily for flood control may also be necessary to remedy a situation below Heise, where there is a possibility of sufficient shift in the location of the channel to affect seriously irrigation deliveries. In parts of the Henrys Fork Basin water shortages are acute. These shortages may eventually be remedied by utilizing storage sites in the Henrys Fork or Snake River Basins. In the Mud Lake area the development of storage and reduction of water losses is essential to future extension of irrigation and stabilization of water supply. In the upper Owyhee Basin in Nevada storage is desirable for the rehabilitation of Indian lands. In the Boise River Basin holdover storage or diversions into the basin will doubtless be desirable to relieve late summer shortage and for the extension of present areas.

Potentially irrigable areas in Snake River Basin—Continued

BY STATES	Acres
Wyoming	15,000
Nevada	25,000
Idaho	1,053,000
Oregon	161,000
Washington	37,000
	1,291,000

In addition to irrigation on the new areas listed above more reliable water supplies will be made available for lands now under canal through the use of additional storage, diversions, pumping from present sources, pumping in connection with drainage and from ground water, reduction in canal losses, and improved irrigation practices. A summary of the probable activities in this connection for the larger areas is as follows:

Henrys Fork Basin: Additional storage.

Mud Lake and Camas Creek: Storage on tributary streams; drainage of swampy areas and pumping, and diversion from Henrys Fork or Snake River.

Big Lost and Little Lost Rivers: Pumping.

Big Wood and Little Wood Rivers and Fish Creek: Pumping.

Snake River, Henrys Fork to Milner: Drainage and pumping.

Minidoka area: Drainage and pumping.

North Side and South Side Twin Falls areas: Drainage and pumping.

Boise River: Additional storage or diversions into basin, drainage, and pumping.

Upper Owyhee River: Additional storage.

Malheur River and Bully Creek: Storage, drainage, diversions into basin, and pumping.

At the present time there seems to be little economic justification for greatly increasing the cultivated area, but no one can predict just when the situation will be reversed. During the intervening time there is an opportunity for the perfection of a complete plan for the utilization of the Snake River. That such a plan is necessary for complete water utilization will be evident by a reading of this report. It is realized that in the future, as in the past, political expediency or economic considerations, apart from engineering features, may be dominating factors in such utilization. For these reasons no detailed plan for development is herein suggested. An attempt has been made, however, to present in this report the available essential information that should be of value in the formulation of a comprehensive plan.

WATER SUPPLY

Present or future power rights not being taken into account, the amount of water that passes the Milner diversion dam is an index of the present utilization of the Snake River for irrigation above Milner and a measure of future possibilities. During the 10 years 1921–30 this flow has been as follows:

Orr Affidavit

Exhibit 38

Excerpted pages of the "Special Report – Upper Snake River Basin (Above Powder River) – Irrigation And Associated Developments," by the U.S. Department of the Interior, Bureau of Reclamation, Regional Office, Boise (Feb. 1955)

UPPER SNAKE RIVER BASIN

(Above Powder River)

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SPECIAL REPORT

IRRIGATION AND ASSOCIATED DEVELOPMENTS

UNITED STATES
DEPARTMENT OF THE INTERIOR
DOUGLAS McKAY, *Secretary*

BUREAU OF RECLAMATION
WILBUR A. DEXHEIMER, *Commissioner*

REGION 1
H. T. NELSON, *Regional Director*

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BOISE, IDAHO — FEBRUARY 1955

JRP016296

UNITED STATES DEPARTMENT OF THE INTERIOR
DOUGLAS McKAY, Secretary

BUREAU OF RECLAMATION
WILBUR A. DEXHEIMER, Commissioner

REGION 1
HAROLD T. NELSON, Regional Director

SPECIAL REPORT

U P P E R S N A K E R I V E R B A S I N

(Above Powder River)

IRRIGATION AND ASSOCIATED DEVELOPMENTS

Regional Office
Boise, Idaho
February 1955

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Palisades Reregulating Reservoir

Reregulation of releases from the Palisades Powerplant would be necessary to allow full use of the powerplant capacity for peaking purposes without undesirable large daily fluctuations in the river below. Uncontrolled fluctuations during the irrigation season impose operation problems at downstream irrigation diversion facilities. In winter rapid rise and fall in the river would promote the formation of ice jams which act as temporary dams to spread water beyond the river banks. This condition would be of particular concern in the Heise-Roberts area where the river slope is quite flat and the surrounding lands are only a few feet above the normal water surface. The Snake River below Palisades is an important stream for fishing and boating, and the elimination of wide daily fluctuations would be essential to full use of this stretch of the river for these purposes.

There are several sites below Palisades that might serve for a reregulation reservoir. From preliminary studies a reservoir of from 65,000 acre-feet to 200,000 acre-feet capacity could be built. This would provide more than ample capacity to control the fluctuations from the Palisades plant under a peaking operation. It would also provide a head of from 100 to 140 feet for the generation of power.

In addition to eliminating undesirable fluctuations, a reregulating reservoir might provide storage which could be used for the same purposes as outlined for the storage reservoir above Palisades.

Storage in Underground Basin, Snake River Plain

The Snake River plain north of the river from Roberts and Camas Creek on the east to Big Wood River on the west, is largely undeveloped. This extensive, fairly level area is underlain by the products of volcanic activity which generally have suitable aquifer characteristics. In scattered locations on this plain, ground-water withdrawals have been successful. In other places inverted drainage wells have given satisfactory service. There are indications of ground-water movements on a fairly large scale.

These and other factors such as the sustained spring flows in Hagerman Valley point to the possibility of using the lavas under this plain as a ground-water storage reservoir which would outlet into the Snake River.

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JRP016316

EXTENSION AND CONSERVATION OF BASIN WATER SUPPLIES

Large scale irrigation of new lands or providing supplemental supplies in the upper portion of Snake Basin would depend upon development of a water supply in the river above Milner Dam.

Holdover storage on the main stem and tributaries would be one means. Pumping from ground water in the areas where the ground water is non-tributary to the Snake River above Milner might provide another reliable source of water supply which could be made available to new lands through exchange. The conservation of waters otherwise escaping from the upper basin through the deep ground-water route under the Snake River plain might be accomplished by reducing seepage losses, by substituting closed, controlled pipe systems for municipal and domestic use in lieu of continuous free-flowing streams, and by careful irrigation practices and water-use management on the part of the individual irrigators and districts. Another possibility would be to import water from the Salmon River drainage. Also, water now held for exclusive power purposes could be reassigned to irrigation.

Drainage problems would be greatly reduced and a substantial quantity of water would become available if the conservative use of water which is practiced in areas of short supply were extended to other irrigated areas in the basin which now use the full amount provided under a liberal right.

Storage opportunities are presented under the individual area and project discussions. The importation possibility and the main water saving opportunities are individually presented as follows:

Snake River Water Conservation

Ground water on the south side Twin Falls District, which is the area on the south of the Snake River from Buhl on the west to Hansen on the east, is unsuited as a source of domestic and stock water. Most farm operators and the two largest towns of Buhl and Twin Falls, are dependent on the flow in the irrigation canals for water for these purposes. Piping water from Milner Reservoir, or from Murtaugh Lake, or from Crockett Reservoir (Rock Creek) supplemented by Murtaugh storage are three means to supply the domestic and stock water needs of the area through a closed-pipe system that includes water treatment facilities. To do so would save 152,000 acre-feet annually in Snake River. This saving would be an improvement to the Snake River Main Stem water supply above Milner.

Shutting off all the canals below American Falls, which includes Minidoka, North Side Twin Falls and South Side Twin Falls, during the nonirrigation season, would result in a net saving of about 300,000 acre-feet of water annually. The estimated water savings are based on average recorded winter diversions since 1936, allowing for, (a) the

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JRP016363

Orr Affidavit

Exhibit 39

"Departmental Report No. 2 from May 1 To June 1, 1919 – To His Excellency C.C. Moore, Acting Governor Of The State Of Idaho," by W.G. Swendsen, Idaho State Commissioner of Reclamation

DEPARTMENT OF RECLAMATION

BOISE, IDAHO.

DEPARTMENTAL REPORT NO. 2 from MAY 1 to JUNE 1, 1919.

TO HIS EXCELLENCY, C. C. MOORE,

ACTING GOVERNOR OF THE STATE OF IDAHO.

SIR:

I have the honor to offer the following report of the activities of the Department of Reclamation during the month of May, and I trust you will find the same correct, in proper form, and containing such information as you desire.

WATER RESOURCES.

Owing to the extreme shortage of water, occasioned by a very light precipitation and snow-fall, most of the time of the various help in the Department of Reclamation has been taken up in handling the various water difficulties and controversies at various parts of the state during the past month.

This shortage is particularly acute in the Big and Little Lost River water sheds, the Snake River water shed, the Big and Little Wood River water sheds, and in fact in practically all of the territory of southern and southeastern Idaho.

During seasons of normal flow, the Snake River is at this time at flood stage and a considerable quantity of water has heretofore, at this time of the year, been wasting over the Milner Dam, whereas during this season the stream has been entirely used for irrigation purposes at this point for some weeks past.

The shortage on the Snake and Big Lost Rivers has become so acute that it has been found necessary and advisable to issue warnings to the various water

JRP012532

users thereunder by circular letter to the more important and larger interests, and by the publication of notices in the newspapers to all of the interested parties. All of the Watermasters and Field Forces on streams where the water supply is short, have been charged with the importance of delivering water to the various users in accordance with their respective rights, and only in such quantities as can be put to a beneficial use. The various water users have been advised that under the existing circumstances, the wasting of water will not be permitted.

By the co-operative arrangement with the United States Geological Survey and this department, Mr. E. Clyde Baldwin has been placed in charge of the distribution of the waters of Snake River, and is in charge of a branch office of the United States Geological Survey which has been opened in the Federal Building at Idaho Falls, and in addition to his duties in distributing the water of Snake River to the respective users thereunder, Mr. Baldwin will conduct a special study of the water supply of Snake River which should result in a complete inventory of this valuable state asset or resource.

In addition to the foregoing, the following miscellaneous and routine matters have been handled by the Bureau of Water Resources. One hundred and eight applications for permit to appropriate the public waters of the state of Idaho have been received and considered by this department during the month of May. Various water controversies have been looked into and settled.

Upon receipt of a complaint concerning the condition of the Murphy Irrigation District Dam on Sinker Creek, careful investigations were conducted and the Irrigation District were permitted to, after making certain improvements, impound some 500 acre feet more water than had heretofore been in their reservoir.

Meetings have been held with the water users at Aroo, Moore and Mackay on the Big Lost River; at Idaho Falls and various other points on the Snake River.

JRP012533

CAREY ACT

The West End Twin Falls, or what is now known as the Idaho Farms Development Company's Carey Act Project in Twin Falls and Owyhee Counties is under construction and the work is progressing satisfactorily. Field examinations have been made at this project from time to time during the month. Examinations have also been made of the Keating, Idaho Irrigation Company, North Side Twin Falls Land and Water Company, and the Darlington Land and Water Company Carey Act Projects.

Owing to the extreme dry season, the water supply available to some of the Carey Act Projects in this state is very short and some crop damage may result.

MISCELLANEOUS.

Under the provisions of Chapter 29 of the Emergency Laws of the Fifteenth Session wherein Thirty Thousand Dollars was appropriated for channel improvements in the South Fork of Snake River, two small contracts, aggregating $1175.00 and $1450.00 each, have been completed, approved and the payment therefor ordered. Owing to right-of-way difficulties, the bulk of the improvement work contemplated under the provisions of this Act has not been completed. On account of the fact that little or no flood water has occurred during this year, this delay has not proven serious. Plans are now under way to overcome this difficulty, and it is the purpose of this department to, if possible, complete this river improvement work during the present summer.

There is submitted herewith a financial statement showing, in addition to other things, the condition of the funds appropriated by this department as of May 31st. There is also submitted herewith a statement showing the receipts from various sources of this department during the month of May.

Yours very truly,

W. G. Swendsen mrs.

Commissioner of Reclamation.

DICTATED BUT NOT READ

JRP012534

Orr Affidavit

Exhibit 40

Notice by W.G. Swendsen, Idaho State Commissioner of Reclamation, "Re: Water District No. 36, To the Water Users on the Snake River" (Jun. 2, 1919)

June 6, 1919

Dubois Enterprise,
Dubois, Idaho.

Gentlemen:

Enclosed you will find a copy of an order last issued by Mr. Forest G. Sedgwick, Commissioner of Reclamation, which is of considerable importance to water users and through them to all sections of the Snake River Valley.

Very truly yours,

Acting Governor.

Dubois Banner
Ashton Enterprise
Rexburg Standard
Rigby Star
Idaho Falls Post
Idaho Falls Register
Idaho Republics, Blackfoot
Blackfoot Optimist
Pocatello Tribune
Burley Bulletin
Twin Falls News

JRP012530

State of Idaho
Department of Reclamation
CAPITOL BUILDING
Boise

June 2, 1919.

To Water Districts No. 36.

To the Water Users on Snake River:

I am just in receipt of a communication from Mr. Clyde Baldwin, deputy representing this department in the distribution of the waters of Snake River, wherein he states that from present indications this year's water supply for the Snake River territory will be short. His report indicates that on my thirty there was only 567,000 acre feet of storage in Jackson Lake Reservoir, whereas the normal capacity is 780,000 acre feet. This shortage has undoubtedly arisen due to light snowfall. Mr. Baldwin states that the gates of the dam have, for some time past, been closed so that all of the available run-off is being and has been stored and that the supply entering the river below the Jackson Lake, up to date, has just been sufficient to supply the various canals diverting therefrom.

In view of these circumstances and in order that the minimum amount of injury may result to crops, it is highly important that the greatest economy be exercised in the use of water during this season and that nothing in excess of the actual requirements be delivered.

Kindly give this matter your attention and govern the matter of delivery of water on your project accordingly.

Yours very truly,

Commissioner of Reclamation.

WGB/MB

JRP012531

Orr Affidavit

Exhibit 41

Letter from B.E. Stoutemyer, District Counsel, U.S. Reclamation Service, to the Chief Counsel, U.S. Reclamation Service (Jun. 26, 1919)

Transfer Case

DEPARTMENT OF THE INTERIOR

UNITED STATES GEOLOGICAL SURVEY

WATER RESOURCES BRANCH

Idaho Falls, Idaho,

June 26, 1919.

163-W

The Chief Council,
U. S. Reclamation Service,
Washington, D. C.

Dear Sir:

I am inclosing a copy of the answer which we have prepared for the Water Master, Mr. John Empey, in the case of the Snake River Valley Irrigation District vs. John Empey. This suit has been brought by one of the larger canals in the Upper Snake River Valley for the purpose of securing a writ of mandate to compel the Water Master to raise the head gates of this canal and allow the canal to divert the water flowing in Snake River.

The head gates of this canal have been shut down by the Water Master because the normal flow of the river is so low that the priorities of this company cannot be supplied without taking either the prior rights from the natural flow or stored water which is being run through Snake River from Jackson Lake Reservoir.

There are two reports as to what the contention of the plaintiff will be in this case. One report is that the attorneys for plaintiffs state that their position will be that so long as there is water running in Snake River, even though it be stored water, the Water Master must deliver the water to the plaintiff to the extent of his decreed rights under the provision of a certain section of the State law which provides that water shall be furnished to decreed rights before any is furnished to rights that are not decreed.

The other statement in regard to the plaintiff's contention is that the plaintiff will claim that a part of the water which is being delivered from Jackson Lake is not really stored water but spring water or some other kind of natural flow which the plaintiff should be allowed to take.

The facts as we understand them are set out in the inclosed copy of answer. It seems to me preposterous that any Court would hold that a party who has no right to storage water should be allowed to fill his canal with the storage water created and made available by the construction of a reservoir at the expense of other parties to the execution of the parties who constructed the reservoir and created the storage.

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However, it is reported that Judge Cowen, who is to hear this case, has recently decided a case on the Lost River in which he has ordered the Lost River Reservoir Company to turn out of its reservoir water for the use of the old decreed rights.

The water situation on Snake River is extremely critical this year and the river is about 3,000 feet lower at the present time than it was ever known to be before at this time of the year. The result is that many canals which have never been cut out before are now being cut out of water with the probability that there will be much confusion and trouble along the river through the remainder of this season.

It is probable that it is the plan of the plaintiff to try to get some kind of a temporary order pending a final trial of the case which will allow them to open their head gates and take water for a week or two at least. If this should be allowed, it is probable that all the other canals will be tempted to do the same thing and take so much of the stored water that it will become impracticable to run the stored water from Jackson Lake Reservoir through the Idaho Falls District to the Minidoka Project.

Should this occur, it is our plan to close the gates at Jackson Lake and hold back all the stored water as long as possible and deliver stored water for a week or so from Lake Walcott Reservoir and if such a condition should continue on the river, we would thereafter try to run the Jackson Lake water through in large heads for a short period of time to refill the Lake Walcott Reservoir in order to avoid having all the storage lost by the opening of the canal head gates of canals not entitled to storage water. The water supply for the Minidoka Project and the North Side Twin Falls project and other projects dependent on the storage water from Jackson Lake will be very short this year at the best and it would be disastrous if any considerable part of the storage water should be taken by canals not entitled to the same.

Of course, I have no very definite idea as to what the result of the hearing on this case which is to occur before Judge Cowen at Blackfoot tomorrow will be but if the plaintiff should be allowed to open his head gates and take the stored water and this should be followed by similar action on the part of other canals as would be almost certain to occur in that event, besides shutting down the Jackson Lake head gates and stopping the running of stored water through this part of Snake River as long as possible, it would be my idea to make use of the week or so that we are shutting off the Jackson Lake water and use storage out of Lake Walcott, to either apply to the Federal Court or get an injunction to restrain the State Court and the Water Master and the plaintiff, Snake River Valley Irrigation District, from opening or permitting the head

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gates to be opened or the taking of any stored water by canals not entitled to same, or possibly to apply to the Supreme Court of the State for a writ of prohibition directed to the Judge of the State District Court and the Water Master for the purpose of prohibiting the diversion of stored water in canals not entitled to stored water , or perhaps we might try both of these remedies. Perhaps the application to the State Supreme Court for the writ of prohibition might be made in the name of the Twin Falls North Side Land and Water Company and the application in the Federal Court in the name of the United States. In case of an unfavorable decision from Judge Cowen, it would be useless to attempt to appeal as it would take at least two years to get an appeal heard in the Supreme Court and the crops on both the Minidoka Project and the North Side Twin Falls projects will be ruined if the stored water cannot be run through the Snake River without being diverted by unauthorized persons.

I hope that the result before Judge Cowen will be satisfactory and that no further action will be necessary but if we must act to protect the users of the stored water in order to be of any value, such action must be taken immediately and I think would have to be in the form of one or the other of the proceedings which I have suggested. I am writing fully on this subject at the present time so that if it should be necessary to take this matter up later and ask for authority to file suit to enjoin the State Court and the Snake River Valley Irrigation District and others similarly situated from taking stored water, we can ask authority by telegraph to file such suit and this letter, together with the inclosed copy of answer will give you sufficient explanation of the situation.

Very truly yours,

B. E. Montemyer

District Council.

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Orr Affidavit

Exhibit 42

Letter from B.E. Stoutemyer, District Counsel, U.S. Reclamation Service, to the Chief Counsel, U.S. Reclamation Service (Jun. 30, 1919)

/ 63-2 Transfer Case

DEPARTMENT OF THE INTERIOR

UNITED STATES RECLAMATION SERVICE BRS-PH.

OFFICE OF
DISTRICT COUNSEL

Boise, Idaho, June 30, 1919.

From - District Counsel, B. E. Stoutemyer,

To - Chief Counsel, Washington, D. C.

Subject- Case of Snake River Valley Irrigation District - v. John Empey - suit to compel Watermaster to raise headgates and divert water flowing in Snake River.

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Chief Counsel

Mr. Blee

1. Referring to my letter of June 26, 1919, in regard to the above case, in which case the Plaintiff sought a Writ of Mandate to compel the Watermaster to allow the Plaintiff to open its headgates and divert the water flowing in Snake River into its canal, to which Plaintiff claimed to have a prior right:

2. As the natural flow of the river is insufficient this year to supply the priorities decreed to the Plaintiff, the opening of the Plaintiff's headgates would have resulted in the diversion of the stored water which we are running from Jackson Lake Reservoir through the channel of Snake River.

3. There is a great shortage of water in Snake River this year, this being the lowest year in thirty years, the Snake River at this time being about 3,000 second-feet lower than ever known before at this time of the year.

4. As a result many of the canals in the Idaho Falls and Blackfoot Districts have been shut out of water with prospect of very heavy losses, and of course, if the Plaintiff in this case could succeed in opening its headgates and diverting the stored water, all other companies would do likewise, with the result that we would have been unable to get the stored water down from the reservoir to the Minidoka Project and the other projects which have the right to use the stored water.

5. We tried this case before Judge Cowan at Blackfoot, Idaho, Friday and Saturday (June 27 and 28). The Plaintiff examined a number of witnesses and we cross-examined the witnesses offered by Plaintiff. At the close of Plaintiff's testimony we made a motion - in effect a motion for non-suit, which after a very extended and rather bitter argument by the Attorneys for

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the Plaintiff, and a very brief argument on our part, was sustained by the Court, the Court delivering his decision and an oral opinion without leaving the bench.

6. The contention of the Attorneys for the Plaintiff as presented in their argument rested on two points:

The first was the bald proposition that the holders of decreed rights had the right to take any water flowing in the river whether natural flow or stored water, on account of the prior rights decreed to them as to the waters of Snake River.

Their second point was that the storage of the water in Jackson Lake during the winter and spring so lessened the natural flow in the river that the ground water went down, and that a large amount of the natural flow which the Plaintiff might otherwise receive, is now being absorbed in the gravel banks which Plaintiff claims were dried out by reason of our storage of water during the winter and spring.

7. The Court made a rather extended argument denying the Plaintiff's contention on both of these points and refused to issue the Writ of Mandate or to allow the Plaintiff to raise its headgates.

8. I was a little uneasy about the result of this case before this particular Judge on account of the fact that Judge Cowan had just tried a case on the Lost River, in which he ordered the Reservoir Company to release stored water from the Lost River Reservoir to supply the rights of prior appropriators on that stream, on grounds similar to those advanced in the second contention of the Snake River Valley Irrigation District.

9. There was this difference, however, in the facts in the two cases - that on the Snake River we store only about 20% or 25% of the water coming into the stream, three-fourths of the water coming in in tributaries below Jackson Lake Dam, so that our storage on Snake River has never resulted in drying up the stream as was the case in connection with the reservoir on the Lost River.

10. I believe that the Judge's decision in the Lost

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River case was entirely wrong as a matter of law, as the law gives the reservoir owner the unconditional right to store water during the non-irrigation season when it is not being used by prior appropriators, and also to store the surplus flood water regardless of the fact that the storing of such water would necessarily lower the level of the water in the stream during the period of such storage, and might to a slight extent affect the amount of water seeping into the banks and adjacent lands from the river.

11. In other words, it is my understanding of the law that under the doctrine applicable in states where the doctrine of prior appropriation prevails, no person whether riparian owner or otherwise, has any vested right to demand that the current of the stream should remain at its accustomed level either for the purpose of soaking his land by seepage or for the purpose of enabling him to conveniently divert the water in his ditch.

12. If this were not so, no person could ever divert any water from any stream after one filing or appropriation had been made thereon, however small the filing of the first appropriator, because every diversion whether for the filling of a reservoir, or for direct use of a canal, would necessarily lower the level of the water in the stream. (See Schodde v. Twin Falls, 161 Fed. 42 - also Schodde v. Twin Falls, 224 U. S. 107).

13. However, as the trial court has decided in our favor with reference to the particular facts involved in the Snake River matter, it will not be necessary for us to consider this phase of the matter further.

14. I presume that this decision will end the effort of the canal companies around Idaho Falls and Blackfoot to open their gates with the permission of the court, but I understand that one of the canal companies has several times opened its gate in the night, or some time after it was looked down by the Watermaster, and has been taking water in violation of law, and has told the Watermaster, or his deputy, that they would open the gate again whenever he shut it down.

15. The Watermaster has notified the County Attorney

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and requested prosecution but the County Attorney states that he is willing to prosecute, but that unless the Watermaster can prove that he saw the Defendants open the gates, they would not be able to make out a case.

16. The local community around Idaho Falls, particularly around Rigby where this case has arisen, are very much in sympathy with the idea of allowing the upper Snake River canals to open their gates and take the stored water belonging to the Minidoka and Twin Falls Projects, and local people familiar with the conditions in that section are very doubtful whether a jury could be secured which would convict.

17. In view of the acute water shortage, it is probable that there will be a good deal of trouble of this kind during the remainder of the irrigation season, and it is a serious problem how to proceed to prevent these parties from stealing the water which is so vitally necessary to mature the crops on the Minidoka and other projects which have a right to the storage water.

18. I have suggested to the Watermaster that if he cannot stop this practice by prosecution under the Criminal Statutes, he should call on the Attorney-General of the State to get out an Injunction restraining the Company from tampering with gates after they have been set by the Watermaster, and then have them up for contempt if the gates are again opened.

- - - - -

B.E. Stoutemyer

CC-C. of C.
P.M., Burley.
F.A. Banks, Idaho Falls, Idaho.

JRP004804

Orr Affidavit

Exhibit 43

Letter from W.G. Swendsen, Idaho State Reclamation Commissioner, to Governor C.C. Moore (Jul. 9, 1923)

State of Idaho
DEPARTMENT OF RECLAMATION
Boise

July 9, 1923

Re: American Falls Project.

Honorable C. C. Moore,
Governor of Idaho,
B u i l d i n g.

Dear Sir:

Pursuant to your request I went to Washington, D. C. for the purpose of looking after the State's interest and the interest of its citizens who are participating in the construction of the proposed American Falls reservoir, and it is my pleasure to offer the following report.

In order that you may have a full understanding of the reservoir enterprise as it now stands and is conceived, it seems necessary to make a brief reference to the various steps that have been taken in connection with the project, from its inception to the present time. A large part of the matter referred to in the following is doubtless already known to you, and I therefore apologize for references to the project historic matter in this communication.

The shortage of water experienced in the Snake River valley in 1919 and the subsequent crop loss from drouth during that year acted to stimulate interest in and created a demand for additional storage on the Snake River. Prior to that time the matter of building the American Falls reservoir for the purpose of regulating the flow of Snake River in the interest of irrigation had received much serious consideration and considerable data had been collected by private interests and submitted to the State for its consideration. Because of the many complications entering into the development of the project, such as the moving of the town of

JRP012580

American Falls, the main line of the Oregon Short Line Railroad, acquisition of Indian lands, etc., together with the condition of the State's reclamation credit, the project was not consummated as a private enterprise.

The United States Reclamation Service, largely in the interest of a further development and extension of its Minidoka project, began negotiations with various districts and canal companies in the Snake River valley who desire and need additional water, according to the writer's information, early in 1919, with the result that a definite plan of procedure was matured, in which the Federal government would construct a reservoir, conditioned upon their being able to secure subscriptions for sufficient water which, added to the quantity necessary for the reclamation of the Minidoka Extension project, would make the construction of the reservoir feasible. You will understand that the feasibility of the project depends upon constructing a reservoir with a capacity at least approximating 700,000 to 800,000 acre feet. It is my understanding that upon this basis the plan was presented to Congress for the purpose of securing funds to meet the government's prorata share of the cost, and upon such presentation various appropriations have been made.

In the mean time, contracts were negotiated between the Federal government and the private canal companies and districts in the Snake River valley, providing for the purchase by such companies and districts, of storage rights in the proposed reservoir. Under the provisions of these original purchase contracts the purchaser obligated himself to pay various sums of money to the Federal government at such time or times as the same may be needed for construction, in addition to making a small payment of ten cents per acre foot at the time of entering into the contract. Immediately following the execution of these contracts a financial depression hit Idaho and particularly its agricultural interests, which made it impossible for these purchasers to comply with the provisions of their contracts.

Prior to the time of my departure for Washington (about May 28, 1923) the Federal government had expended about $500,000 on the enterprise and virtually no funds had been contributed by the private interests.

The construction of the reservoir will ultimately interfere with the power rights and property of the Idaho Power Company at American Falls and at other down river points on the Snake River. For example, Shoshone Falls, Lower Salmon Falls

[redacted]

JRP012581

and Swan Falls. An agreement with this company covering the question of such interference was, therefore, necessary. Negotiations were opened with the Power Company some two or three years ago, with the result that after considerable study and deliberation, involving many conferences in which the writer participated, as the representative of the State of Idaho, an agreement was finally reached, signed and executed by the Power Company, which in substance, provided for the acquisition of all the rights necessary in connection with the construction of a reservoir to a capacity of about 1,500,000 to 1,600,000 acre feet capacity.

Under the provisions of this contract the Power Company released control and ownership of a considerable area of land which it had heretofore acquired through various means, situated above American Falls reservoir dam, and inside of the proposed reservoir, the said land having been acquired by the power company for use in connection with their forebay pondage or storage, together with ownership and control of its water rights, permits, etc., and two old power plants at American Falls known as the Island and West Side plants.

As a consideration for these rights, the power company is to receive $1,000,000 in cash, payable in four equal installments. One upon the approval of the contract by the Secretary of the Interior, the second in one year, at which time title to the power plants mentioned in the foregoing was to pass, and the other payments to be made within three and four years respectively from the date of the execution of such contract. In addition to this cash consideration, the power company is to have a right to 45,000 acre feet of water and reservoir capacity for their use at American Falls and elsewhere on the lower reaches of the Snake River exclusively for power purposes and to be drawn off as they desire, also a right to the use of 100 second feet of water beginning April 1st of each year, increasing uniformly to 2500 second feet on May 1st and continuing at that amount to September 15th inclusive, then decreasing uniformly to 100 second feet on October 31st. This last mentioned right or water, while available to the power company for power purposes during the foregoing period each year at American Falls, is not lost to irrigation, but under the provisions of the contract as executed, is available for diversion to the Minidoka project or the Twin Falls projects for irrigation uses, in satisfaction of rights which have already accrued. In addition to the foregoing consideration, the power company obtained a secondary right to the use of 255,000 acre feet capacity of the American Falls reservoir under certain restricted conditions,

JRP012582

which will not interfere with the use of the reservoir for irrigation purposes [illegible] a capacity greater than the million and a half acre feet is created.

Briefly, it may be stated that the contract between the power company and the government provides for the regulation of Snake River in the interest of irrigation, adequate to the needs of a million and a half acre feet, reservoir capacity. If and when the reservoir is constructed beyond this capacity, it will be necessary, if the reservoir is to be filled each year, to acquire additional power rights. It is my belief that the contract as consummated is satisfactory, acequately protects the interests of the State, and is fair and equitable.

All of the titles to property acquired under the provisions of the said power contract go to the United States Government.

One of the necessary and important steps in providing for the building of this reaservoir was the execution and approval of the power contract by the Secretary of the Interior. This contract was presented to him in the fall of 1921 and the writer, acting upon the request of Governor Davis, went to Washington, D. C. in January, 1922 for the purpose of urging an approval of thie contract. The then Secretary of the Interior, upon a consideration of the matter, declined to approve the contract for the reason that private companies and districts who had subscribed for water in the American Falls reservoir had not fulfilled the conditions of the contract in relation to the payment of monetary demands, and it may be stated that in my belief, the Secretary was quite justified in taking this position, since upon the approval of the said contract the government would have been required to pay over $250,000 and to obligate itself to pay the additional sums in cash, hereinbefore referred to, when the same became due. This the government was probably not justified in doing until it was definitely assured that the subscribing companies would fulfill the terms of their purchase contracts and pay the sums required thereunder. We were advised by the Secretary of the Interior that he would use his efforts to secure an extension of time within which to approve the said power contract, conditioned upon subscribing companies organizing an irrigation district embodying their lands and other lands that might desire additional water, issuing district bonds and thus providing a means of financing private subscribers.

Acing upon this assurance, steps were immediately taken to organize what is known as the American Falls Reservoir Irrigation District, embracing approximately 480,000 acres of land under the various canal systems in the Snake River valley. Appropriate steps were taken to organize thie district

JRP012583

and the matter was pushed as rapidly as possible until the organization was finally created and the bonds voted. Through the efforts of the Secretary of the Interior and the State, extensions of time were secured from the power company within which the Secretary of the Interior may approve the power contract.

The foregoing contains a brief outline of the various steps taken and the conditions obtaining on June 1, 1923.

In order to close up the transaction, secure the approval of the power contract by the Secretary of the Interior and make available Federal funds that had been appropriated for the project, it first became necessary to negotiate and execute a contract between the Reclamation Service and the American Falls Reservoir District. This contract was finally agreed upon and executed by both parties on the 15th day of June, 1923.

Under its provisions the district will acquire 280,000 acre feet of water from the American Falls reservoir, with an option to secure an additional 20,000 acre feet for the use and benefit of unentered and unsold Carey Act lands and school lands situated under the North Side Twin Falls canal systems. As a consideration for such water, the district agreed to pay the actual prorata cost of the reservoir construction, including rights of way and other items entering into the completed project, the said money to be paid upon demand from the United States, at such times and in such amounts as may be necessary to meet the district's prorata share of the construction costs, and that a payment of ten cents per acre foot shall be made upon the signing of the said contract or when it becomes effective, and that a further sum of $2.00 per acre foot shall be payable within ninety days after the signing of said contract.

The contract further provides that the district shall pay a penalty of ten per cent on any sums that are not paid when due.

The exact cost of the reservoir is not known but from data now available and assuming that a reservoir of one and a half million acre feet will be constructed, it is quite certain that the cost will not exceed $6.00 per acre foot.

After this contract was negotiated and agreed upon and ready for delivery, the question of purchasing the Indian lands situated in the reservoir, was taken up with the Interior Department and after considerable discussion and deliberations it was finally held by the Solicitor for the said Department, that the Secretary

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did not have authority to purchase these lands, but that an act of Congress ratifying the appraised price and granting such authority to the Secretary, would be necessary. This contention was a surprise to the officers of the district and to the writer, it having been generally understood that such act of Congress was unnecessary. The Solicitor, in explaining his position, pointed out that the Secretary, under existing statutes, had authority to purchase rights of way including Indian lands, provided the owner was willing to sell. [illegible] appeared at the Interior Department as a representative of the Indians and indicated that they were not willing to sell at the appraised price, hence the holding of the Solicitor. It was pointed out, however, that other means of obtaining these lands might be employed, the Solicitor holding that the consent of the Indians to the sale might be had in an agreement with two-thirds of the male adult Indians on the reservation or that the same may be acquired by condemnation. You will understand that most of the lands in this state are tribal lands, that is, they have not been allotted to individual Indians, hence, the transfer is a deal between the tribe and not with individuals, or is a deal between the United States Government by and with the consent of Congress the appropriation of the money.

About a year and a half ago the Secretary of the Interior appointed the Commission to cruise the Indian lands and to appraise them. This commission consisted of Mr. Dietz, the then Irrigation Engineer for the United States Indian Irrigation Service in this territory, Capt. Hall, a representative of the United States General Land Office, and Mr. Banks, an engineer in the employ of the United States Reclamation Service. This commission conducted a very thorough and exhaustive investigation and rendered a very complete report and appraisal. I have carefully examined the report and am generally familiar with the Indian lands, and it is my belief that the appraised price is more than fair to the Indians, it having been made before the present deflation in Idaho land values. This opinion is, I am sure, concurred in by practically all of the interested persons who are familiar with the situation. I entertain no doubt but that these lands will be acquired at a price not exceeding the appraised amount, and that possession will be had sufficiently soon to prevent any delay in the development or use of the enterprise.

In order to protect owners of land in the American Falls district, the contract as drawn and executed, was delivered and accepted and approved by the parties under the following conditions: That in the event the Secretary of the Interior or

[redacted]

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[redacted] loaning their money prior to the Federal government in advance of the government's other proper officer of the United States fail, either by securing necessary legislation, condemnation or otherwise, to obtain the Indian lands essential to a construction of the reservoir, then and in that event all of the obligations resting upon the said district under the contract are held for naught and regarded as fully discharged, and no demands are to be made upon the district under the said contract [redacted] under the said Indian lands are secured and the district so notified and that no demands for payments under the said contract shall be made and no penalties for delinquencies shall attache until after the said lands are obtained, the district notified and given a reasonable time thereafter within which to sell its bonds.

Two other contracts have been negotiated and signed providing for the purchase of American Falls water, and because of the newspaper interview given out by the Honorable Mr. Crampton of the appropriations committee of the House of Representatives, who recently visited Idaho, in which it was indicated that the conditions under which the American Falls reservoir district are securing storage water are more favorable than the terms under which other subscribers are obtaining the same benefit, and are not in harmony with the representations made to Congress when the appropriations for this enterprise were made, it seems desirable to compare the terms and conditions of the contracts between the government, American Falls district and between the government and other subscribers, hence the following:

The American Falls reservoir district contract provides for the purchase of water from American Falls reservoir and in the event American Falls reservoir is not built and it can not be built and utilized unless the Indian lands are obtained, then the said district obtains nothing. As a protection to the land owners in the district, the delivery of the contract under the restrictions recited in the foregoing, [redacted] seemed absolutely necessary.

The other subscribers, for example, Milner Low Lift Irrigation district and New Sweden Irrigation district, which have already put up their money, have contracted to purchase water in Jackson Lake, which water is now available and being used by them and in the event the American Falls reservoir is not built, they will actually acquire a water supply at an agreed price of $10.00 per acre foot. In the event the American Falls reservoir is built then the price these companies are to pay for their water will be adjusted to equal the per acre foot price of American Falls water. These subscribers, therefore, are perfectly secure and are perfectly protected and justified [redacted] discounts. It is my further understanding that [redacted] property has

JRP012588

in turning their money over to the Federal government in advance of the government's acquiring the said Indian lands.

It is my understanding that the Snake River Valley irrigation district has also executed a contract, or is expecting to execute a contract providing for the purchase of storage water, and it is my information that while the money under this contract has not actually been paid, the same will be paid in the near future when the said district sells its bonds, and that its contract contemplates the purchase of Jackson Lake water under the same terms and conditions as the contract between the two districts last above mentioned. The same ten per cent penalty for delinquent payments attaches to all of these contracts, including the American Falls Reservoir district contract.

With respect to the allegation that the representations made to Congress when American Falls reservoir appropriations were made were not fulfilled by the terms and conditions of the American Falls reservoir contract as delivered, I offer the following explanation.

The Federal government had, prior to the signing of the said contract with the American Falls reservoir district, expended in round numbers, $500,000 on the project and had available in appropriations for use prior to June 30, 1923, an additional sum approximating $1,200,000. The $500,000 previously expended had, with the exception of the comparatively small amount spent for engineering and investigations, gone to purchase rights of way, consisting principally of real property in the town of American Falls. In order to obtain the unexpended balance of the appropriation, it was necessary to encumber the same before June 30th. This was accomplished by the Secretary's approving the power contract and making the payments provided therein, together with the approving of purchase contracts of a considerable amount of additional property in the town of American Falls. In signing the power contract an agreement was reached whereby the power company would accept not only the first payment but additional payments when the Government saw fit to make them, and would discount the advance payments in an amount equaling 6% on the sum of said advanced payments, to be calculated over the period between the time of such payments and the time when they were actually due. It is my recent information that the Government has taken advantage of this tender and has actually paid the first three instalments due under the contract, with a total aggregate amount of $750,000 less the foregoing discounts. It is my further understanding that sufficient property has

[redacted]

JRP012587

been acquired at American Falls or that purchase contracts have been executed in a sufficient amount to utilize the unexpended balance of the appropriation, [illegible] and the government has thus far invested and under ordinary circumstances all it will invest before the American Falls reservoir district money is put up, with the exception of the comparatively small amount for engineering and other executive costs, has gone to purchase real property, power [illegible] planning power rights and real property of American Falls to be sold to this district property, including all of the power rights acquired, passes to the United States government and in the event Indian lands are not acquired and the reservoir is not built, the government still has its investment protected [illegible] assumed that the government has bought wisely and that the property it has acquired with these respective sums is worth what it costs. [illegible]

The writer was advised by the manager of the American Falls reservoir district, and its board of directors, that they were perfectly willing to make their money available, even in advance of the acquisition of the said Indian lands, provided they were permitted to come in with the government on an equal basis and participate prorata with it in the ownership of the property acquired.

In addition to the foregoing, it was recognized that the government had invested and will continue to invest, under the project as it is now planned and outlined and under the contracts that are approved, certain sums of money, prior to the making of any payments or furnishing of any [illegible] by the American Falls reservoir district. A provision was therefore incorporated in the contract between the said district and the government, under which the government or other subscribers for water in American Falls who pay their money in advance of the payments by the said district, may receive interest on any sums advanced, at the rate of 6% per annum up to the time the money from the said district is actually put over to my [illegible].

An analysis of the foregoing readily leads to the conclusion that the contracts as executed are absolutely fair and equitable, and that all of the parties are afforded proper protection, and it is my belief that Mr. Crampton, upon giving out the interview he did, possessed only erroneous and misleading information, and was not acquainted with the actual facts.

[illegible] are fast, and has actually [illegible] proceeds of which go to make up a [illegible] to meet its prorata cost of the [illegible]

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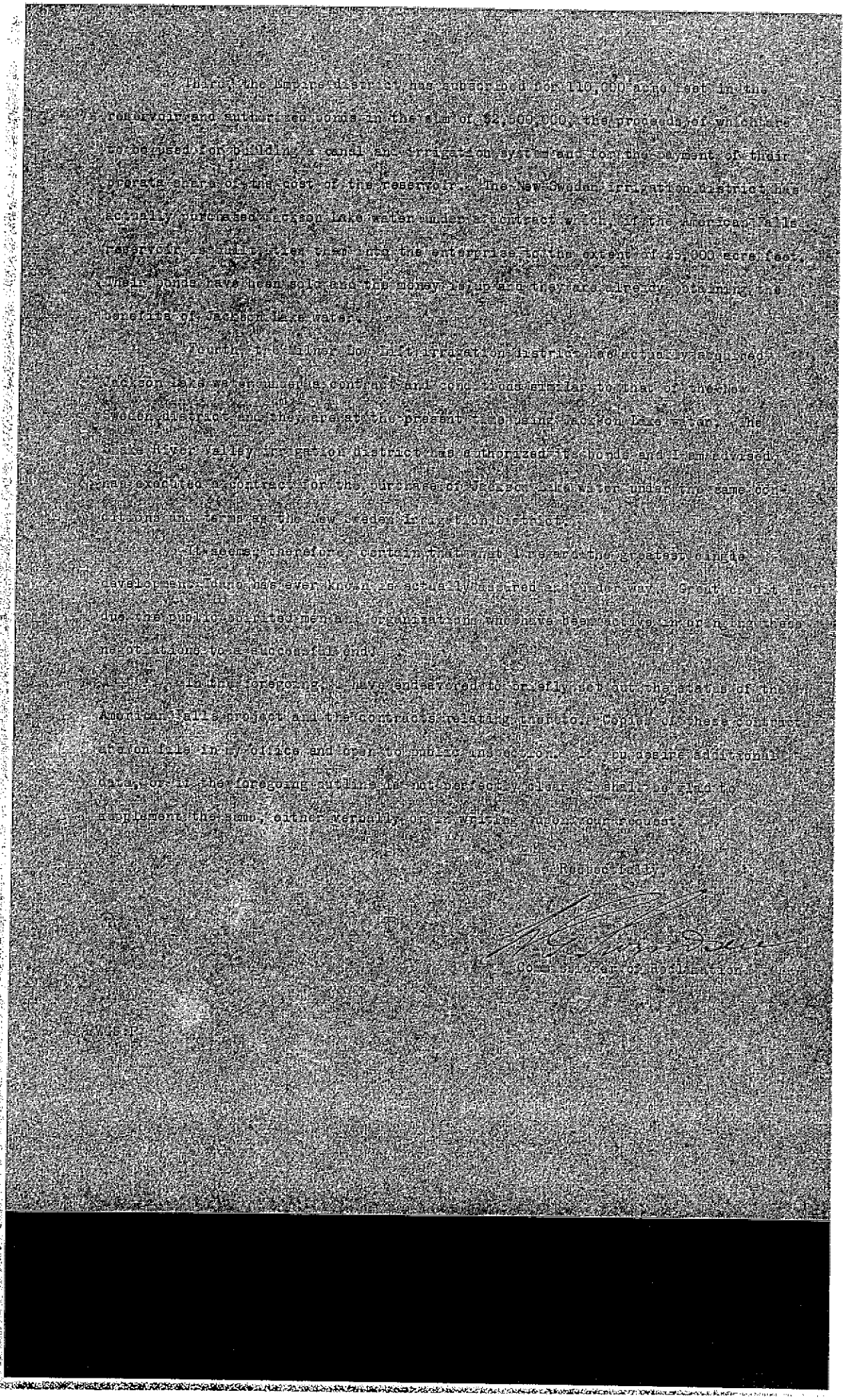
In addition to the foregoing, contracts for the purchase of American Falls water, a contract was also executed between the Empire Irrigation District and the government providing for 110,000 acre feet of American Falls water. This contract is upon the same basis and under the same terms and conditions as the American Falls reservoir contract. The Empire district comprises a total of about 90,000 acres of land situated in Bannock and Caribou counties, about 50,000 acres of which are desirable and irrigable and to which water will be dedicated, the said area being a part of or one unit of what is known as the Greater Fort Hall project. The American Falls water acquired by this district is to be exchanged for water in Jackson Lake, the said Jackson Lake water is to be exchanged for water in the Blackfoot Marsh reservoir, thus making Blackfoot Marsh reservoir water available to the lands in the said Empire district. You will understand that because of the topographic conditions, lands in the Empire district are not susceptible of irrigation from the Snake River, while on the other hand the lands to which Blackfoot Marsh reservoir water is now being dedicated, being lands in the Fort Hall project, may readily be watered from Snake River. In order that the Empire district may carry out its plan, it also negotiated and executed a contract with the United States Indian Service providing for the said exchange of water. The consummation of this transaction between the government and the Empire district does not interfere with or prevent in any way the ultimate development of other units in the Greater Fort Hall project, but on the contrary, the plan adopted by the said district is in harmony with the general plan of development of the Greater Fort Hall project and merely constitutes a unit of it.

The following summary is offered for your convenience. First, American Falls reservoir is definitely assured, the Federal government already having expended approximately $1,700,000 on the enterprise, and has appropriated, according to my information, $400,000 additional, which is available during the present fiscal year. Under the present plan the government will obtain 520,000 acre feet of water in the reservoir for use on its Minidoka Extension project of 120,000 acres.

Second, the American Falls Reservoir District has subscribed and contracted for 280,000 acre feet of water with an option on an additional 20,000 acre feet, and has actually authorized the issuance of $2,700,000 in bonds, the proceeds of which go to make up a five-year interest fund on the said issue and to meet its prorata cost of the reservoir construction.

JRP012589

[redacted]



JRP012590

Orr Affidavit

Exhibit 44

Letter from Barry Dibble, Minidoka Project Manager, to the Chief Engineer of the U.S. Reclamation Service (Apr. 16, 1920)

TRANSFER CASE 201.1

MINIDOKA

DEPARTMENT OF THE INTERIOR

UNITED STATES RECLAMATION SERVICE

Burley, Idaho, April 16, 1920

BD-mc s

Mr. Dean

Engineering

From: Minidoka Project Manager

To: Chief Engineer

Subject: Report of Board of Engineers to consider projects in Snake River Valley which may affect the proposed American Falls reservoir and the available water supply therefor---- Minidoka project

1. I am enclosing herewith the original signed copy of the Report of the Board of Engineers, of which Mr. I. W. McConnell was chairman, which has been considering the Snake River water supply and the American Falls Reservoir. One additional copy will be sent you as soon as we receive some additional copies of Exhibit "F" from Mr. Paul S. A. Bickel. A corresponding signed copy has been furnished Governor Davis.

2. There is considerable demand for this report, and I believe some of the papers will be interested in printing parts of it. The Board indicated they did not care to make the report public until it had been submitted to you and Governor Davis.

3. I beg to ask if you have any objection at this time to allowing those who are interested to see the report or to make such extracts for publication as they may desire.

- - - - -

Barry Dibble

BARRY DIBBLE

enc

APR 23 1059

Transmitted to the Director with original copy of report. Reference is made to office letter of April 16th.

Denver, Colo., April 19, 1920. X Ref.

Chief Engineer.

JRP000097

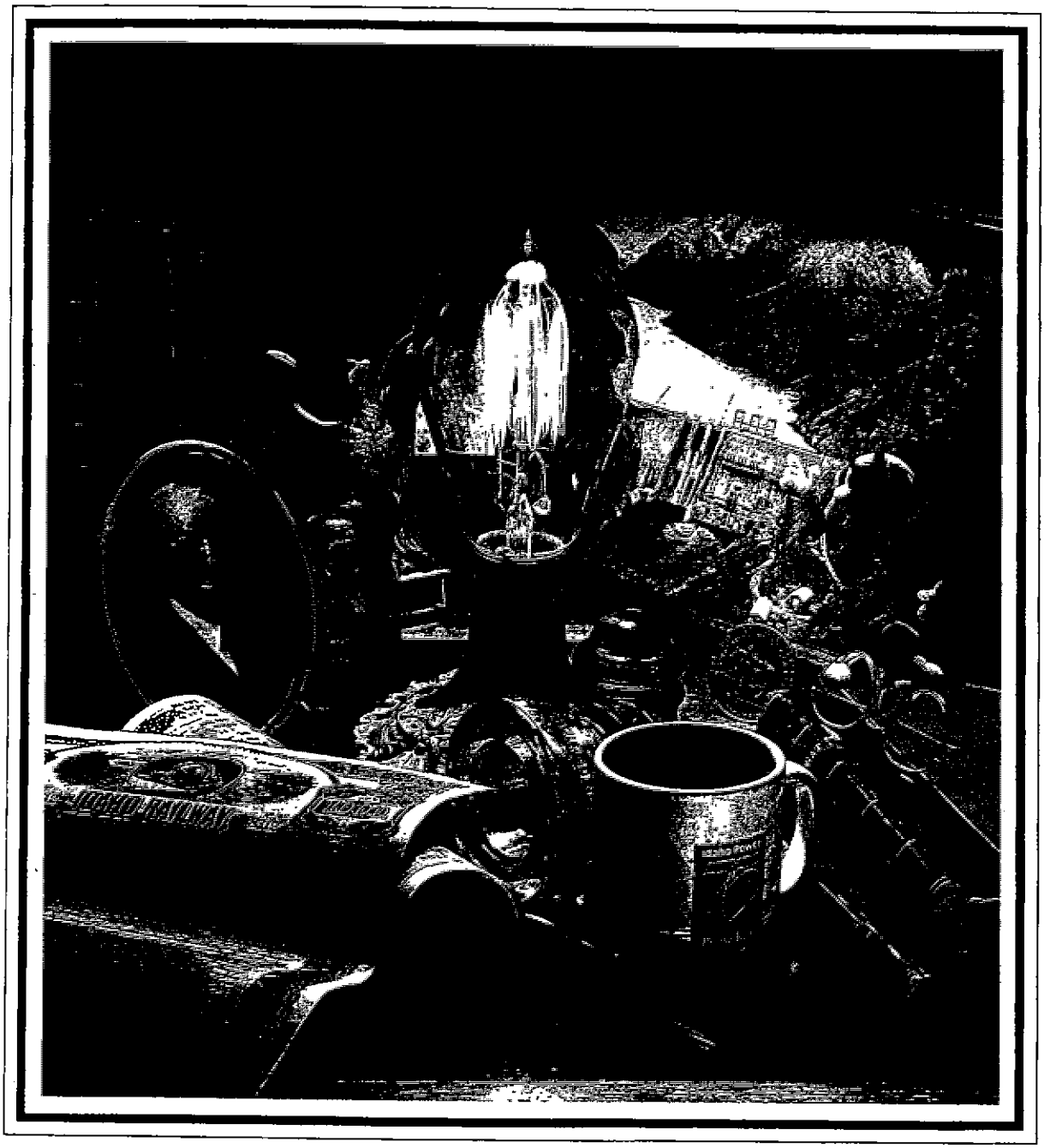
Orr Affidavit

Exhibit 45

Excerpted pages of Legacy of Light: A History of Idaho Power Company, by Susan M. Stacy (Idaho Power Co. 1991)

Legacy of Light

A History of Idaho Power Company

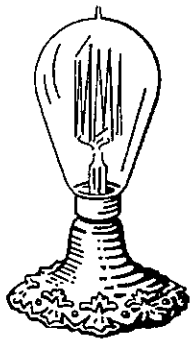


Susan M. Stacy

MAIL 91727

Legacy of Light

A History of the Idaho Power Company

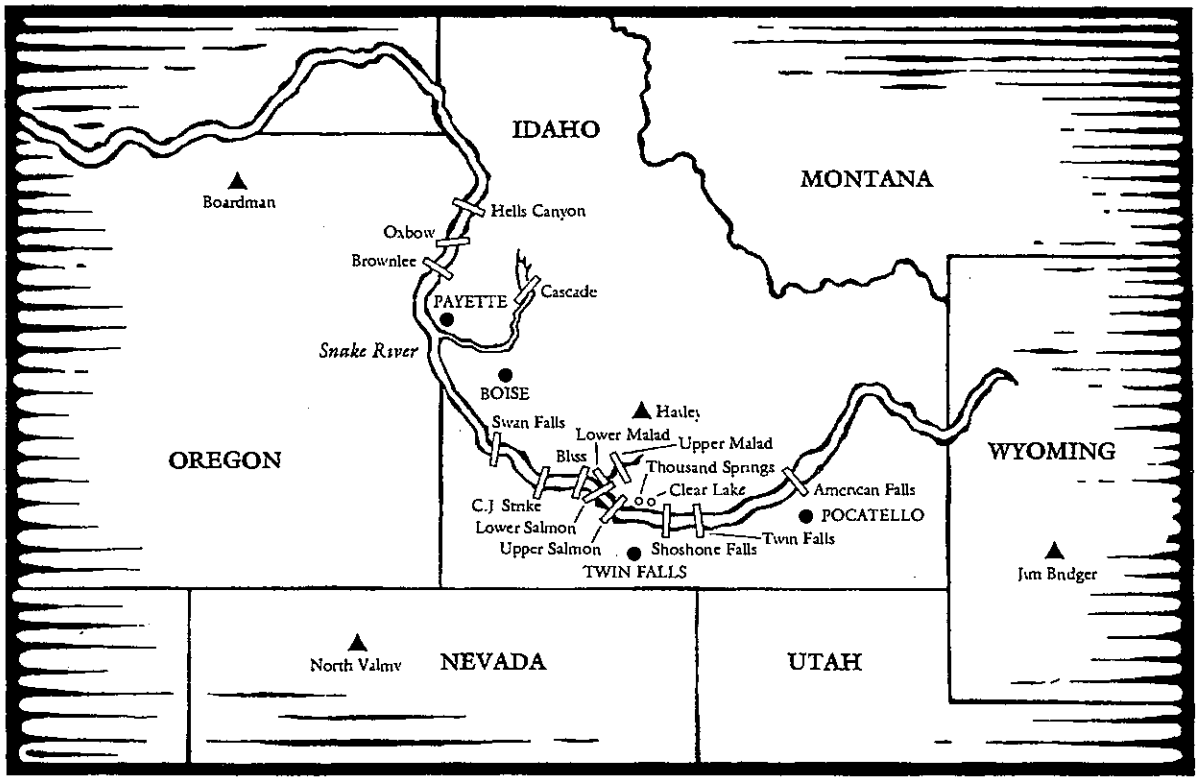


Susan M. Stacy

IDAHO POWER

Boise, Idaho

Idaho Power Company's Service Territory



Lines in Service:
Transmission, 4,668 miles; Overhead, 17,248 miles;
Underground, 1,513 miles; Total, 23,429 miles.

HYDROELECTRIC FACILITIES AND NON-COINCIDENT CAPACITIES

Hells Canyon 450,000 Kw

Oxbow 220,000 Kw

Brownlee 728,000 Kw

Cascade 14,000 Kw

Swan Falls 12,000 Kw

C.J. Strike 89,000 Kw

Bliss 80,000 Kw

Lower Malad 15,000 Kw

Upper Malad 9,000 Kw

Lower Salmon 70,000 Kw

Upper Salmon 39,000 Kw

Thousand Springs 8,000 Kw

Clear Lake 2,400 Kw

Shoshone Falls 12,500 Kw

Twin Falls 10,000 Kw

American Falls 112,420 Kw

THERMAL FACILITIES AND CAPACITIES

Jim Bridger 693,000 Kw

North Valmy 260,650 Kw

Boardman 53,000 Kw

Hailey 50,000 Kw

● DIVISION OFFICES

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Preface and Acknowledgements

In September 1990 Mr. Jim Taney of the Idaho Power Company's public information office explained what his company was looking for in the way of a history to help mark the company's 75th anniversary in 1991. "We want something with context," he said. Idaho Power—and the American electrical utility industry in general—has undergone great change in the last twenty years or so, Taney said, and the company wanted the anniversary to be an occasion for presenting an explanation of those changes to its many publics. The story should begin at the beginning, carry on to the present, and conclude with some thoughts about the future. The intended audience for the work would be Idaho Power employees, retired employees, shareowners, the customers living within the company's service territory, and anyone else who might care to check the book out of a public library.

The intended audience sounded to me a lot like "everybody." But the prospect offered me a chance to act upon my conviction concerning history, which is that the most urgent audience for history is "everybody." Electricity is mysterious to most of us, but a basic need nevertheless. There is no reason why the institution that produces and delivers it should be mysterious. Everyone from policy-makers within the company to the customers who read news stories about the company has a better chance of coping with the world we live in with the benefit of a little historical context.

So I jumped at the opportunity, knowing that the time for research and writing would be somewhat short for an



institution with the years and import of the Idaho Power Company, and knowing that the work couldn't be the definitive history of the company. I aimed to find out what corporate experiences within the Idaho Power territory had marked the company and made it different from all other power companies in the country. A lot of questions came to mind and I proceeded to try and find answers to them: Why are power rates so low here? Why don't we have more REA co-ops in this part of the Snake River Valley? Why are people who move to this region from the East so surprised to find that Idahoans cook on electric ranges? Why don't we have any coal-burning power plants within the service area? Why did Idaho Power have a reputation as one of the political kingmakers in Idaho politics? How come everyone lately is saying things like, "Idaho Power is just not the same company it used to be. The old Idaho Power is gone." What is the difference between the "old Idaho Power" and the new one?

In searching for answers to those and other questions (including "What is a watt?" the complete answer to which you will not find here), I began to see the patterns and outlines of two particularly strong themes in the company's history, neither of which will surprise most Idaho Power employees.

The first has to do with what we now call "envisioning the future." Everyone does it: a family or a business operator or a public servant has some idea of how the future should look and takes steps to make it happen. In the Snake River Valley, there seems to have been a remarkable consensus about what the vision for the future ought to be. Idaho Power managers, other business leaders, state government, and

citizens generally agreed that the best future would come from the continuous expansion of an agricultural industry based on electrical and irrigation technology. There seems to have been little challenge to this "controlling vision" from other ideas, or perhaps other visions were easily vanquished. The Idaho Power Company was an integral participant and believer in that vision, and a major creator of the electrical irrigated empire that actually came into existence.

The other theme is that progress (regardless of how the company defined it) for Idaho Power has never been accomplished by the company alone. It has always needed strong friends, and this history shows that if its friends weren't already organized, the company went out and got them organized. If the company's continuous prosperity and survival is a measurement of success, it must be said that the company has done an outstanding job of choosing its partners. With the knowledge of the company's past patterns of action, an employee or a customer can watch the future and possibly discover "big picture" meaning in the daily events reported in the news.

In the early 1980s, everything changed. Both the irrigation growth machine and the electric machine relied on the water in the Snake River to give ever more of itself with no limits, a thing which it, of course, could not do. The Snake River Valley's consensus about the future vision began to melt, and so did Idaho Power's traditional network of strong partnerships and its traditional place in the scheme of things. But that is the story about to unfold...

The Snake River Valley has in recent years been influenced by the growth of tourism, the environmental movement, the continuing strength of agriculture, and the growth and economic diversification of its larger cities. These have all brought about different ideas about what will make a desirable future, and they aren't all mutually compatible. Here again, listening for the way various interest groups describe their ideas for the valley's future should help make politics and public life in the region particularly interesting in the next few years.

This is not the first history of Idaho Power. The present work owes a special debt to Fritz Cochrane and George Young for their production of *Hydro Era*, a history of the company up to 1976, and the essential base for beginning any history of the company. In addition, Henry Senger, Bob Sessions, Bob Brown, and many others are the authors of scores of articles in *Electrikat*, *Current News*, the annual reports, and other company publications. They took the trouble to explore and explain the history of a technology, a project, or a decision in their articles. Largely because of this important documentation the company's past is available for interpretation now. I hope that future historians will be as fortunate in finding similar documentation of company affairs in the next 75 years.

One of the most rewarding aspects of working on this project has been an opportunity to get to know many Idaho Power people. I have needed, asked for, and received a great deal of help. It is with much gratitude that I thank them all. Idaho Power employees and retirees without exception gave me the same confidence that I assume their company gives them. Just some examples: Art Wittenberger loaned me his Oxbow photograph album with photos from 1906, Shannon Jenné gave me a perfect place to work and forgave me when I kept library materials for more than a month, Larry Wimer gave me a copy of a hard-to-find report on salmon fishing before 1900, Jim Bruce loaned me his Pioneer T-shirt, Ken Wilson loaned me his antique splice so it could be part of the front cover photograph, Nikki Balch Stilwell raided her photograph files for

special pictures and let me use her keys, Doug Sterrett located a long list of photographs at the Idaho Historical Society, Carol Stoops postponed her packing so I could review all the sales programs at her office, Sandy Gardner dropped everything in order to calculate some last-minute figures for one of the graphs in the last chapter, Daralie Yorton appeared one day with a box of old letters and records pertaining to the predecessor companies, a box full of answers to some of my questions. The full list of people I thank is much longer than just these examples and also includes all the retirees I met at social functions outside of work who told me about their careers and talked about the changes they had seen in the company.

A special thanks goes to all of the people I interviewed, both within and outside the company, in person and by telephone. I usually promised that an interview would take about two hours and then stayed four. These talks were essential and invaluable in doing the work, aside from being a great personal pleasure for me.

Since Taney's assignment required "context," my research took me to the archives of the Idaho Historical Society and Boise State University. From their special collections staffs I received the excellent support for which they are so well known. Elizabeth Jacox, Guila Ford, and John Yandell at IHS and Alan Virta at BSU are indispensable colleagues. For their help and "extra miles" I am deeply grateful. To the many other people who searched for or loaned special photographs, my thanks.

All of the company officers and several others were invited to review the draft manuscript, and most of them did. This was a tremendous commitment of their time and a generous service to me inasmuch as their careful reading saved me from many errors, small and large. My thanks to them all. People outside the company have already asked me, "Did anyone censor your work?" I may as well answer them here. No, they didn't. After being given access to any records I asked for, I was then permitted to interpret them on my own. Not even one marginal note from any of the readers contained any censorious sentiments. I myself interpret this as one feature of the "new" Idaho Power Company, and I am very honored to have been given the opportunity to get to know it.

It is a particular pleasure to thank Jim Taney for his steady help, support, guidance, humor, encouragement, and copy editing, which is responsible for many more saves. He was especially generous in sharing his own insight into the company, from which the work benefits greatly.

The latter stages of production involved Pete Wilson and Kelly Mitchell of Pete Wilson DesignWorks, Inc. in Boise, whose versatility, talent, and sympathy for the author were enormously appreciated. Lorrie Meyers stepped in at the last minute to help prepare the index, another save for which I am very grateful.

A person's aerobics classmates should not be overlooked as part of a writer's support network. They provide a soft background noise of unconditional acceptance in both hard and easy times. Thanks, you all. And to my husband Ralph, to whom I became at times a Missing Person while working on this project, I give my most heartfelt thanks for his care, forbearance, and thoughtfulness.





Left: C.J. Strike Dam in 1965. At the right, some water is diverted for irrigation; at far right operators' village.
Above: Dedication ceremony in June 1952 for C.J. Strike Dam. Left to Right: Mrs. C.J. Strike; Bishop Emerson Pugmire; Dr. Wallace Bond, speaker; Fred McCormick; Harry Morrison.

pumped more than 200 feet. The people of Minidoka County honored him with a monument commemorating his accomplishments after he died in an automobile accident in 1955 in Salt Lake City.[10]

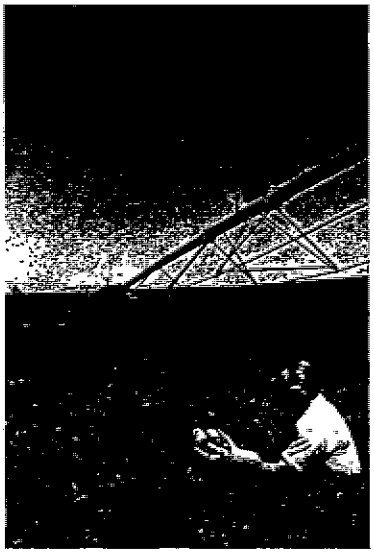
Pressure sprinkling, a more efficient way to distribute water than most of the gravity flow systems, added an additional electrical load. After the war, light-weight aluminum sprinkler pipe became available. A farmer could easily move it from one part of a field to another. Sprinklers didn't require flat ground and could be set up on rolling hills not previously irrigable by gravity ditches. Potato crops in particular came in at higher and more uniform quality because of the sprinkler systems' greater control over soil moisture during different parts of the growing season.[11]

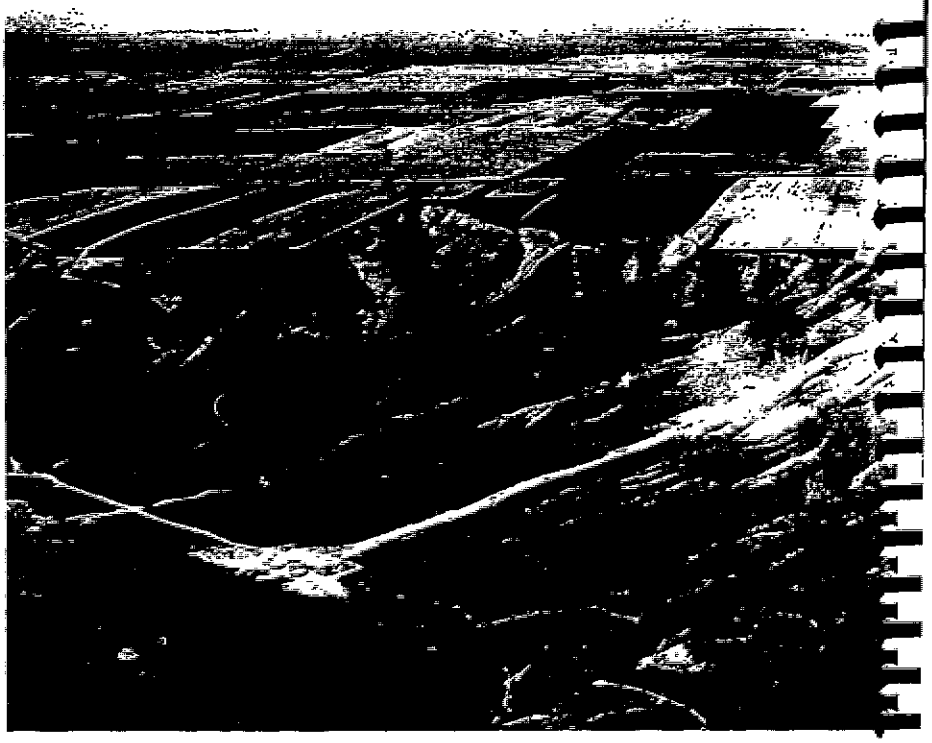
Many farmers and whole projects, like the King Hill project, switched from gravity systems to pressure systems.

The increase in electrical use on farms suddenly went exponential, a marked departure from previous patterns of gradual and steady growth. Idaho Power celebrated the revolution and encouraged more. It wrote in one of its promotional pamphlets, "It remains for the people of Idaho and the nation to do everything possible to encourage men of vision who will continue the expansion of irrigation pumping..."[12]

The pamphlet's reference to the nation was to the role of the Bureau of Land Management (BLM) in managing the Desert Land Entry Act and other legislation aimed at transforming desert into farmland. A second land rush followed the Rupert rush. Developers realized that if a pump could draw water 400 feet from a lava bed, a larger pump could lift it directly from the Snake River 500, 600, or even 700 feet up to lands that no Idaho scheme had yet managed to irrigate.

Desert Land entries had not been a particularly booming business for the BLM for several decades. But between 1947 and 1973, over 1,440 Desert Land entries were patented, bringing nearly 318,000 acres into production. One group of enterprises which started in the early 1960s and took water directly from the Snake River via high-lift pumps would help consume some of the power produced at the great dams yet to be erected in Hells Canyon.





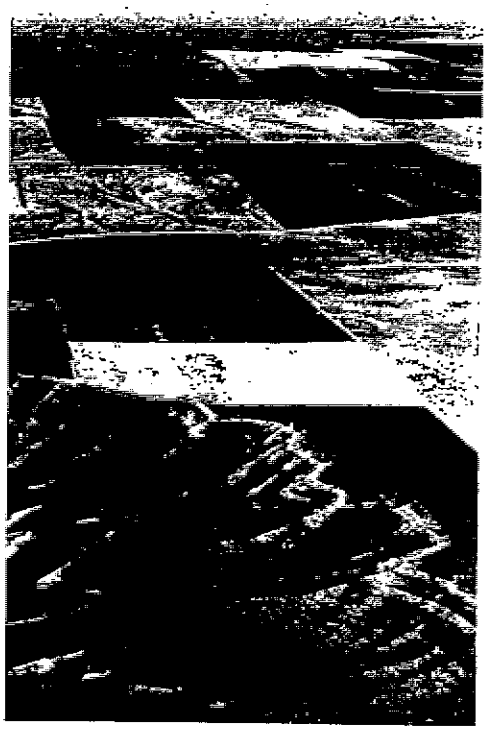
Pressure sprinkling was an improvement over gravity flow systems. Farm operators continued to convert throughout the 1980s and into the 1990s.



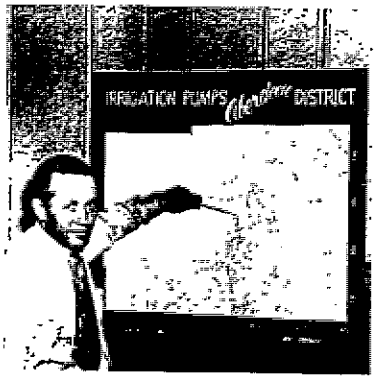
Shirley Clark

Projects popped up all along the rim of the Snake River below Milner Dam, some on land long before homesteaded, as at Dry Lakes south of Nampa, others on newly patented land. Names like Bell Rapids, Sailor Creek, Billy Rio Ranch, Cottonwood Canal, and Black Mesa all attested to another round of resource development made possible by the inexpensive hydropower of the Idaho Power Company. Bell Rapids alone, a project involving 25,000 acres on the southern rim, required 50,835 horsepower for a 625-foot lift. The fertility of the soil and good prices for potato crops meant that the initial investment for the projects could readily be paid off within a few years.[13]

Idaho Power scrambled to keep up with it all. The intense post-war decade of activity had demanded another wave of recruitment to cope with the company's expansion and to replace the staff that didn't return after the war. Once more a generation of young and energetic men and women who would eventually rise to positions of leadership and management joined the company. Women would have a slower rise than the men, but one woman, Shirley Clark, hired in 1945 as a stenographer/secretary, would become the first woman on the management team as section supervisor of stock records. In 1976 as the company's assistant



A high-lift pump on the south side of the Snake River. At the top of the canyon the water flows into a canal.



A typical office wall decoration in the 1950s and 1960s around Idaho Power.

treasurer, she became a corporate officer, another first for Idaho Power women.[14] Among the men, this cohort would include two who would ultimately head the company, James Bruce and Robert O'Connor, and several vice presidents.

The six new post-war dams, all built for the company by the Morrison-Knudsen Company, added a total of 267,300 kilowatts in new capacity to a system that had only 105,000 in 1945 at the end of the war. During the same period, its average load had grown from 62,000 kilowatts to 210,000 in 1952. The percentage increase in kilowatt-hour use per customer was greater than that of any other utility in the United States.[15] The price per kilowatt-hour for domestic customers dropped below two cents, substantially below the national average.

Once again technological change imported into Idaho made a tremendous impact on the fortunes of the Idaho Power Company and its territory. The big pumps committed southern Idaho one more time to agriculture as its key to growth and prosperity. They moved the region to an unsurpassed level of land, water, and electrical consumption. And they strengthened the political and social bonds among the farmers, the state government, the banks, the press, and the power company. These were the forces that now allied themselves in a great struggle to win control over the hydroelectric potential of Hells Canyon.

The Second Coffin Award Nomination

In 1950 Idaho Power was one of the five nominees for a second Coffin Award, still one of the highest electrical industry honors. The recognition was for community relations of the highest order, based on the coordination of rural and urban development, far-sighted engineering planning and system operations, maximum service with lowest possible rates—"all in the face of obstacles plus competition from federal agencies."

Current News
April 1950

Orr Affidavit

Exhibit 46

Letter from Idaho Governor Robert Smylie to U.S. Secretary of Interior Stewart L. Udall (Dec. 7, 1966)

Fourth Orr Affidavit
Exhibit 16:

Letter from Robert E. Smylie, Governor of Idaho, to the Honorable Stewart L. Udall, Secretary of the Interior (Dec. 7, 1966)

STATE OF IDAHO

OFFICE OF THE GOVERNOR
BOISE

ROBERT E. SMYLIE
GOVERNOR

December 7, 1966

Honorable Stewart L. Udall
Secretary of the Interior
Washington, D. C.

Dear Mr. Secretary:

This is the official reply of the State of Idaho to your letter of September 2, 1966 requesting comments on the June 1966 feasibility report of the U. S. Bureau of Reclamation on the Southwest Idaho Water Development Project. Public hearings have been held by the Idaho State Reclamation Engineer in each of the counties directly affected by this proposed project and the report has been approved by the Idaho Water Resource Board.

I am happy to inform you that the project has virtually unanimous support of the people in this area. Unanimity has been reached on the principle of water exchanges between river basins after several years of negotiations. The present plan integrates the flows of the Snake, Boise and Payette River Basins to provide for more efficient utilization of the water resource for multi-purpose development for irrigation, municipal, industrial, flood control, fish and wildlife and recreational uses. This comprehensive approach supplants the previous piecemeal planning efforts undertaken in the separate river basins.

There are, however, certain items which we request be considered and made a part of future studies and operational plans for this project. These are a s follows:

(1) Idaho has tremendous potential for irrigation development. Part of this potential lies in the Upper Snake River Basin above Milner Dam. Several projects have been proposed or authorized in this area including Ririe Dam, Lower Teton (Fremont), Lynn Crandall, Salmon Falls, ground water recharge, and projects connected with the proposed enlargement of American Falls Dam. We feel that these potential projects are feasible provided the water supply of the Southwest Idaho Water Development Project is not dependent upon spills past Milner Dam. We are

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assured by Region 1, Bureau of Reclamation that inflows below Milner are sufficient to meet Southwest Idaho Project requirements.

(2) The water permits issued to the Bureau of Reclamation by the State of Idaho for the Guffey Dam and diversions contain the following language: "Provided that appropriators withdrawing water for irrigation of lands upstream or downstream of the Guffey Dam will not be required to reimburse the Bureau of Reclamation for the consequent loss of energy and also providing that the diversion of the waters of the Snake River and the construction, maintenance and operation of the storage and diversion works shall not in any way impede, interfere with or impair the use, opetation and maintenance of the pumping plant of Gem Irrigation District of Marsing, Idaho." We feel that any required alteration of the pumping facilities of the Gem Irrigation District should be included as project costs.

(3) The Weiser River basin is subject to repeated flooding. The feasibility study for the Weiser Division should include a re-evaluation of the Goodrich Dam for flood protection as well as irrigation of lands not included in the initial reconnaisance report of Region 1, U. S. Bureau of Reclamation.

(4) A major portion of the potential irrigation development under the Garden Valley Division is outside of the Payette River basin. Local Payette River interests have requested that present studies and plans for out-of-basin diversion be limited to 600,000 acre feet annually. We are assured by officials of Region 1, Bureau of Reclamation that this limitation will not interfere with development of the Willow Slope and Initial Butte units of the project. Additional amounts above the 600,000 acre feet will be the subject of a further feasibility study.

(5) Studies of the irrigation features of the Garden Valley Division should include an investigation of the feasibility

COPY

of draining the bottom lands of the Payette River below Black Canyon Dam for expansion of irrigation development.

(6) The Garden Valley Reservoir will inundate a major part of the privately owned agricultural lands of Boise County, which carry a substantial portion of the local tax load. Local interests have suggested that these measures be explored:

(a) Purchase by the displaced individuals of comparable federal lands;

(b) Provision for granting of concessions at developed recreational areas;

(c) Waiving of the normal acquisition by the United States of all lands within 300 feet of the maximum water surface to allow private ownership of the waters edge over part of the shoreline for recreation and summer home use; or

(d) Direct compensation to the county for loss of tax base as a project fixed cost.

(7) There are some 1,400,000 acres of arable dry land within the project area although about 900,000 acres are located at elevations where a water supply is not immediately available. Because of recent successful high-lift pump projects along the Snake River, future studies should consider the extension of the proposed Mountain Home, Guffey, Bruneau and Initial Butte Unit facilities.

(8) We are concerned that the project might be delayed because of the controversy over studies of importation of water to the Colorado River basin. If it is held up for political reasons, I fear that the people of Idaho will interpret the move as proof that the Southwest states want to take water that we could utilize, not merely that in excess of our needs.

Idaho gives unqualified endorsement of the Southwest Idaho Water Development Project as described in the June 1966 feasibility report. Consideration of the items mentioned above will not affect the feasibility of the project and should not prevent early authorization and appropriation of funds to begin construction. I would like to point out that there are many individuals

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who are willing to undertake private development of lands in the project area which are withdrawn for reclamation purposes. In the event that there is any prolonged delay in authorization of the project because of political considerations, I favor release of these lands to allow some development with private capital.

I urge your full support in recommending this project to the Congress.

Sincerely yours,

GOVERNOR

RES:c

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cc: Honorable Len B. Jordan, United States Senator
Honorable Frank Church, United States Senator
Honorable George V. Hansen, Member of Congress
Honorable Compton I. White, Member of Congress
Honorable James McClure, M.C.-elect
Honorable Keith Higgenson, State Reclamation Engineer
Honorable Carl Tappan, Water Resources Board
Honorable George Crookham, Caldwell, Idaho, Chr. Water Board
Honorable W. W. Gartin, Chr. Southwest Idaho Water Development Assn.
c/o Terteling Co., First Security Bank Building, Boise, Idaho

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Orr Affidavit

Exhibit 47

"Statement" of Evan Kackley, Idaho Water Resource Board Member from District 4, to the Idaho Water Resource Board (Jun. 1967)

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STATEMENT

It is indeed good to be meeting in the City of Idaho Falls, the hub of District Four of the Idaho Water Resource Board.

District 4 has two of its residents on the Water Board, Mr. Le Roy Stanger and myself. District 4 and District 3 in water consideration are all but inseparable. District 3 and District 4 comprise the Snake River Drainage and Milner east and north to the borders of it plus the Bear River Drainage of Idaho. District 3 is represented on the Board by Mr. Charles Marshall of Jerome. In the past, District 3 and 4 have also been represented by the most excellent and distinguished gentlemen Mr. Edward Reichert of Filer and Judge Leonard Graham of Rigby. District 3 and 4 are in their boundary of the Snake River Drainage the same as that of Water District 36 officered by the nationally known Committee of Nine.

In the drafting of the Idaho Water Resource Board legislation, your most distinguished attorney, William S. Holden, who was the godfather of that law, and his associates, under the direction of the committee headed by our now distinguished Governor, Don Samuelson, made certain that each Board Water District would have full and complete representation by a member for itself to insure and reflect the District's knowledge and thinking, and by the distribution of Board members at large.

My home, as you know, is at Wayan, Idaho, on the Snake River Drainage, but extremely close to Bear River Drainage. I would like to point out my background is not entirely all Bear River, as some would like to place me in a very narrow niche. I had the pleasure of working very closely with the Committee of Nine and The Protective Committee during development of the Palisades. This is a magnificent project. In its development at a certain stage the matter of Grays Lake came up. This involved two trips to Washington, D. C. by essentially Bear River committees to testify before the House and Senate Interior and Insular Committees. We supported fully the Palisades and we fully supported Burns Creek, and so testified. In the long negotiations we worked out a fine settlement on Grays Lake, which allowed the retention of 55,000 acre-feet of storage water in Palisades and left it to be obligated to irrigation. This is a considerable amount when the feasibility of Palisades is based upon the conservation of 135,000 acre-feet, which is clearly stated in the enabling legislation, with irrigators having to give up their winter water rights and at first by the owners having to put in their own wells at their own expense to conserve the winter water that made Palisades possible.

We now have under development at Grays Lake one of the finest and most important bird refuges in the United States, and we have used the finest principles of multiple-use water available, and have not sacrificed water rights or diminished them.

We have not taken an acre of land off the tax rolls, nor has the land, amounting to 30,000 acres in use, cost the Government or taxpayer a cent.

ATTACHMENT NO. 1 TO MINUTES OF 20th MEETING OF IDAHO WATER RESOURCE BOARD, June 22, 1967.

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On the matter of Grays Lake, I found after visiting with Mr. Stanger that he and I have been very closely connected on it while we had not met each other at that time.

We have some very grave matters in District 4. It is principally to bring before the citizens of District 4 these matters that I am elated that the Board has met for the first time in Idaho Falls.

Before I get into these problems, first let me state that I made the statement as required by law as being a member of the Republican Party when I was appointed to this Board, and also that I am a believer in the concept of multiple purpose use of water, and that it should be used a multiple number of times, first at the highest point on a stream flow or tributary as possible and then as many times as possible on the stream flow, not a big one-shot use and the water lost for any re-use in that area.

What I have to say is non-partisan in the matter of water, as it should be.

On May 31 Senator Church in Boise made a most pertinent statement. He said, to quote from the newspaper of June 1, that Idahoans should be "realists and understand that there are limits in Idaho to both industrial and agricultural growth. . ." as it concerns water resources. Despite our huge water supply in the Snake River Valley, there are definite limits to it. This is particularly true, and we are now looking at the limit of available water on what we like to call the First Snake River of Idaho, namely the area from Milner to the Idaho boundary to the east and actually extending into Jackson Lake. Below Milner there is a second Snake in one sense of the word, but that is not all the story.

Gentlemen, from Milner east on the Snake we have but an average of one million three hundred thousand acre-feet (1.3 m.a.f.) of stream flow water left per year. This yearly flow is very erratic. Unless we obtain importation into the Snake, and it will not be cheap or easy, we must rely upon only a stream flow of 1.3 m.a.f. of water for the future of irrigation, industry and municipalities, water pollution control as well as recreation, fish and wildlife. That, District 3 and 4 clear to Milner, is the grave situation that you now face. We are a water short area in District 36. Our underground reservoirs or aquifers are now critical. We are at a level of withdrawal where they will start dropping by being overdrafted, even on the Great Snake Julion Clawson Aquifer, unless we consider recharging them. How big our bank account of water in the aquifers if we begin depleting them, is only a guess. One guess is 50 m.a.f., or the size of the active reservoirs of Lake Powell and Lake Mead combined. At an overdraft of 1 m.a.f. without recharge it would only take 50 years to go bankrupt in this God-given reservoir without effort on our part.

In the first Wild Rivers bill, I brought to the attention of the Board that there were engineering studies available for bringing the waters of the Salmon into our District, as well as into the

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district above and below Milner, both in water for surface use and for recharging. It is a costly matter, but possible, and I would like to point out that the engineering studies to date are not in the Wild Rivers area, being upstream from them, and that I have always said that if the water was to be moved, it had to be moved by lowhead dams which would not destroy either the passage of the fish or of the spawn, or destroy the spawning beds.

I was glad that at the Pocatello meeting the Board heard a report from the Bureau of Reclamation on proposed plans to make the bringing in of the Salmon water possible.

Now, Gentlemen, I wish to bring to your attention that most important Supreme Court Decision on the control of rivers, only recently handed down, the High Mountain Sheep Dam Decision on the Snake. That decision is of comparatively minor importance to Idaho in the matter of the construction of that dam, but a momentous decision to Idaho and the rest of the Nation. In the copy of the Supreme Court Decision I received, the impact of the decision stood naked without underlining. Besides stating that nuclear energy would replace water power, which has been an accepted fact for the past decade for the immediate future, the impact of this momentous Twentieth Century Decision is as follows (page 21):

> Nor is the test (for the Federal Power Commission to issue a power dam license) solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.

Ladies and Gentlemen, whatever may be your or my personal beliefs, hopes or concepts in the use of water, the Supreme Court has spoken and established those.

Actually, Gentlemen, what has happened to the Federal Power Commission is that the U. S. Supreme Court in the High Mountain Sheep Decision has struck the word "Power" from its title and renamed it with powerful rules for its operation as the Federal Rivers Commission. Do not be mistaken. The High Mountain Sheep Dam may well never be built. Certainly in the ramifications and extension of concept of the High Mountain Sheep Decision, no more dams in the wild rivers area of Idaho will be built whether or not the Wild Rivers Bill is ever authorized, and equally, certainly not the Snake River Narrows Dam in adjacent Wyoming, or the Marble Canyon or Bridge Canyon Dam in the Grand Canyon reaches of the Colorado River.

Surely Senator Church must be clairvoyant when he said in essence

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a few days ago that public power in Idaho as a potential of growth must in effect give way to the broader concepts that the Supreme Court subsequently enumerated in the preceding quotation.

Also today Gentlemen, it is extremely improbable that private power groups will be too ambitious to construct hydraulic power plants with the beginning recapture of private power plants on the rivers of America for Federal operation. This recapture now is but the beginning in magnitude. Today we shall take up the matter of recapture by the Federal Government of several dams in Idaho of the 1,043,692 KW total study now going on over the United States to recapture. Certainly, as in the licensing of the mammoth non-hydraulic power plant at the Four Corners area for only a few short years, it will be in that time that atomic and electrical generation will be mastered to the point that such plants will not be dependent upon water for cooling etc., as well as the problem of quick start-ups solved. Today, Gentlemen, we are at the threshold, and decline will be rapid, of both private and public construction of hydraulic power plants with its vast ramifications.

But District 36, be that as it may, the fact remains that importation from the Salmon will be hard to come by and that we of District 36 have but 1.3 m.a.f. of stream flow water from the Snake passing over Milner on the average per year, and most erratic and difficult to harness for conservation. In the years from 1927 to 1964, 38 years, the average is 1,216,244 acre-feet. Sixteen of those years, the flow was below 1,000,000 acre-feet; 11 of those years it fell below 500,000 acre-feet; 3 of those years, it was above 3,000,000 acre-feet; 5 of those years, it was above 2,000,000 acre-feet and below 3,000,000 acre-feet; and 4 of those years there was none, and 1 year practically none with 1,300 acre-feet.

It is upon that water we are dependent, plus our bank account in the aquifers and our ability to not permanently overdraft it.

We have in another Supreme Court Decision, the Pelton, and this has been ably discussed a long time ago over Idaho by your distinguished attorney William Holden, which gives the Federal Government whenever they wish to exercise the option, control of all the water that falls on Federal lands, and that is the watershed of District Four. In the State of Oregon the Federal Government is exercising this option. Mr. Holden carried that issue from one end of the State to the other and fought a campaign on it but lost it for the United States Senatorship. No one wished to believe him on the fundamental issue of water that this State faced then. Nothing has been accomplished in the Congress to override the Pelton Decision. Now it is being enforced. In fact, in the Barry Opinion -- 160-acre limitation -- the basis is laid for the Federal Government to extend its title to Federally conserved water on the surface when it returns to the underground. This is of great significance to the lands above Milner and on the Bear.

The problem of the Snake above Milner is that it is open at both ends to loss. I have mentioned the average annual spills from Milner of 1.3 million acre-feet. I was glad to note in the report received

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from the Department of the Interior on the Southwest Water Development, addressed to Governor Samuelson and forwarded to this Board some time ago that the Southwest Idaho Water Development would not require the spills of Milner.

Hagerman's Thousand Springs supplies vast amounts of water into the Snake below Milner. The flow of the Springs, as the records show, have increased in amounts as irrigation has increased above Milner. This has been a great amount. But as I have pointed out, the underground water that feeds these marvelous springs is at the critical level, and with more pumping, and upon pumping much depends in irrigation above Milner in the future in District 36, it must be expected that the Springs will decrease in amount to feed the Lower Snake.

Several questions must have recurred repeatedly to the many residents of District 36, agriculturalist, municipal and industrial, to both those dependent upon ground and surface waters. Two of these are:

1. The question of eventual subordination to use of water below Milner requiring that the flow of the Springs be held at a level that would mean the decrease of pumping and/or recharge above Milner; and

2. Eventual subordination of the flows of the Springs that would preclude back pumping from the Snake below Milner to above for recharge and/or use above Milner.

Note I said "eventual." As I understand the present Southwest Idaho Project, this is not envisioned in it. I had the honor of making the motion to this Board to back the Southwest Idaho Project, and it has received full and wholesome support since from all of us and will continue to do so.

Now, Members of District 36, let us turn to the other end of the Snake River, the end known as the headwaters, and as far as Idaho goes to all intent and purposes that means above Palisades, with the full and definite protection to the prime water right of the Snake in Lake Jackson. There are large amounts of water on the Snake that arise in the State of Wyoming.

In the area within 200 miles of us by air, we are truly a continental divide. Water can be moved from the Missouri Basin into the Snake, water can be diverted into the Colorado, water can be diverted from the Snake into the Bear and into the Great Basin, and/or taken into the Central Utah Projects of the Colorado Basin, not only for the presently authorized projects but for those on paper. These, any of these diversions in this radius of 200 miles, are not generally appreciated, as also in the cost feasibility which has favorably changed in the last 15 years, and also in comparison with either diversions at Hagerman, on the Idaho border, or in points of Oregon. If water is taken into the Colorado system, let's say from the Snake via Palisades to the Bear, or further up on the headwaters of the

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Snake into the rivers of Wyoming, eventually reaching the Colorado system of the main segments of that river in Wyoming, this takes a tremendous load off the Upper Colorado Basin States so that water can be delivered to the Lower Basin States of the Colorado for transportation into Metropolitan Los Angeles or for the Central Arizona Project.

The hydrology of the Colorado System of the Upper Basin States by Region 4, Bureau of Reclamation, Salt Lake City is one of colossal error, which puts a burden against the States of the Upper Basin. I shall touch on this later if desired or shall discuss it with those interested privately. But for the moment let us realize that diversion from the upper regions of the Snake, either at Palisades or above, would go a long ways and perhaps resolve the Colorado controversy, which has become widespread over the West because of the colossal hydrology failure in the Colorado Upper Basin by Region 4. This failure by Region 4, Bureau of Reclamation, Salt Lake City, which is over the Upper Basin, is so great that in effect every sixth year is a year in which no moisture falls on the Upper Basin for use in that Basin. This is the 19 percent error annually, causing a total error of 14 percent over the entire Colorado River Basin, or a year over the entire Colorado Basin every 8 years in which not one drop of water falls. This error makes absolutely impossibl the running of the Colorado River as it has been planned or projects built, particularly in the Upper Basin, with its 14 percent error reflected for the Lower Basin.

Let it be understood that Region 1 Boise's hydrology planning on the Snake-Columbia is excellent, as has been other Regions of the Bureau of Reclamation. Region 4, Bureau of Reclamation is the exception, but that does not prevent every effort on Region 4's part to plunder other rivers to cover up their water speculation and kiting and precipitating the greatest deadly water right among sister states in the history of the world.

The Upper Colorado Compact Commission deserves the highest praise for the Commission sponsored hydrology studies that brought out these colossal errors by Region 4, Bureau of Reclamation, and which, to quote from the Commission proceedings, "Although this unpleasant fact (the 19 percent error) has been known for some time, the Upper Basin is now forced to acknowledge it and carefully consider instead of minimizing or ignoring it." (Brackets inserted.)

Region 4 is and has been the hydrological agency of the Upper Colorado Basin.

Gentlemen, here is a 19 percent error on the Colorado River Upper Basin, amounting to 1.2 m.a.f. out of 6.3 m.a.f. On top of that with the construction, another 700,000 acre-feet a year is lost in evaporation, or 11% of the 6.3 m.a.f. Actually there is an error in one sense of the word of 30 percent for the Upper Colorado if the doctrine is adopted that the Lower Basin must guarantee the Upper Basin evaporation losses.

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No wonder the attorney for the Upper Colorado Basin Commission said on September 2, 1965 that "The Basin had been planned to death."

But the fact remains that on August 16, 1965 this statement was made that I quoted you, that "Although this unpleasant fact (of the greatest major error in history of hydrology) has been known for some time, the Upper Basin is now forced to acknowledge and carefully consider it instead of minimizing or ignoring it." (Brackets inserted.)

But the fact remains, the Pacific Northwest, including the Bear and the Missouri, and the rivers of California, are being charged, forced in every way possible to pay off the hydrology speculation of Region 4, Bureau of Reclamation when in no way whatsoever are they, or have they been, a party to the Colorado agreement. In fact in the terrible shortages that Region 4 has been caught in, they have in their franticness to cover their shortage before the Nation demands an accounting, put the heat to Alaska and Canada in a fantastic project to cover their water speculations.

You can speculate with a state's or basin's water just as you can with the hard earned dollars of its citizens placed in a state's or area's regulated institutions, only the results carry forward forever in water.

In the 1950 Western States Reconnaissance Reports, specific volumes are given to the State of Idaho and Northern California. These volumes were completely suppressed, but in them are all the grand-daddies of exportation. The Reports made in Salt Lake City by the Bureau of Reclamation were completely inspired by the threatening Arizona versus California water suit over the Colorado.

In the Idaho volume, and there is not one copy in the State of Idaho except that of Region 1 in Boise, plans for diversion of the Snake River are noted at Palisades into the Bear River. In the writing of the Bear River Compact, a provision was made, unknown to the State of Idaho what was intended, to transport out of basin waters through the Bear. It has been said that this is a routine provision. It is not a routine provision in compacts.

You have heard many comments on the problems of the Bear. Your neighbors on the Bear have known about the Western Reconnaissance provisions for exportation at the Palisades for years. They have known of the provisions of the Bear River Compact of course. They have known that the Proposed Feasibility Report on the Bear of 1962, if it is read carefully and as all should be, not just the benefit-cost ratio, carries in it provisions for exportation of Bear River water out of basin into the realm of the Central Utah system on the Colorado. In fact, just one month before the Bear River Region 4 of Salt Lake Feasibility Report came out in July of 1962, the full plan for this was publicized. It involves a reservoir 4.7 times larger than American Falls just south of Great Salt Lake, and carrying water from here into the Central Utah Project, which in the plans envisions a reservoir twice the size of Lake Mead behind Hoover Dam, which is approximately 28 million acre-feet of active storage.

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Your friends on the Bear River have also protested the key filings to begin the exportation and become a part of the canal system stretching from near the mouth of the Bear towards and into these mammoth reservoirs. Unfortunately for four years, in a contested hearing under oath, in which the Bureau of Reclamation, Salt Lake City admitted several times that they were filing upon vested Idaho water rights, there has been no ruling by the State of Idaho on these filings. They now stand as a priority even if not ruled upon on the waters of the Bear. One looks at the laws of Idaho and wonders how a contest of this would not be ruled upon in four years, particularly when a Writ of Mandamus is now in the courts and very grave decisions and questions of capriciousness and ex parte have been raised.

But be that as it may, approximately two and a half years ago the Bureau of Reclamation in Salt Lake City filed upon other waters of the Bear both in Idaho through exchanges and in Utah, using the unruled upon contested filings in Idaho as the key project to it all, to export the water out of basin through projects built and contemplated to export vast quantities into the Central Utah Project. You probably do not know that the State of Idaho has never raised a question on these later filings to export water, either officially or through the Bear River Compact. What the official position is on this is difficult to say, but only one seems to be indicated.

Your friends on the Bear River have repeatedly tried to bring before the State that the Bear is intimately tied to the headwaters of the Snake and that they are one and the same for exportation in the plans of Region 4, Bureau of Reclamation, Salt Lake City, Utah and the State of Utah. The Bear River is the weak link between the Snake and the Colorado. Your friends on the Bear and defenders of the Snake from where the River enters Idaho to where it leaves and of the Bear have fought alone for over four years against devastating forces to the Snake and Bear. They have been insulted where they should have received a helping hand--from certain levels of the State and from certain levels of Washington, D. C. The few helping hands and words will never be forgotten on the Bear. Your friends on the Bear have staved off through great personal sacrifice the carrying out of the plans to devastate District 36 and the Bear. They are proud to have done it.

At the recent meeting in Lewiston at which your distinguished citizen William S. Holden, member of the Western Governors Water Committee and Idaho member to the Northwest Water Commission as well as Vice President of the same, made this statement, and I quote verbatim:

> "Hansen (former Governor State of Wyoming and now U. S. Senator from Wyoming) said it is not fair to the State of Idaho to lead Idaho to believe that Wyoming isn't looking to waters from the Snake River for import and have stated it on a number of cases when I have visited with them that they are interested in the waters of the Snake River as

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a source of supply for augmentation of the Colorado. He said it would be improper to assure Idaho that exportation of the State's water would not be considered in projects involving the Colorado River. He said that such assurances have the effect of telling the Water Commission where not to look for supplemental water, and so on, as I have stated, but the State of Wyoming actually would like to move water not only into the Colorado but to move it into the Bear River. Some of their representatives have stated that it would be a very simple matter today to divert water from the headwaters of the Snake into the Bear River System. . . ."

Gentlemen, how the citizens of Idaho can not heed the words of William S. Holden, and particularly those citizens in District 36, seems impossible, if the words are not kept concealed on a tape. But I think they will not be heeded.

The good citizens' and your neighbors' on the Bear words were not heeded.

The most powerful man in Washington, D.C. now on the Snake-Columbia was not heeded in the State of Idaho when he told the citizens about two years ago that the easiest and most likely place to tap waters of the Snake-Columbia would be in the headwaters of the Snake in Idaho. That was Senator Henry M. Jackson of the State of Washington, Chairman of the powerful Senate Interior and Insular Committee.

His words were received in Idaho as being rustic and selfish and not in good faith I'm afraid, for when he spoke great talk was going on about exporting Snake-Columbia water at points in Oregon, and the people, I feel, thought he was only looking at his own two adjoining states. He was not, Ladies and Gentlemen of this audience, for following that warning to Idaho, a sister state, I sat in his office and we went over these very grave matters of the headwaters of the Snake, and what it would mean to Idaho.

I trust that the words of William S. Holden, just because he lives in Idaho Falls will not be regarded as rustic, for they are not, any more than have been the words of the Bear citizens.

The diversion of Snake River water at Palisades or above is the greatest major catastrophe that could ever develop to Idaho. It would jeopardize every water right in Idaho from Jackson Lake in Wyoming to where Idaho is left behind by the Snake. It would jeopardize to some degree every water right on the Snake-Columbia itself.

It would preclude any serious development of water above Milner without some way of importing it. It would have serious repercussions to the Southwest Water Development in the second Snake below Milner.

How many times and the many different ways that unconserved water that enters Idaho near Palisades and leaves near Lewiston is used is of the wisdom of a man as Henry Eagles.

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In your own position, and it is so vital to Idaho just as was Burns Creek, it would probably preclude either a Burns Creek or its more magnificent conception of Lynn Crandall, which is to be in a feasibility report as of about June 1, 1968.

The history of Lynn Crandall is one involving the State of Wyoming with controversy one way or the other. These are matters of record. Water for the State of Wyoming could be easily stored above Palisades.

Let us look at these dam sites in Wyoming, at the amount of water and where the past studies keep talking about of the destination of use of these waters.

The following excerpts, unless otherwise stated, are taken from THE UPPER SNAKE RIVER BASIN, VOLUME 4 PART 1, PLANS, STUDIES AND DATA, U. S. DEPARTMENT OF INTERIOR, BUREAU OF RECLAMATION, REGION 1, BOISE, IDAHO & CORPS OF ENGINEERS, WALLA WALLA, WASHINGTON. DATE - 1961.

These are Average Runoff Acre-feet and Proposed Projects in Wyoming on the Snake and tributaries.

HOBACK-GRANITE CREEK RESERVOIR

Average annual runoff acre-feet ... 448,000

Contemplated reservoir at Granite Creek ... 470,000 acre-feet, providing 403,000 acre-feet of capacity for downstream new irrigation in years when sufficient water is available for new storage above Milner. This has an effect of minimizing the requirements for exchange or replacement pumping. New irrigation storage is an essential factor if further irrigation of consequence is to be obtained in the basin above Milner. (Accent supplied)

Power Production ... 55,000,000 KW hours of energy, 8,900 KW of dependable production.

SNAKE-NARROWS PROJECT, WYOMING - GRAND CANYON

Average annual runoff acre-feet ... 3,186,000

Reservoir capacity ... 1,078,000 acre-feet, 878,000 active. Some 228,000 acre-feet of active capacity will be used for irrigation of Swan Valley, Raft River, Oakley Fan, Salmon Falls, and Lake Channel projects. About 200,000 acre-feet will be used to furnish a supplemental water supply to present space holders in Palisades Reservoir in the manner contemplated in the Palisades contracts.

Power Production ... 976,000,000 KW hours of energy with firm capacity of 271,900 KW.

The State of Wyoming repeatedly has stated that under no circumstances will this dam be built as far as that State is concerned, nor after the High Mountain Sheep Decision could it ever be built.

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GREYS RIVER, ELBOW DAM SITE

Average annual runoff acre-feet ... 283,000

Reservoir capacity ... 406,000 acre-feet, 310,000 active.

Power Production ... 49,000,000 KW a year with firm capacity of 7,600 KW.

This reservoir operated in conjunction with Alpine and Granite Creek Reservoirs on a combined basis would provide a maximum amount of water for new irrigation downstream and for flood control and power production. The new land areas involved are Raft River, Oakley Fan, Salmon Falls, Lake Channel and Swan Valley projects. Storage flows at Elbow Reservoir would be dependent on water now released by spill past Milner Dam.

LYNN CRANDALL PROJECT
(Taken from Report of Region 1, Nov. 1966)

Flow figures arising between Palisades and Lynn Crandall site not available.

Total reservoir capacity ... 1,460,000 acre-feet, active storage not given.

Data on lands to be served to be included in sufficient detail to support sizing studies. Lands being considered for receipt of irrigation water stored in the reservoir include those (1) along the Raft River, (2) on Oakley Fan and along Goose Creek, (3) in the Salmon Falls-Milner-Cottonwood area, and (4) adjacent to the Lynn Crandall Reservoir feasibility studies for lands. Land areas 1, 2 and 4 above are programmed for a later date in detail reports from other agencies covering the effect of irrigation and these lands will be requested at that time. The feasibility study on the Salmon Falls-Milner-Cottonwood area has been completed.

RAISING THE AMERICAN FALLS DAM
(From many and various sources.)

Water for Raft River, Oakley Fan, and Salmon Falls.

Gentlemen, Granite on the Hoback and Elbow on the Greys are excellent interlocking Wyoming storage sites, with storage capacity of 876,000 acre-feet and with 713,000 acre-feet of active storage, to which several thousand more active delivery can be added by smaller dams, such as the Alpine, and on the Salt River, Granite and Elbow have together a yearly power potential of 104 million KW and a firm power of 16,500 KW.

With this power, the matter, because of the Colorado Upper Basin shortage, of diverting at Palisades all this potential new storage on the Snake in Wyoming into the Bear and thence into the Colorado

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Basin projects becomes a reality in feasibility. This is known to the Colorado Basin States as shown in the 1930 Western Reconnaissance Report; known to them as shown by the water filings of Region 4 in Idaho and Utah on the Bear and their colossal projects there and in connection with project plans to divert into the realm of the Colorado. The factual proof to this, not fantasy or wishful thinking, has been compiled for four years by the citizens of the Bear. This reality of feasibility to export the Snake at Palisades was carried in what was believed to be the words of a rustic, Senator Henry Jackson of Washington State, and carried in the utterly truthful words of Senator Clifford Hansen of Wyoming, words of absolute frankness for which the citizens of Idaho should be thankful and not resentful. He is a man of the greatest integrity and honor. His words for which William Holden should receive the highest praise for carrying to the citizens of Idaho.

The position of the State of Wyoming was clearly and fairly stated by Governor Clifford Hansen when he was testifying before the House Interior and Insular Committee about two years ago. It apparently has not changed with his election to the Senate. Essentially that position as stated then was this: He, Clifford Hansen, then and in posterity, was not going to be remembered for giving the waters of Wyoming away.

This applied to all the several basins in that State and to all the downstream States on the various basins.

Take away the 713,000 to 800,000 acre-feet that may be stored in Wyoming on the Snake and exported through the Bear at Palisades, little is left of the 1.3 m.a.f. of spills at Milner for use above that critical point. Proposed Wyoming and Idaho projects repeatedly mention in the planning of use for that conserved water are all in the Idaho Falls region, Raft River, the Oakley Fan, Goose Creek and the Salmon Falls-Milner-Cottonwood area. All these Idaho projects that are in the Wyoming reservoir sites, using Wyoming runoff water mainly and based upon spills at Milner, have had first priority as recorded in official records I have quoted.

It is a grim view for the citizens of Idaho to awaken to and particularly to the present and future citizens of District 36 and the Bear. But it has been there for a long time for those charged and interested, as the Committee of Nine and the knowledgeable citizens of the Bear in water.

For a moment let me pause to pay to the Committee of Nine the plaudits of all the citizens of Idaho except for a negligible few: This, the most illustrious Water District Board in the Nation, and their District the Epic of the World in Water Conservation!

The people of the Bear, your friends, have been practically passed up in Washington, D.C. in the Senate for protection of the Bear and headwaters of the Snake. This despite the fact that they have submitted total proof, facts - not fantasies, of what was planned for the Snake. They have been cuffed there when they asked that

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no more money be given to the Bear River Division of Region 4, Bureau of Reclamation to continue their plans of exportation of the Bear and the Snake, and to build the canals for Region 4, Bureau of Reclamation to export the water. They have been cuffed when they have asked that funds to go to the vital Weber Basin in Utah, the key point of the exportation of the Bear into the reservoir south of Great Salt Lake, be held until the matter of the Bear and the Snake was satisfied.

Every dollar spent on these projects is one dollar closer to exporting the headwaters of the Snake into the realm of the Colorado Basin and its exchanges there. Every dollar spent there is in planned projects to export the Snake and the Bear out of basin into the Colorado Basin. Every act in Idaho or Washington to destroy or impair vested water rights on the Bear in Idaho brings the exportation of the Snake and the Bear that much closer to the citizens of Idaho.

Your friends of the Bear have found themselves at times in the same position as the Committee of Nine found their judgment in the matters recently on the Snake.

For the Senate it would be well if they remembered in the matter of the diversion of the Snake through the Bear at Palisades, that the State of Wyoming as a Colorado Basin State will be inventorying their own unused water resources on the Snake and how best to use them, not the State of Idaho. Wyoming is playing a very skillful and astute game in the Northwest Water Commission and in the acts of its own legislature.

The citizens of the Bear have received vague assurances that there will be no exportation, that there must be more studies, that more studies are necessary, in some identical instances these studies it would appear necessary in Washington, but not in other, and that every effort will be made to protect the waters for worthy causes, provided of course. Yet on the Bear, Gentlemen, you are faced with exportation at the headwaters of the Snake. The filings are there, the plans are there, the money is being furnished by Washington, D.C. to carry them out. On top of that, in the writing of the Columbia-Snake Basin Account despite efforts in Idaho and comments by Senator Jackson to prevent by proper provision just what is happening, funds are available to start the exportation and build the canals on the Bear to carry your water out of the Snake into the Colorado.

Today on the headwaters of the Snake, through the Bear, the water and power resources of the Snake-Columbia are being stealthily spliced into the bankrupt in hydrology and cost feasibility of the Upper Colorado River Basin, a condition for which Region 4, Bureau of Reclamation is solely responsible. Once spliced they will never be undone, and the Bear for the Colorado Basin will become the strongest link in Snake-Columbia water and basin funds being poured in to bail out the greatest colossal hydrology and pay-out failure of all history.

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We have on the Bear received the warmest and most cordial support from the members of the House of Representatives from Idaho, past and present, Republican and Democratic, in Washington, D.C. They have grasped what is going on in Southeastern Idaho and its destruction of Idaho.

Now let me say one word before I conclude. I know I shall be severely criticized by some for what I have said here. It is not to protect the Bear for the Bear does not need that. No matter what happens the Bear is protected, for the Bear has a Compact and that Compact protects the State of Idaho, if someone does not circumvent the Compact without going through the proper way to change it, namely by going through and obtaining the approval of the three State Legislatures of Wyoming, Utah and Idaho, and by an act of Congress. The improper way, not the legal way, has been tried more than once and it is a matter of taped record before the Water Board that the State of Utah has approached Idaho to trade the waters of the Bear for Utah's support on other projects. Also from out of the State have come efforts to influence staunch loyal Idaho citizens to sell the waters of Idaho down the river for public acclaim in other states and in Washington, acclaim generated solely by public agencies out of the State of Idaho.

In one sense, the Bear is much better off than the Snake, and I represent as one of two covering both the Snake and the Bear, for no Idaho State Legislature or Idaho Governor would tear open the very headgates of the Snake by tearing open the Bear River Compact. But I do pray of you, if you do not take my words in good faith, to take the good words of William S. Holden of your own area, and the words of Senator Henry M. Jackson, one a Republican, one a Democrat, one from the State of Idaho and one from the State of Washington, when both spoke to you in full honesty. If you do not heed them, that is up to you of District 36 and Idaho. My position on this is that I will continue to fight, despite the ill thoughts I have received, despite the networks of efforts to discredit the Bear and its citizens in the State of Idaho and Washington, D. C. Those people of the Bear will stand by you of Idaho and District 36 to the hilt as they always have.

Evan M. Kackley
Member from District 4
Idaho Water Resource Board

June 1967

JRP018183

Orr Affidavit

Exhibit 48

Letter from U.S. Reclamation Service Director A.P. Davis to the Executive Secretary of Federal Power Commission (Apr. 5, 1921)

CAB:GMA

APR -5 1921

Executive Secretary,

Federal Power Commission.

Dear Mr. Merrill:

Reference is made to application before your Commission of the Idaho Power Company, your serial number 18, Idaho.

Enclosed please find duplicate copies of report by George L. Hoffman, Engineer, U.S.Reclamation Service, relative to this project.

You will note from this report that this power site has been withdrawn under first form withdrawal by the United States for some years and that it is the most available site at which power may be developed to replace that which will be lost at the Minidoka plant by the construction of the proposed American Falls dam.

It is therefore recommended that this permit be not granted until such time as it can be determined that this power site will not be required in the development of the Snake River valley already undertaken by the U. S.Reclamation Service.

Very truly yours,

encls.

1/14/24/2 Copies to CE

A. P. Davis
Director.

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JRP015114

Orr Affidavit

Exhibit 49

"Report on Application Before Federal Power Commission by Idaho Power Company, Serial No. 18, For Preliminary Permit covering Twin Falls site, on Snake River," by George L. Hoffman, U.S. Reclamation Service Engineer, (Mar. 15, 1921)

REPORT ON APPLICATION BEFORE FEDERAL POWER COMMISSION by Idaho Power Company, Serial No. 18, for Preliminary Permit covering Twin Falls site, on Snake River.

1. The watershed of the Snake River includes a large part of the State of Idaho, the wester part of the State of Wyoming, and the eastern part of the State of Oregon.

2. The Twin Falls site covered by Application for Preliminary Permit by the Idaho Power Company, serial No. 18, is located about 22 miles below Milner dam on the Snake River in Sections 3 and 4, 10, 11 and 12, T. 10 S., R. 18 E.; and Section 33, T. 9 S., R. 18 E., Boise Meridian. The Snake River is the boundary line at this point between Jerome and Twin Falls counties. The Snake River flows thru a shallow canyon, approximately 100 feet deep, and has a sheer drop of 125 feet over Twin Falls, which was so named because of an island dividing the water into twin falls. The canyon below the Falls is approximately 225 feet deep.

3. No development of the water resources at this site has been made.

4. The United States Reclamation Serfice, beginning in 1906 built the Jackson Lake dam for a water storage reservoir with a capacity of 847,000 acre-feet. This reservoir is on the South Fork of Snake River in Wyoming. Water is impounded, ordinarily, from the middle of September to the middle of July. Water is then released from Jackson Lake to make up the deficiency in the irrigation supply on the various projects which have rights in the reservoir. The principal part of the water goes to the Minidoka Project, water diverted at Minidoka Dam, and to the Twin Falls projects, water diverted at Milner dam. At the present time, from a power standpoint, the Snake River is divided into two sections, that above and that below Milner dam. This dam lies below the Minidoka dam, approximately 36 miles. During the irrigation season, after the annual flood of the river is past, and beginning usually early in July and sometimes early in June, the Snake river is turned dry at the Milner dam, all of the water being diverted into the irrigation canals above that point. This action is covered by approved water-right filings and decrees. The list of power development projects above Milner dam follows:

(1) Near Ashton, Idaho, a power plant has been installed by the Ashton-St.Anthony Power Company to supply power to an irrigation project which will pump water from Mud Lake onto a portion of the old Dubois project, and to supply power to Ashton and neighboring towns. Plant is designed for three units; one unit is now installed. This unit has a capacity of 3150 H.P. and drives an 1800kilowatt generator. The unit

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operates under a 50-foot head. The water available at the dam site is about 1000 second-feet. Two units would therefore take the entire available supply, and the third unit, when installed is designed to be a spare. The fillings of this plant are on the entire flow of the river at this point and are in good standing at the present time. This site would be seriously affected during the non-irrigation season by the construction of the Island Park dam and reservoir on the North Fork of the Snake River which is contemplated by the U. S. Reclamation Service in the full development of the Snake River for irrigation purposes.

(3) At St. Anthony, Idaho the Utah Power and Light Company has installed one unit operating under a head of approximately 15 feet, and having a capacity of 500 kilowatts. The fillings at this plant will probably not conflict with any other development.

(4) At Idaho Falls, Idaho, there is a small municipal plant supplying part of the requirements of the city. This is a low-head plant and during high water the falls are practically submerged.

(5) About two miles below Idaho Falls, Idaho, there is a power plant of the Utah Power and Light Company where 900 H.P. has been developed. This is a low-head plant and operates with difficulty at times of high water.

(6) At American Falls, Idaho, the Idaho Power Company has three power plants, two of which are old. These old plants have a combined capacity of 2000 H.P. The new plant contains one 5000 H.P. water wheel connected to a 3750 Kv-a. generator. Development work has been done for five additional units of the same size. The further development of this site in fact even the present development would interfere seriously with the storage of water in the American Falls reservoir, which reservoir is the key to the full development of the Snake river for irrigation purposes. Negotiations by the U. S. Reclamation Service with the Idaho Power Company are now in progress for the purchase or replacement of this site and plant.

(7) At Minidoka dam, Idaho, the U. S. Reclamation Service has a power plant of 10,000 H.P. capacity, which supplies power to the pumping unit of the Minidoka Project, and to the towns and rural communities on the Minidoka Project and vicinity. Water for the Minidoka project is diverted at this point.

5. The irrigation development to date along the Snake River from the headwaters to Milner dam covers a total acreage of 1,296,000. In addition to this area there are about 1,439,000 acres of lands which, if irrigated at all, must secure their supply from Snake river.

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6. Inasmuch as the Snake river is turned dry except for leakage of approximately 10 second-feet, at Milner dam during an average of two months every year during the irrigation season, the records of rain fall are not deemed necessary in this report. The runoff for the period from 1902 to 1916, computed for the Neeley station of the U. S. Geological Survey, which station is a short distance below American Falls, is as follows; Maximum runoff 8,602,000 acre-feet, minimum runoff 4,001,000 acre-feet, mean runoff 6,800,000 acre-feet.

7. Plans for storage reservoirs are now being made by the U. S. Reclamation Service, working in conjunction with the State of Idaho and the different water users associations along the Snake River, that will ultimately conserve all the water of Snake river susceptible of economical diversion for irrigation purposes. The lowest point on the river at which diversion is practicalbe in large amounts is at Milner dam. The different reservoir sites that may be developed are as follows: American Falls 3,000,000 acre-feet
Beehler Belcher Swamp---200,000 acre-feet
Island Park-----550,000 acre-feet, and
Swan Valley-----900,000 acre-feet.
The most feasible development to convert all water to irrigation will be made. Considerable time will be necessary to complete the development. Work has been started to secure the right of way for the American Falls reservoir including negotiations for the the purchase or replacement of the American Falls power site and plant of the Idaho Power Company. This will be necessary for the full development of this reservoir. The building of the Island Park reservoir would curtail the usefulness of the Ashton and St. Anthony Power Company's plant except during the irrigation season.

8. The possible powersites on the Snake River from American Falls to Swan Falls inclusive, are shown in the following table which is a part of a report of Board of Engineers to consider Projects on Snake River Valley which may affect the proposed American Falls reservoir and the available water supply therefor. This report was transmitted to Chief of Construction, U. S. Reclamation Service, on April 10, 1920.

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JRP015103

Power Possibilities on Snake River from American Falls to Swan Falls, inclusive

Power site	Head: Test	Now developed	Firm power under present conditions H.P.	Power at site for irrigation Pumping, H.P.
American Falls	45	6,000	18,000	35,000
Eagle Rock	45		18,000	35,000
Minidoka	45	10,000	15,000	23,000
Milner	45			0
Cedar Rapids	90			0
Dry Creek falls	125			0
Twin Falls	125		5,000	Firm power
Shoshone falls	200	1,500	8,000	" "
Auger falls	120		7,000	" "
Upper Salmon Falls	85	68,000	38,000	" "
Lower " "	50		20,000	" "
Crane falls	27		13,000	" "
Swan Falls	25	13,500	10,500	" "

9. The power capacity of the "project" as defined in Regulation 1-O is approximately 9500 H.P. This project, if allowed development by the Idaho Power Company will become a part of its system, and would in time be fully loaded as is their system at the present time. The normal growth of the Idaho Power Company's peak load in kilowatts From 1915 to 1919 inclusive is shown in the following table:

Year	Summer peak in kilowatts	Gain over previous year
1915	17,500	
1916	19,750	2,000
1917	21,900	2,250
1918	24,800	2,900
1919	27,090	2,290

The above figures were secured from a study made by Mr. W. H. Trenner, Chief Engineer of the Idaho Power Company. This study was introduced as evidence in one of the rate cases before the Public Utilities Commission of Idaho in the spring of 1920. The summer peak of 27,090 kilowatts on the Idaho Power Company system during 1919 was divided as follows: Irrigation 13,900 kilowatts, non-irrigation 13,190 kilowatts during August. In January 1919, the peak load on the system without irrigation was 18,960 kilowatts. In addition to the irrigation load, approximately 50 towns and vicinities in Idaho and Oregon are supplied by the Idaho Power Company with electrical energy for light, general

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JRP015104

power and traction purposes.

10. The location of the Twin Falls damsite and reservoir is in the counties of Twin Falls and Jerome instead of Twin Falls and Minidoka as stated in the application.

11. No additional maps, plans, or other data are necessary for a full understanding of the project.

12. The project is on a stream technically considered as navigable but there is no navigation thru this section. It will not affect the navigable capacity of navigable waters of the United States.

13. The project does not contemplate the use of a Government dam.

14. The United States has under consideration the construction of the American Falls reservoir to effect the complete development of the water resources of the Snake River for irrigation purposes. As a result of this work, the development of power at the Government's 10,000 H.P. plant at Minidoka will be practicaly eliminated during the non-irrigation season and it will be necessary to look to other sources to replace the rights established by the Minidoka Project for power required by the United States during the winter and also that which is now being supplied to the settlers on the Minidoka Project including the following cities and towns: Acequia, Rupert, Paul, Jackson, Heyburn, Burley, Declo, Albion, etc., and to take care of some future growth in the summer load. The most feasible site for obtaining this power is at Twin Falls, and the public land at this site was withdrawn about 1908 by the Reclamation Service for this purpose. Subsequently, this land was included in power-reserve withdrawal #565 on November 21, 1916, the following land being described in the Order:
T. 10 S., R. 18 E., Sec. 3, lot 9, SW¼SW¼; Sec. 4, lots 1, 2, and 4 and all unsurveyd islands lying in Snake River

15. The United States is also contemplating the construction of a dam for irrigation purposes on the Payette River at which it will be possible to generate some winter power; but the distance is so great from the Minidoka project that it is not economically feasible to utilize this power as a substitution for the deficiency at Minidoka, mentioned above. It might, however, be feasible to exchange

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REPORT ON [illegible]
by Idaho Power Company [illegible]

this power with the Idaho Power Company for a like amount from one of their plants near the Minidoka Project, and save the loss to the Company of transmission from their plants in the southern part of the state to their principal markets in the western part of the state.

It is the recommendation of this office that the Idaho Power Company's application for the Twin Falls powersite be rejected until such time as some satisfactory arrangements can be made for winter power for the Minidoka Project. [illegible]

GEORGE L. HOFFMAN
Engineer

CC to Denver
Epriley
Stontemyer

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Orr Affidavit

Exhibit 50

Idaho Power Company's Application for License for Twin Falls Project (Feb. 1, 1922)

Third Orr Affidavit

EXHIBIT 4

18

Project No. [redacted]

APPLICATION FOR LICENSE
(Act of June 10, 1920, 41 Stats. 1063)

TWIN FALLS PROJECT
SNAKE RIVER, IDAHO
IDAHO POWER COMPANY

(1) The Idaho Power Company, a corporation organized and existing under and by virtue of the laws of the State of Maine, and having its office and principal place of business at Boise in the State of Idaho, in pursuance of a preliminary permit asked for by this applicant on the fourteenth day of June 1920, does hereby make application to the Federal Power Commission for a license for a project described herein and shown on general and detailed maps signed by the applicant or the 1st day of February 1922, which maps are filed herewith and made a part hereof, said license to authorize the construction, operation and maintenance of certain project works, the principal ones of which are designated as follows on said maps:

(a) Dams and Reservoirs. Reinforced concrete dam approximately 897 feet long will be constructed at the site shown on Exhibit K, Drawing No. 2 to a final elevation of 3557 mean sea level. The initial construction will consist of raising the upstream cut off wall of the dam across the north channel to elevation 3507 mean sea level, this elevation being sufficient to divert the flow of water into the south channel. The ultimate construction will consist of building up from the preliminary dam a reinforced overflow section of dam to elevation 3557 mean sea level. This portion of dam will have a spillway length of 755 feet, a maximum height of 47 feet and will be equipped with construction sluiceways in its base.

The reinforced concrete dam to be built across the south channel will be a non-overflow section and in its initial stage will be constructed to elevation 3522 mean sea level, equipped with two sluiceways in its base for the purpose of discharging sand and gravel which may collect in front of the penstock intake. The ultimate construction of the south channel dam will consist of extending the height of the initial dam to elevation 3545 mean sea level and equipping it with two radial drop gates for the purpose of passing ice and floating debris which will collect in front of the intake. At its ultimate height this dam will have a top length of 160 feet and a maximum height of 50 feet.

The reservoir formed by the initial construction work on the dam will be very small as the normal water surface elevation will be only 3507 mean sea level. The reservoir formed by the construction of the dam to its ultimate height will extend up through the canyon a distance of approximately 3½ miles and its capacity will be in accordance with the following table:

Contour	Acres	Total capacity in acre-feet
3505	31.03	0
3510	80.28	203.25
3520	105.24	1007.10
3530	124.99	1950.25
3537	153.84	2955.56

The land affected by the construction of the dam and its resultant reservoir is outlined on Exhibits J and K drawing No. 1.

(b) Penstock. An intake having a capacity of 1140 sec ft will be constructed at the east end of the south channel dam and it will be equipped with screens and gates so as to control the flow of water into the penstock and remove ice, floating debris, gravel and sand before the water enters the penstock. There will be one penstock to conduct the water from the intake to the unit located in a power house directly at the foot of the Falls. This penstock will be 11 feet inside diameter with a total length of 170 feet, the top third of which will consist of a concrete lined tunnel, the middle third a reinforced concrete lined tunnel and the lower third a steel plate lined tunnel, the plate steel section conducting the water from the tunnel to the turbine inlet. The lower end of this penstock which is in steel will be given such a shape that it can be used as a venturi meter for the measurement of water utilized through the unit. A sectional elevation of this penstock is shown on Exhibit L, Drawing No. 4.

(c) Power House. The power house for this project will be located directly at the foot of the present south channel falls and will be a building having a concrete substructure which will contain the generating and control equipment and a steel frame superstructure of such shape as to give easy access to the generating station from the top of the cliff.

This station will house one 17,000 hp vertical water turbine to operate at approximately 189.5 rpm under a normal head of 162 ft. The maximum head will be 168 ft., the minimum head during a short time in April and May may be as low as 144.5 ft. on account of the rise in tailwater during flood. This turbine will be direct connected to a vertical 12,000 kw. 6600 v, 3 phase, 60 cycle generator. The station substructure will contain all the auxiliary equipment necessary for the complete control and operation of this unit, such as switchboard, motor generator set, oil switches, instrument transformers, governor, lubricating oil and governor oil system, air washer and station transformers. Plans and sectional elevations of this power house are shown on drawings under Exhibit L, and these drawings are as follows:

Exhibit L-1 - Plan of Power House, Intake and South Channel Dam (I.P.Co.F-15124)
" L-2 - Dam-Profile and Sections (" F-15128)
" L-3 - Power House Plans and Sections (" F-15125)
" L-4 - Sectional Elevation through Power House, Penstock and Intake (" F-15126)
" L-5 - Sectional Elevation through power house (" F-15127)

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The switchboard will be located at the top of the cliff on a plot of ground directly east of the south channel dam. It will contain the transformers, switching structure, high tension buses, switches, etc., for transforming the power and distributing it over the transmission lines extending from this station. The location and size of the switchyard and number of outgoing lines are shown under Exhibit "F" Drawing #5, General Plan of Development.

It is the applicant's intention in the future to make this station a switching and sectionalizing point in the system to meet the normal growth which may occur in the next ten or fifteen years. In the future 132 kv lines may be built connecting the now separated portions of the applicant's power system and several additional 44 kv lines may be required for local distribution.

(d) Transmission Lines. The transmission lines included in this project will consist only of the short lines needed to connect this station to the Applicant's general transmission system.

(2) The location of the project applied for is as follows:

(a) In the State of Idaho.
(b) In the Counties of Twin Falls and Jerome
(c) On the following named stream: Snake River; navigable and carrying commerce to the following extent, none.
(d) In the region of the following named cities and towns: The territory served by the applicant lies generally along the Snake River Valley from Blackfoot, Idaho, on the east to Homestead, Oregon, on the west. The system is now in two parts which are to be connected by transmission lines in the future; the eastern part comprises the towns and cities of Pocatello, Blackfoot, American Falls, Aberdeen and Fort Hall; while the western part contains the towns and cities of Carley, Milner, Twin Falls, Jerome, Wendell, Hagerman, Gooding, Mountain Home, Boise, Nampa, Caldwell, Payette, Weiser and Huntington, with other small villages.

(3) The proposed scheme of the development of the project is as follows:

A concrete reinforced dam across the Snake River which shall form a reservoir with 2900 acre feet capacity. From an intake located at the east end of this dam the water will be conducted through an 11 ft. penstock, 170 ft. long, to a power house located at the foot of the cliffs forming the south pool of the Twin Falls. The water will be utilized under an average head of 162 ft. to develop a maximum of 12,000 kw. of power. Transform this power and transmit it into the applicant's distribution system as outlined under Exhibit "J" No. 2.

Courtesy National Archives, Rocky Mountain Region

(4) The proposed use or market for power to be developed is for light, general power and traction purposes; also for irrigation pumping, eleven large irrigation districts now being served under the applicant's system.

(5) The location and capacity of all power projects operated by the applicant, the markets supplied thereby and the relation thereof to the project applied for, are briefly described as follows:

Name of Plant	Geographic Location	Eva Rated Capacity
American Falls:		
East Side Plant	Sec. 31, Twp. 7 S., Range 31 EWM	5,000
West Side Plant	31 " 7 S., " 31 "	500
Island Plant	30 " 7 S., " 31 "	1,040
Shoshone Falls	36 " 9 S., " 17 "	11,000
Lower Salmon Falls	2 " 7 S., " 13 "	6,500
Thousand Springs	8 " 8 S., " 14 "	8,500
Milner	34 " 6 S., " 19 "	5,500
Twin Falls	18 " 8 S., " 1 "	9,900
Horseshoe Bend	32 " 7 N., " 2 "	1,500
Oxbow	20 " 7 S., " 48 WEM	2,000
Barber	29 " 3 N., " 3 "	900

Note: Leased

Idaho Towns and Vicinities Served.

American Falls	Filer	Kuna	Parma
Aberdeen	Fort Hall	Kimberly	Pocatello
Amsterdam		King Hill	Payette
Boise	Gooding	Meridian	Paul
Blackfoot	Glenns Ferry	Mountain Home	Rockland
Barber	Hagerman	Murphy	Richfield
Brunean	Hansett	Middleton	Roswell
Bliss	Hazelton	Meridian	Shoshone
Buhl	Hollister	Milner	Star
Berger	Homen	Nampa	Silver City
Caldwell	Homedale	New Plymouth	Twin Falls
Clover	Horseshoe Bend	Notus	Wendell
Emett	Jerome	Oakley	Weiser
Eagle		Peavey	Wilder

Oregon Towns and Vicinities Served.

Copperfield	Homestead	Ontario
Gypsum	Halfway	Robinette
Huntington	Nyssa	

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Large Irrigation Pumping Plants Served

Gem Irrigation District, in Owyhee County, Idaho.
Snake River Canal Company, in Owyhee County, Idaho.
Ontario-Nyssa Irrigation Company, in Malheur County, Oregon.
Wilson Irrigation District, in Owyhee County, Idaho.
India Cove Irrigation District, in Owyhee County, Idaho.
Snake River District Improvement Company in Owyhee County, Idaho.
North Side Pumping Company, Ltd., in Jerome County, Idaho.
Payette-Oregon Slope Irrigation District, in Malheur County, Oregon.
High Line Canal Company, in Twin Falls County, Idaho.
Owyhee Ditch Company, in Malheur County, Oregon.
Payette Heights Irrigation Company, in Payette County, Idaho.

The markets noted in the foregoing statement, and others in adjacent municipalities, which are shown on a map accompanying this application, are adjacent to this power project and are within practical transmission line distance from it. The continued agricultural, industrial and social growth of the territory served creates an increased demand for electric energy, the production of which depends upon water power development and the project applied for will play an important part in meeting this growth.

The applicant being a Public Service Corporation and being bound to provide the necessary electric energy for the continued growth and prosperity of the territory which it serves, makes this application with a view to supplying the immediate power demand.

(6) The following exhibits are filed herewith and are hereby made a part of this application:

Exhibit A - Reference to certificate of organization.
Exhibit B - Statement of organization and list of officers and directors.
Exhibit C - Field notes and Description of Project Boundaries and Transmission Lines.
Exhibit D - Evidence that applicant has complied with requirements of the Laws of the State within which the project will be located.
Exhibit E - Statement of the nature, extent and ownership of water rights.
Exhibit F - Statement regarding government dams or other structures involved.
Exhibit G - Statement concerning ability of applicant to finance project.
Exhibit H - Statement of effect of project on stream flow.
Exhibit I - Statement of power capacity of project (P-13255).
Exhibit J - General map of entire project (P-13250) and general map of applicant's transmission system (P-13254).

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Exhibit K - Detail maps of entire project (F-13250)
(F-13122)
(F-13123)

Exhibit L - General design drawings .....(F-13128)
(F-13124)
(F-13125)
(F-13126)
(F-13127)

Exhibit M - Statement of mechanical, electrical and transmission equipment.

Exhibit N - Estimate of cost of developing project

Exhibit O - Statement of time desired to complete initial construction and date of beginning and final completion of the project.

IN WITNESS WHEREOF, the applicant has caused its name and corporate seal to be hereunto signed and affixed by E. W. Hill, its Vice-President, thereunto duly authorized this 1st day of February 1922.

IDAHO POWER COMPANY

(SEAL) By E. W. Hill
Vice-President

Attest:
E. P. Summerson
Assistant Secretary.

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EXHIBIT "H"

Statement of the effect of the proposed operation of the project works on the normal flow of the stream.

The project covered by this application is located approximately 16 miles below Milner, Idaho. Stream flow at the proposed site is, therefore, materially effected by the diversion of water at Milner into the North Side and South Side Twin Falls irrigation districts. Also by the diversion into the North Side and South Side Canals at Minidoka.

The effect of the Milner diversion is to completely stop the natural flow of water at Milner during a part of the irrigation season so that the only water available at Twin Falls is the make-up which amounts to about 400 sec.ft. This condition exists for about two months in a year of normal stream flow and approximately four months in a year of minimum flow. During the non-irrigating season there would be more than enough water to run the proposed power unit to capacity. The above outlines in general the present conditions of stream flow.

In the near future the flow will be further effected by the construction of a storage reservoir at American Falls by the U. S. Reclamation Service, to have an initial capacity of 1,500,000 acre feet and an ultimate capacity of 3,000,000 acre feet. Therefore, upon completion of the reservoir to its initial stage the only natural flow available at the site from the beginning of the irrigation season in April until the reservoir begins to spill, which in an average year will be about December 1st, and in a minimum year not until March or April, will be make-up from Milner to Twin Falls.

On account of the above situation there is an agreement pending between the United States of America represented by the Secretary of the Interior and Director of the Reclamation Service and the Idaho Power Company, whereby the Power Company retains the right to certain waters in the proposed reservoir to permit proper operation of its power plants located on the Snake River at American Falls and all sites below. Copies of this agreement are on file in the office of the Secretary of the Interior, but in the following paragraphs is an abstract from those parts of the agreement, which define certain of the water rights to be retained by or granted to the applicant for rights and property conveyed to the U. S. The numbers preceding these paragraphs are the same numbers which precede corresponding paragraphs in the agreement.

(10) The company reserves a primary right at American Falls to use the following amounts of water during the following periods of each year; 100 sec ft beginning April 1st, increasing uniformity to 2500 sec ft on May 1st, and continuing at that amount to Sept. 15th inclusive, then decreasing uniformly to 100 sec ft on October 31st, and none except that hereinafter provided from Nov. 1st to March 31st inclusive.

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Orr Affidavit

Exhibit 51

Excerpted pages of the "Contract Between the United States and the Idaho Power Company Relative to Power Rights at American Falls Reservoir, Idaho" (Jun. 15, 1923)

Symbol Ilr-733

C O N T R A C T

Between the United States and the Idaho Power Company,

Relative to Power Rights at American Falls, Idaho.

Dated June 15, 1923.

DEPARTMENT OF THE INTERIOR

UNITED STATES RECLAMATION SERVICE

MINIDOKA IRRIGATION PROJECT.

Contract between the United States and Idaho Power Company relative to power rights at American Falls, Idaho.

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THIS AGREEMENT, Made this 15th day of June, 1923 in pursuance of the Act of Congress of June 17, 1902, (32 Stat., 388) and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA, hereinafter styled the United States, acting for this purpose by Hubert Work Secretary of the Interior, and the IDAHO POWER COMPANY, a corporation organized under the laws of the State of Maine and authorized to do business in the State of Idaho, and having its principal place of business at Boise, Idaho. hereinafter styled the company, its successors and assigns.

2. Purpose and Plans of United States.

WHEREAS, the United States contemplates the construction of a large reservoir at American Falls, Idaho, to store the flood water and winter flow of Snake River and make the same available for the reclamation of large areas of public lands of the United States including the North Side Pumping Division of the Minidoka Project and other portions of the Snake River Valley, and to supplement the water supply of various projects in the Snake River Valley now having an inadequate or insufficient water supply during part of the irrigation season. And

3. Company Public Service Corporation.

WHEREAS, the company is a public service corporation furnishing electricity throughout the Southern portion of the State of Idaho for light, heat, and power and irrigation purposes. And

4. Interference with Rights of Company.

WHEREAS, said electricity is, to a large extent, generated by the company in hydro-electric plants owned by it and located on the Snake River at American Falls and various points below and the water which it uses and claims for use at American Falls is or would be also used, to a large extent, in its plants located and to be located at points below on the stream, so that the storing by the United States of winter flow at American Falls will interfere with certain power and other rights of company at American Falls and points below and

5. Use of Property Owned by Company.

WHEREAS, a portion of said proposed American Falls dam and reservoir will be located on land owned by the company and the construction and operation of the same will also make necessary the destruction of or interfere with certain generating stations and other property of the company; and

6. Company's Prior Filings at American Falls.

WHEREAS the company has at American Falls water filings prior to the American Falls filings of the United States sufficient to embrace the entire amount of water reserved

to the company under this contract.

7. Need of United States for Power.

AND WHEREAS, the said proposed North Side Pumping Division of the Minidoka Project of the United States is a pumping project and the United States will require in connection with the said project a large power plant for the development of a large amount of electric power for pumping water upon the lands of the said project.

8. Mutual Covenants.

NOW, THEREFORE, WITNESSETH: That for and in consideration of the covenants and agreements of the parties herein, upon the conditions herein named, the parties covenant and agree:

9. Property to be Conveyed to United States.

The Company hereby agrees, upon the terms and conditions hereinafter stipulated, to sell and by good and sufficient deed convey to the United States of America, free of tax liens and of liens or incumbrances created, granted or imposed by itself or its public utility predecessors, all its right, title and interest in and to the following described real estate, situated in the counties of Power and Bingham, State of Idaho, to-wit: (a) The property described in the list of land descriptions hereto attached as Exhibit "A" and made a part of this contract: and any other real property owned by the company, if any such there be, under the proposed dam or reservoir to be

(d) All the company's water rights, appropriations water filings and permits, at American Falls, or used or intended to be used in connection with the company's power plants and proposed plants at American Falls, except the rights, whether primary or tertiary, expressly reserved to the company, as hereinafter set out. The water rights of the company transferred to the United States for use for power purposes shall be considered as impressed with a right in the United States to change the use of such water from power to irrigation or to store the same for irrigation whenever the Secretary of Interior shall decide that such water is required for irrigation purposes. But it is expressly agreed and understood that the water rights and rights to the use of water which it is herein agreed that the Company shall have are reserved out of its existing appropriations and rights as independent rights under its own filings and appropriations and of the dates of priority to which the Company is entitled under such appropriations and are not to be considered as mere contract rights under contract with the United States.

(e) The right to limit all other rights of the company on Snake River at whatever points and in whatever counties the same may be located insofar as and no farther than the rights allowed and granted to the United States to store and use water as herein provided may interfere with any rights of the company at any lower points on Snake River.

half-hour peak, whenever the Secretary of the Interior shall decide that such water is required for irrigation purposes. The expression "10,000 kilowatts, half-hour peak", wherever it occurs in this contract shall be interpreted as meaning that the average for any half-hour interval must not exceed 10,000 kilowatts.

20. Company Right to Primary Storage Water.

The water required to fill the 45,000 acre-feet of primary storage capacity allowed the company under Paragraph 16 hereof shall be a part of the 300,000 acre-feet of water reserved to the company under Paragraph 19 hereof, and the company shall have no right to require the turning out for the company of more than 300,000 acre-feet in any one year beginning October 1st in addition to the primary rights set forth in Paragraph 10 and the holdover authorized in this paragraph. The company shall have the privilege of holding after October 1st and until November 15th any water which it may have remaining in its own storage capacity of 45,000 acre-feet, but the company's right shall expire on November 15th to any amount so held over beyond that date.

21. Company's Rights below Milner Dam

The company's right to demand the turning out of water from the reservoir for release by and use below Milner Dam shall be limited to the 45,000 acre-feet of primary storage rights, the water referred to in the last sentence of Paragraph 10, and to such portion of the 255,000 acre-feet men-

tioned in Paragraph 18 as is needed for beneficial use for power development at Shoshone Falls or Twin Falls but not exceeding the amount that may be necessary to make the total flow at the head of Shoshone Falls:

790	second-feet	October 1st to November 30th,	incl.
890	"	December 1st to January 31st,	"
790	"	February 1st to February 12th,	"
690	"	February 13th to April 15th,	"
790	"	April 16th to June 10th,	"

exclusive of any part of the company's said 45,000 acre-feet of primary storage and the water referred to in the last sentence of Paragraph 10.

Provided, however, that the amount of water released past Milner for maintaining the flow at Shoshone Falls between October 1st and June 10th inclusive, as listed above, shall be a part of the 255,000 acre-feet of primary storage water which the Company may have stored in its secondary storage capacity in the reservoir, and provided that it releases such water from the American Falls Reservoir in such a way that the required flow can be maintained at Shoshone Falls by the utilization of storage capacity in Lake Walcott not to exceed 3,000 acre-feet of storage capacity.

Nothing in this paragraph is to be construed as abridging the Company's right to release from the Reservoir and have passed by Milner at any time any part of its 45,000 acre-feet of primary stored water stored in its primary storage capacity, or held over as provided for in Paragraph 20.

Orr Affidavit

Exhibit 52

Letter from A.P. Davis, Director of the U.S. Reclamation Service, to Mr. Merrill, Executive Secretary of the Federal Power Commission (Mar. 26, 1921)

CAB:GMA

MAR 26 1921

Executive Secretary,

Federal Power Commission.

Dear Mr. Merrill:

Reference is made to application before your commission of the Idaho Power Co., Serial No.19, Idaho, covering the Upper Salmon Falls power site on the Snake River about 60 miles below Milner dam.

Enclosed please find in duplicate copy of report of Engineer George L. Hoffman of this bureau on the proposed development.

From this report, you will note that the Upper Salmon Falls development is intimately tied up with the Minidoka project of the Reclamation Service, comprising 121,500 acres now under ditch with a 115,000 acre extension planned for the immediate future. It is also intimately concerned with our proposed American Falls reservoir for which preliminary work is now in progress. Large sums have already been expended by the United States for purchases of rights of way for the reservoir. The Sundry Civil Act of March 4, 1921, appropriated $1,735,000 for this proposition.

The American Falls work has been undertaken under agreements with the various irrigation districts up and down the river whereby the dam will be built by the Reclamation Service. Part of the funds will be advanced by these local interests, the cost being divided between them and the United States in proportion to their several interests in the storage, of which the share of the United States will be by far the largest.

This reservoir will completely control and utilize Snake River above Milner dam and it would manifestly be opposed to the public interest to grant to a private company rights which might enable them to handicap seriously, if not prohibit, the otherwise feasible complete development of the power and irrigation resources of Snake River Basin.

The dam and a portion of both canals proposed to be constructed by the power company at Upper Salmon Falls are shown

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as located on land that has been withdrawn by the Reclamation Service for the past 12 or 13 years and it is earnestly recommended that no permit be granted for this site at the present time, pending the complete study of the American Falls development.

Yours very truly,

A. P. Davis

encl. in duplicate.

Director.

-2-

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Orr Affidavit

Exhibit 53

Letter from James L. Boone, Secretary of Idaho Power Company, to Mr. Hibbard, Vice President of Idaho Power Company (May 29, 1931)

May 29, 1931.

Mr. Hibbard:

Yesterday evening, I had a conference with Mr. Stoutemyer relating primarily to the Twin Falls Federal Power license and, secondarily, to the agreement which the irrigators are negotiating with the Government for storage water at American Falls. The matters which he volunteered for discussion were so important that I think it quite advisable to reduce them to writing.

The discussion indicated very clearly to me that we may expect little concession from the Department of Reclamation in the way of further prior rights to the use of the waters of Snake River so far as the same may be available for irrigation use at, or at points above, Milner Dam. This view confirms in some respects a conversation I had not long back with Mr. Hoyt Ray, United States District Attorney, the latter telling me that sooner or later the issue must be drawn and decided between the use of the waters of Snake River for irrigation purposes and the use of those waters for power purposes. Mr. Stoutemyer said that he was firmly of the opinion, and likewise everybody else connected with the Reclamation Department, that it was the duty of that Department, so far as it was within its power to do so, to preserve for Southern Idaho the waters of Snake River for irrigation purposes. He quite frankly stated that necessity may arise which will require the condemnation of such parts of our power rights at American Falls and Shoshone Falls which may be further essential for irrigation purposes.

He said that so far as he and his associates were concerned, they thought we, or anyone else developing power, should be quite well satisfied to make such developments at points below Shoshone Falls, taking advantage of the springs flow and the return flow. I told him that so far as our Twin Falls site was concerned, we had considerable money invested in preliminary developments and we felt it advisable to take any and all necessary steps to perfect our rights at that point. I pointed out particularly the impossibility of financing under the clause for the Twin Falls license which the Reclamation Department had suggested. I asked him if he had taken into consideration the flow between Milner Dam and the Twin Falls site and whether he would have any objection to our superior and prior use to these waters. He said that he did not think so and felt that we might reach some satisfactory agreement in relation to those waters. I told him I thought it was quite necessary that we have some prior and superior rights in addition to the flow between Milner Dam and Twin Falls. It was very clear to me that it is not his nor the Reclamation Department's intention that we shall gain, without his or their serious protest, any further prior rights to water of Snake River which may be used for irrigation purposes at or above Milner Dam. My conclusion is that we may be able to negotiate a clause which will give us a prior and superior right to those waters which originate between Milner Dam and Twin Falls site, but, as to other waters

IPC048605

originating above Milner Dam, I doubt whether we stand much chance in gaining approval of Mr. Stoutemyer or anyone else in the Reclamation Department. He was very out-spoken in the beginning to say that this clause was not necessarily his own but had received the sanction of everyone concerned, but that he felt that it, as drawn, represented at that time the views of all concerned.

He, incidentally, mentioned Mr. Williamson of the Federal Power Commission as a man who has had considerable experience in irrigation and power matters, especially as conflict between the two uses of water may possibly arise. Whether the matter of the Twin Falls license had been discussed with Mr. Williamson, Mr. Stoutemyer did not say, but he did infer that he felt that Mr. Williamson would be very much given to the Reclamation Department's ideas thereon.

It does occur to me that the question of how far we should go in attempting to press our claims for prior use of water originating at or above Milner Dam presents a very serious question for us. My personal opinion is that we should go very slow before any attempt is made to press claims which will be antagonistic to those expressed in this letter as the views of Mr. Stoutemyer and the Department of Reclamation.

In reading Mr. Clogher's correspondence and in talking with Mr. Senger, I arrive at the conclusion that a very desirable peak load plant of approximately15,000 kw capacity can be developed at Twin Falls site, relying primarily on the return flow between Milner Dam and the Twin Falls site and such other waters as may from time to time be released at Milner Dam, but to which we would have no prior call or prior rights therein.

Any further negotiations by me with Mr. Stoutemyer in this matter will be held in abeyance until further instructions are received.

As to the contract between the irrigators and the Government for further use of the waters at American Falls, I advise that the conference between Mr. Stoutemyer and Mr. Shepherd had been postponed until Saturday, May 30th. He said that the matter had proceeded to the point of negotiating a contract between the irrigators and the Government which covered (1) the price of the water, (2) the conditions of the use of water, and (3) our consent to the contract so that the instructions of the irrigators to the Government to shut off water in the late fall, or such time thereafter as the irrigators might direct, would be binding on us. He said that so far as he was concerned, our present contract would stand. However, with the new contract between the irrigators and the Government, it occurs to me that, at least for the immediate future, we may well expect that orders will be given to the Government by the irrigators to withhold release of any waters until the reservoir is full. As to the conference which is to be held on May 30th, I asked Mr. Stoutemyer to give us a memorandum on the same. He said that he would be pleased to do this.

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Mr. Stoutemyer was also interested in the trade of kilowatt hours, which he said he had taken up with you sometime back and concerning which he had not heard from you. This trade, as I understood him, was a matter of getting kilowatt hours from us for use of irrigators now supplied by them in this section of the state, which kilowatt hours would be returned to us at American Falls. I told him I was not familiar with this matter and that it would necessarily have to await your return.

James L. Boone.

JLB/B

IPC048607

Orr Affidavit

Exhibit 54

Letter from M.L. Hibbard, Vice President and General Manager of Idaho Power Company, to E.B. Darlington, Superintendent, U.S. Reclamation Service (Apr. 7, 1931)

(Copy)

Idaho Power Company
Boise, Idaho

April 7, 1931

Mr. E. B. Darlington, Supt.
U. S. Reclamation Service
Burley, Idaho

Dear Mr. Darlington:

I am sending you herewith copy of an article that appeared in the Wendell Irrigationist of Wendell, Idaho, under date of April 2, 1931, as perhaps you may not have seen this particular item.

It seems to me that the question of why the surplus water sold for power purposes is disposed of at a lower price than that charged the irrigators should be definitely answered as soon as possible by yourself or Mr. Stoutemyer, and that this answer should be sent to the Wendell Irrigationist and some of the other papers who have raised this question on previous occasions.

It is my understanding that at a meeting last fall at American Falls Mr. Stoutemyer covered this matter very thoroughly, but apparently the information has not yet gotten out to all who should have it, as is evidenced by this particular article, which I believe was in the form of an editorial.

Very truly yours,

(Sgd) M. L. Hibbard
Vice-Pres. & Gen'l Mgr.

encl.

cc - Mr. R. E. Stoutemyer

APR 9 '31 [illegible]

JRP002812

Orr Affidavit

Exhibit 55

Minutes of Special Meeting of Board of Directors of Idaho Power Company (May 11, 1934)

Third Orr Affidavit

EXHIBIT 10

IDAHO POWER COMPANY

Minutes of Special Meeting

of Board of Directors

May 11, 1934.

A special meeting of the Board of Directors of the Idaho Power Company was held at the office of the Company in the Company's General Office Building at 1220 Idaho Street, Boise, Idaho, on Friday, May 11, 1934, at 10 o'clock A. M., pursuant to a call of the Vice President of the Company and a notice of the meeting duly given in writing more than five days prior to the date of the meeting.

* * * * * *

The Chairman then announced that it was necessary to procure authority from the Federal Power Commission to construct, maintain and operate certain project works on Snake River at Twin Falls, in the vicinity of Jerome and Twin Falls, in the Counties of Jerome and Twin Falls, State of Idaho, and that the Federal Power Commission had submitted a proposed form of license. The said proposed license was then presented to the meeting and considered at length. Whereupon, it having been moved by Mr. Dewey, seconded by Mr. Standrod, the following resolution was unanimously adopted:

"RESOLVED that all the terms and conditions of the Federal Water Power Act of June 10, 1920, and all the terms and conditions of the proposed Federal Power Commission license for Project No. 18, giving Idaho Power Company authority to construct, maintain and operate certain project works on Snake River at

Twin Falls, in the vicinity of Jerome and Twin Falls, in the Counties of Jerome and Twin Falls, State of Idaho, be, and the same hereby are, accepted, and the officers of the Company are hereby authorized and directed to execute the said license, thereby accepting, in writing, for and on behalf of the Company the terms and provisions of said act and license; and

"BE IT FURTHER RESOLVED that the officers of this Company are hereby authorized to execute and acknowledge a recordable contract or deed embodying the provisions, conditions and limitations set out in the stipulation and agreement contained in Article 14 of Federal Power Commission license for Project No. 18, Idaho, Idaho Power Company."

* * * * * * *

STATE OF IDAHO,)
) ss.
COUNTY OF ADA.)

I, James L. Boone, Secretary of the Idaho Power Company, hereby certify:

Attached hereto is a true and correct copy of a portion of the minutes of the special meeting of the Board of Directors of the Idaho Power Company held on the 11th day of May, 1934.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of said Company this 15th day of May, 1934.

(CORPORATE SEAL)

James L. Boone
Secretary.

Orr Affidavit

Exhibit 56

Excerpted pages of the Federal Power Commission License for Idaho Power Company's Twin Falls Project (May 11, 1934)

Third Orr Affidavit

EXHIBIT 9

FR-481

JUN 1 - 1964
RECEIVED

FEDERAL POWER COMMISSION

WASHINGTON, D. C.



[illegible] OF GOVERNMENT LANDS

Project No. 18, Idaho

Idaho Power Company



11-1

U. S. GOVERNMENT PRINTING OFFICE: 1931

FP-481

11-32--a

THE FEDERAL POWER COMMISSION

LICENSE ON GOVERNMENT LANDS

Project No. 18
Idaho

Idaho Power Company

WHEREAS, by Act of Congress, approved June 10, 1920 (41 Stat., 1063) designated therein as "The Federal Water Power Act" and hereinafter called "the Act," the Federal Power Commission, hereinafter called "the Commission," is authorized and empowered, inter alia, to issue licenses for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development, transmission and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam; and

WHEREAS, Idaho Power Company, - hereinafter called "the Licensee," a corporation - - - - - - - - - - - - organized and existing under the laws of the State of Maine - - - - - - and having its office and principal place of business in the city of Boise, - - - - - - - - - - - - in the State of Idaho, - - - - - - - has, pursuant to the provisions of a preliminary permit issued on the 30th day of April 1924, -

made application in due and proper form to the Commission for a license for a power project designated as Project No. 18 on the records of the Commission, and for authority to construct, maintain and operate, ~~at~~ on Snake River at Twin Falls, in the vicinity of Jerome and Twin Falls, in the counties of Jerome and Twin Falls, State of Idaho, - - - - - - - - - - certain project works, as hereinafter described, necessary or convenient for the development, transmission and utilization of power, and to occupy and use therefor certain lands of the United States, as hereinafter described together with all riparian rights appurtenant thereto which are necessary or useful for the purposes of the project; and

WHEREAS, the Licensee has submitted to the Commission satisfactory evidence of its compliance with the laws of the State of Idaho, as required by Section 9, subsection (b) of the Act, and the Commission is satisfied as to the ability of the Licensee to carry out the plans for said project as filed with said application; and

WHEREAS, notice of said application has been given and published by the Commission, as required by Section 4 of the Act; full opportunity has been given to all interested parties to be heard, and no application for said project, or in conflict therewith, has been filed by any State or municipality; and

WHEREAS, the maps, plans and specifications of said project and of said project works, as hereinafter described, have been approved by the Commission, and the Commission has found that said project, as hereinafter described, will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of water-power development and of other beneficial public uses, and that the license will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired; and

WHEREAS, the Commission, by order adopted at its meeting of September 16, 1933, waived Orders No. 27, with respect to said project, and, therefore, the determination of the preliminary cost thereof will not be required prior to the issuance of a license; and - - - - - - - - - - - - -

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WHEREAS, the Licensee, on the 12th day of May, 1934, pursuant to an authorization of its board of directors, a copy of the record thereof being hereto attached, accepted in writing all the terms and conditions of the Act and of this license;

NOW, THEREFORE, the Commission hereby issues this license to the Licensee for the purpose of constructing, operating and maintaining upon the lands of the United States hereinafter designated and described, certain project works necessary or convenient for the development, transmission and utilization of power and constituting a part of the project hereinafter described, and of authorizing in connection with and as a part of said project the occupancy and/or use by the Licensee of said lands of the United States and of all riparian rights appurtenant thereto which are necessary or useful for the purposes of the project; said license, including the period thereof, being subject to all the terms and conditions of the Act and of the rules and regulations of the Commission pursuant thereto as amended and made effective on the 23rd day of June, 1930, as though fully set forth herein, which said rules and regulations are attached hereto and made a part hereof, and being subject also to the following express conditions and limitations, to wit:

Article 1. This license is issued for a period of fifty (50) years from the date hereof, and in consideration of such license and the benefits and advantages accruing thereunder to the Licensee it is expressly agreed by the Licensee that the entire project, project area and project works as hereinafter designated and described, whether or not upon lands of the United States, shall be subject to all the terms and conditions of this license, including the terms and conditions of the Act and of the rules and regulations of the Commission pursuant thereto and made a part of this license.

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Article 2. The project covered by and subject to this license is located partly on lands of the United States, - - - - - - - - - - - - - and consists of—

A. All lands constituting the project area and inclosed, or the location of which is shown, by the project boundary, and/or interests in such lands necessary or useful for the purposes of the project, whether such lands or interests therein are owned or held by the Licensee or by the United States; such project area and project boundary being more fully shown and described by certain exhibits which accompanied said application for license and which are designated and described as follows:

Exhibit J: Sheet 1, Map designated "General Map of Entire Project" (F.P.C. No. 18-10);

Exhibit K: Sheet 3, Map designated "General Plan of Development (F.P.C. No. 18-13);

B. All water rights which are more fully described in a certain exhibit, which accompanied said apolication for license, and which is designated and described as follows:

Exhibit E: One typewritten sheet entitled "Statement of the nature, extent, and ownership of water rights," signed Idaho Power Company by M. L. Hibbard, Vice-President and General Manager, and received in the office of the Federal Power Commission with the application for license on June 21, 1930.

C. All project works consisting of a reinforced concrete dam, a penstock, a power house, and appurtenant works, the location, nature, and character of which are more fully shown and described by certain exhibits which accompanied said application for license and which are designated and described as follows:

Exhibits J and K: Cited above.

Exhibit L: Plans, in 3 sheets, designated:
"Plan of Power House, Intake, and South Channel Dam" (F.P.C. No. 18-14);

"Dam - Profile and Section" (F.P.C. No. 18-15;

"Power House Plan and Section through Power House, Penstock, and Intake" (F.P.C. No. 18-16);

Exhibit M: Two typewritten sheets designated "Description of Mechanical, Electrical, and Transmission Equipment," signed Idaho Power Company by M. L. Hibbard, Vice-President and General Manager.

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D. All other structures, fixtures, equipment, or facilities used or useful in the maintenance and operation of the project, whether owned by the Licensee or by the United States, and located upon the project area, including such portable property as may be used and useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as a part of the project works is approved or acquiesced in by the Commission; also all other rights, easements, or interests, including said riparian rights, the ownership, use, occupancy or possession of which is necessary or appropriate in the maintenance and operation of the project or appurtenant to the project area.

Article 3. The maps, plans, specifications, and statements designated and described in Article 2 hereof as Exhibits J, K, M, L, and M, respectively, and approved ~~by the Executive Secretary for the Commission~~ the Commission's in accordance with ~~its~~ authorization of December 22, 1933, are hereby made a part of this license, and no substantial change shall hereafter be made in said exhibits, or any of them, until such change shall have been approved by the Commission: Provided, however, that if the Licensee deems it necessary or desirable that said approved maps, plans, specifications and statements, or any of them, be changed there shall be submitted to the Commission for approval amended, supplemental, or additional maps, plans, specifications and statements covering the proposed changes, and upon approval by the Commission of such proposed changes such amended, supplemental or additional maps, plans, specifications and statements shall become a part of this license and shall supersede, in whole or in part, such map, plan, specification, or statement, or part thereof, theretofore made a part of this license as may be specified, respectively, in the order or endorsement of approval.

Article 4. Said project works shall be constructed in substantial conformity with the approved maps, plans and specifications thereof made a part of this license and designated and described in Articles 2 and 3 hereof or as changed in accordance with the provisions of said Article 3. Except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed under this license without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission shall direct. Minor changes in or divergence from such approved maps, plans, and specifications may be made in the course of construction, if such changes will not result in decrease in efficiency, in material increase in cost, or in impairment of the general scheme of development; but any such minor changes made without the prior approval of the Commission which in its judgment have produced or will produce any of such results shall be subject to such alteration as the Commission may direct.

Article 5. The work of construction under this license, whether or not conducted upon lands of the United States, shall be subject to the inspection and approval of the District Engineer, U.S.Geological Survey, Boise, Idaho, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall notify such representative of the date upon which work will begin, and as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of construction for a period of more than one week, and of its resumption and completion.

Article 6. Subject to the provisions of Section 13 of the Act, the Licensee shall begin the construction of the project works on or before May 1, 1935, and shall thereafter in good faith and with due diligence prosecute such construction; and shall on or before November 30, 1937, complete the initial installation with dam crest to elevation 3,507 feet above sea level, and shall complete the dam to a crest elevation of 3,550 feet at such time as the Commission may direct.

Article 7. Upon the completion of the project works, or at such other time as the Commission may direct, the Licensee shall submit to the Commisson for approval revised maps, plans, specifications, and statements, in so far as necessary to show any divergence from or variations in the project area as finally located or in the project works as constructed when compared with the area shown and the works designated or described in this license or in the maps, plans, specifications, and statements approved by the Commission under the provisions of Article 3 hereof, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variations in or divergence from the approved maps, plans, specifications, and statements. Such revised maps, plans, specifications, and statements shall, if and when approved by the Commission, be made a part of this license and shall, to the extent and in the particulars set forth in the order or endorsement of approval, be substituted for the maps, plans, specifications and statements theretofore approved by the Commission under the provisions of Article 3 hereof. The maps finally approved by the Commission and made a part of this license under the provisions of Article 3 and/or 7 hereof shall show the project area to an adequate scale and the boundary thereof either by legal subdivisions, by metes and bounds survey, or by uniform offsets from centerline survey. Said project area shall include all lands without respect to ownership and whether or not the exact boundaries can be definitely fixed and determined, the use and occupancy of which are or will be valuable or serviceable in the maintenance and operation of the project; on which are located or to which are appurtenant the project works (other than portable property) and the rights, easements, or interests likewise valuable and serviceable; and the ownership or possession, or the right of use and occupancy, of which are subject to acquisition by the United States under the provisions of Section 14 of the Act. Said maps shall show the ownership of each parcel of land in said project area, and with respect to each parcel to which the Licensee has not the fee title, the character of the right of use and occupancy possessed by the Licensee together with the term of such right.

Article 8. For the purpose of determining the stage and flow of the stream or streams from which water is to be diverted for the operation of said project works and of the amount of water held in and drawn from storage, the Licensee shall **install a substantial staff gage in the pool, and a standard gaging station equipped with a recording gage below the plant,** and

shall provide for the required readings of such gages and for the adequate rating of said station or stations. The Licensee shall also install and maintain standard meters adequate for the determination of the amount of electric energy generated by said project works. The number, character, and location of gages, meters or other measuring devices, and the method of operation thereof may be altered from time to time if necessary to secure adequate determinations, but such alteration shall not be made except with the approval of the Commission or its authorized representative or upon the specific direction of the Commission. The installation of gages, the ratings of said stream or streams, and the determination of the flow thereof, shall be under the supervision of /or in cooperation with/ the District Engineer of the U. S. Geological Survey having charge of stream gaging operations in the region of said project, and the Licensee shall advance to the amounts estimated to be necessary for ~~reimburse~~ the said United States Geological Survey / for costs incurred ~~in~~ such/ supervision ~~of~~ for such/ periods as may be mutually agreed upon. ~~part thereof as said District may deem equitable in the circumstances.~~ The Licensee shall keep accurate and sufficient record of the foregoing determinations to the satisfaction of the Commission, shall make return of such records annually, at such time and in such form as the Commission may prescribe.

Article 9. The Licensee shall be liable for all damages occasioned to the property of others by the construction, maintenance or operation of said project works, or of the works appurtenant or accessory thereto, and in no event shall the United States be liable therefor.

Article 10. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto constructed under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 11. Timber upon lands of the United States, to be used or destroyed in the construction of the project works, shall be paid for in accordance with the requirements and estimates of the Department concerned.

Article 12. In the construction and maintenance of the project works herein specified, the Licensee shall place and maintain suitable structures to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling and obstructing traffic and endangering life on highways, streets, or railroads.

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Article 13. Before beginning construction, the Licensee shall prepare and submit plans for the initial section of the dam to an elevation of 3,507 feet, and before raising the crest of the dam above the initial elevation of 3,507 feet, the Licensee shall prepare and submit plans for preventing erosion below the downstream toe of the structure and shall secure the approval thereof by the Commission.

Article 14. As a condition of this license, the Licensee, for itself, its successors and assigns, hereby stipulates and agrees that all rights to the use of water for power purposes heretofore or hereafter acquired for the development of power at the site of this project shall be held and considered at all times to be subject, inferior, and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation purposes, except (a) the right to use for power development at this project the water from the 45,000 acre-feet of primary storage capacity which the Licensee holds in American Falls Reservoir under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923, and the discharge of which it may control under the terms of said contract; (b) the right to use for power development at this project the seepage, percolation, drainage, spring or springs, waste, and/or other influent waters which do not flow or spill over Milner Dam but which enter in, arise in, and flow in and along the channel of Snake River between the down-stream toe of Milner Dam in Snake River, Idaho, and the site of the project covered by this license. Licensee further agrees, for itself, its successors and assigns, to forego any and all claims which it might otherwise have for damages or other relief, in connection with any power rights at the site of this project, other than those mentioned in (a) and (b) above and which are necessary for irrigation purposes, and it is mutually agreed by the parties hereto that this license neither expressly nor impliedly has modified, relinquished, abandoned, or surrendered, nor does hereby modify, relinquish, abandon, or surrender any of the Licensee's rights and privileges under said contract of June 15, 1923, nor any of its rights and privileges heretofore or hereafter acquired to the use of water or waters for power purposes at any other point or points.

This stipulation and agreement shall be considered as a covenant running with the title to the said power plant at Twin Falls, and all rights in connection therewith, and the Licensee agrees to execute and acknowledge under authority of a suitable resolution of its board of directors, a recordable contract or deed embodying the provisions, conditions, and limitations set out in the foregoing stipulation and agreement, so that the same may be recorded in the counties in which said power sites are located.

This stipulation shall be effective to bind the Licensee and its successors and assigns, without signature or execution by or on behalf of the United States, and shall become effective for such purpose upon the execution of the license.

Article 15. The Licensee shall, before placing any transmission line into operation, make provision satisfactory to the Commission for avoiding inductive interference between such transmission line and any existing telephone line or lines of the United States, or with any such line or lines for which location has been made and specifications prepared but upon which construction has not begun at the time of erection of said transmission line. Such provisions may be applied either to the transmission line or to the telephone line or to both, as may be determined upon the basis of least cost. The Licensee hereby agrees to assent to such changes in the location or design of any of its transmission lines as may in the opinion of the Commission be necessary or desirable in order to avoid inductive interference with any telephone line or lines of the United States hereafter constructed or proposed to be constructed, provided such changes are made at the expense of the United States.

Article 16. The Licensee shall clear the bottoms and margins of all reservoirs up to high-water level, shall clear and keep clear to an adequate width lands of the United States along open conduits and along transmission lines, and shall dispose to the satisfaction of said representative of the Commission of all temporary structures, brush, refuse, or unused timber on lands of the United States resulting from the clearing of lands or from the construction and maintenance of said project works.

Article 17. The Licensee shall allow officers and employees of the United States free and unrestricted access in, through and across the said project and project works in the performance of their official duties.

Article 18. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this license shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of War. Such rules and regulations may include the maintenance and operation by the Licensee at its own expense of such lights and signals as may be directed by the Secretary of War, and such fishways as may be prescribed by the Secretary of Commerce.

Article 19. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of War, as may be necessary for the purposes of navigation and the operations of the Licensee so far as they affect the use, storage, and discharge from storage of waters affected by this license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of War may prescribe in the interests of navigation and as the Federal Power Commission may prescribe in the interests of flood control and of the fullest practicable use of said waters for power purposes.

Article 20. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with said 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 dam or other structures and permit such control of pools as may be required to complete such navigation facilities.

Article 21. The Licensee shall construct and install such appliances as are necessary for furnishing power for the operation of navigation facilities, including lights and signals, whether constructed by the Licensee or by the United States; and shall furnish free of cost to the United States power for the operation of such navigation facilities.

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Article 22. Upon the completion of the construction of said project or of each of the separable parts thereof for which dates of completion are specified in Article 6 hereof, or of any addition to or betterment of said project, the Licensee shall file with the Commission a statement under oath in duplicate showing the actual legitimate cost of construction thereof and the price paid for water rights, lands, or interest in lands appurtenant to such construction as required by Regulation 20, Section 2, of said rules and regulations of the Commission. Any such statement shall include all proper and legitimate costs, whether incurred prior to issuance of license or on and after such date; and the Licensee shall, if requested by the Commission, show separately on any such statement, or on a special report or reports, the items and amounts of cost incurred prior to date of issuance of license, with such other details as the Commission may require. Each and every item of cost included in any such statement shall be supported by proper voucher or other evidence; and any such voucher or evidence or certified copy thereof, in support of any item properly includible in said cost shall become a part of the permanent records of said project and shall be kept and retained by the Licensee in the manner required by the Commission. Any statement or report submitted to the Commission under the provisions of this article shall be subject to the provisions of Section 6 of said Regulation 20.

Article 23. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of such reservoir or other improvement for such part of the annual charges for interest, maintenance and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by the Licensee shall be determined from time to time by the Commission. Whenever such reservoir or other improvement is constructed by the United States the Licensee shall pay similar charges into the Treasury of the United States upon bills rendered by the Commission.

Article 24. The Licensee shall pay to the United States reasonable annual charges for the purpose of reimbursing the United States for the costs of the administration of the Act and for recompensing it for the use, occupancy and enjoyment of its lands or other property hereinbefore described. The payment by the Licensee of such annual charges for any calendar year shall be made to the United States at the end of the year, or within thirty days thereafter, upon bills rendered or approved by the Commission. Such charges shall be determined in accordance with the provisions of Regulation 14 of said rules and regulations of the Commission, and for the purposes of such determination the power capacity of the project shall, subject to the provisions of section 3 of said regulation 14, be taken as 7,670 horsepower.

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Article 25 After the first twenty years of operation of said project under this license, ont of surplus earned thereafter, if any, accumnlated in excess of a specified reasonable rate of return upon the actual, legitimate investment of the Licensee in said projeot, all as defined in and determined by the provisions of regulation 17 of said rules and regulations of the Commission, the Licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of retnrn shall, subject to the proviso of paragraph A, seotion 3 of said regulation, be one and one-half (1½) times the weighted average annual interest rate payable on the par value of the bona fide interest-bearing debt of the Lioensee actually outstanding, in whole or in part, on account of projeot property at the beginning of the period of amortization and of each calendar year thereafter; such weighted average annual interest rate being determined as provided in paragraphs B and C of section 3 of said regulation 17: Provided, That, if at the beginning of the period of amortization or of any calendar year thereafter, the outstanding interest-bearing debt of the Licensee on account of the project or projeots nnder license, together with any other works or property operated in conneotion therewith, is less than 25 per cent of the actual, legitimate investment of the Licensee in said project or projeots, then and in such event for the oalendar year next following the speoified rate of return shall be two (2) times the legal rate of interest in the State in which the project or major part thereof is located.

Subject to the provisions of seotion 6 of said regulation, the following proportions of snch surplus earnings shall be paid into and held in such amortization reserves: Of all surplus earnings up to and including 2 per cent upon the actual, legitimate investment, 30 per oent thereof shall be so paid; of all snrplus earnings in excess of 2 per cent and not in excess of 4 per cent upon suoh investment, 50 per cent thereof shall be so paid; of all surplus earnings in excess of 4 per oent and not in exoess of 6 per cent, 70 per cent thereof shall be so paid, and of all surplus earnings in excess of 6 per oent, 90 per cent thereof shall be so paid: Provided, That if at the end of any calendar year of the amortization period the Commission shall find that the accumulated earnings of the Lioensee during the period of operation, inoluding the first twenty (20) years thereof, have not yielded a fair return upon the actual, legitimate investment in the project or projects under license, the proportion of such surplus earnings for such calendar year and for succeeding calendar years to be paid into such amortization reserves shall be ten (10) per cent thereof until such time as the acoumulated earnings of the Lioensee represent, in the judgment of the Commission, a fair return upon such investment for suoh period of operation.

Artiole 26. No lease of said projeot or part thereof whereby the lessee is granted the exolusive ocoupancy, possession, or use of projeot works for purposes of generating, transmitting, or distributing power shall be made without the prior written approval of the Commission; and the Commission may, if in its judgment the situation warrants, require that all the oonditions of this lioense, of the Aot, and of said rules and regulations of the

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Commission shall be applicable to such lease and to such property so leased to the same extent as if the lessee were the Licensee hereunder: Provided, That the provisions of this article shall not apply to parts of the project or project works which may be used by another jointly with the Licensee under a contract or agreement whereby the Licensee retains the occupancy, possession, and control of the property so used and receives adequate consideration for such joint use, or to leases of land while not required for purposes of generating, transmitting, or distributing power, or to buildings or other property not built or used for said purposes, or to minor parts of the project or project works the leasing of which will not interfere with the usefulness or efficient operation of the project by the Licensee for said purposes.

Article 27. 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: Provided, That a mortgage or trust deed or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article. The Licensee further agrees, on behalf of itself ~~(himself)~~, its ~~(his)~~ successors and assigns, that, in the event said project is taken over by the United States upon the termination of this license, as provided in Section 14 of the Act, or is transferred to a new Licensee under the provisions of Section 15 of the Act, it ~~(he)~~ will be responsible for and will make good any defect of title to or of right of user in any such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge or will assume responsibility for payment and discharge of all liens or incumbrances upon said project or project property created by said Licensee or created or incurred after the issuance of this license: Provided, That the provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear, or to require the Licensee for the purpose of transferring the project to the United States or to a new Licensee to acquire any different title or right of user in any such project property than was necessary to acquire for its ~~(his)~~ own purposes as Licensee.

Article 28. The Licensee shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is

rendered or the rate charged; and in case of the development, transmission, distribution, sale or use of power in public service by the Lioensee or by its customers engaged in public service within a State whioh has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by the Licensee or by its customers engaged in public service, or the rates and charges of payment therefor, or the amount or oharaoter of securities to be issued by any of said parties, it is agreed as a oondition of this license that jurisdiotion is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exeroise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and oontrol: Provided, That the jurisdiotion of the Commission shall oease and determine as to each specifio matter of regulation and oontrol prescribed in this Article as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

Article 29. With the written consent of the Licensee, the Commission may by order made under its seal, and after the publio notioe required by Section 6 of the Aot, modify, alter, enlarge or omit, in so far as authorized by law, any one or more of the conditions or provisions of this lioense.

Article 30. The enumeration herein of any rights reserved to the United States or to any State or municipality under the Act, or of any requirement of the Act or of said rules and regulations of the Commission shall not be construed in any degree as impairing any other rights so reserved by the Act or as limiting the force of any other requirement of said Act or of said regulations.

IN WITNESS WHEREOF, the Federal Power Commission has caused its [illegible] seal to be hereto signed and affixed by its Frank R. McNinch, its Chairman, this 11th day of June, 1934, pursuant to an order of the Commission issued December 22, 1933, and amended April 24, 1934.

FEDERAL POWER COMMISSION

Frank R. McNinch

Chairman.

Executive Secretary.

Attest:

Acting Secretary.

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IN TESTIMONY OF ACCEPTANCE of all the terms and conditions of the Federal water power act of June 10, 1920, and of the further conditions imposed in the foregoing license, the Licensee, this 12th day of May, 1934, has caused its name and corporate seal to be hereto signed and affixed by K. M. Robinson, its President, pursuant to a resolution of its board of directors, passed on the 11th day of May, 1934, a certified copy of the record thereof being hereto attached.

IDAHO POWER COMPANY

By K. M. Robinson
President.

Attest:

James L. Bowman
Secretary.

FFH*EKM
1-11-34

Executed in triplicate.

WWH

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Orr Affidavit

Exhibit 57

Excerpted pages of *Twin Falls Hydroelectric Development,* by H.L. Senger of Idaho Power Company, in ELECTRICAL WEST Vol. 76, No. 4 (Apr. 1936)

Third Orr Affidavit

EXHIBIT 7

Engineering Symposium + +

[A monthly forum in which engineers will present and discuss their problems, this department is dedicated to advancing the art of power generation, transmission, distribution and utilization]



Twin Falls Hydro-Electric Development*

Idaho Power Company's New Hydro Plant On the Snake River Incorporates Unusual Design Features. Sliding Joint Permits Arch Dam to Adjust Itself to Load Changes. Powerhouse Built Below Station Yard Level. Control and Alarm System Simplify Operating Procedure

By H. L. SENCER
Idaho Power Company

IDAHO POWER COMPANY has recently completed a 9,375-kva. hydro-electric development at Twin Falls, on Snake River, about nine miles northeast of the city of Twin Falls, Idaho. This project is known as "Twin Falls," deriving its name from the twin falls in the river. It is the fifth development of Idaho Power Company on the Snake River in Idaho, and there are three additional developments on tributary streams. About four miles downstream from the Twin Falls plant is the Shoshone Falls plant, with an operating head of 212 ft., the backwater from which is less than a mile below the tailwater of the Twin Falls plant. The completion of the Twin Falls plant makes it possible to utilize more fully the fall of the river in this section. The Twin Falls plant, which now has a head of 147 ft. and a generating capacity of 9,375 kva., can be changed by increasing the height of its dams to provide 179 ft. of head, thereby increasing the generating capacity of the present unit to 13,500 kva. The Twin Falls project is not primarily a storage proposition, but contrasted to the company's three run-of-river plants on Snake River and the three plants on tributary streams, has a small pondage for daily regulation. The Twin Falls dams, as constructed, form a small lake in the Snake River canyon of about 1,000 acre-ft. available storage to supplement stream flow.

*A report prepared for Production and Generation Committee, Engineering and Operation Section, Northwest Electric Light & Power Association, for presentation at 1936 Annual Section Meeting.

River Regulation

The Snake River above Shoshone Falls is a highly regulated stream, its waters being used primarily for irrigation. The Jackson Lake Reservoir near the headwaters of the stream has a capacity of 847,000 acre-ft. The Blackfoot Reservoir on the Blackfoot River, a tributary of Snake River, has a capacity of 409,000 acre-ft. The American Falls Reservoir and Lake Walcott, both on Snake River above Twin Falls and near Minidoka, have capacities of 1,700,000 and 107,000 acre-ft. respectively. The combined developed storage space of these and other reservoirs in the drainage area above Shoshone Falls is approximately 2,859,000 acre-ft. At Milner Dam, located about 22 miles above Twin Falls, the final diversion of substantially all water in Snake River is made into three large irrigation canals, having a combined capacity of 8,000 sec.-ft. The Snake River immediately below Milner Dam for the greater part of the time is practically dry, the measured loss by seepage and leakage being as low at 10 sec.-ft. The regulation of Snake River flow above Milner Dam for irrigation has been such as to eliminate flood run-off below

View of Twin Falls development showing (left) the arch type dam across the main channel and (right) the station yard made by filling behind the rock wall constructed from the river bed to an elevation equal to maximum high water. Only the roof of the power house, the Gantry crane, the transformer and switch rack are visible above ground

this point of diversion for the past five years. Practically speaking, Snake River starts anew at Milner Dam. It is a remarkable coincidence that immediately below this dam Snake River plunges into a canyon, where it remains unmolested by diversions for irrigation uses other than pumping installations for two hundred miles, and when it again emerges from this rock walled canyon it has replenished its supply from springs, drainage, and return irrigation water with 7,000 sec.-ft. of water.

At Twin Falls the accumulated minimum flow from return irrigation water and springs varied from 444 sec.-ft. in the year 1930 to 320 sec.-ft. in the year 1935. The monthly average flow rarely exceeds 500 sec.-ft. This condition applies throughout the year, excepting for occasional periods of flood and water released to the river below Milner Dam. On October 1, 1934, the Idaho Power Company entered into a contract with the United States Department of the Interior, Bureau of Reclamation, which includes the Snake River Valley Projects and the Owyhee Project, for conservation of Snake River water and the furnishing of transmission service.

The provisions of this contract are such that through the coordinated use of the combined power plant facilities of the United States and the Idaho Power Company, a saving of approximately 150,000 acre-ft. of Snake River water can be effected in the American Falls reservoir for irrigation purposes during the summer months.

Idaho Power Company has a contractual primary right to the release of 45,000 acre-ft. from the American Falls Reservoir which it may release as the exigencies of its system operations may require. It also has a secondary contractual right by virtue of which water from American Falls Reservoir may be used below Milner Dam, and which at present is limited to make the total flow at the head of Shoshone Falls at certain stipulated amounts from October 1 to March 15, inclusive. The Twin Falls plant, therefore, may be said to be dependent for its water supply upon that water returning to, or arising within, the 22 miles of river bed between Milner Dam and that plant, with the addition of such limited amounts of water permitted under contract to flow by Milner Dam.

Natural Conditions

Twin Falls is in a deep rock-walled canyon 400 to 500 ft. deep. The geological formation of this region shows that it is a built-up plain formed principally of lava sheets deeply dissected by the Snake River canyon. At Twin Falls a sheet of lava a thousand or more feet wide and of unknown depth lies athwart the bottom of the canyon nearly 400 ft. below its rim. The natural falls at this point are 130 ft. high. An island of solid rock having its lower extremity at the rim of the falls divides the stream bed into two channels, the principal one being on the right or north side of the river. This channel is split by a deeply eroded crevice of sufficient capacity to carry the regulated low flow of the river thus leaving the remainder of the original stream bed dry. Below the north falls there is a pool of unexplored depth; that below the south falls measured 62 ft. deep. These pools were separated with a ledge of solid rock maintaining the water level in the south pool 6 ft. above the level of the main stream. The south falls under present conditions discharges a small amount of seepage water reaching this channel from the south wall of the canyon.

General Plan

The entire development comprised seven units or sub-divisions; the construction of a road into the canyon, retaining wall and yard fill for substation, power house and substation, an arch dam in the north channel, gravity dam and headworks of power house in the south channel, penstock, and tail race.

The station is shaped in the form of a square; the generating unit being placed in the main body of the structure with the control board cubicle, pumps and compressor, governor, air washer and auxiliary equipment conveniently located on the main and basement floors. This machine is a complete generating unit, having its own direct connected exciter, separate station service transformer and bus layout. There is no provision for a spare exciter. The terminals of each of the three phases are brought out and the windings connected "Y" and this neutral assembled to connect with ground bus through a disconnect switch. Current transformers are placed in each line between the machine and neutral and afford means of differential protection. The circuit of the main generator bus is through an oil circuit breaker and disconnecting switches to the main transformer.

No provision is made to remove the oil circuit breaker from service while in operation. Current to auxiliary transformer is supplied from line side of disconnecting switch. Through this system of switching equipment the machine is connected to the low tension side of a power transformer, consisting of one 9,000-kva., three-phase Westinghouse transformer connected delta on the 6,600-volt side and "Y" on the 132,000-volt side. With forced cooling the capacity of the transformer can be increased to 13,500 kva.

In regard to relay protection the machine and its auxiliaries and equipment are protected by differential relays connected to current transformers in the

Airplane view of the Twin Falls site in the irrigation season when gates of Milner Dam, 22 miles above, are shut down for maximum diversion. Note the natural formation readily adapts itself to a hydraulic development at this spot



COPY-National Archives-Rocky Mountain Region

Orr Affidavit

Exhibit 58

Excerpted pages of the Transcript of examination of Lynn Crandall (Federal Power Commission proceedings on Idaho Power Company's proposed Hells Canyon project) (Jan. 12-13, 14-15, 1954)

Fourth Orr Affidavit
Exhibit 8:

Excerpted Pages of Transcript of Examination of Lynn Crandall, Formal Hearings Before the Federal Power Commission, Project No. 1971, P-2132, P-2133

Part 41 - January 12, 1954 to January 13, 1954
Part 42 - January 14, 1954 to January 15, 1954

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

CERTIFICATION

I hereby certify that the attached 134 pages are true and correct copies of a document on file with the Commission.

May 18, 1984
Date

Records Officer

I hereby certify that the Records Officer, whose signature appears above, is official custodian of the records of the Federal Energy Regulatory Commission which certification is made and was such official custodian at the time of executing the above certification.

SECRETARY

FERC-03-F-028

SwanFalls - 3352

DAGSF08-019357

Volumes 79 & 80

Accession no. 56-A-161 BOX 213

F. P. C. Form No. 70

FEDERAL POWER COMMISSION

PROJECT NO. 1971
P-2132 7 P-2133

IDAHO POWER COMPANY
(Hearing 7-14-52 on)

FORMAL
HEARINGS

IMPORTANT

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January 12 1954

TO

January 13, 19 54

Part 41

U. S. GOVERNMENT PRINTING OFFICE 16—64170-2

FILE No. 100-2

PROJECT NO. 1971
(Hearing) Part 41

IDAGSF08-019358

PRESIDING EXAMINER: Come to order, please.

Do you have another witness to present, Mr. Mason?

MR. MASON: Yes, sir, Mr. Examiner, but before I call that witness, who will be Mr. Lynn Crandall, I should like to take up a matter of procedure. You will recall, Mr. Examiner, and counsel will also, that a document entitled "Future Upstream Depletion Above Hell's Canyon", which bears the date of April 28, 1953, has been identified as Exhibit 119. You will also recall, Mr. Examiner, that a ruling on the admissibility of Exhibit 119 was deferred.

I have been supplied from the Department of the Interior a report bearing the same title by Mr. Lynn Crandall, bearing the date of April 6, 1953, and it also carries a footnote on the first page which is not carried on the document identified as Exhibit 119.

I also direct attention to the fact, Mr. Examiner, that the document dated April 6, 1953 gives much better prints of the two charts attached to the report. And I would move at this time that the present Exhibit 119 be withdrawn and we substitute for that exhibit this same, or substantially the same document bearing the date of April 6, 1953, and with the footnote on the first page which is missing from the present Exhibit 119.

MR. PARRY: May I inquire, is the text identical?

MR. MASON: I think it is. Mr. Crandall has informed me

that the reports are identical except for the footnote which was omitted from page one of the copies you had, and that the difference in date occurs because the first supply of copies was exhausted and additional runs were made, and it carried the date of the new run rather than the date of the original run.

MR. PARRY: We have no objection to it, Mr. Examiner.

PRESIDING EXAMINER: Mr. Parry, it is your exhibit.

MR. PARRY: Yes, we have no objection to it.

PRESIDING EXAMINER: You will have to withdraw it if it is to be withdrawn.

MR. PARRY: In order to accommodate Mr. Mason, I will ask to withdraw the copies heretofore marked as Exhibit 119 and ask that the ones now supplied by Mr. Mason be substituted in lieu thereof with the same number.

PRESIDING EXAMINER: Very well, that may be done, and I will ask the reporter to instruct his firm to send over the copies of Exhibit 119 which they are holding over there as identified but not received, and we will make the substitution here with the copies with the copies that Mr. Mason is now furnishing as Exhibit No. 119 for identification. As far as the sponsorship of the exhibit is concerned, I don't think that is going to trouble us very much.

MR. PARRY: No.

MR. MASON: Then, under those circumstances, I would

IDAGSF08-019360

assume it is appropriate for me to make available to Mr. Parry four copies for the record for substitution purposes, and I would presume, Mr. Examiner, that the identification date of the exhibit would remain the same, namely, August 6, 1953, and this is merely a physical substitution of copies. Is that correct?

MR. INMAN: April 6.

MR. MASON: August 6. I was talking about the date it was identified, August 6.

PRESIDING EXAMINER: At page 4315, according to the index that we have.

MR. MASON: That is correct.

PRESIDING EXAMINER: Especially so since one of the witnesses, or perhaps two of the applicants' witnesses, made reference to it in their testimony at about that time. It would have to relate back to those dates.

MR. MASON: That is what I had in mind, Mr. Examiner. I knew it had been used in the testimony.

At this time I will call Mr. Lynn Crandall to the stand.

Whereupon,

LYNN CRANDALL

was called as a witness, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MASON:

IDAGSF08-019361

Q Will you please state your name and address for the record?

A Lynn Crandall, Idaho Falls, Idaho.

Q Will you state by whom you are employed and in what position?

A I am District Engineer of the United States Geological Survey of the upper Snake River. I am also Watermaster of Water District No. 36, which includes the irrigated lands from the Snake River in Idaho, which is a State position, being elected annually by the water users. I am also a deputy State reclamation engineer for the State of Idaho, which is an annual appointment, in charge of the delivery of stored water from the Snake River reservoirs.

Q For what period of years have you been the Snake River Watermaster?

A From 1930 to date.

Q Continuously?

A Yes, sir.

Q Now, would you please give us, Mr. Crandall, a statement of your education and experience, if you will, please, sir.

A I graduated from the College of Civil Engineering at Cornell University in 1910. From 1910 to 1916 I was employed by the U. S. Geological Survey on stream guaging work in Idaho and Utah. From 1916 to 1920 I was hydraulic engineer with the Twin Falls Northside Land and Water Company, in charge of

investigations of use of water and water supply on a 170,000-acre irrigation project in the Snake River Valley in Idaho. From 1920 to 1930 I was Commissioner of the United States District Court of the District of Idaho in charge of the distribution of water on Big Lost River, Idaho, and a study for the court of the use of water on that stream and the effect the storage of water in a reservoir had upon the supply of natural flow rights.. During the last four years of that period, from 1926 to 1930, I was also Commissioner for the same court in charge of the distribution of water on Salmon Falls River, a tributary of the Snake River, which rises in Nevada and flows into Idaho. During the same period I also carried on a general engineering practice at times when I wasn't occupied with work in these other positions, and I made numerous reports and investigations in connection with water problems on the Snake River and its principal tributaries. From 1930 to date, as I said, I have occupied this position as District Engineer of the Geological Survey, and Watermaster on the river.

Q Could you , please, sir, just generally, give us some idea of your duties in your present positions?

A Well, as District Engineer I have charge of the collection of stream flow and reservoir records in that portion of Idaho on the upper Snake River and its tributaries above Milner Dam, and as Watermaster I have charge of the

distribution of the natural flow of the stream, and as Deputy State Reclamation Engineer the distribution of the stored waters, most of those to about one hundred canal companies serving a million and a quarter acres of irrigated land.

I am also the author of the annual reports of Water District 36, which is an extensive volume of report, and I am joint author of many water supply papers published by the Geological Survey, including "Geology and Ground Waters of the Snake River Plains", "The Geology and Ground Waters of the Mud Lake Region", "The Wells on the Snake River Plains", and many publications giving the result of stream flow measurements in that area.

Q Do you have before you, Mr. Crandall, a copy of a document entitled "Future Upstream Depletion Above Hell's Canyon" by Lynn Crandall, dated April 6, 1953, which has been identified here as Exhibit 119?

A Yes.

Q Was that document or report, including the two plates attached thereto, prepared by you or under your supervision?

A Yes, it was prepared by me.

Q Would you please tell us what source material and data and other information you had available and used in the preparation of this report that is not stated in the document itself?

IDAGSE08-019364

A Well, the information is largely of my personal knowledge acquired during these 40-odd years that I have worked in the area, supplemented by the reports of the Geological Survey, reports of the State Reclamation Engineer, and reports by the U. S. Bureau of Reclamation in their files in their Boise office, and personal conferences with many individuals who lived in these tributary areas, and from watermasters on the projects and things of that kind.

Q Do you have any further explanation that you would like to make, Mr. Crandall, in connection with your report that you think ought to be brought out or that would make it clearer in any respect?

A Well, I don't know. I might make a general statement of the basis upon which I prepared this report, if you would like.

Q If you would, please, sir.

A It is a difficult matter in any line of human endeavor to make estimates of what is going to happen a long distance in the future. That is particularly true in so complex a matter as water supply available during the pay-out period for the Hell's Canyon project. Not only must we base it on the stream flows of the past but it will be modified by additional development. That development will depend on the availability of land and water, it will depend on the future price of farm crops, whether and to what extent

those prices may be subsidized or supported by the government, the extent to which the government might subsidize some of these proposed irrigation projects; all of those things make it extremely difficult to arrive at a figure with a great deal of assurance. I had some acquaintance years ago with a number of irrigation projects in southern Idaho that were either complete or partial failures on account of the water supply turning out not to be as great as had been estimated, and on that account I have a tendency, I think, to be somewhat conservative in estimating future water supplies. It is something like when an engineer designs a bridge or a dam; he allows what he calls a factor of safety, and makes the structure a little stronger than would actually be required to stand the computed stresses, and I think that in a project of this kind that involves the expenditure of so much money that some similar procedure ought to be applied in determining the water supply.

Accordingly, in determining these acreages and areas that might be irrigated in the future, I have included generally all areas that, according to my feeling, have an adequate water supply and good land, and in which there is a reasonable possibility of their being developed during this period of time. That may result in a somewhat moderately greater figure than might otherwise be arrived at, but I believe that is the basis I would like to set it up on if I was

IDAGSF08-019366

investing my money in building the Hell's Canyon project. And that basis will follow through these various calculations that are given here in these tabulations.

Q By the tabulations you mean Exhibit 119?

A Yes.

MR. MASON: I might inquire whether there are any clarifying questions on the part of counsel before I offer Exhibit 119. That concludes the direct of this witness.

MR. PARRY: Our position, Mr. Examiner, is this, that because of our long acquaintance with and confidence in Mr. Crandall and his report, we have heretofore offered it as the applicant's exhibit, so I guess it might be appropriate to either reoffer it or to join in Mr. Mason's offer, whichever is proper.

MR. MASON: Do you have any comments, Mrs. Cooper?

MRS. COOPER: Just one question, Mr. Mason.

BY MRS. COOPER:

Q Mr. Crandall, can you tell us the circumstances under which the preparation of this report was undertaken?

A Michael Straus, who was Commissioner of Reclamation late in the summer of 1952, requested the Secretary of the Interior to ask the Director of the Geological Survey to have me make this report. I prepared the preliminary copy of the report in the fall of 1952 and awaited final completion, waiting for the availability of some 1952 stream flow

IDAGSF08-019367

records that had not then been computed. And meanwhile it was circulated around amongst the engineers of the Geological Survey in that area and in Washington, and was reviewed by them, and, based on their review, my original estimate, I think, of the irrigated acreage which was 1,170,000 acres -- which is on page 4 of the exhibit -- my original estimate was 1,170,000 acres, and as a result of that review that total was raised to 1,300,000 acres, with suggestions about various little areas that they thought there was more land available there than I had first included. And then the report was finally prepared andgotten out here. It just lay quiescent then until these hearings developed, and I finally got it out last April. It is the same form as it was prepared in the preceding September except for raising that acreage from 1,170,000 to 1,300,000.

Q When Mr. Straus' request for the preparation of this report was relayed to you did you understand that the report was wanted by the Interior Department in connection with its consideration of the Hell's Canyon project?

A Yes; particularly I was advised that they wanted it in consideration of the Hell's Canyon project, and I might be asked to come back here and testify before some Congressional committees in support of the project.

MRS. COOPER: That is all, Mr. Examiner.

PRESIDING EXAMINER: Mr. Crandall, there is something I

am not clear on. Are you an employee of both the State government of Idaho and the U. S. Geological Survey, or just one of those?

THE WITNESS: Yes, both of them, and there is an executive order outstanding authorizing me to hold both federal and state positions as a part of the cooperative work between the Geological Survey and the State of Idaho.

PRESIDING EXAMINER: And you receive a salary from both places?

THE WITNESS: I may charge my salary to either one. I just have my federal salary, but it may be paid at times out of State funds. If it is paid out of State funds I go off of the federal payroll. I just get the regular salary. But its source may come intermittently from either way, depending on how much particular work I do.

PRESIDING EXAMINER: You have to keep track of the time you spend working for the State as against the time you spend working for the U. S. G. S.?

THE WITNESS: The way the thing is arranged there, a large part of this work as watermaster is constituted of the collection and study of the stream flow records and the geological survey contributes an amount of money into this operation fund which they would otherwise spend on maintenance of a number of guaging stations which we have there under their regular program.

IDAGSF08-019369

The State of Idaho contributes some money, and the balance of the money is paid by the Snake River water users. So it is somewhat elastic. A bill comes in and it might be charged to one of those funds or the other. The total for the year is all we are particularly concerned with.

PRESIDING EXAMINER: You have a regular office at Idaho Falls, Idaho? Is that right?

THE WITNESS: Yes, in the Federal Building there.

PRESIDING EXAMINER: And a number of engineers work under you, is that it?

THE WITNESS: Well, we have three permanent civil service employes, one engineering assistant, one clerk, and during the summertime we hire a half dozen additional hydrographers and a number of people to regulate the head gates, who are just employed during the period of water regulation in the summer months. And we keep the records of the stream flow year round, and we work up all these reports and so forth.

PRESIDING EXAMINER: And this work of drafting and preparation of reports of this kind would be all done in Idaho Falls?

THE WITNESS: Yes.

PRESIDING EXAMINER: That is all I have to ask, Mr. Mason.

MR. MASON: I have one further question.

PRESIDING EXAMINER: Yes.

BY MR. MASON:

IDAGSF08-0T9370

Q I would like to refer a minute, Mr. Crandall, to your previous answer with respect to the raising of the number of acres that you refer to on page 4 of your report.

A Yes, from my original figure in the tentative report, you mean.

Q That is correct. And I want to ask you whether the figure included in the report now of 1,300,000 acres is your own best judgment, after the review of the others and these matters were brought to your attention?

A Yes. There was some small areas with which I wasn't so intimately familiar as I am with the area above Milner, the area between King Hill and Oxbow, for example, including the Boise River, and the Owyhee and Malheur and various other tributaries; while I have worked on them in a general way, I wasn't so familiar with the immediate future possibilities on those streams, and I had originally used some figures from the Bureau of Reclamation's reports, and Mr. Nace, who is the District Geologist of the Geological Survey at Boise and who has made an intimate study of the ground water possibility of that area, felt that those figures were too low, and, on reviewing the matter with him, I concluded that he was correct, and I raised them accordingly. That is a common practice, as you know, in all these government departments, that somebody prepares a preliminary report and it is circulated around amongst the engineers and employes

and hashed over and finally comes out in the final form, and this isthe final form on which we stand.

MR. MASON: We have a technicality as to who offered Exhibit 119. Mr. Parry, as far as I amconcerned, it is immaterial who offers it. I raised a technical objection to it originally because I thought there was no foundation for it, which has certainly been supplied now.

PRESIDING EXAMINER: Since the report is practically all of the direct testimony of the witness, there is a question as to whether Mr. Parry has any right to cross-examine.

MR. PARRY: I am not going to argue about that.

PRESIDING EXAMINER: Or whether the staff has any right to cross-examine. I don't know, maybe Mrs. Cooper will have to bear the principal burden here, since this witness comes from, primarily, two sources. This report, which is his direct testimony, was offered by the applicant, and now the staff has adopted it for its presentation.

MR. MASON: I think Mr. Parry's difficulty is he anticipated too soon. I do not raise any technical objection to his right to ask the witness any questions. That is what the staff brought him here for, to develop the record on this subject. But I am not raising any technical objection against Mr. Parry's right to ask questions, and I have asked the witness all the questions I have, and I understand he has given the testimony here he desired to give in connection with his

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Volumes 81 & 82

ACCESSION NO. 58-A-161 BOX 213

F. P. C. Form No. 39

FEDERAL POWER COMMISSION

PROJECT NO. 1971
P-2132 & P-2133

IDAHO POWER COMPANY
(Hearing 7-14-52 on)

FORMAL
HEARINGS

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January 14, 1954

TO

January 15, 1954

Part 42

U. S. GOVERNMENT PRINTING OFFICE 16—68791-1

FILE No. 100-2

PROJECT NO. 1971
(Hearing) Part 42

IDAGSF08-019378

with this morning?

MR. MASON: Yes. Mr. Crandall is present, and he has obtained the tabulation with respect to diversions which was requested yesterday by Mr. Parry. I had just received copies of his tabulation; that is, Mr. Crandall's, and have not shown it to Mrs. Cooper. It might save a little time to go off the record and examine these before we put the witness on because I am not familiar with it.

PRESIDING EXAMINER: All right. I will excuse you now, Mr. Koessner, temporarily.

(Witness temporarily excused.)

PRESIDING EXAMINER: We will take a five-minute recess.

(Whereupon, at 11:30 a.m., a recess was taken until 11:35 a.m.)

PRESIDING EXAMINER: Come to order, please.

Mr. Mason, you wish to have Mr. Crandall come back, is that correct?

MR. MASON: That is correct.

Whereupon,

LYNN CRANDALL

was recalled to the stand, and having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. MASON:

Q You will recall yesterday Mr. Parry asked for certain

data with respect to diversions above Milner on the Snake River and storage diversions. I understand now that in response to that request, Mr. Crandall, you have prepared a computation, copies of which have been made available to counsel. Do you have before you a single sheet, being a tabulation bearing the title at the top, "Snake River, Idaho," with a column "Diversions Above Milner," and a column "Storage Diversions"?

A Yes.

Q That was prepared by you in response to a request by Mr. Parry?

A Yes.

MR. MASON: I would like to ask a question or two about this tabulation if I may.

PRESIDING EXAMINER: You may, indeed.

BY MR. MASON:

Q Could you give us for the record, Mr. Crandall, the source of the data shown on the statement I have just referred to, the one you have before you?

A It is annual reports of Water District No. 36 of the State of Idaho and the Water Supply Papers of the U. S. Geological Survey.

Q Now would you refer to the vertical column headed "Storage Diversions" and tell me whether or not the amounts shown for each year under that column heading are included in the amounts shown for each respective year under the vertical

column headed "Diversions Above Milner"?

A Yes, they are so included.

Q Now referring again to the vertical column headed "Storage Diversions," will you tell me whether the figures shown for each year in that column includes any allowance for evaporation?

A No, they do not. It has been our experience on Snake River after many years of observation that the reservoirs generally under ordinary conditions have enough return flow from what we call bank storage; that is, water that is stored in the adjacent soils and gravels, so that as that drains out it just about equals the evaporation losses.

Q Referring again to the figures for each year under the vertical column "Storage Diversions," is each figure for each year intended to show the volume of water, stored water, leaving the storage reservoirs?

A And diverted by the canals.

Q But that figure for each year in that vertical column does not necessarily represent the exact amount of water that actually reached the irrigated areas, does it?

A Well, it is approximately the amount at the heads of the canals, but not the amount that reached the lands. There are some transmission losses in the stored water charged to stored water going down the river channels. We also have an item of storage water gain to the river from the Minidoka

project, which in the aggregate just about offsets the losses charged to the stored water charged to transmission down to the channels. So that for the purposes of this tabulation I have taken drop in the reservoirs and allowed the river loss to balance the storage gain from the Minidoka project and used the same figures to represent diversion by the canals in this tabulation. That is approximately correct. There might be small differences in some of the years that would not be significant for the purposes that Mr. Parry might have in mind using this information.

MR. MASON: I might at this point ask Mr. Parry if this tabulation supplies the data he requested?

MR. PARRY: It does.

PRESIDING EXAMINER: Could I ask a question here to be sure I understand what this is?

MR. MASON: Yes, sir.

PRESIDING EXAMINER: Take the year 1952 on your tabulation there, for example. If I understand this correctly there was used --

THE WITNESS: Was diverted.

PRESIDING EXAMINER: Was diverted and therefore used, I presume?

THE WITNESS: I mean, some of it wastes back to the river, but it was diverted from the stream.

PRESIDING EXAMINER: Taken from the stream?

THE WITNESS: Yes.

PRESIDING EXAMINER: Above Milner Dam in thousand acre-feet, 7941 thousand acre-feet?

THE WITNESS: That would be 7,941,000 acre-feet. You just add three ciphers. It was merely tabulated this way to save the stenographer putting on all those extra zeroes.

PRESIDING EXAMINER: I understand. And of that amount that was diverted there was 1,723,000 acre-feet which came from storage which had been accumulated at some prior time?

THE WITNESS: That is correct.

PRESIDING EXAMINER: So you get the impression from this tabulation in the early years from 1919 on through 1927 or 1926, thereabouts, there was less storage used than there was in subsequent years?

THE WITNESS: There was less storage available. The American Falls Reservoir, which was not built until 1927, was the first year that was in use. So it is a combination of two things, increasing acreage going into cultivation and additional stored water being available. Other reservoirs were made available about 1939, ~~and the other reservoirs~~.

PRESIDING EXAMINER: Now the wide difference between the storage diversion shown for 1951 and 1952 --

THE WITNESS: That depends on the character of the year. Some years the water supplied from the melting snow holds up well into the year. In other years it drops off and that just

reflects runoff conditions.

PRESIDING EXAMINER: 1951 was one of those good water years so that less storage was needed to supply the needs of the owners of the canal?

THE WITNESS: That is right. There wasn't much difference in the total diversions, but the natural flow water held up a long time, and they didn't need to draw on their storage.

PRESIDING EXAMINER: I think I understand it now.

MR. MASON: I have one or two further questions.

PRESIDING EXAMINER: All right.

BY MR. MASON:

Q Will you refer to your note on the bottom which starts out "Column 3." Do you find that?

A Yes.

Q In that note you use the term at the end "During regulation period." Would you define that for us?

A In the early part of the season when the flood waters are on there is plenty of water for everybody, and we are usually spilling water to waste past Milner which goes down to the Pacific Ocean. We don't attempt to regulate anybody's diversion at this time according to their rights. The water is in ample supply; it is being wasted, and we don't put our regulation river riders to work until the stream flow drops to a point where we no longer have any water to waste and have to ~~begin~~ begin the use of stored water.

From then until the end of September or early October is what we call the regulation period when the canals are under regulation and the water being delivered according to their priority rights and stored water being delivered from the reservoirs.

Q Now is that waste that you speak of past Milner, does that occur only during the flood period or might it occur at other periods during the year?

A Well, if the amount of water held in storage in the reservoirs at the end of the season is of considerable magnitude so that we feel sure that some of them at least will fill then instead of filling them during the winter first we figure how much could be spared for power production, and we spill that water gradually during the winter and get a use out of it for power production at the downstream plants rather than to wait and fill the reservoirs and then spill it in large flood flows.

We also sometimes spill water to reserve space in the reservoirs for flood control. So that under those conditions there may be substantial spills during the winter months and extending on through the spring months, usually into about early July.

Q In deriving your figures as shown in the vertical column, the third column --

MR. PARRY: Mr. Mason, could I make this suggestion? I

have been mentally wondering what the record would look like. Since the recess we have been talking about a tabulation that has not been identified or put in the record.

MR. MASON: I have identified it, and I intend to put it in the record when we have these qualifying questions in.

MR. PARRY: I simply asked this to keep the record straight.

MR. MASON: If you would feel better about it, I would offer it at this time. I have no feeling one way or the other.

MR. PARRY: That is agreeable with us, to incorporate it in the record.

MR. MASON: I thought it would be well to have these explanations of the tabulation before incorporating it in the record; that was my plan of procedure.

PRESIDING EXAMINER: I would think so, too.

Mrs. Cooper, are you going to have any questions about this before it goes into the record? That is the time to ask the questions, it would seem to me.

MR. PARRY: I withdraw.

PRESIDING EXAMINER: Do you have any further questions, Mr. Mason?

MR. MASON: I have one more.

PRESIDING EXAMINER: Let's finish up with your questions, Mr. Mason.

BY MR. MASON:

Q Mr. Crandall, in deriving the figures shown for each

year under Column 3 headed "Storage Diversions," did you assume that all flow past the Milner Dam in the regulation period to be diversion storage?

A That is true usually except in some instances where due to perhaps a canal shutting some water off unexpectedly or something of that nature there was some water spilled for short times. Ordinarily we charge the water spilled past Milner during the regulation period as storage. The Idaho Power Company has certain storage rights which it draws past there and in the operation of the river, many reservoirs and canals, there is occasionally a little stored water spilled which has to be charged up to the various canals as operation waste. It doesn't amount to much.

MR. MASON: I have no further questions, Mr. Examiner.

PRESIDING EXAMINER: Did I understand that you had some questions, Mrs. Cooper?

MRS. COOPER: Are you assuming that Mr. Parry has none?

PRESIDING EXAMINER: I am.

MR. PARRY: I have no more on this. I have two more that I am going to ask Mr. Crandall independent of the tabulation.

MRS. COOPER: Mr. Examiner, we have no questions on this tabulation.

MR. MASON: Then, Mr. Examiner, if there are no further questions and if there are no objections I move that this tabulation about which we have had testimony of the Witness

Crandall be incorporated in the transcript of the record.

PRESIDING EXAMINER: Without objection then, that may be done by the reporter at this point.

(The information referred to above is as follows:)

Snake River, Idaho

Year	Diversions above Milner (1,000 acre-feet)	Storage Diversions (1,000 acre-feet)
1919	4,839	705
1920	6,296	590
1921	5,957	590
1922	6,051	644
1923	6,352	741
1924	5,298	664
1925	6,582	487
1926	6,049	1,003
1927	6,822	608
1928	7,130	1,017
1929	6,628	1,279
1930	6,851	1,381
1931	5,960	2,152
1932	7,052	1,562
1933	7,234	1,906
1934	5,039	1,641
1935	6,423	1,652

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1936	7,164	1,616
1937	6,890	1,979
1938	7,220	1,498
1939	7,659	2,091
1940	7,059	2,420
1941	7,036	2,031
1942	7,265	1,906
1943	7,565	1,080
1944	6,759	1,837
1945	7,043	1,231
1946	7,501	1,544
1947	7,609	1,490
1948	7,364	1,804
1949	7,649	1,828
1950	7,619	1,091
1951	7,697	907
1952	7,941	1,723

Note: Diversions between American Falls and Milner are for entire year ending Sept. 30. Diversions above American Falls are for irrigation season, May to September, inclusive. The totals of these two items are combined to get the figures in column 2 of the above tabulation.

Column 3 is the combined drop in the reservoirs during period of storage draft less stored water spilled past Milner during regulation period.

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MR. PARRY: Might I ask Mr. Crandall then one or two other questions?

PRESIDING EXAMINER: Yes. This is not cross examination?

MR. PARRY: No.

PRESIDING EXAMINER: It is clarifying material?

MR. PARRY: That is what it is intended to be.

PRESIDING EXAMINER: All right.

BY MR. PARRY:

Q What, Mr. Crandall, is the total usable reservoir capacity above Milner Dam in your district at this time exclusive of Palisades, which, as I understand, is still under construction?

A 2,872,000 acre-feet.

Q Do I understand your testimony that that is filled annually in the spring where necessary and to the extent of the available water at each reservoir?

A That is correct. If the water is there we can store that much.

Q Is that your custom, to fill each of those reservoirs each year?

A If the water is available.

MR. PARRY: That is all I have of Mr. Crandall.

PRESIDING EXAMINER: All right. What arrangements did you make with Mr. Hilmer for cross examination of Mr. Crandall?

MRS. COOPER: I checked with Mr. Hilmer during the morning

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Q Does the 80,000 figure represent the maximum possible with such a dam, or is that a --

A It is a question of water supply available at the point of diversion. As I state, the river now has a flow there sufficient to irrigate about 110,000 acres. There is a much greater acreage available, and I cut that down to 80,000 acres to allow for a possible diminution in the flow at that point due to pumping from ground waters on the Snake River plains.

Q Would you put any of the 80,000 acres in the period up to the mid point of 1985?

A Well, I would say it would be quite doubtful if it would be developed by the mid point.

Q I notice your statement in connection with this 80,000 acre Bruneau project, that the flow below Milner that you referred to may be appreciably lessened by future pumping developments on the Snake River plains.

Could you explain that statement a little further?

A That is the same thing that we were discussing yesterday relating to the irrigation of this 400,000 acres which I estimated on the Snake River plains. And in my opinion, that will eventually reduce the present ground water in-flow into the river below Milner.

Q That involves some assumptions with respect to time lag, does it not?

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A Yes.

Q Does that also involve the assumption that the cycle of use will be established before the 50-year pay-out period is concluded?

A Yes; essentially, or at least in major part.

Q What difference, if any, would exist in this situation in dry years, as opposed to wet?

A In extremely dry years, when the canal systems are seriously short of water, or, rather, in the year following such years, the in-flow drops down considerably.

Q I notice your statement in connection with this possible project, that it would doubtless be quite costly per acre of land irrigated. Could you give us some idea of the cost you had in mind?

A I don't know exactly, and I couldn't give a definite figure except that I am certain in my own mind that it would be greatly in excess of the cost that could be repaid by the irrigators, and that additional cost would have to be subsidized in some way, either by payment from sale of power or a direct government subsidy.

Q Do you know whether there has been any land classification or soil analysis in this area of your contemplated Bruneau project?

A I don't think there has been any.

Q Does the 80,000 acre estimate include any use of

would be somewhat more precipitation falling on the plain itself, and these minor streams from the north, which run down and during the flood water periods flood out over the margins of the plain, would contribute a little more.

But this water table beneath this whole area is a considerable depth below the land, considerable depth below the river face even, and I don't see how the lowering of the water table a few feet will in any way induce a greater inflow in it.

The possibility exists of an artificial recharge.

Q I was about to ask you about that because I noticed --

MR. HILMER: It is getting a little after our usual recess time. Perhaps we could save this artificial recharge subject until we reconvene.

PRESIDING EXAMINER: If you would like to have a little rest, we will take our ten-minute break at this time.

a.m. recess

(Whereupon, at 11:15 o'clock a.m. a recess was taken until 11:25 o'clock a.m.)

PRESIDING EXAMINER: Come to order, please.

BY MR. HILMER:

Q Just before the recess, Mr. Crandall, we were about to get into the subject of artificial recharging of the ground water basin, which is discussed on page 6 of your report.

Will you describe what you had in mind there and expand on it a little for us?

A There are a number of possibilities where water could be diverted from the Snake River or its tributaries in the vicinity of Idaho Falls and carried out onto the plain and allowed to spread over the surface of depressions and porous lava flows and things of that kind, and contribute it to the water table to provide greater storage and offset to some extent depletions arising out of ground water pumping.

One of these possibilities is in the diversion of water from Henry's Fork, in the vicinity of St. Anthony, and carrying it over into the Mud Lake basin over a low divide that exists between those two areas, and dissipate it into the ground by flooding.

The ditch would be constructed so that as it crosses swells and depressions, only the lower bank would be built, and water allowed to flood as far up the depressions and over as large an area as possible to induce a greater rate of recharge into the underlying ground waters.

There are also possibilities of diversions of water from the main Snake River between the mouth of Henry's Fork and the vicinity of Roberts. And the water could be carried by gravity through canals out over the plains and similarly be spread over as large areas as are available to dissipate the flow of the stream.

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There are some sections along the river channel where the river itself is flowing as a perched channel at considerable distance above the water table. And at such points it might be possible to recharge the ground water by wells drilled along the shoreline of the river.

Any of these projects would be quite costly. They would have to be financed by the government, perhaps as a work relief project or something of that nature, in times of depression, or on account of the general widespread benefits. But I believe it is quite possible that they might be able to put in an additional perhaps half million acre feet of water a year in years when it was available over and above filling the present reservoirs, put this additional amount into the ground in the valley by artificial recharge, provided the government would finance the cost.

Q First, as to the physical aspects, under what conditions could this type of diversion for ground water recharging occur?

A It would occur at times when all prior water rights on the river were being filled, the canals were drawing what they wanted, and the reservoirs were either filled or assured of filling; so that this would be the diversion of waters that would otherwise spill down the river past Milner into the Columbia.

Q Would that condition be uncommon, in your judgment?

A No. Outside of the 1928 to '35 period it would occur in the majority of years.

Q Can you not conceive of financial arrangements other than through federal subsidy that might aid this kind of project or make it possible?

A I am a little dubious about it because the Snake River plain rises considerably in elevation as you go west from Idaho Falls, and the construction of the canals for long enough distances to flood areas sufficient to allow this water to sink into the soil would represent a considerable investment, I think, running into some millions of dollars.

I don't know exactly how much. It might run to $15 or $20 million.

Q Do you know of any similar projects outside of the Snake basin where the financing has not depended on government subsidy?

A Yes. There are considerable areas in California where the waters are spread and allowed to sink. And they have all been financed by local interests.

However, I don't think in those areas that any canals as long as those that would be required in the Snake River or that would be necessary to dispose of as large volumes of water have been built elsewhere.

Q Do you know of any other similar projects outside

of those you mentioned in California?

A I read in the Engineering Press from time to time in some of the eastern areas around Long Island and some places, water is spread that way for municipal or industrial water supplies. If the costs were paid privately, they would have to be paid by the downstream water users who would benefit from their greater return flow, I take it.

Q Applying the same standards of likelihood and feasibility that you have applied to the various projects listed on page 4 of your report, would you say that the artificial recharging, which is discussed on page 6 of your report, is a likely development?

A I think that depends on circumstances. If this irrigation development takes place and the stream flow down below is greatly depleted so that in the dry years it is markedly less than has been estimated, I think there would be quite a favorable chance of relief being forthcoming from this artificial recharge. That is a kind of a matter that you might think of as being held in reserve to meet some unfortunate contingency that wasn't anticipated.

Q If the artificial recharging development should occur, what effect would it have on your depletion estimates in dry years?

A If it was of a magnitude that would put a half million acre feet into storage during the years when it

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was available, I would think that you could safely say that, not being available in some years, you could say that it would increase the river flow down below by an average annual amount of probably half of that.

Q Half of what?

A Half of the 500,000 acre-feet that you would put in in years when it was available would produce an average annual outflow of half of that amount, of 250,000 acre-feet.

Q So that, on the average, under the circumstances you have described, such recharging would practically offset the depletion that you have estimated would occur from the development of some 678,000 acres of irrigation east of King Hill, would it not?

A No, I don't think that is true. I estimated the average annual depletion during the pay-out period was 1,650,000 acre feet. And if this water recharge was put into existence and that produced an average annual inflow of 250,000 acre feet, that would result in reducing my average annual depletion from 1,650,000 to 1,400,000 acre feet.

Q I was trying to relate it to the areas east of King Hill, Mr. Crandall.

A I haven't made any distinction in those ultimate figures between east and west of King Hill. I think it is just a question of so much depletion in the basin.

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There are substantial depletions above ~~Kelly~~ King Hill besides those that are included in this area beneath the plains.

Q Could you give us your judgment, Mr. Crandall, on the storage and regulating aspects of the ground water basin in the Snake Valley?

A It in effect is sort of an equalizing reservoir by which the waters are poured into it from these various sources, principally from irrigation uses. And the outflow is at a relatively uniform rate, with minor variations. So that you might think of it as a big equalizing reservoir.

Q Turning now to the subject of surface water irrigation rather than ground water, in your ~~judge of~~ judgment is there likely to be any appreciable amount of new surface water irrigation in the Snake basin without additional storage development?

A In that list of projects that appears on page 4, the items that are not starred are principally almost entirely surface water irrigation, and some of the starred items, such as the Mountain Home project, 192,000 acres of that would be surface irrigation.

So that more than half of the area would be irrigated from pumping, but there still would be substantial surface irrigation projects.

Q The question is, though, whether that is all

IDAGSF08-019457

Orr Affidavit

Exhibit 59

"Future Upstream Depletion Above Hells Canyon," by Lynn Crandall (Apr. 6, 1953)

Fourth Orr Affidavit
Exhibit 7:

"Future Upstream Depletion Above Hells Canyon" by Lynn Crandall (Apr. 6, 1953)

(Exhibit 119 in Formal Hearings Before the Federal Power Commission, Project No. 1971, P-2132, P-2133) (admitted Jan. 13, 1954)

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

CERTIFICATION

I hereby certify that the attached 8 pages are true and correct copies of a document on file with the Commission.

MAY 18, 1984
Date

Records Officer



I hereby certify that the Records Officer, whose signature appears above, is official custodian of the records of the Federal Energy Regulatory Commission which certification is made and was such official custodian at the time of executing the above certification.

Kenneth F. Plumb

SECRETARY

FERC-03-F-028

RAL POWER COMMISSION
...t No. P-1966, et al Filed with Exec. Certification
...aring Ex. No. 119 ...ated 5/6/55
Date Identified 8-6-53
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April 6, 1953

19936

FUTURE UPSTREAM DEPLETION ABOVE HELLS CANYON

By Lynn Crandall 1/

The discussion of this subject will be divided into various sections as follows:

1. The Snake River Plain

This term as used herein applies to the area north of Snake River extending southwest from St. Anthony to Bliss, beneath which the great Snake River ground-water flow moves. Generally speaking, the soils in this area, where they exist, are of a satisfactory quality for agricultural use outside of local areas of sand dunes. There exists, however, a wide range of soil depths and depths to ground water. A large portion of the area is either bare lava rock or shallow soils. About 300 feet is assumed to be the maximum pumping lift likely to be sustained during the Hells Canyon payout period for profitable farming operations in this region. It is possible that greater lifts than this may prove feasible under certain conditions but the additional acreage involved is not likely to be of great magnitude. After examining the available information on this area, including my own observations from driving over it for many years, I believe that possibly 400,000 acres may be feasible of development by ground-water pumping. This figure and other similar ones in this report include the pumping developments already made since 1947. In this section the ground-water supply is believed to be adequate generally and the controlling elements are good land and feasible pumping lifts.

2. Minor tributary streams from the North, Camas Creek to Big Wood River

In this section ground-water pumping will be limited in some cases by available supplies contributed from the tributary streams. In some of the valleys pumping may be used as supplemental supply for lands that do not now receive a full supply in dry years. It is believed that the total use might be the equivalent of supplying about 45,000 acres of new lands. This would include any new storage developments on these streams.

3. Fort Hall Project

There are about 40,000 acres of new land on this project susceptible of irrigation, probably mostly by pumping from ground water. Some lawyers claim that the Indians' treaty rights would entitle them to so use the water even if it interfered with downstream Snake River rights. Some small developments are already under way by leasing the land for a term of years to whites who agree to provide a well on the land. About half of this area is south of the Portneuf River in the Michaud Flat-Bannock Creek region and about half in the vicinity of Fort Hall. The lands around Fort Hall have mostly somewhat sandy soils.

1/ District Engineer, U. S. Geological Survey, Idaho Falls, Idaho, and Snake River Watermaster, Idaho State Department of Reclamation.

4. Marginal increases to existing projects above American Falls

There is a narrow fringe of good land along the benches bordering the lands at present irrigated from Snake River along the east side of the valley between Ririe and Blackfoot. This may be irrigated partly by pumping from ground-water and partly by pumping from existing canals whose water supply will be augmented from Palisades reservoir. Some similar areas exist west of Snake River between Roberts and Shelley. During recent years there has been considerable clearing of brush lands and those subject to flooding in high-water years between Heise and Roberts. All these and others somewhat similar elsewhere are estimated to total 15,000 acres starting from 1947.

5. Tributary valleys south of Snake River, from Portneuf River to Salmon Falls River, inclusive.

In most of this section ground-water pumping developments will be limited by water supply or pumping lift. In some of the tributary valleys ground-water pumping might be used as supplemental supply; in others it would be used on new land. It is estimated that the total use for both purposes might be equivalent to irrigating 60,000 acres of new land.

6. Bruneau Project

The Bruneau Project of about 400,000 acres as heretofore proposed required the construction of a dam about 500 feet high on Snake River near Bliss, Idaho, and the creation of a reservoir which would flood Hagerman Valley, including about 10,000 acres of irrigated land and 4 power plants of the Idaho Power Company. Owing to the likelihood of large leakage thru the porous inter-canyon lava fill at the damsite it does not now appear feasible to construct the proposed dam. This fact, together with the large costs for property damage, appears to me to warrant discarding the proposed large Bruneau project for consideration within the foreseeable future. A possibility exists, however, of building a smaller dam on Snake River in the vicinity of the mouth of Salmon Falls Creek that would back the water upstream to the foot of Shoshone Falls and water could be diverted from above this dam to irrigate a portion of the Bruneau Project. Snake River at this point has at present a dependable flow of about 2800 second-feet that enters the river below Milner which would be sufficient to irrigate about 110,000 acres of the Bruneau Project. This flow may be appreciably lessened by future pumping developments on the Snake River Plains. This plan has not been studied in detail as to its feasibility and although it would doubtless be quite costly per acre of land irrigated I have included 80,000 acres in the list of projects that might conceivably be built during the 50-year payout period for the Hells Canyon project, assuming some decrease in present water supply due to upstream ground-water pumping.

7. Mountain Home Project

If the high dam near Bliss heretofore proposed for the Bruneau Project is discarded it will not be possible to supply the second unit of the Mountain Home project as contemplated in previous plans of the Bureau of Reclamation. Mr. W. G. Sloan has proposed a plan for irrigation of 123,000 acres of the Mountain Home project, by a combination of pumping from Snake River to Deer Flat Reservoir and ground-water pumping in Boise Valley. If this is done it would then be possible to irrigate an additional 192,000 acres from Payette-Boise River sources making a total of 315,000 acres on the Mountain Home project without use of the high diversion dam near Bliss. If this area is placed under irrigation on the Mountain Home project the ground-water levels beneath the project could very well rise to a level that would permit of ground-water pumping for the remaining 57,000 acres on the Mountain Home project heretofore proposed. Although these matters are somewhat speculative, the good quality of land and favorable location of this project appear to me to warrant the belief that some plan will eventually be devised for irrigating the full acreage of 372,000 acres.

Permits granted by the State of Idaho for ground-water pumping since interest in this subject started in 1947 are as follows:

Year	New Land (acres)	Supplemental supply for lands now irrigated (acres)
1947	12,400	7,600
1948	192,600	34,200
1949	39,000	73,000
1950	75,200	18,600
1951	104,400	104,600
1952	114,270	6,500
Total	537,870	244,500

Figures are for the entire State but nearly all are in the Snake River drainage area in southern Idaho. Some of these permits or water filings are no doubt speculative and will be canceled for failure to do the development work within the time allowed by the permits. In some areas also the permits cover more land than can be irrigated from the locally available water supply. However, additional filings are being made all the time at the rate of 100,000 acres annually and many wells are being drilled by individuals without permits. Under the provisions of the Idaho Constitution water rights can be so established without requiring authorization by the State and about 20% of irrigation wells drilled to date have been developed without applying to the State for a permit. Considering these various matters it appears from these water permit figures that the total acreage

of feasible ground-water pumping projects in Idaho on Snake River above Hells Canyon could possibly be as much as 700,000 acres of new land since 1947.

New land areas (acres) that might be irrigated by 2010
(Figures include developments since 1947)

Michaud Flat to Neeley (outside of Fort Hall Reservation)	25,000
Minidoka North Side Extension from river flow	13,000
*Snake River plains ground-water pumping	400,000
*Minor tributaries Camas Creek to Big Wood River	45,000
*Fort Hall Reservation	40,000
*Marginal increases to existing projects	15,000
*Tributaries Portneuf to Salmon Falls River	60,000
Bruneau Project	80,000
Bruneau River	40,000
*Mountain Home project	372,000
Grandview pumping	18,000
*Weiser River basin	25,000
*Owyhee River basin	15,000
*Other tributaries below King Hill	20,000
*Miscellaneous ground-water pumping areas not listed above	132,000
Total	1,300,000

*All or partly ground-water pumping

The total consumptive use of water in this area will average about 2.3 acre-feet per acre actually irrigated. Assuming that 0.3 acre-foot per acre of this will be available from precipitation now used by native vegetation and that 10% of the area will be occupied by roads, buildings, small rocky areas, etc., we arrive at a consumptive water use of 1.8 acre-feet per acre from sources other than local precipitation applicable to the gross acreage.

Supplemental use on currently irrigated lands either by ground-water pumping, or from storage in reservoirs such as Palisades and Anderson, will also increase the consumptive use. This is a matter that cannot be calculated with any exactness because it would be small in good water years and larger in dry years. It might be estimated roughly at 270,000 acre-feet annually which would supply 1,000,000 acres with one-half of its consumptive use in three out of 10 years.

Evaporation losses on new reservoirs constructed since 1947 or proposed for new construction, in excess of water losses on the flooded areas prior to reservoir construction, will be of the magnitude of 130,000 acre-feet annually.

The sum of these three items, consumptive use on 1,300,000 acres of new lands, additional consumptive use from supplemental supply on lands now irrigated, and evaporation losses from new reservoirs will amount to about 2,740,000 acre-feet annually at the end of the 50 years Hells Canyon payout period.

If we assume that the Hells Canyon project will be completed by 1960, the end of the 50-year period would be 2010. The figures heretofore given refer to developments beginning in 1947 when the ground-water pumping projects started. Probably close to 150,000 acres of new lands have already been developed since 1947, mostly from ground-water pumping. Assuming a uniform rate of increase from now until 2010 the average additional consumptive use since 1947, during the Hells Canyon payout period, would be 1,650,000 acre-feet annually.

This additional consumptive use will not, however, decrease the stream flow at a uniform similar annual rate. The flood waters in years of ample runoff will be stored in new reservoirs such as Palisades and will be fed out onto the lands in dry years. Ground-water pumping will draw to some extent during dry years on water stored in the ground, with the ground-water supply being replenished in wet years. As a result the stream flow at Hells Canyon will generally be depleted more than the average in wet years and less than the average in dry years.

By reference to the attached Plate No. 1 it will be observed that the gain, excluding surface runoff from Big Wood River, in Snake River between Milner and King Hill has been steadily increasing during the past decade and from 1946-50 was running over 300,000 acre-feet annually greater than it was during the 1928-30 and 1938-41 periods in spite of steadily increasing irrigated acreage upstream. This would appear to be a permanent increase during the future as compared to past years except as it would be modified by new upstream ground-water pumping, and is doubtless due to increased canal diversions shown on the diagram. If the increased gain noted in 1951 and 1952 continues in future years the permanent gain would be greater than the 300,000 acre-feet above mentioned.

The Gooding project which began sizable diversions from Snake River in 1931 probably is responsible to a considerable extent for the increased gain as this project has contributed about 300,000 acre-feet of Snake River water annually to the ground water for a number of years past. The project had previously contributed a lesser amount when it received an inadequate water supply from Big Wood River. The recent gain is even greater if compared to the 1931-35 period but it is believed that the comparison will be more useful if made with years of similar precipitation on the plains and similar discharge from the streams whose runoff reaches the plains from the north. From Plate No. 1A it will be noted that a moderate decrease in the gain occurred from 1946 to 1950. This may represent the decreased contributions from river losses and canal diversions in the upper valley above American Falls in 1931 and 1934 indicating a time of travel of around 15 years before the ground water from those sources appears in the Hagerman Valley springs. In any event the gain appears to have resumed its upward trend in 1951 and 1952.

The years of critical water supply for power production at Hells Canyon occur in the period 1929-37 as shown on accompanying Plate No. 2. From the mid-date, 1933, until 1947, when the increased consumptive use figures

used herein start, there was an increase of about 200,000 acres in the irrigated area above Hells Canyon which would consume 360,000 acre-feet annually. This factor, as far as flow during low-water periods is concerned, is probably more than offset by new supplemental storage in such reservoirs as Anderson, Lucky Peak, and Palisades that will increase the river flow in low-water periods over that which occurred in the past.

Past experience on the river has been that irrigation of new land from surface flow of the streams above return-flow sections has increased downstream flow during low-water periods. Future expansion of the irrigated area by pumping from ground water or diversion of water from the stream in or below the return-flow sections will, however, directly reduce the downstream flow during low-water periods.

The drought during the early 1930's was the most severe and prolonged of any that have occurred during the 62 past years of stream-flow records on Snake River. The possibility exists that one of equal severity might not occur during the Hells Canyon payout period. If one should occur at the midpoint of the payout period, it is my opinion, considering all the matters herein discussed, that it might result in a runoff at Hells Canyon of about 1,300,000 acre-feet less annually than the historic flows that occurred 1929-37. If a dry period of this severity should occur at the end of the payout period rather than the midpoint, with more land in cultivation, the decrease below the historic flows of 1929-37 might be of the magnitude of 2,200,000 acre-feet annually.

Except in years of well above normal runoff it is quite likely that future years will see the flow of upper Snake River controlled so as to practically eliminate spills past Milner except for storage rights owned by the Idaho Power Company that usually require the discharge of about 155,000 acre-feet annually over Milner dam for downstream use by the Power Company.

Additional storage of about 350,000 acre-feet may be developed on the river above Heise and surplus flood flows that would otherwise spill past Milner can be diverted by new canals onto the Snake River plains, allowed to spread over as large an area as possible, and be dissipated by percolation and recharge wells into the lavas, thereby replacing in part the water consumed by ground-water pumping. Such a project would be expensive and would probably require government financial aid. Similarly any surplus flood waters of Big Wood River could in wet years be diverted onto the lava beds north of Shoshone. The ground-water reservoir beneath these plains is of great capacity. Water contributed to it in the vicinity of Idaho Falls, for example, has to travel 150 miles underground before it reappears in Hagerman Valley, probably requiring a number of years to do so. Return flow from irrigation use below American Falls will of course reappear in lesser time, ranging from several months on portions of the North Side Canal Project to perhaps a year or more from the Minidoka project. If new upstream reservoirs are built and if the surplus flood waters are diverted to this ground-water reservoir it would result in a nearly equalized flow of Snake River at King Hill with an increased flow during low-water periods and less future depletion at Hells Canyon during low-water years than the figures herein suggested.

-213-A
(September 1939)

UNITED STATES DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WATER RESOURCES BRANCH

File Number { Washington ____ District ____

Thousands of acre-feet

GPO 16—13465-2

PLATE NO. ____

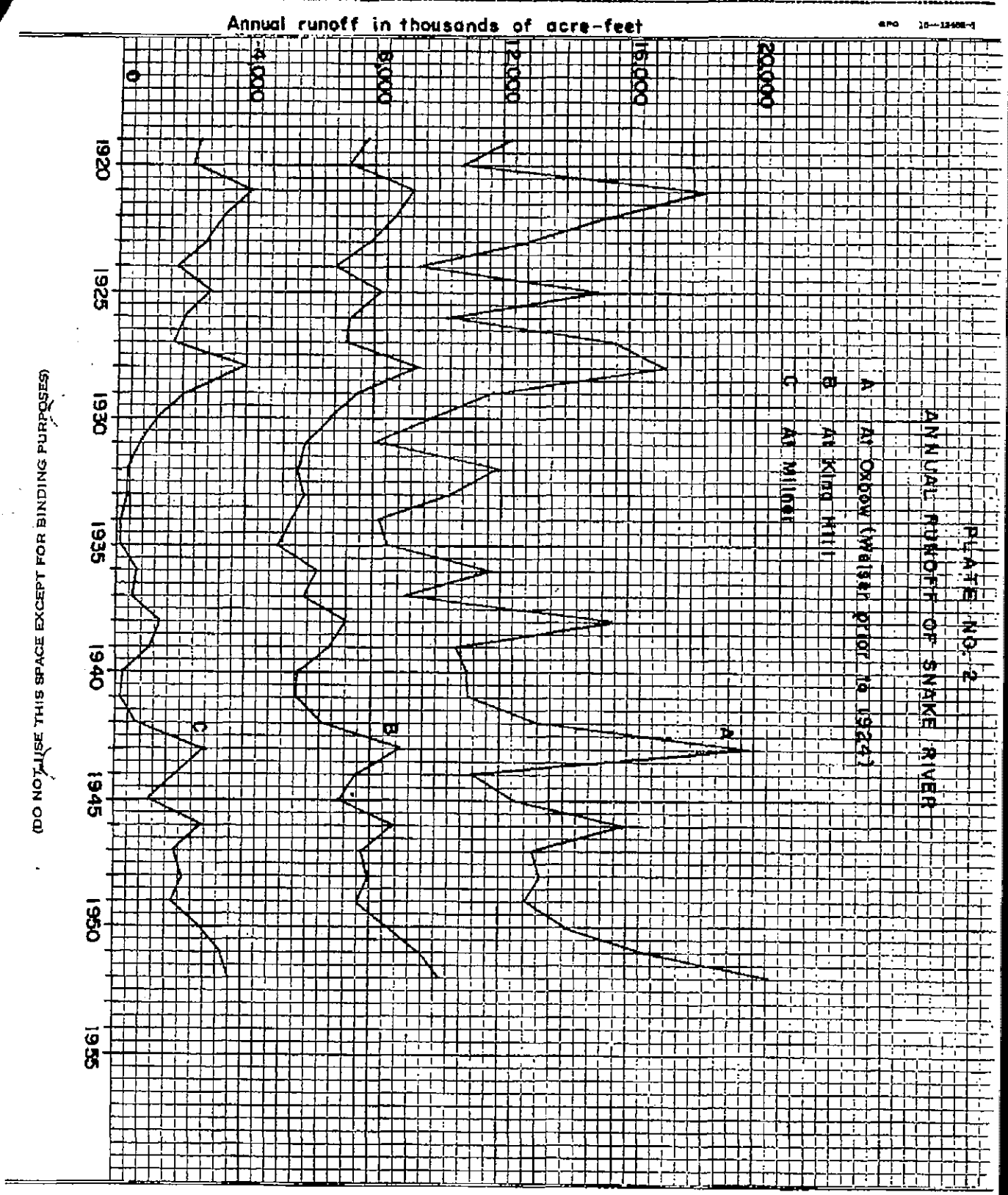
A Annual gain Milner to King Hill excluding surface spill from Big Wood River.
B Annual diversions by canals American Falls to Milner.
C Irrigation season diversions by canals above American Falls.
D Calendar year precipitation on Snake River Plains. Average of records at Idaho Falls, Blackfoot, Aberdeen, Rupert, Shoshone and Arco.

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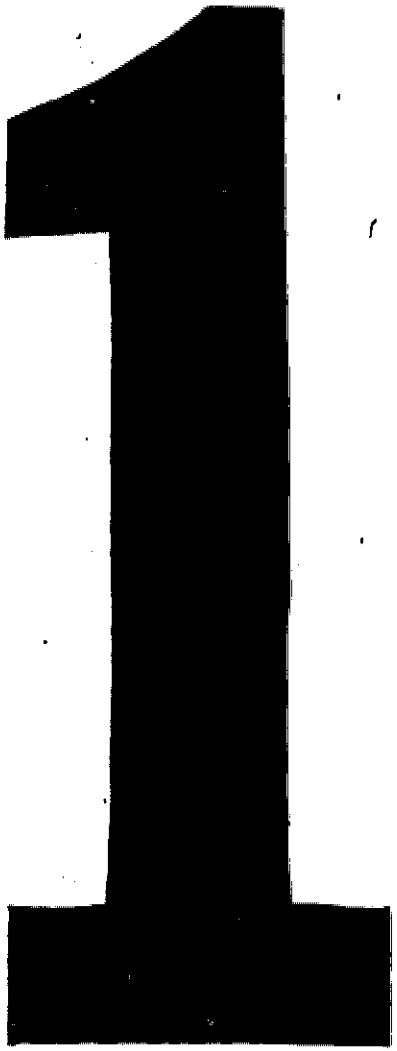
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Orr Affidavit

Exhibit 60

Excerpted pages of "The Palisades Dam And Reservoir Project – Hearings before a Subcommittee On Irrigation And Reclamation Of The Committee On Public Lands, House of Representatives and a Special Subcommittee Of The Committee On Interior And Insular Affairs, United States Senate – Eighty-First Congress – First Session on H.R. 5506" (1949)



THE PALISADES DAM AND RESERVOIR PROJECT

HEARINGS

BEFORE A

SUBCOMMITTEE ON IRRIGATION AND RECLAMATION OF THE
COMMITTEE ON PUBLIC LANDS
HOUSE OF REPRESENTATIVES

AND A

SPECIAL SUBCOMMITTEE OF THE
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS
UNITED STATES SENATE

EIGHTY-FIRST CONGRESS
FIRST SESSION

ON

H. R. 5506

A BILL TO AUTHORIZE THE PALISADES DAM AND RESERVOIR PROJECT, TO AUTHORIZE THE NORTH SIDE PUMPING DIVISION AND RELATED WORKS, TO PROVIDE FOR THE DISPOSITION OF RESERVED SPACE IN AMERICAN FALLS RESERVOIR, AND FOR OTHER PURPOSES

AUGUST 8, 9, 10, 11, 12, 18, AND 19, 1949

Serial 20

Printed for the use of the House Committee on Public Lands and the Senate Committee on Interior and Insular Affairs

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PALISADES DAM AND RESERVOIR PROJECT

MONDAY, AUGUST 8, 1949

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IRRIGATION AND RECLAMATION OF
THE COMMITTEE ON PUBLIC LANDS, AND A SUBCOMMITTEE
OF THE SENATE INTERIOR AND INSULAR AFFAIRS COMMITTEE,
Washington, D. C.

The subcommittees met at 10 a. m. in the committee room of the House Committee on Public Lands, Hon. John R. Murdock (chairman of the subcommittee on Irrigation and Reclamation) presiding.

Mr. MURDOCK. The committee will come to order, please.

We have the pleasure of having the Senate subcommittee on this legislation with us this morning. Senator Miller, will you come up?

Also, Senator Taylor. Senator McFarland will be a little bit late.

Senator TAYLOR. I just wanted to make a little statement, but I will sit up here with you.

Mr. MURDOCK. We are glad to have you.

The Subcommittee on Irrigation and Reclamation has been called this morning to consider H. R. 5506, a bill to authorize the Palisades Dam and Reservoir project, to authorize the north side pumping division and related works, to provide for the disposition of reserved space in American Falls Reservoir, and for other purposes.

The bill will be inserted in the record at this point.

(The bill is as follows:)

[H. R. 5506, 81st Cong., 1st sess.]

A BILL To authorize the Palisades Dam and Reservoir project, to authorize the north side pumping division and related works, to provide for the disposition of reserved space in American Falls Reservoir, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Palisades Dam and Reservoir project, Idaho, heretofore authorized under the provisions of the Federal reclamation laws by the presentation to the President and the Congress of the report of December 9, 1941 (House Document Numbered 457, Seventy-seventh Congress, first session), by the Secretary of the Interior (herein called the Secretary), is hereby reauthorized under the Federal reclamation laws for construction and operation and maintenance substantially in accordance with that report as supplemented and modified by the Commissioner's supplemental report and the recommendations incorporated by reference therein, as approved and adopted by the Secretary on July 1, 1949.

SEC. 2. There are hereby authorized for construction and operation and maintenance under the Federal reclamation laws: (a) the north side pumping division of the Minidoka project, this to be substantially in accordance with the Commissioner's report and the recommendations incorporated by reference therein, as approved and adopted by the Secretary on July 1, 1949; and (b) for the furnishing of electric power for irrigation pumping to that division and for other purposes, power generating and related facilities at American Falls Dam. These generating and related facilities, to the extent the Secretary finds to be proper for pay-out and rate-making purposes, may be accounted for together with other power facilities operated by the Bureau of Reclamation that are interconnected with the American Falls Dam power facilities, excluding any power

facilities the net profits of which are referred to by subsection 1 of section 4 of the Act of December 5, 1924 (43 Stat. 702).

SEC. 3. The Secretary is hereby authorized to contract, under the Federal reclamation laws, with water users and water users' organizations as to the use for their benefit of the heretofore reserved storage capacity in American Falls Reservoir. Not in excess of one hundred and fifteen thousand acre-feet of that capacity shall be made available to those who have heretofore held the use of reserved capacity under lease arrangements between the United States and the American Falls Reservoir District of Idaho, the distribution of this capacity among such users to be determined by the Secretary after consultation with the interested water users' organizations or their representatives. Of the balance of the reserved capacity, forty-seven thousand five hundred and ninety-three acre-feet are hereby set aside for use under contract for the benefit of the lands comprising unit A of the north side pumping division of the Minidoka project, and seventy-one thousand acre-feet are hereby set aside for use under contract for the benefit of those lands in the Michaud area which may hereafter be found to be feasible of development under irrigation. Contracts for the repayment of construction charges in connection with reserved capacity shall be made without regard to the second proviso of the tenth paragraph (Minidoka project, subject under the heading "Bureau of Reclamation" of the Act of June 5, 1924 (43 Stat. 380, 1171). Such contracts shall require the repayment of all costs determined by the Secretary to be allocable to the reserved capacity, less, in the case of the three hundred and fifteen thousand acre-feet of capacity above described, three hundred and sixty-eight four-hundredths and thirty-fourths of reclamation realized, after deduction of what the Secretary determines to be an appropriate share for operation, maintenance, and replacements, from the leasing of that capacity for irrigation purposes up to the time water first becomes available in Palisades Reservoir and, in the case of the capacity set aside for the north side pumping division, all other revenues realized from or connected with the reserved capacity and which the Secretary determines to be available as a result against the cost allocable to that division.

SEC. 4. (a) The continuation of construction of Palisades Dam beyond December 31, 1950, or such later controlling date fixed by the Secretary as herein provided, is hereby made contingent on there being a finding by the Secretary by the controlling date that contracts have been entered with various water users' organizations of the Upper Snake River Valley in Idaho that, in his opinion, will provide for not less than annual savings of one hundred thirty-five thousand acre-feet of winter water. If in the Secretary's judgment the failure of the reputable organizations so to contract by the controlling date or any time, is for reasons beyond the control of those organizations, he may set a new controlling date but no beyond December 31, 1951.

(b) Repayment contracts made in connection with the use of capacity in either American Falls or Palisades Reservoir may include, among other things, such provisions as the Secretary determines to be proper to give effect to recommendations referred to in section 1 of this Act, and particularly those concerning the continued effectiveness of the arrangements as to the minimum average annual water savings.

SEC. 5. This Act is declared to be a part of the Federal reclamation laws as those are defined in the Reclamation Project Act of 1939 (53 Stat. 1187).

Mr. MURDOCK. There is a companion Senate bill, introduced by Senator Miller, and we are happy to conserve the time of the House and Senate by having this joint session or joint hearing.

I think it would be quite well and quite proper to open our hearings with a brief statement from the author of the bill, Congressman Sanborn, to be followed by Senator Miller, author of the companion bill in the Senate.

STATEMENT OF HON. JOHN SANBORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Mr. SANBORN. Mr. Chairman, I will take the witness chair.

Mr. MURDOCK. Yes, Mr. Sanborn. We can see you better down there and also hear you better.

Mr. SANBORN. Mr. Chairman, I am happy that the Senate committee agreed to meet in joint session with us to consider these companion bills, and I am also happy to state that we have a large delegation of representative people from the territory involved, which is in my district in Idaho, and I am sure that they will present some very interesting information to the committee.

Mr. Chairman, I have introduced H. R. 6600, and identical companion bills have been introduced in the Senate, for the following purposes:

1. The authorization of the Palisades Dam and Reservoir project, Idaho.

(a) This project will furnish reservoir storage space of 1,100,000 acre-feet which will be used to store water to provide supplementary irrigation for about 330,000 acres of land in the upper Snake River Valley.

(b) Power installation of 112,500 kilowatts to supply firm power to the city of Idaho Falls and irrigation pumping power for the Michaud area, the north side pumping division of the Minidoka project, and other areas.

(c) Control of major floods and preventing damages to several thousands of acres of fine irrigated land in the upper Snake River Valley.

(d) Fish and wildlife benefits through Palisades storage and the restoration of Gray's Lake to its natural state and control of its level to create the optimum of its wildlife environment.

(e) Substantial recreational benefits through the coordination and operation of the Palisades and Jackson Lake Reservoirs.

2. Authorization of the north-side pumping division of the Minidoka project to supply irrigation water to 77,650 acres of land not now irrigated, lying north and west of Rupert, Idaho.

3. Power installation at American Falls Dam for the purpose of furnishing electric power for irrigation pumping and other purposes.

4. The sale of heretofore reserved storage capacity in the American Falls Reservoir as follows:

(a) Not to exceed 115,000 acre-feet of that capacity to those who have heretofore held lease arrangements for American Falls Reservoir space.

(b) To set aside 47,593 acre-feet of American Falls space for lands comprising unit A of the north-side pumping division of the Minidoka project.

(c) Setting aside 71,000 acre-feet of American Falls space for use under contract for lands in the Michaud areas which may hereafter be found feasible of development under irrigation.

This legislation is vital to the continued development of our irrigation and reclamation projects in Idaho. The active capacity will be used jointly for irrigation and flood control under a plan of operation worked out by the Bureau with the Corps of Engineers.

This project is a multiple-purpose development involving irrigation, power, flood control, recreation, and fish and wildlife. The dam will be located on the main stem of the Snake River at Calamity Point in eastern Idaho about 8 miles west of the Idaho-Wyoming boundary, and about 50 miles east of Idaho Falls. In addition to

providing supplementary irrigation water already contracted. It will provide flood protection for several thousand acres of irrigated land on the Snake River plain above Idaho Falls.

The project will also provide additional hydroelectric power to serve irrigation pumping loads, municipalities, rural cooperatives, and others. However, the construction of power at Palisades Dam will be entirely incidental to the operation of the reservoir for irrigation and flood control.

It is encouraging to observe local support for actual construction of the Palisades project. This project was authorized in September 1911, and little more than preconstruction survey work has been done to date. Roughly, this project will provide new farm homes and opportunity for livelihood for 1,000 or more families. The new wealth created in the form of new production from the farms in the division would create additional livelihood opportunities for an equal or greater number of families in the trade and individual enterprises which would service this new farm production.

It will place a block of public domain presently unproductive into active economic production.

Details regarding the cost of the development proposed under H. R. 5000 are to be given the committee by officials of the Bureau of Reclamation, who are present and will appear immediately following the conclusion of my statement.

The legislation under consideration deals with the control and use of water in the entire watershed of the Snake River above Milner Dam. The annual inflow of water into the Snake River, including Henry's Fork and other tributaries, averages about 9,600,000 acre-feet. Waters of the upper Snake River are now used for furnishing a full or partial supply of water for approximately 1,200,000 acres of high-type agricultural land. The proposed legislation will authorize the construction of units for the storage and use of nearly all of the water not now utilized in the upper Snake River Valley. The land to be irrigated is limited only by available water supply.

Among the outstanding cash crops produced in this irrigated area are potatoes, sugar beets, dry beans, and seeds. This valley is famous for its production of the high-quality Idaho russet potato. A very high percentage of the 100 carloads per day shipment of Idaho russet potatoes comes from this area. About one-third of the irrigated area is devoted to the growing of hay and alfalfa, in rotation, providing winter feeds for the livestock industry of the area. The upper Snake River Basin is a garden spot prolific in peas, cauliflower, and other vegetables and fruit. The valley as a whole is one of the largest agricultural communities in the entire West.

Idaho Falls is the metropolis of northeastern Idaho. The city has harnessed the Snake River and installed its own municipal power plant to supply its light and water. Idaho Falls has a famous street known as Spud Alley, from which 10,000 carloads of choice Idaho potatoes have been shipped within a single year.

A few miles west of Idaho Falls, the Atomic Energy Commission is starting the construction of its new plant for the purpose of applying atomic energy to commercial purposes.

As we move down the highly agriculturally developed valley of the Snake, we pass the Blackfoot and Fort Hall Indian Reservation and

eventually arrive in Pocatello, the second largest city of Idaho. Pocatello is a railroad center where lines of steel radiate to the east, west, north, and south, connecting Idaho with the markets of the world. At Pocatello railroad yards, car shops, and roundhouses, workers turn upwards of a million dollars each month.

A permanent addition to Pocatello in the war period was the naval ordnance plant, where guns up to 16 inches in diameter and 90 feet in length are rolled. Pocatello also boasts of having many factories and in particular a flour mill, potash factory, oil-refining plant, and phosphorus and fertilizer plants.

Each of Pocatello's underlying grazing lands are 5,000,000,000 tons of phosphate, enough fertilizer to restore and maintain the fertility of worn-out farms of the entire Nation.

To the southwest of Pocatello is located the American Falls Reservoir, with a share line of 125 miles and a capacity for storage of 1,700,000 acre-feet of water. This reservoir is a major unit for the purpose of supplying irrigation water to 400,000 acres of farm land and the towns of Rupert, Burley, Rheobeck, Jerome, Twin Falls, Buhl, and Gooding.

In this entire area, more than 95 percent of all farms now have electricity.

While most of the cultivated land of Idaho is devoted to high-quality potatoes, sugar beets, peas, beans, onions, wheat, and fruit, the production of vegetable seeds is also of great importance to the Nation. Idaho now grows more than one-half of all the vegetable seeds produced in the United States. Fifty percent of all onion seed used in the United States is grown in Idaho and more than 60 percent of all hybrid sweet-corn seed.

Idaho's reclamation projects have been developed over a long period of time on a unit-by-unit basis. Early projects were largely for the purpose of growing alfalfa and grain to supply winter feed for Idaho's sheep and cattle industries. In later years, more row crops have been grown, requiring a late supply of irrigation water, which, together with changing seasons, has resulted in water shortages being experienced on thousands of acres of lands under irrigation projects.

The Bureau of Reclamation has been conducting studies over a period of more than 20 years for the purpose of developing a plan to place under beneficial use all available water in the Snake River Valley above Milner, Idaho; and has recently submitted its reports on the Palisades Dam and Reservoir project and the north-side pumping unit of the Minidoka project, and its representatives and engineers are now present and prepared to give detailed testimony regarding the projects and other features proposed under the legislation now before this committee.

The benefits of the projects authorized in this bill will go far beyond the borders of the State of Idaho. With an increasing population and depletion of soil resources, the agricultural productivity of these projects will benefit the economy of the entire Nation. This development will not be immediate. It will require several years of work and planning before all projects authorized can be brought into full operation. The end result will strengthen our economy.

Following the officials of the Bureau of Reclamation, I will present a number of witnesses from the project area. Those witnesses will include the watermaster of the river, the mayor of the city of Idaho Falls, officials and representatives of irrigation districts and other water users' organizations.

Mr. LEMKE. Mr. Chairman, I think our colleague has made a very splendid statement, but I want to ask him just one question.

You say, "this is to reauthorize." Has this project been authorized? According to your statement it has; so why duplicate it? What is the reason for a second act if it has already been authorized?

Mr. SANBORN. Mr. Lemke, the project has been materially changed in size and benefits and needs reauthorization to proceed.

Mr. LEMKE. Some new development has been brought into the bill; is that the idea, which is not in the old authorization?

Mr. SANBORN. The capacity, especially for the electric part of the project, needed enlarging; and it really appeared best to have the reauthorization to take in the added features.

Mr. MURDOCK. If that answer partially satisfies, let the Chair suggest that since we have our colleague, Congressman Sanborn, on the committee with us, we should refrain from further questioning now so that we may hear from the Senators who are here.

Mr. SANBORN. Mr. Chairman, I am sure that the engineers of the Bureau will go into those matters and answer those questions quite satisfactorily. I am sure we would be glad to hear from Senator Miller on the legislation. He is a member of the Senate Subcommittee and author of a companion bill. I am glad that we have Senator McFarland with us. He is the chairman of the Senate subcommittee, which is sitting with this committee. We are also glad to have with us Senator Taylor, senior Senator from Idaho.

Mr. D'EWART. I would like to ask the witness one question before he leaves the stand.

I would like to know how the Atomic Energy Commission came into this picture.

Mr. SANBORN. Just a statement of interest regarding the territory-community interest.

Mr. D'EWART. Will not the location of that project in this area destroy many of the benefits of this irrigation project?

Mr. SANBORN. I believe not.

Mr. D'EWART. It is dangerous.

Mr. SANBORN. I believe, if I remember correctly, the Montana delegation fought quite hard to get the Atomic Energy Commission into their territory.

Mr. D'EWART. That is correct, and here I find it right in the middle of this project.

Mr. MURDOCK. We thank you, Mr. Sanborn, for that statement. We will ask you to hold yourself in readiness to answer a lot of questions. I have a lot to ask myself, pertaining to atomic energy and spuds and some other things.

Mr. SANBORN. Thank you, Mr. Chairman.

Mr. MURDOCK. Senator Miller, we would be mighty happy to have a statement from you now. You probably do not care to go to the witness stand, but may we have a statement from you?

STATEMENT OF HON. BERT H. MILLER, A UNITED STATES SENATOR FROM THE STATE OF IDAHO

Senator MILLER. Mr. Chairman and members of the committee, I have prepared no statement with respect to this matter and, of course, for that reason, I will be very short in what I have to say.

I was somewhat interested in the question asked by the gentleman over here on my right (Mr. Lemke) as to whether there had previously been any authorization for this project.

I mention that fact at the present time because I was unaware, until recently, that the dam for the Palisades Reservoir was moved upstream quite considerably, since I knew where it was some years ago. Whether or not there was any authorization I do not know.

Furthermore, during the very early part of the year some of the Idaho Falls energetic people talked to me about what a wonderful thing the completion of the Palisades Dam would be, insofar as the city of Idaho Falls is concerned, and they interested me to some extent. For that reason I did talk with the second assistant of the Department of the Interior incident to said dam and its benefits.

The Idaho Falls people were particularly interested in having the dam constructed, among other things, for the purpose of securing additional power at Idaho Falls.

As you may know, Idaho Falls municipally owns its utilities, but would not have sufficient to perform the tasks that these people who were talking to me had in mind for the energy that could be generated if Palisades Dam were constructed.

We have in that vicinity a great deal of low-grade ore, just whole mountains of it, and it is not so far from Idaho Falls. If we had adequate road facilities to it, which is just a comparative matter, we could make great use of it. Those people were vitally interested in making the city of Idaho Falls more prosperous. If we had the power and could bring in a lot of that low-grade ore, for the benefits that would inure from the smelting operations, it could be brought in cheaper. Then the power would also be available.

The particular representative of the Department of the Interior to whom I was talking gave that as a reason why there would be no activity with respect to the construction of the Palisades Dam, or as to why there had not been any heretofore. They recognized that, so he told me some of the benefits for irrigation, and that it would be very, very beneficial. However, what they were looking for was, of course, a multipurpose dam. They would not only have the benefits of irrigation, but they would also have hydroelectric power, and this dam would not be such as could participate in anything more, probably, than just the irrigation feature.

I have given considerable thought to that, and if there are any that have the same notion with me, I think that notion should be dispelled for the reason of the location of the Palisades Dam. We all know from the map that is high up on the south fork of the Snake River. In fact, it would be the farthest dam other than the dam at Jackson's lake that we would have. Of course, Jackson's lake, as you know, was created into a reservoir and supplies lands that also would be supplied to a certain extent by the Palisades.

These lands are down below American Falls Reservoir. Twin Falls and Minidoka, and all through that section of the country.

If we take into account for just a moment the hydroelectric possibilities of the dam such as the Palisades we must recognize the fact that all the irrigation waters or storage waters go farther on down the river and would, of necessity pass through that dam because it is higher up. Therefore, it appears to me that any thought that it would not contain what is largely sought from the Reclamation Bureau—or, I take it, from the Corps of Army Engineers—would be a thing of little or no consequence insofar as the possibilities of it are concerned because all of the water of the south fork of the Snake River—and it has a lot of it—would pass through that dam.

To me it would seem that the creation of hydroelectric power would be a matter of course rather than a matter of speculation.

We have tracts in Idaho above Pocatello or at least northwest of Pocatello and to the west of Lake Walcott, which forms a small reservoir for the Minidoka Dam, and west of the Minidoka Dam, and even to the northwest. There are vast tracts of virgin land that would be susceptible of irrigation in the event a project such as the Palisades is brought into operation.

To my way of thinking, and having been a native of the State of Idaho and seeing the development that has gone forward so far as irrigation projects are concerned, I can see what a vast area would be opened up in the event the Palisades Dam is authorized and utilized for the purpose of irrigating virgin tracts of land such as now are contemplated by the bills that are before these committees.

I think that is all I need say.

Mr. MURDOCK. Thank you, Senator Miller.

We have with us at this time Senator Taylor, who has an identical bill. Senator Taylor, may we hear from you?

STATEMENT OF HON. GLEN H. TAYLOR, A UNITED STATES SENATOR FROM THE STATE OF IDAHO

Senator TAYLOR. I am not going to address myself to the bill, but just to the committee, to thank you gentlemen for the courtesy extetded to our delegation from Idaho. They will give you the facts of the matter, as well as the Reclamation Department.

I was impressed with the Chairman's questioning, since he mentioned atomic energy and Idaho potatoes in one breath. It is generally conceded that Idaho potatoes were the first development of atomic energy.

If you will hurry up and authorize this, that is all we ask.

As has been pointed out, we have waited almost 10 years, and it is a very important part of the development of our region out there. The atomic energy plant is located nearby, and in case of a national emergency I think it would be well, particularly, to have these power features close by in case long-range transmission should be disrupted by hostilities. I think the power aspects are very important.

Of course, the reclamation is going to bring in a lot of very fertile land, and we have GI's out there who are waiting for homes and we are glad to welcome GI's from any part of the country who want to

come out and settle. We have room for them. All we need is the water.

Mr. MURDOCK. It occurs to the chair that it is well we do not have service-club regulations applying to committee hearings. Otherwise three gentlemen already would have to be fined for extensive advertising.

Thank you for your statement, Senator Taylor.

As I said at the beginning, this is a joint session. We had scheduled these hearings some weeks ago, and 24 hours in advance of the Senate hearing. As I said to Senator McFarland, the chairman of the Senate subcommittee, "We will be happy to have you come and meet with us." I wanted to open the session. I wanted, particularly, to invite the Idaho Senators to make a statement. However, I will be glad now to present the gavel to my colleague from Arizona, Senator McFarland.

Senator MCFARLAND. Thank you, Mr. Chairman. I would prefer that you go right ahead. We are just visitors and are trying to learn all that we can here.

Mr. MURDOCK. Very well.

When I came here in the Seventy-fifth Congress and was made a member of this committee it was an independent committee. The Subcommittee on Irrigation and Reclamation was a full and independent committee of the House. Congressman Compton White, of Idaho, was the chairman. I worked with him during those several years while he was chairman, and we put through a great many pieces of legislation which, I think, were highly beneficial to the West. I find that Congressman White is quite familiar with the whole field and realm of reclamation.

I am glad now to have him join with his colleagues in a statement concerning this particular legislation. Mr. White?

STATEMENT OF HON. COMPTON I. WHITE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Mr. WHITE. Mr. Chairman and members of the committee, since I represent the northern district of Idaho I am somewhat familiar with this project.

In the first place, I want to say that I am in favor and am in full support of this legislation. The passage of this bill, as I understand it, and the carrying out of the program proposed in the bill is always dependent upon one thing, and that is the agreement of the States of Wyoming and Idaho for the use of water and the division of water of the Snake River.

The Snake River has been our main source of water supply in irrigating the large and productive areas of southern Idaho, which is one of the most productive areas in the whole Northwest.

I was quite surprised, when talking from a railroad standpoint, to learn the amount of tonnage and freight handled by the great Union Pacific Railroad system. It handles the freight from California, and the products of the Willamette Valley and all the Oregon country. I was told that the greatest part of their freight originated and came from the great production of Idaho. We all know the history of the Idaho potatoes and all the products of that great fertile productive country, which was semiarid until water was put on it.

The Department of the Interior, through its Bureau of Reclamation, has made a great many studies, and has worked out the details of irrigation plans to utilize the waters of the upper Snake River.

In this same hearing where the Palisades Dam is now proposed to be built, I think the first site was changed due to underground conditions, when it was found necessary to put the project over to another site. We have now agreed and have found a proper site.

All we need is the agreement between the State of Idaho and the State of Wyoming.

This pumping project would be very beneficial. Not only will the proposed legislation give supplemental water to existing irrigation districts, but it will bring in new land, some of the most fertile in the State of Idaho.

I can think of no irrigation project that would do more good and bring more money to the people of Idaho. Do not forget the tax revenue to the Government in this project, which we have under consideration.

I am, therefore, sponsoring the legislation. I thank you, Mr. Chairman.

Mr. MURDOCK. We thank you for that statement, Mr. White.

Congressman Sanborn, you have given us a list of witnesses.

May I ask the clerk whether there is a departmental report on the bill?

Mrs. MCMICHAEL (the clerk). We have no report, as yet, on the bill.

Mr. MURDOCK. Congressman Sanborn, what is your knowledge of the departmental report?

Mr. SANBORN. Mr. Chairman, I understand that the report has been prepared and will be ready to present to the committee at the hearing tomorrow morning. That is my understanding.

Mr. MURDOCK. You have knowledge that it will be a favorable report?

Mr. SANBORN. That is my understanding.

Mr. POULSON. Mr. Chairman, is there a representative here from the Department?

Mr. SANBORN. Yes. There are Department men here who can speak on that subject with authority, I am sure.

Mr. MURDOCK. May we have a brief answer as to the report, Mr. Nelson?

STATEMENT OF WESLEY R. NELSON, ASSISTANT COMMISSIONER, BUREAU OF RECLAMATION, WASHINGTON, D. C.

Mr. NELSON. My name is Wesley R. Nelson. I am Assistant Commissioner of the Bureau of Reclamation.

The report which was drafted in the Bureau of Reclamation has been cleared by all of the various bureaus concerned. It is now before the Secretariat and it is expected that it will be presented to your committee tomorrow. Obviously, I cannot say for certain until the Secretary finally signs it but we anticipate that you will have the report tomorrow. [The report is printed on p. 92 of these hearings.]

Mr. MURDOCK. Mr. Nelson, if you will please be seated, I see you are the first witness representing the Department.

Mr. NELSON. Yes, sir.

Mr. MURDOCK. Before you proceed with your testimony I would like to say just one thing.

We have on this committee, the Public Lands Committee, the entire delegation in the House from the great State of Idaho. We find that both of them are great boosters for Idaho spuds and many other products.

(Discussion off the record.)

Mr. MURDOCK. While we have the two Senators from Idaho here, we want to tell them that we think very well indeed of their colleagues representing Idaho in the House of Representatives.

Mr. Nelson, as a representative of the Bureau of Reclamation, will you proceed with your testimony?

Mr. NELSON. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, as has been previously stated, you have before you several identical bills, H. R. 5500, S. 2195 and S. 2203, all relating to improvements in the upper Snake River Valley. The documents which we will present, and the testimony of the witnesses that will appear before you, will give the committee sufficient background for appropriate consideration of the bill. I want at this time only to give you some general information about the proposals to be made effective through the bill and to let you know of the keen interest of the Bureau of Reclamation in those proposals.

The purposes of the bill are the reauthorization of the Palisades Reservoir and the authorization of the power installation at American Falls Dam, together with authority for disposition of unsold space in American Falls Reservoir, and the authorization of the north side pumping division of the Minidoka project.

Later the witnesses from the field will point out these various features in detail and give you an explanation of each one.

Commissioner Page of the Bureau of Reclamation, whom many of you remember, presented the original plan for Palisades Dam in 1941, but its construction was regarded then, as now, as being dependent on the working out of assurances of a minimum water supply through the curtailment of certain wasteful winter diversions in the upper Snake River Valley. The Palisades Dam project was authorized in December 1941 upon the basis that these negotiations be worked out prior to construction. The negotiations and plan of operation, together with the plans for facilities to accomplish the desired operation, have now been completed.

As a basis for those negotiations, it was necessary first to make an intensive study of the water supply problems of the upper Snake Valley, but the war prevented the completion of that study until late in 1946. Since the completion of the water supply report, regional representatives of the Bureau of Reclamation have been meeting and negotiating with the water users as to ways and means of curtailing winter diversions. It was gratifying indeed to receive a report from Mr. Newell early this year indicating that agreement in principle had been reached as to this problem and the related one concerning the disposal of the heretofore unsold space in American Falls Reservoir. The results of these negotiations are a special tribute to the patience of Mr. Newell and the confidence reposed in him by the various factions in the upper Snake River Valley, but I leave to him the privilege of discussing this in greater detail.

One phase of the proposal before you I wish to dwell on in a little more detail. Since the cessation of hostilities in the last war great pressure has been put on the Bureau of Reclamation to complete promptly the development of new land opportunities for veterans. In Idaho the immediate possibilities of this kind are limited, but one of these is the North Side Pumping Division of the Minidoka project. That is an especially fine body of land lying north of the Snake River in the vicinity of Rupert.

Senator McFARLAND. Mr. Chairman, may I ask a question?

Mr. MURDOCK. Yes, sir.

Senator McFARLAND. Why are the possibilities limited? Is that on account of the elevation of the land there?

Mr. NELSON. The available water supply, primarily.

Senator McFARLAND. I thought Snake River had more water in it than Idaho was using.

Mr. NELSON. In the particular area where it could be applied to the lands I am confident that the water supply is fully appropriated, for the lands that are available.

Senator McFARLAND. For this project?

Mr. NELSON. For this project in this particular area.

Senator McFARLAND. But there are areas that could be developed in Idaho, are there not?

Mr. NELSON. There are other areas that could be developed in Idaho. The Mountain Home project is one. The costs of those developments are quite large, as you undoubtedly know.

Senator MILLER. Do not forget the Bruneau tract of 1,000,000 acres.

Mr. NELSON. Yes, sir. Thank you for that comment.

Mr. BARRETT. I might say to my good friends from Idaho that all of the water to be stored in the Palisades Dam is Wyoming water, and we want to use a little of it in Wyoming.

Mr. PAULSON. I would like to ask the Senator a question. Do you consider that all the water in the Snake River will be needed for the development of Idaho?

Mr. BARRETT. We hope not.

Mr. PAULSON. And Wyoming.

Mr. SANBORN. Mr. Chairman, in answer to that I believe that Idaho will not be able to hold all the water any more than Wyoming will be able to hold all the water. Some little will get away.

Mr. PAULSON. The point is that you are going to have need for it, and it will not be going down into the Columbia River and be used as a propaganda move of the Department right now to say that it ought to go to California.

Mr. BARRETT. I will say to my colleague from California that we cannot hold all this water in Wyoming and make beneficial use of it. We can use a little.

Senator McFARLAND. I am afraid we cannot talk about developing the State unless California comes in.

Mr. POULSON. I just wanted it on the record at this point that we do not want any of that water. I think my colleague, Mr. Engle, will back me up on that. We are not asking for that water.

Mr. ENGLE. We would take it if we could get it.

Mr. SANBORN. Well, we in Idaho certainly appreciate the fact that California is not after that water.

Mr. NELSON. The Bureau long has had plans for the development of these lands. The lands are the present public lands, and they have been under withdrawal since 1908 looking toward their ultimate development. The original plan was for their development by the use of unsold space in American Falls.

During the course of negotiations as to ultimate disposition of American Falls space, it appeared for a time that the area to be developed would have to be greatly reduced because of insufficient storage water. However, with the well program now proposed, it now seems probable that the total development will embrace 77,650 acres.

Under the arrangement now proposed, a part of the division, called unit A, will be developed with stored water; the remaining lands, unit B, to be developed through pumping of underground water.

The Bureau of Reclamation with the cooperation of the Geological Survey, during the past 2 years, has carried on an exploratory well-drilling and test pumping program, and a number of private wells have been put down in the area. It is, of course, not possible to indicate now whether the entire area of 64,000 acres of land regarded as suitable for irrigation in unit B can be developed through the well program, but the prospects are promising.

Mr. BARRETT. Mr. Nelson, may I ask you a question right there? Is it because there is not sufficient water that you find it necessary to put down these wells?

Mr. NELSON. The problem in the Snake River Valley, which Mr. Newell will discuss later, is a very complicated one.

Mr. BARRETT. Very well. I will withhold the question.

Mr. NELSON. Unless you want to discuss the matter at this time I will let Mr. Newell explain it later, because he is more familiar with the details.

Mr. BARRETT. Very well.

Mr. D'EWART. Mr. Nelson, will he go into the geological results of putting in these dams in the headwaters, and the effect it may have on the springs below?

Mr. NELSON. Mr. Clinton, the man who had charge of the later investigations, can give you some information on that subject.

Mr. D'EWART. I understand they made extensive surveys.

Mr. NELSON. Yes, sir.

Actual experience with the pumping operations will, in the final analysis, dictate whether all of these lands, or possibly more lands can safely be supplied from the underground supplies. For that reason, our plan of development is flexible so as to permit full use of safe underground water withdrawals, without the possibility of damaging overdraft.

The problem in the upper Snake River Valley has been for many years that of providing adequate supplemental storage for existing irrigated lands. While the Bureau of Reclamation does have a special responsibility concerning the development of new lands, and especially public lands, it is also concerned about adequate storage for lands already developed. The opportunities for such storage are limited and the Palisades site appears to afford the one best remaining opportunity for the upper Snake River Valley. We feel, therefore, that it will be of more than usual moment to Idaho to have the Congress approve a general plan that provides adequate supplemental water

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for existing projects, and provides also for the development of a sizable block of new, public land.

Mr. Chairman, at the completion of my statement or at some place in the discussions I think it would be appropriate to insert certain documents.

I should like to submit for the information of the committee certain other documents.

I have with me a report on the Palisades project which has been submitted by the Secretary of the Interior to the President through the Bureau of the Budget; the report on the Minidoka north side development, which has been sent to the interested States for comment; and a pay-out schedule for the American Falls power plant. The committee may desire to have these as exhibits for its use in considering the bill.

Mr. MURDOCK. Without objection, they may be submitted for this purpose.

Mr. NELSON. Thank you, sir.

Mr. NELSON. Then I have a letter from Governor Robins of Idaho commenting on the north side pumping division of the Minidoka project.

I understand that a letter from the State engineer of Wyoming with respect to the Palisades project has been forwarded but has not yet been received, and that it is favorable. I believe it would be desirable to place it in the record at this point, when it is received.

Mr. MURDOCK. Without objection, it may be placed in the record at this point.

(The document to be furnished is as follows:)

STATE OF WYOMING,
STATE ENGINEER'S OFFICE,
August 6, 1940.

Mr. WESLEY R. NELSON,
Acting Commissioner, United States Department of the Interior,
Bureau of Reclamation, Washington 25, D. C.

DEAR MR. NELSON: This will acknowledge receipt of your letter of July 8, 1940, inclosing two copies of your supplemental report on the Palisades Dam and Reservoir project in Idaho. One of these copies is being mailed to Mr. Clifford Hansen at Jackson, Wyo.

Wyoming water rights, and in particular its right to the use of an equitable portion of the water of Snake River unappropriated at this time, would be seriously jeopardized by construction of this project in the absence of a compact or agreement with Idaho on division of the water.

Representatives of the two States have recently met and entered into an agreement that must be drafted into the form of a compact and approved by the representatives of the States, the legislatures and governors of the States, and consented to by the Congress of the United States before it becomes effective.

With the assistance of Mr. H. J. Newell, Federal Representative on the Snake River Compact Commission, and the legal and engineering staff of the Bureau of Reclamation, I feel sure that a satisfactory compact will finally be approved.

My only further comment is to the effect that your report appears to be complete and comprehensive, and seems to be ample evidence of the necessity for construction of Palisades Reservoir in the over-all development plan for the Columbia River Basin.

Yours very truly,

L. C. BISHOP, *State Engineer.*

Mr. MURDOCK. Would it be desirable for the committee to hear Governor Robins' letter read? It is short.

Mr. NELSON. It is short, sir. If you like I shall read it.

Mr. MURDOCK. I think that would be preferable.

Mr. NELSON. It is addressed to the Honorable Michael W. Straus, Commissioner of Reclamation.

MY DEAR COMMISSIONER: I have had on my desk for study for the last 3 weeks the proposed report of the Secretary of the Interior on the north side pumping division of the Minidoka project, Idaho.

This project has been a part of the over-all planning for nearly 45 years largely because it was, even thus early, recognized that the lands involved were, by the reason of their fertility, climate, and situation and topography, well suited to intensive agricultural use.

The project, in its major portion, will make beneficial use of Idaho's subterranean waters available in the area as demonstrated by the great amount of investigation work done by the Bureau. Developed by individual units as planned, there should be no deleterious effect on the subterranean water supply and continuing studies by the Bureau will keep check on this feature.

Referring again to history, when 500,000 acre-feet of American Falls Reservoir space was reserved for this project, it was naturally implied that as and when the development was feasible the obligation would be met.

For the above reasons and since new irrigated land in Idaho is in demand and since there is presently none being developed elsewhere exclusively for veterans, this project has the hearty approval of Idaho.

Sincerely yours,

D. A. ROBINS,
Governor of Idaho.

Mr. D'EWART. Mr. Chairman, this letter only covers part of the authorization in H. R. 5506. Does the Governor of Idaho approve the rest of the features?

Mr. NELSON. The project report concerning the reauthorization of the Palisades project was not required to be forwarded by law to the governors of the States but it was sent to them for informational purposes.

Similarly, the American Falls power plant is considered as already authorized. The present proposal is for the completion of the plant.

Mr. D'EWART. Does the Governor of Idaho give his approval to all features of H. R. 5506?

Mr. NELSON. We only have from him the statement with respect to the Minidoka north side unit.

Mr. SANBORN. Mr. Chairman?

In answer to that I believe that the Governor will have a representative who will speak for him on the bill.

Mr. NELSON. I understand there is a representative here.

Mr. BARRETT. Mr. Chairman.

Mr. MURDOCK. Mr. Barrett.

Mr. BARRETT. I have been advised that the Governor of Wyoming and the State engineer have sent down a communication on this matter. It has not been received in my office as yet. It will probably be received today.

I should like to inquire from you, Mr. Nelson, if my understanding of the situation respecting Wyoming and Montana is correct.

I have before me a copy of a resolution adopted by the Snake River Compact commissioners on July 29 last. I assume that you have a copy of that, also.

Mr. NELSON. Yes, sir.

Mr. BARRETT. The resolution is short. I will read it:

Be it resolved by the Snake River Compact commissioners as follows:

That, with respect to the main stem of the Snake River and the Salt River, the formula for the apportionment of water measured at the State line, excluding rights for use in Wyoming established prior to July 1, 1949, shall be in principle as follows:

Idaho shall have the right to divert directly or store 96 percent thereof.

Wyoming shall have the right to divert directly or store 4 percent, subject to the following conditions:

One-half thereof, or 2 percent, of the flow at the Idaho-Wyoming State line may be used without restriction. The other one-half, or 2 percent, of said flow at the State line shall be subject to the requirement that replacement storage shall be provided for the reimbursement of Idaho users who may be injured by such diversion to the extent of one-third, and all diversionary rights to be established for projects to be constructed by Federal agencies shall be subject to this requirement until this 2 percent has been appropriated for use in Wyoming.

That the adoption of this formula is subject to clearance by L. C. Bishop, State engineer of Wyoming, and, of course, to the incorporation of it in a suitably framed compact to be executed by both State compact commissions and subsequently ratified by the State legislatures of each State and thereafter approved by the Congress.

That it is the sense of this meeting that the Idaho Compact Commission will request that the Bureau of Reclamation do not request any more appropriations, other than that now pending in the amount of $205,000, be made for Palisades Reservoir until after the Idaho Legislature shall have ratified a compact in accord with the foregoing.

Now, the difficulty with our State has been occasioned because of the recent illness of our State engineer, Mr. Bishop. However, he has recovered and he advises that he has approved this resolution.

I would like to ask you now if it is not your understanding that the reauthorization of this project will be upon the condition that appropriations pursuant thereto will be made in accordance with this understanding, and that clearance for appropriations will be conditioned upon (1), the execution of the compact and ratification by the legislature of the State of Idaho and approval by the Governor; and (2), that the Bureau will withhold its request for appropriations until the Idaho Legislature has acted. At least, since I do not want to put it quite that strongly, they may make the request for appropriations but they will advise the Appropriations Committee after the Idaho Legislature has ratified this compact that there is no reason why the appropriations should not be made.

Is that not your understanding?

Mr. NELSON. Yes, sir. I believe it would be desirable to make the request for the appropriation because it takes a long time to follow designated procedures in getting the item before the Congress.

However, when the item does come before the Congress a full statement will be made of this proposal so that the Congress will be fully aware of it.

I assume that the State legislature will have an opportunity to act upon this item before appropriations are actually passed by the Congress next year.

Mr. BARRETT. I certainly approve of that arrangement and I think it is very fair and equitable and satisfactory and in accordance with the proper methods for handling these matters.

My State, of course, furnishes most if not all the water that will be stored in the Palisades Reservoir and we are agreeing to take a very small part of it—4 percent to be exact—together with such other water as we presently have the right to use.

Mr. WHITE. Will the gentleman yield for a question at that point?

Mr. BARRETT. Just let me finish this line of thought, please.

Accordingly, as I understand the situation, Wyoming will interpose no objection to the reauthorization of the Palisades project with the

distinct understanding that while the Bureau may request from the Bureau of the Budget an appropriation for the Palisades Dam for the fiscal year 1951 that neither the Bureau nor the State of Idaho will insist upon appropriations pursuant thereto and in fact they will advise the Appropriations Committee that they have agreed not to request the appropriations unless and until the Idaho Legislature has ratified a compact and the Governor has approved same providing for the agreement that we have outlined above.

Mr. NELSON. I think that is a very fair statement, Congressman Barrett.

Mr. BARRETT. Thank you very much.

Mr. NELSON. And the Bureau of Reclamation will follow that line.

Mr. BARRETT. I yield to the gentleman from Idaho.

Mr. MURDOCK. Mr. White?

Mr. WHITE. You stated a minute ago that the request for the appropriations should be made, so that the money could be made available, and not too much time would be lost.

Mr. NELSON. It is a matter of the procedure involved. We must put in our request to the Bureau of the Budget within the next month.

Mr. WHITE. Assuming that this authorization is made for the passage of this legislation, then the item would be put into the Bureau of Reclamation budget and would be sent to the budget and be included in the regular Department of the Interior appropriation bill.

Is that the plan to be followed?

Mr. NELSON. We would make the request to the Bureau of the Budget within the next month, as I mentioned, anticipating that action would be taken on the authorization, and ratification by the State of Idaho, prior to the time the appropriation is actually made.

Mr. WHITE. In other words, you would make a separate budget estimate and send it up to the Bureau of the Budget as soon as this authorization is made for this legislation. Is that the plan?

Mr. NELSON. We would send it up at this time, regardless of whether the authorization is made or not. If the authorization is not made the Bureau of the Budget may refuse to send the item to the Congress.

Mr. WHITE. Then in your statement you want to anticipate and expect to anticipate favorable action on this authorization, and you will fortify yourself by having the Bureau estimate in there?

Mr. NELSON. That is right; yes, sir.

Mr. WHITE. I think that is a good procedure.

Mr. MURDOCK. Off the record just a moment.

(Discussion off the record.)

Mr. NELSON. Mr. Chairman, would it be in order for me to finish my statement? I only have a couple more comments.

Mr. MURDOCK. Go right ahead.

Mr. NELSON. The officials for the Fish and Wildlife Service are here to testify on behalf of the plans, and I have a favorable report by the National Park Service which I would request be inserted in the record.

Mr. MURDOCK. Without objection, it may be admitted.

(The document is as follows:)

STATEMENT BY THE NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, RECREATIONAL ASPECTS OF THE PALISADES PROJECT, IDAHO, BEFORE THE JOINT HEARING OF SUBCOMMITTEES OF THE SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS AND THE HOUSE COMMITTEE ON PUBLIC LANDS (IDENTICAL BILLS, H. R. 5506, S. 2198, AND S. 2203, 81ST CONG., AUGUST 8, 1949)

The National Park Service has consistently maintained that no satisfactory method has been developed for evaluating recreational benefits at reservoir sites in terms of dollars and cents. The sale of water for irrigation purposes or municipal consumption and the sale of electricity are ordinarily transactions in marketable commodities. Recreation, however, is an intangible thing. The kind and degree of benefit that people derive from recreational areas varies from every individual, with the weather, and with many other factors that cannot be expressed in monetary terms. Since there is an undeniable economic benefit, however, connected with the provision of recreational facilities in connection with reclamation operations, the National Park Service feels that it is justified in assigning a "managerial range" to such benefits, drawing on its long experience in the field of outdoor recreation for its conclusions.

The construction of the Palisades Dam and the plan of operation proposed by the Bureau of Reclamation would result in important recreation advantages, mainly in the vicinity of Jackson Lake but also to some extent in the reservoir behind Palisades Dam. The stabilization of Jackson Lake would greatly enhance the appearance of the shore line, which is highly unattractive when stumps and dumps under present conditions of levels. This improvement would also result in a far better foreground for the spectacular Grand Tetons when viewed across the lake by all travelers through that country. Many additional recreational developments and uses, especially for boating and bathing, would be possible with a stabilized lake area. With a constant water level at the shore line instead of the present unsightly mud flats, attractive opportunities would be provided for the location of accommodations for visitors, both transient and vacationing, and the establishment of business such as boat docks would be encouraged.

Despite the adverse factors of scenery alterations in the general vicinity, rough topography, and fluctuations in water levels of the Palisades Reservoir it is certain that a structure like Palisades Dam together with the large body of water in the reservoir will attract people in the area. The Service estimates that these will number about 1,250 people annually. Accommodations such as parking, camping and picnicking areas, access roads, water, toilets, and boat piers should be provided in order that the public may take full advantage of the recreational opportunities of the reservoir.

It is the judgment of the National Park Service that the benefits accruing to the Jackson Lake area by reason of construction of the Palisades Dam would be worth $1,000,000 over the life of the project, due to the increased tourist business which would result and to the fact that visitors would stay for longer periods under more attractive conditions. It is also estimated that benefits in the amount of $300,000 would be created by the provision of recreational facilities at the Palisades Reservoir site. At the present time approximately 250,000 persons annually visit the Jackson Lake area. Based on this number alone the total proposed expenditure in recreation of $1,240,000 would only amount to about 48 cents per visitor over the life of the project.

Mr. NELSON. Thank you, Mr. Chairman.

That agency would also be glad to have a representative appear in person on behalf of the plan.

There are three representatives from the Bureau of Reclamation here to testify today. The first is Mr. Robert Newell, now a consultant, and formerly the regional director of region 1, in which these projects are located.

The second is Mr. Frank Clinton, the man who was in charge of the recent investigations on this project, and who knows all the answers in that regard, and who is now assistant regional director of region 1, receiving that appointment about a month ago.

The third is Mr. Howard R. Stinson, the chief counsel for region 1, who is one of the top-notch lawyers in Reclamation. He has had

some 15 years with the Department, of which 11 have been with the Bureau of Reclamation. He has been in region 1 for the last 5 years.

Mr. Newell retired just recently, after more than 31 years of service with the Department. He started in 1909 as an engineer aid on the Minidoka and Boise projects, so he knows this area from a long way back.

He was out of the service for a while, including some final-control investigations over in China, and he came back in 1923.

Among the various undertakings which he accomplished satisfactorily were superintendent of the Boise project and construction engineer on the Deadwood Dam of the Boise project.

Later assignments included service as construction engineer on the Clear Lake Dam, eastern Washington, and he was also connected with the construction of the Owyhee Dam.

He was appointed regional director in 1945. He handled prior to that time the raising of the Arrowrock Dam.

One of the items that he paid a lot of attention to, and as a result the report was completed recently, was the comprehensive development of the Columbia Basin.

Finally, I should say that he on his retirement received the highest award which the Secretary of the Interior could confer, that for distinguished service.

I would like for Mr. Newell to be the next witness for Reclamation.

Mr. MURDOCK. Thank you for that statement, Mr. Nelson.

(Discussion off the record.)

Mr. MURDOCK. Now, if Mr. Nelson will remain with us a while, we may want to ask some questions.

Mr. MILES. Mr. Chairman!

Mr. MURDOCK. Governor Miles.

Mr. MILES. Before the witness proceeds with his testimony, there was a statement made this morning that I cannot let go unchallenged. Some of my colleagues here promised to come to my rescue, but they do not seem to be coming forth.

It was stated that Idaho and the Idaho potato created atomic energy. I want it understood that it was New Mexico and the pinto bean.

Mr. MURDOCK. My impression is, Governor, that you do not need anyone to come to your assistance.

Mr. POULSON. Mr. Chairman, will Mr. Nelson be the chief representative of the Department, or Mr. Newell?

Mr. NELSON. I expect to be able to answer questions relating to departmental policy.

The gentlemen from the field, of course, are familiar with the figures and facts relating to the project, but I shall be at hand to answer any questions you wish to ask.

Mr. POULSON. I want to ask some questions later on.

Mr. MURDOCK. Mr. Newell is scheduled as our next witness.

STATEMENT OF ROBERT J. NEWELL, CONSULTANT WITH THE BUREAU OF RECLAMATION; FORMERLY REGIONAL DIRECTOR, BUREAU OF RECLAMATION, BOISE, IDAHO.

Mr. NEWELL. Mr. Chairman and members of the committee, I am R. J. Newell of Boise, Idaho. I was recently regional director and now am consultant with the Bureau of Reclamation.

This project that is to round out the land and water development in the upper Snake River Valley is quite important because that development now includes more than 1,000,000 acres of good irrigated land.

I would like in the beginning to tie down this term "upper Snake River Valley." The formal Palisades report designates the watershed of the Snake River above Milner Dam including lands irrigated by canals diverting at that point as the "upper Snake River Valley."

Now, in local usage, we divide this section in two parts at the American Falls Reservoir. About half the improved land is below the American Falls Reservoir and it is locally referred to as the lower valley; and the other half above will probably be referred to by succeeding witnesses as the upper valley.

This land in the upper valley was developed first largely by private enterprise. Practically all and certainly the greater part was under ditch before the year 1900.

After the beginning of this century the two Twin Falls tracts, the south side and the north side, were developed by private capital under the Carey Act. Very nearly at the same time, beginning about 1904, or 1905, the Minidoka project was developed under the Reclamation Act. That includes something over 100,000 acres.

The south side of the Minidoka project is almost entirely watered by pumping and a power supply was necessary to make this pumping possible, and a power plant was installed at the diversion and storage dams at Minidoka to supply this power for pumping.

As soon as operations began, it seemed wrong to let that power plant stand idle through all the season that irrigation was not going on, and arrangements were made to peddle it out in the nonirrigation season to settlers in the farming area and in the towns of Rupert and Burley largely at first for space heating. Thus the project got into the power business 40 years ago.

The planning for this area of over 1,000,000 acres of irrigable land in the valley was handicapped by lack of water-flow records. At that time the records of river flow had not been kept long enough to discern possible years, sometimes two or more successive years, of short flow. Alas, through the years since that time the farming practice has changed from the old grain and hay economy in which late water was not important to the more high-priced row crops such as the Idaho potato and sugar beets which demand plenty of water in the late season.

It was soon discovered that supplemental water in large amounts would be necessary for the land that had been developed practically all by 1920.

There is a reservoir at Jackson Lake on the edge of Wyoming that was originally installed for the Federal project at Minidoka.

There is also a reservoir at Henry's Lake, which was installed for the privately irrigated land in the upper valley, and that is practically all the storage that was available in 1820.

By that time the demand for supplemental water had become strong enough that the provision of storage was the main interest in the next period. For the extreme upper end of the upper valley the Island Park Reservoir and the Grassy Lake Reservoir were provided.

For the major part of the valley, both upper and lower, the large

reservoir at American Falls was built, and Jackson Lake Reservoir was increased in capacity.

It was then believed that the American Falls Reservoir would be sufficient to meet the demands for supplemental water. Subscriptions were taken from the districts that were short of water, and, incidentally, those districts were required to put up the cost of the storage in advance at that time; and such subscriptions amounted to half the feasible capacity of the reservoir.

Some of the districts underestimated how much storage they would need. Others were not in an organizational or financial condition to put up the money.

There remained one-half that reservoir capacity which was unsubscribed for, and it was proposed by the Government at that time to hold it for the area that we now term the Minidoka north side pumping.

Shortly after this the Gooding division, which is on the Wood River, got into serious water supply difficulties and Congress authorized the sale of half the remaining reservoir space in American Falls to the Gooding, but the inference was that the other half, or one-fourth of the total space in American Falls, would still be reserved for the Minidoka north side pumping, which is a part of this general project.

Mr. WHITE. Will the gentleman yield there for just one little question?

You speak of space. Was there water in the space or was it just vacant?

Mr. NEWELL. The American Falls space yields almost 100 percent water. The reservoir has not filled every year, but generally it fills and space means water.

Mr. WHITE. The supply coming down the Wood River to the big irrigation district was found to be short, and the arrangement was made to take the water and just apply it to half the land, and make a deal with the Government to get water from this reservoir for the other half by building a long canal?

Mr. NEWELL. You are speaking of Gooding now?

Mr. WHITE. Yes.

Mr. NEWELL. That is correct.

The original Gooding development covered too much land for the water supply available.

Mr. WHITE. It was to get the water from the Wood River?

Mr. NEWELL. That is right.

Mr. WHITE. But it was insufficient, so they cut it down to one-half and eliminated the other half from consideration, and then got water from this reservoir on the Snake River for irrigation. Is that the Minidoka or the American Falls?

Mr. NEWELL. American Falls.

Mr. WHITE. It took a long canal to do that.

Mr. NEWELL. Yes.

Mr. WHITE. And the people on the other half who got water from the Wood River had to help bear the expense of building this canal?

Mr. NEWELL. That is right.

Mr. BARRETT. Mr. Newell, would you mind pointing out the 650,000 acres that will get supplemental water on this project and also the new land, on the map?

Mr. NEWELL. The new land is easily pointed out. It is colored in yellow, in those two locations [indicating]. One is adjoining the Minidoka project and one is adjoining the American Falls Reservoir.

It is not so easy to point out the 650,000 acres which would subscribe for space in the proposed Palisades Reservoir. That would include the north side, Twin Falls, out the south side, possibly a small subscription by each side of the Minidoka, and the area in the upper valley varies. Some districts need a little water, some of them need none at all, and some need a very considerable amount; so there is a large percentage of this upper valley area that is subscribing for more or less Palisades space.

Mr. WHITE. Will you indicate where the Palisades Reservoir will be?

Mr. NEWELL. The Palisades Reservoir is on the south or main fork of the Snake, a few miles below the Wyoming-Idaho line, and the backwater crosses the line several miles.

Mr. WHITE. How much is the lift? How high will the lift be?

Mr. NEWELL. For the Minidoka north side? It is about 160 feet.

I believe I have worn out the usefulness of that chart for a moment, perhaps.

Mr. LEMKE. Let me ask you this question: How many acres of valuable land do you flood or cover up with water and retire from cultivation entirely because of this dam?

Mr. NEWELL. There are about 6,000 acres which are being farmed, irrigated or dry-farmed, in the reservoir area.

Mr. LEMKE. So it is just a small amount?

Mr. NEWELL. Clerk. And that is in a high mountain valley.

Senator MILLER. Mr. Newell, would you irrigate any on the south of the American Falls Reservoir, by gravity flow?

Mr. NEWELL. It would be possible to divert a good many miles up the valley through an Indian Service canal, and extend that canal far enough down to cover that land. It is believed that it will be cheaper and more feasible not to use that long canal but to pump directly out of the American Falls Reservoir.

Senator MILLER. About how many acres would be included in that tract?

Mr. NEWELL. There is believed to be in the neighborhood of 30,000 acres of good, irrigable land. Perhaps a little less than that.

Mr. MURDOCK. While we are on the technical phase of it, one or two questions occur to me, right at this point.

What is your water duty in that area? About how much water per acre do you use for farming operations?

Mr. NEWELL. That varies very widely according to the soil conditions. The Twin Falls tracts, I believe, use a little over 3 acre-feet per acre, between 3 and 4.

The requirement increases as you go up the river, and much of this upper valley is on a gravel bed and uses a much larger amount of water which, however, generally returns to the stream and is reused at lower points.

Mr. MURDOCK. Yes. Senator, have you any questions to ask?

Senator MCFARLAND. You had not finished your testimony, had you?

Mr. NEWELL. No.

Mr. MURDOCK. Go right ahead, Mr. Newell.

Mr. NEWELL. It should be mentioned that when the American Falls Reservoir was built it was contemplated that at some time a power development would be made there, and pen stocks were installed in the dam for use if and when such a power plant should be built.

Part of the cost of right-of-way and water rights was charged to power and, has been held in a suspended account since that time.

Shortly after American Falls was built we had an unprecedented drought in the Snake River Valley which lasted over 5 years, 1931, 1932, 1933, 1934, and 1935. In two or three of those years the reservoir did not fill. Particularly in 1934 and 1935 the supply was very short and the damage to crops was very severe.

The settlers immediately started a request for investigations for further storage. In that connection on new projects it is frequently difficult to get domestic water. Wells frequently have to be very deep and are very expensive, and it is the usual procedure to use ditch water held in cisterns for domestic purposes and in ponds for stock water which requires the operation of canals in the winter.

The upper Snake River Valley is rather a cold country and to keep ditches open and operate them through the winter you must run them to considerable depth, so the practice has grown up on a considerable part of the valley that diversions of water were made in the winter for domestic and stock purposes and in much greater amounts than were actually used, but these greater amounts were made necessary by the possibility of getting the water through the ditches in cold weather.

The study for additional supplementary water, as stated by Mr. Nelson, ended in the Palisades project report that was submitted in 1941. It was given a feasibility certification contingent on the saving of some of this winter water that had been diverted in such large amounts in the past so that there would certainly be something to put in the reservoir if it were built. That was a difficult problem. That has required much of negotiation that has gone on since 1941. That is the contingency that was necessary before this request for a reauthorization could be made.

The project plan has developed. Arrangements for the saving of at least 135,000 acre-feet of this winter water diversion were necessary. The plan also required an agreement for the disposition of the remaining unsold space in the American Falls Reservoir. This required settlement of the long deferred plan for the Minidoka north side pumping, and that required a provision for pumping power for that particular project.

So the project that we have brought in here for authorization includes, as has been laid out, the Palisades storage reservoir with power in connection, the Minidoka north side pumping, the disposition of the unsold space in the American Falls, and the provision of power at the American Falls Reservoir.

For Palisades we have received appropriations for preliminary work for the past four years. We have completed or practically completed all the foundation exploration, the testing and drilling and surveying.

Mr. D'EWART. May I inquire with regard whether or not it is class A funds or class B funds? What are those appropriations you have used?

Mr. NEWELL. I am not familiar with those terms.

Mr. D'EWART. Class A is conetruction funds and class B ie precon- etruction and class C, under the rules of the Appropriation Committee, is eurveys and studies.

Mr. NELSON. Those were in the category of construction funds for the authorized project.

Mr. NEWELL. We have hought some right-of-way for the dam and camp.

As the negotiatione necessary for authorization looked more promising we have started the preliminary work that would be necessary when the ectual construction of the dam could start.

We have let a contract for a tranemission line to carry construction power into the site, euoh power as would be needed, as soon as the contract for the construction of the dam was let.

We have signed a relocation agreement with the State of Iduho for relocation of the Stote road that traverses the reservoir. The first echedule of that road construction has been advertised for bids and bids received and I believe that the work has been awarded this past week end.

On the American Falls Dam the old penstocke are still waiting to be connected for power development there.

In regard to a settlement of the disposition of the unsold storage in American Falle, that hns been a subject for long, extended negotiations. As I have stated, there wae originally reserved about half the total capacity for new land. Then half of that part was disposed of to the Gooding district.

When the severe drought etarted in the early 1930's the remaining watar was leased to water users throughout the valley, and that leasing arrangement lus continued ever since. The unsold epace has been leased from year to year to present water users for 18 years.

These water users hnve urged that they be allowed to purchase this remaining space in American Falls, and the proponents of the Minidoka north side pumping project have urged that the space all be reserved for this north side pumping.

Gradually a compromise has been worked out in which an agreement hns been made that about 70 percent of the remaining unsold space be sold outright to the water ueers in the valley who have been leasing it all these years and the remaining 25 to 30 percent be used on new land, divided between the Minidoka north side pumping and the Michaud arca.

Mr. WHITE. May I nsk a question there?

If that water is sold outright, what becomes of the space in the reservoir from the north side plant which you propose to build now?

I underetood from your first statement that half the reservoir had been subscribed for, and the rest of the water or space had been reserved. Now you speak of selling it outright to water users. What becomes of the reservations made for the north side pumping in the event of such a eale?

Mr. NEWELL. It is proposed that there will still be reserved and earmarked for the Minidoka north side pumping a small part of this reserved storage space.

Mr. WHITE. You told us that so many aores were to be put under water, the eupplemental and new acres, by this proposal, for the north

side plant. If you only reserve a little space in the reservoir, will you have enough to do the job you propose to do?

Mr. NEWELL. Well, there enters the subject of ground water. It is an interesting fact that for over 200 miles down the Snake River there is not a single tributary from the north, all having been cut off by the lava flows.

Mr. WHITE. In other words, what you mean to tell the committee is that the Wood River and the flow of the Wood River and the flow of the Lost River disappear? They go underground and are not seen any more until they come out in Thousand Springs down on the walls of the Snake River?

Mr. NEWELL. That is correct. There is a great amount of underground water flowing through this north side area and it is planned to tap thie underground water for irrigation of the land on the North Side Minidoka, beyond what the reserved epace in American Falle and eome associated Palisades space will cover.

Mr. WHITE. Do you uct think that you are raising a very complicated and interesting issue in talking about tapping the water that flows underground, when you know that the local utility, the Idaho Power Co., is operating a big plant down at Thousand Springs, and you might deplete the water flow? Would we not get into trouble with the utilities if we tried to tap the weter flowing underground that emerges in the springs that flow out of the lava walls and are trapped there by the local utility and turned into power?

Would we not get into trouble if we tried to tap that underground flow?

Mr. NEWELL. The total water that it is proposed to pump out of the underground supply is less than 5 percent of the water that emerges in that Thoueand Springs area. It is physically possible that it could affect, to some such extent as that, the rights of the Idaho Power Co. in that area. If such effect wore established then some arrangement would have to be made about it, but it is a very small portion.

Mr. ASPINALL. Will the gentleman from Idaho yield?

Mr. WHITE. Certainly.

Mr. ASPINALL. In other words, as I understand it, it would not affect the feasibility of the project proposed here this morning?

Mr. NEWELL. That is correct.

Mr. WHITE. The question in my mind is this: Provision has been made to preserve a part of the space for this north side pumping now. It is now proposed to utilize that space. It has been explained to the committee that in past yoars due to the drought years there has been a shortage where the reservoir did not fill.

In the division of water between the different organizatione of water users, who would have priority? Would we be able to take care of the north side project in the event there were a shortage of water in the reservoir? Suppose it did not fill and there was not enough water to go around. How would you divide the water?

Mr. NEWELL. We have always divided the water in the American Falls in percentage of total space. If it lacked 10 percent of filling then each right in it would be reduced by 10 percent.

Mr. WHITE. Have you such a clause in your contracte with the different water users?

Mr. NEWELL. That is right.

Mr. WHITE. You are talking about an outright sale. Would they have to take a out, also?

Mr. NEWELL. Yes, indeed.

Mr. WHITE. I just wanted to clear up these items.

Mr. MURDOCK. Off the record a moment.

(Discussion off the record.)

Mr. MURDOCK. Senator Taylor?

Senator TAYLOR. There is no certainty of that? As you said, there is just a bare possibility that this water taken from underground in the Minidoka project would in any way affect the Thousand Springs, is that not what you said?

Mr. NEWELL. It certainly could affect it, only very slightly.

Senator TAYLOR. Then it is unlikely it would affect it at all. It is upriver quite a ways, and a good long ways. It is more than probable that the water that comes out of Thousand Springs much further down the river comes in from the north.

Mr. MURDOCK. Senator McFarland, did you have any questions?

Senator MCFARLAND. Will Mr. Newell be back on the stand tomorrow?

Mr. MURDOCK. Yes.

Senator MCFARLAND. His testimony has been very constructive, and I want to state that we appreciate the privilege of having this joint session with the House and trying to save a little time for these witnesses who have come so far, to keep them from testifying twice.

Mr. Newell has already given a good picture of this project and I will be glad to come back tomorrow to be with you.

Mr. MURDOCK. We appreciate having this joint session, Senator. Possibly Senator Miller has some questions at this point.

Senator MILLER. Well, all I am going to say or want to ask Mr. Newell is this: There has been no appreciable increase in the flow of the Thousand Springs since irrigation was brought into effect to the northeast of the springs, has there?

Mr. NEWELL. I do not have the records at hand, but I think that the flow in the Thousand Springs area has increased with irrigation on the north side of the river.

Senator MILLER. How long have you been acquainted with those springs?

Mr. NEWELL. Well, I have observed them for 40 or 50 years, but I do not have such records of their flow as are available in mind. I can produce them, I think.

Senator MILLER. And they serve no useful purpose at the present time, only to run some more water into the river? The only use that is applied to the Thousand Springs is one plant for the Idaho Power Co.?

Mr. SANBORN. Well, Mr. Chairman, I would like to interpose one observation at that point.

The valley of Hagerman is also irrigated from those springs. It is not just the Thousand Springs but other springs which have come from the same source. There is also an irrigation project of about 8,000 acres which gets water from this same spring source, and also power plants are operated from water that comes from the same underground source.

Senator MILLER. Yes.

Mr. SANBORN. As a matter of fact, my own home place is irrigated from this same spring water.

Senator MILLER. What I am trying to get at is that the Thousand Springs covers an area so far as the bank of the river is concerned running out of solid lava.

Mr. SANBORN. That is right.

Senator MILLER. Of a distance of 8 or 10 miles, in that vicinity, or it or 7 miles, at least.

Mr. SANBORN. It starts in the Blue Lakes near Twin Falls and continues for better than 40 miles down the river.

Senator MILLER. Yes. There was a good amount there before there was ever any irrigation up on the benches above.

Mr. SANBORN. I might observe, also, that there may be some increase since irrigation. My observation is that the flow has been quite constant through the years, however.

Senator MILLER. In other words, it would be purely speculative as to whether the irrigation above it increased that flow or not?

Mr. NEWELL. I would like to refer to the records on that.

Senator MILLER. I think it is rather inconsequential.

Mr. NEWELL. Check.

Mr. WHITE. Would you not include all the flow in the Hagerman Valley, and those streams, in the water that comes from Wood River and disappears through the lava beds? Would you not include all the water in the streams and springs in the Hagerman Valley with the Thousand Springs water? That comes down the Wood River and East River and disappears and finally comes out again down along the Snake in the springs, running into the Snake River.

Mr. NEWELL. It is usual to include all the spring inflow from the Milner Dam down as far as a distance of 50 or 60 miles, as a measure of this underground flow.

Mr. PAULSEN. Will the gentleman yield?

You are not positive, then, that the water which you will be pumping now is water that makes up the Thousand Springs?

Mr. NEWELL. No; I am not positive.

Mr. PAULSEN. That is what I say.

Mr. LEMKE. Even if it were, what harm is done? You are saving the water and using it; are you not?

Mr. NEWELL. We might be reducing the water used by the Idaho Power Co. through several plants in that stretch of the river.

Mr. LEMKE. But you create a lot of new power; do you not, by this dam?

Mr. WHITE. Will the gentleman yield to me?

Mr. LEMKE. Yes.

Mr. WHITE. For the purpose of the record, the water on the north-side pumping plant does not come in any way from the water of the flow that comes from the water in the Snake River and which is stored at the American Falls Dam. You are talking about the supplemental or additional places where you might tap some underground water with wells to the north, but the water covered by this bill is not underground water at all. That comes from the flow underground, and this water comes out of the main Snake River and is stored in the American Dam and Reservoir and will be lifted and put out into the ground.

Is that not correct?

Mr. NEWELL. The Minidoka north-side project that we are asking authorizatian for includes about 14,000 acres of land that will be supplied by surface water from American Falls and about 64,000 that we propose to irrigate by pumping from ground water, so that it is about one-fifth surface water and four-fifths ground water.

Mr. WHITE. That ground water is not the water that flows under this lava bed?

Mr. SANDORN. Yes; it is.

Mr. NEWELL. Yes, indeed; yes, sir.

Mr. WHITE. I wanted to get the record straight.

Mr. MURDOCK. Perhaps we ought to discontinue the testimony at this point.

You will be available tomorrow, Mr. Newell?

Mr. NEWELL. Yes, sir.

Mr. MURDOCK. At 10 o'clock?

Mr. NEWELL. Yes, sir.

Mr. MURDOCK. I, too, want to congratulate you on the splendid statement on a highly technical matter, You see, it is very difficult for us who live 1,000 or 2,000 or 3,000 miles from the area to get accurate information.

Mr. WHITE. Mr. Chairman, I would like to add to what the chairman has said in complimenting Mr. Newell for his wonderful and comprshensive statement and his technical grasp of the whole problem. I think it is as clear and as concise as anything I have ever heard.

Senator TAYLOR. May I say that Mr. Newell is one of our best-loved and most respected citizens out there in Idaho. He is not an individual out there; he is an institution.

Mr. MURDOCK. We can understand that very well.

The committee stands adjourned until 10 o'clock tomorrow morning.

(Thereupon, at 12 noon, Monday, August 8, 1949, an adjournment was taken until 10 a. m. Tuesday, August 9, 1949.)

PALISADES DAM AND RESERVOIR PROJECT

TUESDAY, AUGUST 9, 1949

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IRRIGATION AND RECLAMATION OF
THE COMMITTEE ON PUBLIC LANDS, AND A SUBCOMMITTEE
OF THE SENATE INTERIOR AND INSULAR AFFAIRS COMMITTEE,
Washington, D. C.

The subcommittees met at 10 a. m. in the committee room of the House Committee on Public Lands, the Honorable John R. Murdock (chairman of the Subcommittee on Irrigation and Reclamation) presiding.

Mr. MURDOCK. The committee will come to order, please.

We will proceed with our hearings. This is a continuation of the hearings on H. R. 5506, a bill to authorize the Palisades Dam and Reservoir project, and for other purposes.

We are glad to have the Senators join us for the conservation of their time and the time of the committee, and those people who have come some distance. I understand that other Senators are on the way here and will be here presently.

We are glad to welcome Senator Taylor again this morning.

Senator TAYLOR. Thank you.

Mr. MURDOCK. Mr. Newell was our witness yesterday and had not completed his testimony.

Mr. Newell, may we hear from you further?

STATEMENT OF ROBERT J. NEWELL, CONSULTANT WITH THE BUREAU OF RECLAMATION, FORMERLY REGIONAL DIRECTOR, BUREAU OF RECLAMATION, BOISE, IDAHO—Resumed

Mr. NEWELL. Mr. Chairman and gentlemen of the committee, there have been several years of field negotiation leading up to this plan that has been presented. A great deal of that negotiation had to do with the disposition of the unsold space in the American Falls Reservoir. There remains 433,000 acre-feet of space which has not been sold but which has been leased for the last 18 years to water users in the valley.

The proponents of the development of the new lands wanted all of this space. The old water users in the valley who had been leasing the space also wanted it all. The result here offered is a compromise between those two positions.

It is clear that if the space in question is used on now land the prospective shortages on old land in the valley will be more severe than would be the case with this compromise.

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Orr Affidavit

Exhibit 61

Excerpted pages of the "Report on Upper Snake River Storage Investigations – Volume I – Snake River Above Idaho Falls," by E.B. Debler, Hydraulic Engineer & J.R. Riter, Associate Engineer of the U.S. Department of the Interior, Bureau of Reclamation (June 1935)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

REPORT ON

UPPER SNAKE RIVER STORAGE

INVESTIGATIONS

VOLUME I

SNAKE RIVER ABOVE IDAHO FALLS

By

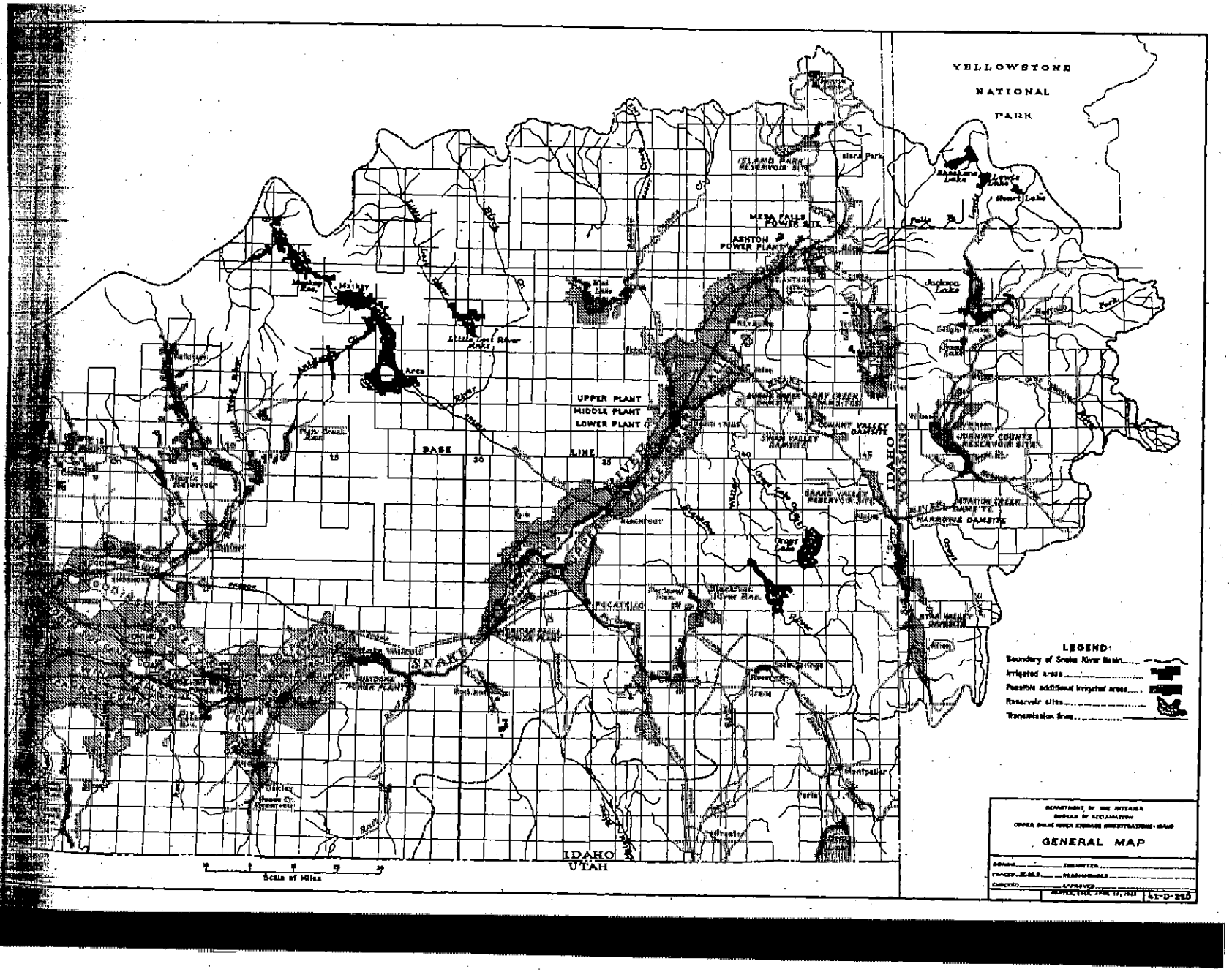
E. B. DEBLER - HYDRAULIC ENGINEER

J. R. RITER - ASSOCIATE ENGINEER

JUNE 1935.

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YELLOWSTONE
NATIONAL
PARK
IDAHO
WYOMING
UTAH
BASE
LINE
UPPER PLANT
MIDDLE PLANT
LOWER PLANT
SNAKE
Scale of Miles
LEGEND:
Boundary of Snake River Basin
Irrigated areas
Possible additional irrigated areas
Reservoir sites
Transmission lines
GENERAL MAP

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In May 1933 the American Falls reservoir district obtained an order from the State Commissioner of Reclamation requiring the watermaster to charge all diversions made by the Gooding project against the storage owned by that project in the American Falls reservoir.

In 1933, the American Falls reservoir district No. 2, comprising the Gooding Project, filed suit in the Federal Court against the American Falls Reservoir District, the Secretary of the Interior, the State Commissioner of Reclamation, and the Watermaster to obtain a summary decree for 1700 second feet of natural flow of Snake River. In March 1935 the judge handed down a preliminary opinion denying the summary decree. In his remarks the judge stated that on the evidence submitted, the right of 8,000 second feet granted to the United States was for storage purposes only and that the Gooding Project has no natural flow right for direct diversion from Snake River.

The Gooding Project can no doubt establish a natural flow right, with a priority ahead of any new reservoirs that may be constructed on the Upper Snake River. Whether or not the natural flow right for the Gooding Project is senior or junior to the American Falls storage right then becomes immaterial for the purpose of this study, which is to determine the surplus water for contemplated future storage developments.

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"Geology and Water Resources of the Snake River Plains," (copy of report is on file in the office of the Geological Survey at Idaho Falls, Idaho), show a ground water loss from Snake River areas above Milner as follows:

Region	Average annual loss Acre Feet
Henrys Fork Valley	698,000
Snake River, Heise to Blackfoot	922,000
Minidoka	240,000
Twin Falls North Side	600,000
Total	2,460,000

In addition to the above losses the return flow from the Twin Falls (south side) Project, and the Gooding Project is lost to the Snake River Valley insofar as use above Milner Dam is concerned, and to a considerable degree that of proposed Minidoka North Side Pumping extension may be lost also.

Possible savings by elimination of winter diversions (By Mr. Crandall)

Mr. Lynn Crandall, District Engineer, U. S. Geological Survey and watermaster of Snake River District No. 36, has prepared the following discussion on the possibility of saving water by the elimination of winter diversions from Snake River for stock and domestic purposes.

> "The situation relating to winter use of water on Snake River is different in the section below American Falls Reservoir from what it is in the section above that point due to the fact that there is some return flow to the reservoir from upstream use while any winter use below the Reservoir is a total loss as far as irrigation is concerned.

JRP006879

Orr Affidavit

Exhibit 62

"Findings of the Secretary of the Interior as to net profits from the Black Canyon and the Minidoka Power Plants, through sales of power on the Minidoka project and towns adjacent thereto, during the year 1935," by T.A. Walters, Acting Secretary of the Interior (Mar. 12, 1936)

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Findings of the Secretary of the Interior as to net profits from the Black Canyon and the Minidoka Power Plants, through sales of power on the Minidoka project and towns adjacent thereto, during the year 1935.

During the last five years the enlargement of the irrigation canals supplying the lands of the South Side Pumping Division of the Minidoka Project (Burley District) and the installation of more and larger pumps at the three pumping plants supplying water for that district, has resulted in a rapidly increasing demand upon the Minidoka Power Plant for electric energy for irrigation pumping for the benefit of the Burley Irrigation District and the landowners therein.

During the year 1935 this increased demand for power for irrigation pumping reached such a point that the entire available power capacity of the Minidoka Power Plant was required to supply the power used for irrigation pumping during the height of the irrigation season, leaving no power available from the Minidoka plant for the purpose of carrying on the commercial and domestic power business on the Minidoka project, which in recent years has yielded a net profit close to $100,000 per year.

The absorption of the entire power output of the Minidoka Power Plant during the height of the irrigation season in irrigation pumping would have resulted in the entire loss of the commercial and domestic power business of the Minidoka project and the profits therefrom, except for the power brought into the project from outside sources in exchange for power from the government's Black Canyon Power Plant on Payette River, Boise project, under the contracts hereafter referred to. But by means of the power brought into the Minidoka project from outside sources under the exchange above referred to, the commercial and domestic power business on the Minidoka project has been continued during the year 1935 and has increased at a normal rate as compared to the previous year.

Under the Idaho Constitution use of water for irrigation purposes is considered a superior public use, to the use of water for power development, and the very serious water shortages which have occurred in large sections of the Snake River Valley during the last five years have emphasized the urgent importance of saving every acre foot of the winter flow of Snake

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River which it is possible to save, and storing the water for use during the next irrigation season.

Under the conditions prevailing in the Snake River Valley where farming is entirely dependent on irrigation and the towns are also dependent on the success of the irrigation farmers, it is believed that the furnishing of an adequate water supply for irrigation purposes should be the first consideration of those in charge of the irrigation works constructed by the United States and the power works incidental thereto, and that the public interest requires that the water supply needed for irrigation purposes should not be sacrificed for the purpose of providing increased power profits, and especially so in cases where ample power can be brought into the Valley from outside sources where the winter operation of power plants does not interfere with the storage of water needed for irrigation purposes.

It has therefore been found necessary (in order to avoid the waste of water needed for irrigation purposes) to limit the operation of the Minidoka Power Plant during the non-irrigation season to such amount of water as is turned down for the purpose of supplying the requirements of the canals below American Falls for domestic purposes and stock water and municipal water supplies.

The power available from the Minidoka power plant during the non-irrigation season from October 1, 1934 to April 15, 1935 was found to be insufficient to meet the power requirements of the commercial and domestic power business on the Minidoka project during the non-irrigation season and a large part of the power used for such purposes during that period was also brought into the Minidoka project from outside sources in exchange for power from the Black Canyon Power Plant.

In order to provide power from outside sources to replace the Minidoka power which has been completely absorbed by the increased irrigation demands in the Burley District and to save the commercial power revenues which would otherwise have been lost and for the purpose of providing free transmission service for irrigation pumping on the Owyhee Project and also for the purpose of saving the winter flow of Snake River so that it may be stored for irrigation use, a contract was made between the United States and the Idaho Power Company, copy of which is hereto attached as Exhibit A, under which the company has agreed to furnish and deliver free of charge on the Minidoka Project 4,000 kilowatts of additional firm power during the irrigation season and such non-

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irrigation season power as may be needed up to 20,000 kilowatts in exchange for the power to be delivered to the company from the government's Black Canyon Plant on Payette River, and the furthermore of the United States during the life of the contract to exercise its right to build a power plant at American Falls.

Under the said contract the United States in effect secures the free use of the company's transmission system for the purpose of transmitting power from the Black Canyon plant to the Minidoka Project for the uses above mentioned.

The Black Canyon Power Plant and the Deadwood Reservoir used in connection therewith were constructed under acts of Congress which required that the entire cost of the Deadwood Reservoir, the entire cost of the power plant and one-half the cost of the Black Canyon Dam be repaid out of revenues from the sale of power from that plant. A reasonable charge for the use of the Black Canyon Power Plant and related works in providing power for use on the Minidoka Project under the exchange above referred to has been found to be the sum of $50,000 per year. In order to provide the $50,000 per year for this purpose without placing additional burden on the users of irrigation water, it has been found desirable to provide for the sale in the Minidoka Irrigation District and the town of Minidoka of a part of the power brought into the Minidoka Project from outside sources under the said exchange. For that purpose a contract has been made, under date of January 1, 1935 (copy of which is hereto attached as Exhibit B) under which the district has guaranteed the payment to the United States of the net sum of $50,000 from the sale of power in the Minidoka District and the town of Minidoka, subject to the agreement of the Advisory Board representing the American Falls Reservoir, to insure the district to the extent of $10,000 per year against loss on its said guaranty.

It is found that during the calendar year 1935, that is from January 1, 1935 to December 31, 1935, inclusive, the number of kilowatt hours of electric energy brought into the Minidoka Project from outside sources in exchange for the said Black Canyon Power was substantially the same as the number of kilowatt hours of electric energy sold in the Minidoka Irrigation District and the town of Minidoka; that the net collections from the sale of power in the Minidoka Irrigation District and the town of Minidoka during the said year 1935 was the sum of Fifty-two thousand three hundred eighty-four dollars and fifty-two cents ($52,384.52); that the amount of the net collections during the year 1935 from the said sales of power in the Minidoka district and the town of Minidoka, that is the sum of

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$52,384.52 is found to be the reasonable amount to be credited as net profits on the electric power brought into the Minidoka project during the year 1935 from outside sources and delivered to the Idaho Power Company under the attached contract (Exhibit A) in exchange for the Black Canyon power and the other considerations provided in said contract; that $50,000 is found to be the net profits of the Black Canyon Power Plant and related works in providing power for use on the Minidoka project during the year 1935 and will be credited accordingly in the manner required by the acts of Congress under which the Black Canyon Power Plant and Deadwood Reservoir were constructed; and that the sum of $2,384.52 is found to be the amount of credit to which the Minidoka district is entitled under the contract of January 1, 1935 (Exhibit B) in consideration for the obligation assumed by that district in guaranteeing the collection of the $50,000 per year and the efforts of the district in increasing the power sales in that district during the calendar year 1935.

It is further found that the net profits from the Minidoka Power Plant during the year 1935 were the sum of Sixty-six thousand seven hundred forty-four dollars and twenty-six cents ($66,744.26), credit for which will be divided between the Burley Irrigation District and the Minidoka Irrigation District in the proportion of 95.6% to the Burley district and 4.4% to the Minidoka district; that is, $63,807.51 will be credited to the Burley Irrigation District under the provisions of article 8(c) of the contract of March 15, 1926 between the United States and the Burley Irrigation District to be applied in the manner provided for in that contract, and $2,936.75 will be credited to the Minidoka Irrigation District out of the said total net profits of $66,744.26 from the 1935 operation of the Minidoka Power Plant.

Dated this 12th day of March, 1936.

(Sgd.) T. A. WALTERS

Acting Secretary of the Interior.

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Orr Affidavit

Exhibit 63

Comments of Thomas R. Newell, U.S. Geological Survey engineer, on Baldwin, *Transmission and Delivery of Reservoir Water* in *Administrative Water Problems: A Symposium*, 94 TRANSACTIONS OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS 321 (1930)

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Paper No. 1722

STREAM FLOW IN GENERAL TERMS*

By Melvin D. Casler,† M. Am. Soc. C. E.

With Discussion by Messrs. Frank S. Bailey, Cecil E. Pearce, F. Theodore Mavis, Morrough P. O'Brien, R. D. N. Simham, and Melvin D. Casler.

Synopsis

The purpose of this paper is to present a workable general method for the analysis of stream flow in irregular channels—channels in which the invert slope and the channel cross-section are not constant. To attempt to apply the Chezy formula to such a case is to force a perfectly good formula into a situation to which it is not properly applicable. Various scattered attempts have been made to treat this question as applied to special cases, but no satisfactory general treatment has been found in such a form as to be readily followed by most computers.

An exhaustive consideration of the subject of "back-water curves" is contained in "Technical Reports," Part III, of The Miami Conservancy District, but this discussion is confined to "rectangular channels the width of which is uniform and so great in comparison with the depth that the hydraulic radius may be considered equal to the depth."

The discussion contained in this paper is general, and demonstrations of its applicability to weirs, orifices, and siphons are appended.

The Chezy formula, $v = C\sqrt{r\,s}$, is the one most commonly used in stream-flow computations. The factor of longitudinal slope, s, is sometimes referred to as the slope of the water surface and sometimes as the slope of the bed of the stream. As a matter of fact, it is neither of these except under special conditions. The Chezy slope factor should be defined as the friction factor, or rate of loss of head. This is equal to the slope of the water surface

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† Mount Vernon, N. Y.

ground-water inflow. As the stream emerges from the mountain canyons into the lower valley, it often flows for some distance over a delta or cone where the adjacent ground-water level is lower than the water level in the stream, and where the natural channel loses water at all stages. Farther down stream the ground-water may again rise higher than the water level in the stream, resulting in a ground-water inflow, and it may then gain to the stream in such sections. On numerous Western streams such alternate sections of gain and loss occur for many miles.

In sections where the stream loses water due to the adjacent water-table being lower than the level in the stream, the stored water should manifestly be charged with the additional loss created by carrying it, as compared with what the natural loss would be without including the stored water. The practice of determining percentage losses in the channel with both stored water and natural flow in the stream, while supplying information of interest, should not be relied on entirely to determine proper losses chargeable to stored water. A comparison of losses with natural flow alone, and when carrying the additional stored water should also be made. Studies of the ground-water flow through the valley must necessarily be made to determine whether the water lost in the "loss" sections of the stream returns farther down stream as gain and, if so, when and where such return takes place. Stored water is properly entitled to credit for whatever portion of the "lost" stored water that returns to the stream above diversion points during the period of full use of the stream flow each year. In some of the larger river valleys of the West, this "lost" water requires several years to complete its underground travels and finally emerges as ground-water or spring inflow into the stream. Thus, the continual carrying of stored water for year after year may result in that portion of such stored water that is lost in the "loss" sections, finally re-appearing as a permanent increase in the gain to the stream in the "gain" sections.

In sections of the stream where the water-table is higher than the water level in the stream channel, the stored water sustains little actual loss, but it has the effect, when first turned in, of damming back part of the natural ground-water inflow until the ground-water slopes adjacent to the stream re-adjust themselves to the higher water level in the stream occasioned by the stored water. The effect of running stored water in such sections of natural gain from ground-water inflow to the stream can best be studied by noting the reduced gain for a short period, varying under different conditions from a few days to several weeks, when stored water is first turned into the channel. This temporary bank storage returns rapidly to the stream when the stored-water run ceases and the stream drops to its natural level. In the delivery of stored water on Big Lost River, the matter is adjusted by allowing the natural flow rights to use some of the stored water during the first week that it is turned into the stream, the same quantity being repaid to the stored-water owners later in the season from the increased gain that occurs for a brief period when the stored-water run ceases.

As pointed out by Mr. Baldwin, the matter of the equitable segregation of stored water and natural flow is a complicated one in many cases. It is not subject to exact determination on account of differences in climatological

factors, ground-water levels, stream channel conditions, etc., from year to year and at different times during the same year. By securing records covering a number of years on inflow, diversions, and losses along the stream, together with studies of the ground-water movements, however, a basis may be developed for an intelligent study of the question, and a fair approximation may be thus reached for the determination of the natural flow and stored water, as each is delivered to its respective owners.

THOMAS R. NEWELL,* ASSOC. M. AM. SOC. C. E. (by letter).—An outline of the methods used in transmitting and delivering reservoir water in Water District No. 36, Idaho, has been presented by Mr. Baldwin. It is mentioned that transmission is effected through the Snake River channel from both the Jackson Lake and American Falls Reservoirs to the river head-gates of the numerous owners of storage rights. Thus, the channel of the main river carries an increment of reservoir in addition to the current run-off of the water-shed during a large part of the irrigation season. Natural water distribution must be made simultaneously with storage delivery despite the complications introduced by mingling this current run-off with these continuous streams of transit storage. In some sections of the river the reservoir water increment is even greater than the natural flow during part of the season. The relative proportions vary for years of differing snow supplies and irrigation demands.

Transmission loss schedules and reservoir outlet divisions always must meet the tests of changing conditions and even of changing ownerships. The small percentage of ultimate wastage (flow past Milner Dam during regulation period) is a real index of the excellence and efficiency of the control system of river operation as a whole. The fact that these major reservoirs have been operated ever since their construction in conjunction with natural water distribution from the same water-shed, through identical delivery channels and without the authority of a Court Commissioner, speaks well for the efforts of the administrative official and perhaps also for the tolerance of district water users.

The compromise agreements upon which division is made between natural and reservoir waters when flowing commingled are of particular interest to the writer. In Water District No. 36 these agreements consist of brief digests of methods of division at reservoir outlets and schedules of percentage transmission losses to be applied through successive river sections to transit storage. As they are adopted annually in slightly revised form, these compromise schedules should carry greater prestige from year to year, and as time goes on, should become more nearly representative of true conditions. It is readily seen that variations in these schedules directly affect the quantity of reservoir delivery. In like manner, changes affect the total supply of natural water in the opposite direction. Even now basic changes are stubbornly contested and are almost impossible of adoption without recourse to hydrological investigations of a co-operative nature. Objections of merit are usually met by secondary arrangements or the granting of special privileges to avoid upsetting standard compromise schedules.

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In this connection it is interesting to note the exact effect of a change in a river operation agreement from the viewpoint of a holder of a natural water decree and a user of reservoir water. Assume, for example, that a transmission loss schedule is increased 10 per cent. Each storage owner's holdings are decreased 10 per cent. The only escape he has from the penalty is that his storage right may be a more insurance and seldom withdrawn. This same increase in applied transmission loss increases the total supply of natural water, but not *pro rata* to each holder of a decreed right. In Idaho, a decreed right specifies a quantity (if beneficially used) and, in all cases, a priority date. As river supplies decrease below the quantity necessary to fulfill all decrees in use, the river water master refers to his chronological list of priority dates and declares that right with the latest date either partly or completely invalid and denies use thereunder. This process of eliminating one user after another is continued until the river stage reaches the summer low. Then, as supplies increase, each decree is restored in reverse order.

Pioneer rights to the extent of the minimum summer flow remain untouched and, in reality, have no interest in the changed transmission loss. The younger the right the longer is the period of denied use which must be suffered. To each invalidated right an increased transmission loss means an extended time of validity at either end of its period of denied use. The length of the extension is defined by the amount of gain to natural supplies due to the changed schedule and the rate of river decline or increase. It may not encompass the whole decree and it may not help for more than a single day; but for several years the storage delivery rate from the Jackson Lake Reservoir has been quite large during the months of July and August. Likewise, the summer minimum of Snake River flow usually remains fairly constant for several weeks in the height of the irrigation season. Therefore, it is possible for a single large decree, properly placed along the chronological scale, to garner a lion's share of the total increase in natural supplies resulting from a changed transmission loss.

To carry the illustration still further, it is true that many of these young rights have purchased supplemental storage, so that their gains may be partly offset by losses to their supplemental supplies. Careful study of these effects serves to accent the fallacy of the popular belief that any general method of division between the two classes which balances for the season is fair to the individual decree holder. It may also present to the politically minded an interesting angle of the "ins and outs" of stipulative agreements.

Compromise river and reservoir agreements should tend toward workable methods of division which should be fair to each party throughout each season and which should keep pace with current events. With the initial draft from the new American Falls Reservoir comes a series of changed ownerships, new river complications, and notable variations in river regimen extending from Jackson Lake all the way to Milner. A reservoir outlet division, operated on the contour method, in which evaporation losses and natural storage credits are balanced against bank storage return, usually contemplates a full use of the reservoir and cannot be expected to serve a hold-over storage unit. Henrys Lake Reservoir is notably in the latter class and on account of recent

changes in ownership at Jackson Lake, this great storage unit is tending in that direction.

These same factors operate toward less regular increments of reservoir water being carried through the main river channel. Flat percentage rates of transmission loss and flat time interval allowances for any and all river stages and rates of delivery will not so fairly comprehend the new situation. Lag credits help to even the charges, but should be applied in direct proportion to increases in stage and should not be permitted to be used in any but a regular mechanical manner. The space privilege, the temporary transfer, and many permanent transfers might each serve an honest purpose did they not so often go hand in hand with appropriation and even Court decree beyond the bounds of beneficial use. The current dearth of water supply in Water District No. 36, due to the many new storage purchases (made possible by the construction of the American Falls Reservoir, and the ample natural run-off of 1927 and 1928), has eased the river operation situation temporarily. The advent of a season of shortage will not soon bring general crop losses on account of the presence in the district reservoirs of much "water insurance" which may be rented; but with the reclamation of additional lands, now contemplated, supplies will eventually be depleted to the point where river and reservoir problems will become more important.

Only a part of the transmission and division agreements now in force have support in actual seepage investigations. Of these investigations, many have been continued during one season only, while some are based only on miscellaneous field runs. Continuity through different types of seasons—the fundamental of every thorough hydrological study—has been denied in most cases. Few, if any of the channel studies made in the past, show the application of the modern methods of refining river-station differences in use in California and some even ignore surface tributary inflow as an independent variable. The Kootenai River study now in progress (1928) on the International Boundary has been planned with a view to obtaining a degree of refinement for beyond that of any lake or reservoir segregation yet made in this district. The criticism often heard, to the effect that the segregation of the many factors involved can never be exact, is true despite the use of the most modern methods economically feasible.

However, real values do result from orderly presentation of measurable factors properly qualified as to exactitude. Just divisions require careful observation of seasonal trends of disputed factors. Developed waters resulting from drainage recoveries, return flows from new irrigation, artificial ground storage, and reservoir bank storage, should each be observed currently. Changed plans for reservoir drafts due to changing ownerships should not be overlooked. All in all, too much should not be expected of old and insufficient investigations, and every effort should be made to make the new ones more thorough and continuous. The effort to centralize and co-ordinate all administrative activities, within the district, has built up a continuing and an adequate organization which has effected improved operation service. The basic schedules underlying operation schedules are entitled to equal consideration and support.

To the student of river operation, Mr. Baldwin's paper is particularly interesting, in that it is representative of ten years' experience in transmitting reservoir waters at rates of much greater magnitude than usual. The same rules which apply to storage deliveries at the rate of a few miner's inches for a few miles are entirely inadequate in transmitting reservoir water by the thousands of second-feet for hundreds of miles to the respective owners. It is to be regretted that more detail has not been included for a careful description of the very effective system of control which has resulted in uninterrupted service and, at the same time, a negligible ultimate waste. The attainment of these two ends is the mark of good regulation and deserves the careful consideration of every person interested in orderly distribution on a large scale.

E. B. DEBLER,* M. AM. SOC. C. E.—The State of California adopted riparian rights as the basis of its water rights many years ago, and as no affirmative action on the part of the grantee was required, such rights became vested as to all riparian lands, with the action of the State Legislature.

Fundamentally, riparian rights imply non-consumptive uses only, but in the main the Courts have upheld any uses which did not deprive other riparian owners of their proportionate share of such use.

Recent attempts to impose limitations on the use of these riparian rights, even if only in support of a more efficient use of the State's water resources, either by legislative enactment or by regulations of an administrative arm of the State Government, are likely to prove fruitless as they would appear to be in the nature of confiscation of a vested property right which the Courts will not sanction. In view of this situation, plans for the conservation of the water resources of the State must be placed on a sounder legal basis.

The situation with regard to conflict of riparian and appropriation rights is not limited to California. Both types of rights exist in a number of Western States. Nebraska has adopted riparian rights for its humid section and appropriation rights for its arid section. Land grants by the Spanish Crown in the Southern Border States often carried water rights, sometimes distinctly "appropriation" in character, at other times, "riparian." The outcome of California's attempts to curb riparian rights will be watched with interest, as it is likely to be followed in after years by similar attempts in other States when water becomes of greater value.

G. CLYDE BALDWIN,† M. AM. SOC. C. E. (by letter).—Discussion of the writer's paper has very properly not been limited to the problems incident to the transmission and delivery of water from Snake River reservoirs. Mr. Hinderlider has presented an excellent summary of the methods used in the State of Colorado and has listed eight so-called requisites for equitable and efficient water administration which, with possibly slight modification, should be generally applicable.

The extent to which transmission losses are increased by "adverse-user" diversions, together with the accessibility of their head-gates, obviously will

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determine the degree of regulation which should be enforced. For example, it would probably be unwise to attempt to prevent the use of water by isolated canyon ranches unless the resulting benefits to be derived by the owners of older rights would be sufficient to justify the expense of the regulation.

Mr. Meeker emphasizes the desirability of continued, comprehensive, engineering investigations and reports as an aid to better administration, and this is also stressed by Mr. Newell. Both, however, recognize the variable, complex character of the different factors on which the stream flow at any given point depends, and they understand that exact solutions of river or reservoir loss problems can never be attained.

Engineers usually are anxious to secure an increasing amount of data on such subjects in order to minimize the always recognizable error in the final application.

From the practical viewpoint of the ordinary water user, on the other hand, extreme accuracy seems less essential, especially if the engineering investigations must be done at his expense. Furthermore, in such extremely complicated problems as those on Snake River, the same basic facts may be used sometimes in good faith by different engineers to derive somewhat divergent conclusions. The water users, therefore, as a group, are rather slow to adopt radical changes in methods of operation and prefer to follow the usage of preceding years, with perhaps slight modifications based on new facts, rather than to sanction expenditures for engineering investigations which may result in controversy.

As mentioned by Mr. Crandall, segregation of stored water and normal stream flow at the outlets of reservoirs and the schedule of losses to be charged the former while in transit in the stream channel between the reservoirs and points of diversion are usually the two principal sources of contention in river administration.

The desirability of having these points settled by Court order or decree has long been recognized by those most interested in the storage and delivery of water on Snake River, and much has been accomplished through special studies and investigations with that end in view. At present (January, 1929), reports covering ground-water conditions along Snake River and the 1928 gains and losses in the American Falls Reservoir Basin are in process of preparation.

The net result of more than ten years of river operation has been the plan described in the paper which, as modified from time to time to meet new conditions or to be more consistent with added facts as they became available, has now, through precedent, attained a position almost comparable to, and may eventually be converted into, a Court order through stipulation by the interested parties.

Orr Affidavit

Exhibit 64

Letter from Lynn Crandall to Elwood Mead, Commissioner, U.S. Bureau of Reclamation (Feb. 21, 1934)

370.
MINIDOKA Commissioner

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

Asst. to the Com'r.
Engineering
ACCOUNTING

Idaho Falls, Idaho,
February 21, 1934.

Dr. Elwood Mead, Commissioner,
U. S. Bureau of Reclamation,
Washington, D. C.

Dear Doctor Mead:

In reply to your request for my comments on the proposal to construct a government power plant at American Falls, I would say that there are several features of the proposal that will need to be carefully worked out if the present owners of storage space in American Falls reservoir are to contribute toward the cost of the power plant on account of the benefit that would ensue to them from making more water available for storage.

As stated by you, the canals that divert from the river at Milner require about 1200 second-feet for winter use. Of this amount about 200 to 250 second-feet is supplied by ground-water inflow from the Minidoka project, leaving 950 to 1,000 second-feet necessary to pass the Minidoka dam.

During the winter months, due to lowered area of Lake Walcott and increased inflow from several streams tributary to the river, there is no loss, as a usual thing, between American Falls and Minidoka dam; in fact, there often is a small gain during those months. I think that, on an average, about 950 second-feet passing American Falls dam during the winter months would yield 1,200 second-feet at Milner.

During the present winter the Government plant at the Minidoka dam has been using about 1,600 to 1,700 second-feet to carry its load. In extreme cold weather it may use as much as 2,000 second-feet on account of increased demand by the air heating load. The above use during the present winter at Minidoka dam plus 200 second-feet ground-water inflow below that point has supplied the requirements of the canals at Milner and allowed about 600 second-feet to waste past Milner down the river. On account of being able to use this 600 second-feet at its downstream plants the Idaho Power Co. for the past couple years has voluntarily

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refrained from withdrawing all of its stored water past American Falls. If the construction of the Government power plant at American Falls proceeds it will save the 600 second-feet now wasting past Milner all winter as the result of operating the Minidoka plant. However, when this is accomplished the Idaho Power Co. will be compelled to release enough of its storage to maintain waste past Milner of substantial volume in order to carry the load on its downstream plants, particularly the one at Shoshone Falls. Inasmuch as all water passing Milner is waste as far as irrigation is concerned, a definite plan should be adopted to stop all such water or at least as much thereof as possible, whether such waste comes from the Idaho Power Co. rights or from the Government power rights at Minidoka dam. Only by decreasing present discharge past Milner dam can the supply for American Falls reservoir be increased and to effect a permanent satisfactory solution of the problem this will require some negotiation with the Idaho Power Co. on account of its ownership of 300,000 acre-feet of water at American Falls. Of the above total, 45,000 acre-feet is a so-called primary right to be discharged past Milner, and 255,000 acre-feet is a so-called secondary right to be used by the Power Co. at American Falls but to be available for use below that point by the various canals if needed. The Power Co., however, by timing its withdrawal of the secondary right to the winter months when the canal draft is at a minimum, can also get, if so desired, most of this secondary water past Milner for use at its downstream plants.

On account of the fact that the Idaho Power Co. already has equipment installed at American Falls sufficient to use all the winter flow, and which could be connected with the reservoir to secure a greater head, if desired, it might be worthwhile to see what, if any, arrangements could be made with that company whereby all waste past Milner could either be done away with entirely or reduced to a very low amount. Such an arrangement might involve the construction of an additional power unit at Minidoka dam for summer use and for summer exchange with the Idaho Power Co., leaving the latter company to use the available discharge from American Falls and carry about half of the winter load of the Minidoka plant.

The power right of the Government at Minidoka dam, as awarded in the Foster Decree, amounts to 2,700 second-feet of earlier priority than American Falls reservoir. If the private canal companies on Snake River contribute to the cost of a Government power plant at American Falls they will want some definite commitment by the Government that the latter will forego during the winter months any claim to that part of the above decreed right in excess of such amount as will deliver 1,200 second-feet at Milner; otherwise there will be nothing to prevent the Government from eventually drawing up to 2,700 second-feet if its load should so increase as to require that amount of water.

It is not inconceivable that if the existing drought should continue for a number of years or become even more severe it might be necessary for the Twin Falls companies to cease winter diversions entirely and rely on wells, in order to permit of storing enough water at American Falls to save the crops on the several projects below that point. In such case an additional power plant at

JRP003399

American Falls would be useless during the winter and power would have to be developed either upstream from American Falls or in the Hagerman Valley section farther downstream where the river flow is replenished by springs.

I am not suggesting these various matters in any sense as opposing the proposal to construct the Government plant at American Falls as I think that such a plant would naturally result in the conservation of some water. The construction of the plant, however, would still leave unsolved the question of making available for storage the water that the Idaho Power Co. can waste past Milner and I cannot help but feel that a plan to work out the complete problem should be made before starting on a partial program. Sooner or later the need for irrigation water on Snake River will require the elimination of any discharge past Milner in years of deficient run-off, and plans might as well be made now to accomplish that result with the minimum possible cost.

Very truly yours,

Lynn Crandall

District Engineer.

cc-C.E.
D.C., Portland
Supt., Burley
2/28/34

JRP003400

Orr Affidavit

Exhibit 65

Excerpted pages of the "Water Distribution And Hydrometric Work – Water District No. 36 – 1936," by Lynn Crandall, Watermaster for Water District No. 36.

WATER DISTRIBUTION AND HYDROMETRIC WORK

WATER DISTRICT NO. 36

1936

By Lynn Crandall

Watermaster

JRP023239

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"	54	Portneuf River at Pocatello, Idaho.

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River and Gros Ventre the entire low water flow of the streams is diverted in Wyoming. Probably at least 2500 second-feet are diverted to supply these Wyoming rights and this is no doubt one of the reasons why the natural flow cuts on Snake River in Idaho begin at an earlier date and reach to earlier priorities each year than was formerly the case.

It is a matter of regret that lack of storage facilities resulted in the waste of 620,000 acre-feet of surplus flood waters past Milner during 1936. About one-fourth of this waste could have been retained if the reservoirs now under construction at Island Park and Grassy Lake had been completed. The occurrence of a year of fairly good run-off in 1936 should not be permitted to result in any decrease in efforts towards further water conservation. Dry years to be expected in the future will require all the water that can be made available from any source at reasonable cost if the established irrigated agriculture is to be adequately maintained in the Snake River Valley.

TRANSFERS & EXCHANGES

The following permanent transfers were granted during the year after advertising and hearing before the Commissioner of Reclamation as provided by the Idaho Statutes:

Transfer No. 558.- 9.18 sec. ft., June 1, 1886 priority, from Long Island Canal to Lenroot Canal.

Transfer No. 559.- 2.50 sec.-ft., June 1, 1884 priority, from Osgood Canal to New Swedon District canals.

Transfer No. 560.- 0.60 sec.-ft., June 1, 1886 priority, from Long Island Canal to Sunnydell Canal.

Transfer No. 562.- 3.20 sec.-ft., June 1, 1887 priority, from Harrison Canal to Farmers Friend Canal.

Transfer No. 563.- 4.56 sec.-ft., June 1, 1886 priority, from Long Island Canal to Lenroot Canal.

Transfer No. 565.- 1.00 sec.-ft., June 1, 1885 priority, from Butler Island Canal and 1.00 sec.-ft., June 1, 1886 priority, from Long Island Canal to lands in Swan Valley served by Palisade Canal.

JRP023250

Orr Affidavit

Exhibit 66

Letter from District Engineer Lynn Crandall to B.E. Stoutemyer, District Counsel, U.S Reclamation Service (Sept. 8, 1939)

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

Idaho Falls, Idaho
Sept 8 1939

Mr. B.E. Stoutemyer
603 Post Office Bldg.
Portland, Oregon.

Dear Mr. Stoutemyer:

In reply to yours of the 5th inst. and one from Mr. Debler on the same subject, the matterof trying to solve the water problems on Snake River might well drive one to despair as he tries to evolve some plan of procedure that will meet with the approval of all concerned and yet be possible of execution.

Some time ago we sent out a circular letter to all canal companies on the river asking them how much storage they would desire in the proposed Grand Valley Reservoir on the assumption that they would be permitted to buy one-half of their present American Falls lease water and that the Grand Valley storage would cost $4 per acre ft. of space payable at the rateof 10¢ per acre ft. per year.

Replies so far received are as follows:

Requests for Storage in So. Fork reservoir

(acre-ft.)

A. For use under existing canals

Rigby Canal Co.	10,000	Aberdee-Springfield	255,000
Arnsberger Canal	700	Enterprise Canal Co.	20,000
Kite & Nord	400	Parsons Ditch	200
Island Irrig. Co.	10,000	Peoples Canal Co.	40,000
Bear Island	100	New Lava Side Co.	10,000
Dilts Irrig. Co.	1,000	Mattson-Craig	2,100
Snake River Valley Irr. Dist.	50,000	Harrison Canal	40,200
Burgess Canal Co.	40,000	Liberty-Park Irr. Co	2,000
Butte & Market Lake Canal Co.	40,000	Farmers Friend Irr. Co.	6,000
Reid Canal Co.	2,000	Present Fort Hall project	414,600(a)
Minidoka Irr. Dist.	50,000	Little Indian Project	23,400(a)
Burley Irr. Dist.	100,000(c)	Idaho Irrg. Dist.	25,000
Swan Valley Users	22,360	New Sweden Irr. Dist.	30,000
Martin Canal Co.	4,000	Sunnydell Irr. Dist.	6,000
Danekin Ditch Co.	1,000	Progressive Irr. Dist.	11,000
Lenroot Canal Co.	10,000	Portneuf River Users	50,000(b)
		Total on present projects	1,277,060

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(a) U.S.I.I.S. Project will require Congressional authorization

(b) Will require diversion from Blackfoot River and Agreement withIndian Service

(c) Also wants 50,000 Am. Falls lease water

B. For use on New Lands.

Michaud Project for lands within Fort Hall Reservation	630,000
Power Irr. Distt for lands west of Michaud Project	420,000(d)
Total new lands	1,050,000

(d) Also wants 70,000 acre-ft Am. Falls lease water.

Other requests for storage will be made by existing projects not tabulated in the foregoing and if it should be deemed advisable to abandon the proposed Teton Reservoir the users on Henrys Fork and tributaries would probably desire 150,000 acre-ft. of space. Even if Teton Reservoir is built they should have some So.Fork storage for exchange as the Teton Reservoir priority would be valuless for storage in dry years. It is thus apparent that the full space in the proposed reservoir will be over subscribed by existing canals on the river, leaving no space available for new lands. The Bureau of Reclamation seems to feel that the So.Fork reservoir will not be feasible unless some water can be made available for storage therein each year, but in taking this position it misconstrues, in my opinion, what the Snake River water users have in mind in desiring the construction of the reservoir. Most of them now have an adequate supply for use in normal years and in such years probably not over 10% of the water in the reservoir would be withdrawn. What they want to do is to save the surplus water in the wet years and retain it for use in the dry years such as 1919, 1924, 1926, 1931 and 1934 and they are figuring on acquiring enough space to permit them to do this. These folks have lived here on Snake River for many years and know what dry years as well as wet ones are and what can be expected from the river. They know that even with all the alleged extravagant use of water on the stream, winter diversions, etc., there have been over 3,000,000 acre-ft. of surplus water spill to waste over Milner Dam during the past 4 years and that if the So. Fork Reservoir was in existence over a million acre-ft. of this wasted water would today be in the reservoir waiting to be used in future dry years. Nothing would contribute more to economical use of water on Snake River than for these people to own space in the proposed reservoir with the privilege of individual hold-over credit. Where can the Bureau find a better record of past payments on purohased stored water than here on Snake River?

JRP008937

The users who bought space in Jackson Lake paid for it long ago; the various canals who bought half of American Falls space raised the money by private borrowing and paid the Government in full before construction even started. They will have paid off these private loans in full in three more years, many companies outside of the American Falls Dist. having already paid off in full.

Many of the canals have no outstanding debt at all at the present time and the average debt is very low. Under the Bureau's estimates and set-up the South Form Reservoir would cost the irrigators $4,000,000 which would be equalled by the increased crop returns in just one dry year. These are 500,000 acres under the canals now applying for water in the South Fork reservoir so the proposed obligation is $8 per acre repayable at the rate of 20 cents per acre per year for 40 years. One additional sack of No. 2 spuds per acre would pay this.

You state that the Chief Engineer reports that the Grand Valley Reservoir is not feasible unless definite arrangements can be made to save at least 250,000 acre ft. per year of water now being wasted. If water now being wasted by unnecessary use could be saved to that amount it would probably be necessary that such saved water accrue to reservoirs in order of priority of right, - 1st to fill American Falls; 2nd, fill Island Park; and 3rd, fill Grassy Lake, before any of the saved water would become available for Grand Valley.

In the dry years the saved water would all be absorbed before reaching The Grand Valley priority. We might better face the fact, as the users here on the river do, that in years of extreme drought there wont be any water to store in a new reservoir and that in such years it must rely upon holdover from preceding years. This is unavoidable it seems to me in this final step in irrigation development on a river where the normal flow is fully appropriated, the firm storage is all developed, and all that remains is to catch the wet year surplus and hold it for the dry years.

Let us consider this question of so-called wasteful use of water on Snake River. It falls into two parts, - 1st. - excessive diversions and 2nd, - winter use.

Excessive diversions.

When I became watermaster on the river in 1930, I, with mistaken zeal and a liking for statistics, started the practice of including in our annual reports a tabulation showing seasonal diversions, acreage irrigated, and diversions in acre feet per acre for each canal on the river. It developed that these figures in many cases showed a large acre-ft. per acre diversion, far in excess of the amounts used in some other localities, and these figures have really been responsible, I think, for the charge so frequently heard regarding excessive use of water on Snake River. There are a number of things to be considered in this connection, however; one is the loss in many miles of canals

JRP008938

from point of river diversion to the land; on the Twin Falls No. Side Project for example there are a thousand miles of canals operated by the Canal Co. besides hundreds of miles of settlers laterals. On a number of the larger projects, deliveries to the farmer are only 60% of the water diverted, and on an average throughout the district canal losses to the farmers headquates probably are 35% of diversions, with additional losses in the farm ditches. Our canal measuring stations are located at the heads of the canals and, particularly during the flood water season, substantial amounts of water are spilled through wasteways back into the river below the measuring point and should not really be charged against the canal as it is picked up further downstream.

Most of the canals with very heavy diversions are in "sub" districts where the water used to raise the ground water for sub irrigation and drains through spring creeks back into the river. Immediately following the flood period for example with 16,000 sec.-ft at Heise we can fill 23,000 sec.-ft. or more of diversions by downstream canals from Heise to Milner without drawing storage from American Falls. The rights were awarded by Court decrees and can not be now disturbed by persons who were parties to the decree. There is no practical way whereby the canals desiring to acquire So. Fork storage can compel these canals to reduce their diversions below the amount awarded by court decree. The Bureau of Reclamation has been on Snake River for over 30 years and its Minidoka Project today diverts more water per acre than the average diversion by all canals from Heise to Milner including those that divert excessively. In 1938 the Minidoka project diverted 7.0 acre-ft per acre irrigated, being 7.6 on the No. Side and 6.4 on the So. Side, compared to an average of 6.4 in the entire Snake River area. There are just as many borrow pits full of water on the Minidoka project as elsewhere. The Bureau has enlarged the South Side Minidoka Canal and pumps until that project now during the peak months draws more water even than its decree, the excess being charged to storage. The Govt. was a party to the Woodville decree and in 1929 in that decree agreed to the amounts of water awarded in previous decrees and to the award of new flood water rights of over 2,000 sec.-ft. to various upper valley canals in addition to their old decrees. Even a few years ago it voiced no objection to the Fremont-Madison District's allotment of Island Park storage to canals serving the Egin Bench which are already among the heaviest users of water on the stream. I dont mention these facts as any criticism of the Bureau's policy because it had to deal with the situation as it existed, with facts and not theories, but it does seem a little unfair that the Bureau today says to the Snake River water users they they must take steps to compel these canals to reduce their diversions or it wont approve the So. Fork reservoir, when for many years it not only acquiesced in but contributed to the situation of which it now complains.

JRP008939

E. Stoutemyer
9/8/39

In 1938 there were 30 canals on the river from Heise to Milner that diverted more water per acre than the Minidoka No. Side project. These canals however irrigated only 94,475 acres or 10% of the area served by all the canals and nearly all of them served areas where the water table is tributary to the river. A number of small canals with large diversions per acre in our annual tabulations give an entirely erroneous impression of excessive use if applied to the area as a while.

Winter Use.

This matter can best be discussed bysections;

Twin Falls Project.- Owing to quality of groundwater the domestic requirements can not be supplied from wells. The only possible method of eliminating winter diversions would be to pump water from springs on the north side of river above Shoshone Falls and distribute same by pipe line over the project which would probably cost a considerable sum of money. About 148,000 acre-ft of water is now diverted from Nov. 16 to Mar. 31 each winter. The Company has a fairly adequate supply of storage even in dry years and would doubtless give up entirely any American Falls lease water rather than agree to cease winter diversions. As far as I can see there is little present hope of eliminating winter use on this project.

No. Side Twin Falls Project.- This project diverts about 142,000 acre-ft. from Nov. 1 to Marc. 31 each winter which is a total loss to irrigation. Domestic water of good quality could be provided from wells, at a probably cost of from $700,000 to $1,000,000. This project is desirous of continuing the existing situation on Snake River, no new reservoirs and keep all of its present lease water at 12¢ per acre-ft. per year. It is the largest lease holder, having 151,000 acre-ft. of lease water. It is opposed to any development that would curtail its supply of this leased water which it needs. It could probably be compelled to agree to some program of well drilling if it had to do so to prevent itself from being deprived of the lease water, provided some feasible plan was adopted for financing the construction of the wells. It feels that if it provided wells at the expense of its stockholders the water saved should belong to it for its exclusive use. Any plan of eliminating winter use of water must include this project if much water is to be saved.

Upper Valley Heise to Blackfoot- Winter diversions less surface spill back to the river amount to about 185,000 acre ft. for the 5 mos. Nov. to March, incl. of which about 1/2 drains back as ground-water inflow into American Falls reservoir and 1/2 drains westward under the desert and is lost for irrigation above Milner. Wells would probably cost $800,000 and save 90,000 to 100,000 acre-ft of water each winter.

The canals serving areas of non-tributary water table in this section are all applicants of So. Fk. storage and would agree to cease winter diversions if the well drilling program would be financed by the government, repayable under the Reclamation Act.

JRP008940

C.E.Stoutemyer
6, 9/8/39

It will appear from the foregoing that approximately 250,000 acre-ft. of winter water could be saved on the No. Side Twin Falls project and in the upper valley from Heise to Blackfoot. A small additional amount might be saved on the North Fork but much of that section is in an area of tributary ground water and het savings would be relatively small.

The principal difficulty with the well drilling program is to finance it. People who have wells wont pay for wells for someone else. Canals that dont divert winter water now refuse to pay for wells so that other canals can cease winter diversion. The more prosperous farmers now have wells and the owners of most of the places needing wells are either non-resident, mortgage companies, or persons of limited means with their places mortgaged. It costs from $500 to $1,000 to drill and equip a well and the only way to complete well drilling program can be accomplished, in my judgment, is for the government to finance it, repayable by the individual land owner under the Reclamation Act along with this payments for storage. He can pay from $12 to $25 per year for his well where he never could, in many cases, raise at one time the entire cost thereof. The government could make a contract with each Canal Co. providing that it would drill as many wells as necessary and desired by landowners under the canal and the canal Co. agree that after this was done it would run no winter water. If the lands were in an irrigation district the cost of the well would be assessed against the lands and the payment collected through taxes. If the lands were under a Canal Co. the Canal Co. might pledge its canal system and water rights as a guaranty of payment as it might also do for purchase of stored water, provided it had the authority to make special levies for payment of costs of wells, or the lands might be annexed to an irrigation district if they weren't already in one. I am sure some method could be devised to guarantee to the Govt. repayment for costs of the wells.

I think that all of the projects who have applied for space in the So. Fork reservoir would agree as a condition to their being granted rights therein, that they would cease winter water diversions if the Govt. would drill the wells and let them pay for the wells along with the payments for stored water. If it should be decided to permit present lease holders of American Falls space to buy one-half of such space, the same requirement of ceasing winter water diversions should also be applied to such parties who had not already so contracted in connection with the So. Fork reservoir, under the same plan for initial financing. Thus the matter of saving winter water is tied up with The So. Fork reservoir, the sale or continued lease of Am. Falls space, and some method of financing the cost of wells by the Govt. The whole situation is hopeless if you just say to the canals that they must first get contracts for elimination of 250,000 acre-ft. of winter use, because that amount of saving can not be secured without elimnating such use on either the Twin Falls No. Side or So. Side projects. Neither of these projects has so far applied for any So. Fork reservoir space and both seem quite satisfied with the status quo on the river. The only way in which either might be induced to cease winter water is for the Govt. to make some such requirement in connection with the continued use or sale of the leased water, so that the means of compelling the

JRP008941

W.E. Stoutemyer
7. 1/9/39

saving of winter water is now in the hands of the Govt. and is not possible of accomplishment alone by those desiring the So. Fork reservoir.

You tried 5 years ago to insert a provision in the lease requiring that winter diversions cease but upon protest withdrew the requirement. If the Govt. would finance the initial cost of the wells under repayment contracts with Irrigadistricts or canal companies there wouldn't be much excuse for anyone except the Twin Falls project objecting to the well drilling program. There is quite a keen demand for leasewater, however, and you might be able to dispose of the full amount of lease water if you inserted a provision in the next 5-year contract requiring that all participants therein agree to start at once drilling wells and to cease winter diversions within three years.

The Twin Falls Canal Co. probably wouldn't sign such a contract and I dont know whether the No. Side Canal Co. would sign or not. These two projects have slightly over half or about 220,000 acre feet of leased water. The Burley and Minidoka districts would probably take 50,000 of this if the two Twin Falls projects gave it up and we might be able to dispose of most and perhaps all of the balance above American Falls. There would be a lot of ill-feeling arouse however which would be regrettable in view of the present harmonious relations among the canals on the river. This could be avoided if the Govt. would finance the well drilling program.

We have appreciated the large amount of study that the Bureau has given to the perplexing problem of additional storage on Snake River and especially its latest set up whereby half of the cost of the reservoir will be repaid from power sales, one-fourth as flood control benefits, leaving one-fourth to be repaid by irrigation. This has reduced the irrigation cost per acre-ft to a figure where purchasers of space can buy enough to tide them over the years of no storage. If an owner of space only drew his water once in five years it would be equivalent to $20 an acre-ft cost, on an average annual use basis, and you have built and have in contemplation numerous projects costing more than that.

The storage is desired as a supplemental dry year supply exclusively for existing projects and as such it is entirely feasible. These projects survived the past dry years on the river with their present water rights ao they wont collapse no matter how much may or may not be available for future storage in the South Fork reservoir. Surely there will be enough retained there under any conceivable future occurrence of stream flow to be worth $4,000,000 to the Snake River irrigators, who produce an average annual crop worth five times that amount. Why quibble over contracts for saving 250,000 acre-ft which is only one-fifth of the reeervoir capacity, and which would largely accrue in dry years to reservoirs with prior rights, and furthermore which will be saved anyhow if the govt. will so require in contracts for the new space and for sale or lease of American Falls space, provided it will finance the well drilling program.

We have the opportunity now to contract for the sale of the power output if we can make it available by 1945. It would be a tragedy here on Snake

JRP008942

E. Stoutemyer
9/8/39

River if we compelled these power users to develop power elsewhere and thereby lost this market, as we might never find another. I sincerely hope the Bureau will consider this matter further and with a full appreciation of the existing situation. I have been in close contact with water problems here on Snake River for about 30 years and the project seems so meritorious and feasible to me, under the existing proposal for distribution of its costs between power, flood control and irrigation, that I find it hard to believe that others should doubt its being a success, and I wish that I had the ability to make them see the situation as it actually exists.

The subscriptions on the So Fork space are evidence of what the people here think of it.

In connection with the So. Fork storage, if undertaken, there will need to be some decision made on the disposal of the present lease water. I think, personally, that the plan to sell one-half of the lease space to present holders and put one-half on new lands is about right, as this results in a demand that will exhaust the South Fork space by present projects. If they were not allowed to buy as much as one-half of their leased space they would want more So. Fork storage which isn't available. The balance of the leased water ought to be used on Michaud Flat or areas similarly situated as the net water cost to the river there is only one-third of what it would be per acre irrigated if diverted to the Minidoka N.S. Extension where the water table drains away from the stream. I suppose the use of the water of the South Fork Reservoir on the Govt. Indian lands of the Fort Hall project will be just as effective an argument for condemnation of lands in the reservoir site as if the water was used on Govt. lands on the Minidoka Extension.

Very truly yours,

(SGD) Lynn Crandall

District Engineer.

cc-Chief Engineer, USBR, Denver
Commissioner of Recl., Washington, DC
Acting Construction Engr., Ashton, Idaho.

JRP008943

Orr Affidavit

Exhibit 67

Excerpted pages of a letter from B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation, to the Commissioner, U. S. Bureau of Reclamation (Mar. 12, 1940)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
603 Post Office Building
Portland, Oregon

March 12, 1940.

MEMORANDUM for the Commissioner,

Concerning the provisions of the contracts between the United States and the Idaho Power Company, the conditions which led to the contracts in question, and the purposes which have been accomplished by the contracts.

The Government has three power plants in connection with its reclamation projects in Idaho. All of the power plants were constructed for reclamation purposes, and in so far as there has been any power production for commercial purposes it has been merely incidental to the main purpose of reclaiming the arid lands under the reclamation act.

Minidoka Power Plant

The largest of the 3 government power plants in Idaho is the one at the Minidoka Dam, in connection with the Minidoka reclamation project. It has a generating capacity of about 10,000 kilowatts. This plant has been enlarged several times, and another unit is now in process of construction. The demands for power for irrigation pumping on the Minidoka project -- mainly in the Burley Irrigation District -- have grown to such an extent that the irrigation pumping requirements alone now require all, and at some times more power than is available from the total capacity of the Minidoka plant, thus leaving no firm power at all from the Minidoka

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mission lines and other equipment connected with the Minidoka Project for distributing power received in exchange for Black Canyon power, in no way interfered with the use of the same equipment in distributing power generated at the Minidoka power plant or in distributing power used in the Burley Irrigation District and other points outside the Minidoka Irrigation District and in no way increases the depreciation of these facilities. Furthermore, the restricted use of the Minidoka power plant during the period between October 1 and April 1 of the succeeding year reduces the cost of operating the plant, diminishes its wear and tear and consequent depreciation, and facilitates repairs to the plant and equipment by allowing ample time to make any needed repairs.

- - - -

R. E. Stoutemyer

JRP001066

Orr Affidavit

Exhibit 68

Letter from B.E. Stoutemyer, District Counsel, U.S. Reclamation Service, to W.H. Philbrick, President of Aberdeen-Springfield Canal Company (Jun. 6, 1934)

COPY

MINIDOKA

603 Postoffice Building
Portland, Oregon
June 6, 1934

Mr. W. H. Philbrick,
President,
Aberdeen-Springfield Canal Co.,
Aberdeen, Idaho.

My dear Mr. Philbrick:

Replying to your letter of June 2:

Under the proposed contract between the United States and the Idaho Power Company, the company agrees to deliver on the Minidoka project free of charge such power as is needed on that project during the non-irrigation season up to 10,000 kilowatts, in exchange for the winter power generated at the Black Canyon plant on Payette River and the benefit derived by the company from the non-construction of the proposed power unit at American Falls. The company also agrees to deliver free of charge such additional power up to an additional 4,000 kilowatts as is needed on the Minidoka project during the irrigation season. The company also agrees to transmit free of charge the irrigation season power generated at the Black Canyon and Boise Diversion plants - the power plants on Payette and Boise Rivers - to the various pumping plants which serve the pumping districts of the Owyhee project, including the pumps serving the Gem district, the Ontario-Nyssa district, the Payette-Oregon Slope district, the Advancement Tracts, the City of Ontario, the Owyhee Ditch Company, the Bench district, the Crystal district, and the Slide district. The company also surrenders during the term of this contract its 255,000 acre-feet of reserved right at American Falls and part of its right at Shoshone Falls.

By securing the winter power requirements of the Minidoka project in this way and eliminating the company's reserved right of 255,000 acre-feet, we would be able during the non-irrigation season to close down the power plant at Minidoka dam (which has a decreed priority many years earlier than that of the American Falls reservoir) and store all the winter flow of Snake River except the amount released to supply the winter stock water run by the Twin Falls companies.

It is estimated that this contract will save each year from 400,000 to 600,000 acre-feet of the winter flow of Snake River, depending on how far the Twin Falls companies are willing to go in giving up the running of winter water for stock water and domestic purposes.

Such a saving of winter flow would assure the filling of American Falls Reservoir practically every year. This contract would also provide the additional power needed on the Minidoka project, without the cost of

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building a power plant. The saving of water which can be secured under this contract would be somewhat larger than can be secured under the proposed plan to construct a power plant at American Falls, and without the cost of the power plant. The benefits of the proposed contract can be secured immediately so that the winter flow can be stored next winter, while the benefits from the proposed power plant would be postponed until a year later. If this contract had become effective two years ago, the American Falls reservoir would have filled to full capacity this year and there would also have been at least 200,000 acre-feet more water in the Jackson Lake Reservoir.

The reason why there would have been more water in Jackson Lake Reservoir is that if the projects in the lower valley which have rights both in Jackson Lake and American Falls had a full supply from American Falls, they would leave a larger part of their Jackson Lake water as a carry-over supply in the Jackson Lake. This would be particularly true if it were known that the filling of American Falls Reservoir was assured every year. With the filling of American Falls Reservoir assured practically every year, the projects in the lower valley would have every motive for using their American Falls water first and holding as much water as possible in Jackson Lake, as hold-over, to aid in filling Jackson Lake the following year.

As to the possible effect upon the proposed reservoirs in the Upper Snake River Valley, would say: The first essential in locating any feasible reservoir on the North or South Fork of Snake River (after finding a reservoir site that will hold water) is to find a water supply to put in the reservoir after it is built, especially in the low water years when the reservoir is most needed.

I am sure that your company would not want to issue bonds or to sign a contract equivalent to a bond issue obligating the company to pay for a reservoir in which no water could be stored except in high water years when it would not be needed.

The available water supply of Snake River is overappropriated in low water years, as is evident from the fact that the American Falls Reservoir has failed to fill to full capacity five years out of the last seven.

The American Falls Reservoir has a prior right over any new reservoir which may be hereafter constructed either on the North or South Fork of Snake River and such new reservoir would have no right to store water until American Falls Reservoir is filled, unless a substitute water supply is provided in American Falls to take the place of the water to be stored in the proposed new reservoirs in the upper valley.

There are only two feasible ways in which any substantial amount of additional water can be saved on Snake River.

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One is to save the winter flow of Snake River. That would be accomplished under the proposed contract better than in any other way that I know. With the filling of American Falls Reservoir practically assured in that way, there would be that much better chance to secure surplus water to fill any new reservoirs which may be constructed in the upper valley.

The other is to find a reservoir site large enough and cheap enough per acre-foot so that we can afford to provide about three acre-feet of storage capacity for each acre-foot of annual yield desired, and hold over the flood water of the high water years for two or three years for use during the low water years. So far as I know there is only one place on Snake River where that can be done at a feasible cost. That is the proposed enlargement of American Falls Reservoir to 3,000,000 acre-feet capacity.

If the cost of reservoir capacity in the proposed reservoirs in the upper valley is around $10 per acre-foot, the cost of providing three acre-feet of capacity for each acre-foot of annual yield would amount to about $30 per acre-foot of annual yield and that would be prohibitive. But if the cost of providing additional storage capacity at American Falls is $2.50 or $3 per acre-foot, the cost would not be prohibitive even if you provide three acre-feet of capacity for each acre-foot of annual yield of water. The water held over in the additional capacity provided at American Falls could be exchanged for an equivalent amount of the winter flow of Snake River to which the American Falls Reservoir is entitled and in that way a right could be secured to store winter flows of Snake River each year in the proposed new reservoirs in the upper valley.

If it is found feasible to construct a reservoir or reservoirs on the North or South Fork of Snake River, or both, the proposed enlargement of American Falls Reservoir would provide a means, and probably the most feasible means, of providing a water supply to fill the proposed new reservoirs. At any rate, the proposed contract with the Idaho Power Company, by saving a large amount of the winter flow of Snake River, brings the proposed new reservoirs that much nearer to a feasible water supply.

If the top rights at Jackson Lake could be bought for what they cost the Twin Falls companies, which is about $2 per acre-foot, such rights could be used for carry-over purposes on the basis of two or three acre-feet of capacity for each acre-foot of annual yield desired, in much the same way as the proposed enlargement at American Falls and without any need for exchange. But I feel quite sure that the Twin Falls companies, especially the North Side Company which owns three-fourths of the top rights at Jackson Lake, could not give up their Jackson Lake rights unless they could secure a substitute water supply/means of the proposed enlargement of American Falls Reservoir or from some other source, so that this possibility is also tied up with the proposed enlargement of American Falls Reservoir.

As you probably know, I was strongly opposed to accepting the original proposal of the Idaho Power Company as submitted several months ago. The

JRP003346

present proposal of the company, however, is very much better in every way and I am in favor of accepting it. I think it will be of great benefit to the entire Snake River valley and a long step in the right direction in securing an ample water supply for the entire valley.

The proposal for the enlargement of American Falls Reservoir is an independent proposition which has no connection with the proposed contract with the Idaho Power Company but I believe that it is also desirable and probably the best means of providing the necessary water supply to fill any new reservoirs that may be built in the upper valley.

I am sending copy of this letter to the other companies and districts which have rights in the American Falls Reservoir as I think they will all be interested. Possibly there are some other parties in the upper valley, particularly on the North Fork, who have no rights in American Falls Reservoir but who hope to secure stored water from some of the proposed new reservoirs in the upper valley and who would be interested on that account. If you know of any others you think would be interested I would be much obliged if you will pass this information on to them.

Very truly yours,

E. K. Stephenson
District Counsel

JRP003347

Orr Affidavit

Exhibit 69

Letter from B.E. Stoutemyer, District Counsel, U.S. Reclamation Service, to the Chief Engineer, U.S. Reclamation Service (Aug. 16, 1926)

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MINIDOKA
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Portland, Oregon, August 16, 1926.

From District Council B.E.Stoutemyer

To Chief Engineer

Subject: Use of American Falls Storage - Minidoka Project.

1. Referring to your letter of August 13th to the Construction Engineer at American Falls in regard to the use of American Falls storage.

2. I am under the impression that if the year 1927 proves to be another low water year like that of 1924 and 1926, the only thing which can save the irrigation interests of the Snake River valley from a great disaster, involving crop losses aggregating possibly as much as the entire cost of the American Falls reservoir, is the storage this winter in the American Falls reservoir of all the winter flow which can be saved. To gamble on sacrificing irrigation projects of the valley to this extent for the purpose of getting a few thousand dollars from the Power Company by selling to them the winter water which we have secured the right to store, would seem to me very unwise.

3. Judging from past records, the chance that next year will be another low water year may be considered to be one chance in four, but on account of the drouth during the preceding year and the amount of water which would be absorbed in the soil, it is possible that even a normal precipitation during the coming year would not produce a normal runoff.

4. In years like 1924 and 1926 there is little or no flood flood water available for storage in the spring. Whatever storage is secured must be secured out of the winter flow. Ordinarily the winter flow of Snake River at American Falls runs pretty close to 5000 second-feet in round numbers, but after a year of drouth the winter flow might be less. If we begin storing early in November we would have a storage period of about 5 months or 150 days before the beginning of the irrigation season in April.

5. The power plant at the Minidoka dam can not be shut down without depriving the project towns and many of the project farms of light and power and in many cases of heat. To shut down the power plant would also

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disrupt the power business and the power revenue on the project which has required many years of effort to develop. I am under the impression that if we continue operating the Minidoka Power plant, we can not count on being able to store more than five or six thousand acre-feet per day for a period of about 150 days, so you will see that even if we do our best to save the available winter water, storage capacity of American Falls reservoir will not be filled by any means at the beginning of the next irrigation season in the event that next year is a year like 1924 and 1926--in fact, the reservoir would be little more than half filled.

6. The only reason why the water shortage in Snake River Valley was not much more serious this year is that we carried over 350,000 acre-feet of stored water in Jackson Lake reservoir from 1925. All the water available for the Twin Falls projects from Jackson Lake reservoir this year and a little of the stored water available for the Minidoka Project and projects in the upper valley was water carried over from 1925. There was also a little stored water purchased by the North Side Canal Company from the Blackfoot reservoir at 75 cents an acre-foot and the Minidoka Irrigation District made a contract to purchase a considerable amount at the same figure provided the Indian Bureau could deliver the water but was much disappointed because the delivery could not be made.

7. In the event of another low water year in 1927, there would be no stored water in that part of Jackson Lake reservoir belonging to the Twin Falls projects and the part belonging to the Minidoka Project would not be completely filled. In that event, the amount of stored water needed by the North Side Twin Falls project would be about three times the amount of its share in the American Falls reservoir and many other projects would be in a similar situation.

8. In the event that we have another low water year, the winter flow which can be stored in American Falls reservoir is far more valuable for irrigation than for power and we should store all the water we can and rent the Government's share to the projects which will need it. When we have stored enough water in the American Falls reservoir to take care of all the irrigation needs of Snake River valley, we can then consider dickering with the Power Company to release some water for power development, but not before that time.

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9. Practically all the irrigation projects of the Snake River Valley, in a most commendable spirit of cooperation, have bonded themselves and paid in advance to the government about half the cost of the American Falls reservoir, for the purpose of insuring the valley against water shortages. The government has also put its money into the enterprise primarily for irrigation purposes. Under the circumstances, I think we owe it to the irrigation farmers on the million acres of irrigated lands in the Snake River Valley to give them the first chance to rent any stored water which the Government may have available and which is not needed for the government project. The farmers have always been rather jealous of the Idaho Power Company and disposed to criticise the Reclamation Bureau or the Secretary of the Interior for favoring the Power Company, altho I am satisfied that there has been no ground for such complaint in the past, but if we sell to the Power Company the winter flow of Snake River which we ought to save for irrigation purposes and let the irrigated farms burn up next summer, in case of a low water year, we would never hear the end of it.

10. There is another point to be considered in this connection: If the North Side Twin Falls Project has only a third or a half of the stored water that it needs and the Twin Falls Canal Company is also cut down early in the season to the amount available of its prior right to the natural flow, the pumping division of the Minidoka Project will be short of power, and while we are burning up the farms on the Twin Falls North Side Project thru lack of irrigation water, the settlers in the Burley Irrigation District will also be suffering for lack of sufficient power to pump the required water onto their project lands and to supply the commercial power demands.

11. So far as the Power Company is concerned, it is probable that they would rather have a larger amount of water in the winter at their American Falls plant and that they might be willing to pay something for this privilege, but so far as the total amount of power developed at American Falls is concerned, so long as the total amount of water passing the American Falls dam does not exceed the combined capacities of the Company's plant and the Island and West Side plants owned by the Government, the company would be almost as well off to have the winter flow stored, as we propose, and then have it pass thru the

JRP000262

power plant of the company during the irrigation season, as it would be to have the water discharged in the winter time and the Company's plant operated only to partial capacity during the summer; that is to say, the water we send down to the North Side Canal Company and the Twin Falls Canal Company in the irrigation season is useful for power development both at American Falls and at Minidoka dam as well as for irrigation, and under these conditions, it is problematical whether the Power Company would nw would not be willing to pay much of a consideration for having the water discharged in the winter instead of in the summer.

12. The Company is also dependent upon the prosperity of the county for its commercial power business, and it is not impossible that in the event of a disastrous water shortage and the consequent inability of the farmers and towns people to pay for electric power and electric appliances, the Power Company might lose indirectly more than it could gain by selling winter power to the Utah Power Company, but in any event it is my opinion that we should not consider releasing any water for power development until we have secured sufficient storage in American Falls reservoir to fully protect all the irrigation interests of the Snake River valley in the event that next year proves to be another low water year like 1924 and 1926.

- - - -

B.E.STOUTEMYER

CC to American Falls
to Burley

JRP000263

Orr Affidavit

Exhibit 70

Contract between the United States and Idaho Power Company for conservation of Snake River water and furnishing transmission service (Oct. 1, 1934)

Durgheo

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

CONTRACT DATED

Oct. 1, 1934

with

IDAHO POWER COMPANY

(Conservation of Snake River
Water & Furnishing of
Transmission Service)

(Symbol Ilr-801)

COPY:OP

Symbol Ilr-801

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Reclamation

SNAKE RIVER VALLEY PROJECTS
and
OWYHEE PROJECT

Contract between United States and Idaho Power Company
for conservation of Snake River water and
furnishing transmission service

THIS AGREEMENT, Made this 1st day of October, 1934, in pursuance of the act of Congress of June 17, 1902 (32 Stat. 388) and acts amendatory thereof or supplementary thereto, between the UNITED STATES OF AMERICA, hereinafter styled the United States, acting for this purpose by T. A. Walters, First Assistant Secretary of the Interior, and IDAHO POWER COMPANY, a corporation organized under the laws of the State of Maine but authorized to do business in the State of Idaho and having its principal place of business therein at Boise, Idaho, hereinafter styled the Company, its successors and assigns.

WITNESSETH, That:

WHEREAS, for the purpose of enabling the United States to build a dam and storage reservoir and power plant on Snake River at American Falls, Idaho, the parties hereto entered into a certain contract under date of June 15, 1923, hereinafter referred to as the 1923 contract, whereby the Company conveyed to the United States certain real property, two certain power plants and all the water rights, appropriations, water filings and permits at American Falls, Idaho, except those certain rights expressly reserved to the Company, as in said contract set forth; and

WHEREAS, the parties hereto entered into a certain temporary contract under date of April 23, 1929, hereinafter referred to as the 1929 contract, whereby provision for the winter release of water in American Falls reservoir was made which contract expires October 1, 1938; and

WHEREAS, during several years since the construction of said dam and reservoir there has been a shortage of water available for filling said reservoir and for irrigation purposes from Snake River; and

WHEREAS, to meet possible future like emergencies arising from extreme low water years, various plans to effect a greater conservation of Snake River water to be impounded in said reservoir to be used for irrigation purposes have been proposed and considered; and

WHEREAS, the Company has electric power plant and generating facilities at said American Falls on Snake River with an approximate capacity of 27,000 kilowatts, and the United States has an electric power plant and generating facilities at Minidoka Dam below American Falls on Snake River, with an approximate capacity of 10,000 kilowatts; and

WHEREAS, one of the plans proposed for conservation of Snake River water for storage and irrigation purposes was for the construction of a power plant with a 7,500 kilowatt generating unit by the United States at American Falls; and

WHEREAS, the Company has proposed to furnish power from its

present facilities to be utilized in connection with the use of the preeent facilities of the United States at Minidoka, Black Canyon and Diversion in such way as will effect a conservation of water in said reservoir for storage and irrigation purposes; and

WHEREAS, the construotion of such a power plant by the United States at American Falls is embraced within the original plans and specifications for the construction of the American Falls reservoir to be utilized for the purpose of more nearly insuring that the American Falls reservoir will fill from year to year and also provide such additional power as may be needed; and

WHEREAS, after careful study and consideration it has been determined that oonservation of Snake River water for summer irrigation purposes in substantially greater amounts than could be accompliehed by the construction of such new unit at American Falls may be immediately effected by coordinated use of the present plant facilities of the Company and of the present plant facilities of the United States; and

WHEREAS, the plan proposed for the coordinated use of such facilities is seemingly both practicable and feasible and will not only effect a substantial conservation of water in the American Falls reservoir for irrigation purposes but will supplement the power requirements of Minidoka project;

NOW, THEREFORE, IT IS MUTUALLY AGREED AS FOLLOWS:

A 1. The Company shall be permitted to use for power at American Falls during the period of this agreement any water in

addition to its own released from American Falls reservoir.

2. The release of the Two Hundred Fifty-Five Thousand (255,000) acre-feet of the water reserved to the Company under paragraph 19 of the 1923 contract being a part of the water for which regulation and control is provided in paragraph 18 of said contract shall hereafter during the life of this agreement as herein provided be subject to the direction and limitation of the Bureau of Reclamation provided there shall be released such portion of said Two Hundred Fifty-five Thousand (255,000) acre-feet of water as may be necessary to make the total flow at the head of Shoshone Falls as provided and prescribed in paragraph 21 of the 1923 contract, except that the amounts so released each year shall not exceed during the term of this agreement, the amounts that may be necessary to make during the term of this agreement, the total flow at the head of Shoshone Falls:

790	second-feet,	October 1	to	November 30,	inc.
870	" "	December 1	to	January 31,	inc.
790	" "	February 1	to	February 12,	inc.
690	" "	February 13	to	March 15,	inc.

with no further requirement for the release of said water over Milner Dam between March 16th and June 10th incl., exclusive, however, of any part of the Company's Forty-five Thousand (45,000) acre-feet of primary storage, and the water referred to in the last sentence of paragraph 10 of the 1923 contract. For the sole purpose of preserving to the Company the right it might otherwise have to the use of the

Two Hundred-Fifty-five Thousand (255,000) acre-feet of water, it is agreed that the whole of said Two Hundred Fifty-five Thousand (255,000) acre-feet of water shall be released from American Falls Reservoir once during each five-year period (or once during such lesser or other period as the Idaho status relating to abandonment of rights to the use of water may provide) for use at the American Falls plant of Company but at such times and in such manner as the officers of the United States in charge of American Falls Reservoir shall deem least detrimental to irrigation and provided that once in said five-year period or said lesser or other period there shall be released an amount of water sufficient to preserve to the Company the right to make the total flow at the head of Shoshone Falls in the amounts and at the times as prescribed and specified in said paragraph 21.

3. For the period from October 1 of each year to April 1 of the following year after the United States plant at Minidoka Dam has generated such energy as is available from the efficient use of the water available at said plant during such period then the Company agrees to deliver at approximately 132 k.v. at said Minidoka Power Plant from its power plant at American Falls or other of its power plants in Idaho such power and energy as is necessary to meet the power demands and uses on the Minidoka project, provided that the Company shall not be obligated in any event to furnish power hereunder

during said period in an amount which will make the total power available to the Minidoka project from the Company and from the Minidoka Power Plant exceed the 10,000 k.w. of winter power provided for in paragraph 23 of the 1923 contract. In consideration of the benefits which will inure to Company by the United States forebearing to construct a power plant at American Falls at the time of entering this contract and the Company being permitted to use through its power plant at American Falls during the period of this agreement such water in addition to its own as may be released from the American Falls Reservoir until such time as the United States may oonstruct and place in operation a power plant at American Falls and the furnishing of certain power and energy by the United States to the Company and the indirect benefits that will inure to the Company by the oonservation of water in American Falls reservoir and the other benefits accruing to the Company under this agreement, no charge shall be made under this agreement for the power and energy so furnished during the nonirrigating season.

B As a part of this agreement and to meet the other inorease in power demands and uses on the Minidoka project, the Company will furnish power and energy to the United States at approximately 132 k.v. delivered at Minidoka power plant for use on said Minidoka project as follows:

At such time and as often as may be required during the months of April to September, inclusive, up to 7,500 k.w. of which

the power to be furnished over 4,000 k.w. is understood to be breakdown power only. By breakdown power as used herein is meant power furnished by the Company in excess of 4,000 k.w. to replace power temporarily lost or unavailable on account of a breakdown or interruption in operation of some part of the Minidoka power plant.

In consideration of the other benefits received by the Company under this agreement breakdown service will be furnished by the Company upon the payment by the United States of $2.00 per hour for the first 720 hours in each calendar year and for each hour thereafter in such calendar year United States will pay $4.00 per hour. No money payments shall be made for power furnished by the Company except for breakdown service.

B-1 The present Black Canyon contract under date of April 10, 1930, between United States and this Company is extended to run concurrently with this agreement, provided that the United States shall deliver to the Company under said Black Canyon contract all the Black Canyon power and energy available in excess of that power and energy now specifically reserved under said contract when used for construction and other purposes, including operating purposes at Owyhee Dam and Tunnel Canyon, and in excess of the power and energy being used by irrigation customers now served by the United States from said Black Canyon plant, except that the United States shall have the option to furnish power and energy to Owyhee Ditch

pumps and to the Payette Division of the Boise Project; also additional power to enlargements of and additions to the Payette-Oregon Slope pumping plant equal to the requirements of the Crystal Irrigation District, Bench Irrigation District, the Slide Irrigation District; also the requirements of the North and South Advancement pumps, provided that in the case of such Advancement pumps the United States Bureau of Reclamation shall install transformers to receive power from Company's present distribution lines, which latter provision is in addition to the transmission provisions of the present Black Canyon contract, provided in each instance above set forth other than the irrigation customers now served by the United States from the Black Canyon plant an equivalent reduction is made in the demands and uses of the Gem Irrigation District; however, for the seasons of 1935 and 1936 the requirements of Owyhee Ditch pumps and Advancement pumps may be supplied from a reduction in the demands of the Ontario-Nyssa pumps. And in addition thereto, the United States shall deliver to Company all power and energy available from the present Minidoka power plant not required for power demands and uses on said projects, except the power used at Albion, or in the event of enlargement of said plant, then from a capacity equal to the capacity of said present plant.

C Unless terminated in the manner hereinafter provided, this agreement shall remain in force and effect until such time as the

United States, its assigns, permittees or licensees shall construct, and place in operation a power plant at American Falls and the United States shall give Company at least sixty days' notice at its office at Boise, Idaho, of the date on which any such plant shall be placed in operation, provided that this agreement may be terminated by the United States at any date after five years from the effective date provided in "G" hereof by giving written notice to the Company at least two years prior to such date of termination and may be terminated by the Company at any date after 25 years from the said effective date hereof by giving notice to the Secretary of the Interior at least ten years prior to such date of termination; and Provided further, that the Secretary of the Interior may terminate this agreement at his option at any time, by giving the Company six months' written notice, in the event of a final court decision or final court decisions (A) holding (1) that the Secretary cannot lawfully secure an annual net income of $50,000 to reimburse the United States for the use of the Black Canyon plant by assessments or charges as an item of reservoir operation and maintenance cost against the parties who are benefited by the water saved hereunder, and also holding (2) that the Secretary cannot lawfully secure such income by sale of the power furnished under Article 3 and Section B thereof, to the Minidoka Irrigation District; or (B) holding that the Secretary may not discontinue or reduce the nonirrigation season use of the

power plant at Minidoka Dam in order to conserve the flow of Snake River for storage, for the purpose of irrigation, in the American Falls Reservoir for the benefit of the contracting parties therein, and in the proposed reservoir in the North Fork, if and when it is built. The United States, its assigns, permittees or licensees shall not within 5 years from the date of this agreement oonstruct and/or plaoe in operation additional generating facilities at Minidoka Dam for any purpose other than supplementary to the present faoilities thereat in furnishing the power demands and uses on the Minidoka Project. During the life of this agreement the United States will not sell power from its Minidoka Projeot power system outside of the Minidoka Project in excess of an amount of power 850 k.w. less than the amount generated from the additional power unit or units hereafter installed at the Minidoka Dam exoept the power furnished at Albion.

D. In effecting the necessary conservation of water at American Falls Reservoir and thus aiding in carrying out both the letter and spirit of this agreement, the Company and the United States agree to effect, so far as practicable, a closely ooordinated and synchronized operation of their respective plants. In case of breakdown the United States agrees to restore its plant or plants to full operating condition with all possible diligence so far as consistent with ordinary construction methods and laws and regulations applicable to Government work.

E This agreement shall not alter, amend or affect in any way the terms and conditions of the 1923 contract, except in so far as the release by American Falls and Milner Dam of the Two Hundred Fifty-five Thousand (255,000) acre-feet of water reserved to the Company under paragraph 19 of the 1923 contract, being a part of the water for which regulation and control is provided in paragraph 18 of said contract, is changed as herein specified for the duration of this agreement nor constitute or be construed as a release, surrender or abandonment of any of the Company's power or water rights.

F The 1929 contract shall be suspended during the term of this agreement.

G This agreement shall take effect October 1, 1934, and shall continue in effect as above provided until terminated in the manner hereinbefore provided.

H Nothing in this contract contained shall be or constitute a release, surrender or abandonment by the United States of any of its rights to use of water for power purposes at the Minidoka Power plant nor a release, surrender or abandonment by the United States of any rights acquired by construction of the American Falls reservoir.

I It is agreed that the water conserved and made available by the terms of this agreement is for storage in the American Falls Reservoir except the water saved by the Company's release of the right to have water discharged over Milner Dam which water may be stored in the North Fork Reservoir if built and is in lieu of water that would otherwise be conserved and so stored by the construction of the

said generating unit at the American Falls Reservoir and shall inure to the benefit of all parties interested in American Falls Reservoir in like manner and extent.

J This agreement shall inure to the benefit of, and be binding upon the successors and assigns of the Company and also upon the successors and assigns of the United States.

K No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract or to any benefit which may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

IN WITNESS WHEREOF, the parties hereto have signed their names the day and year first above written, said Company acting in pursuance of a resolution of its Board of Directors duly adopted May 9th, 1935.

(SEAL)

(SEAL)

Attest:

(Sgd) James L. Boone
Secretary

UNITED STATES OF AMERICA

By (sgd) T. A. Walters
First Assistant Secretary
of the Interior

IDAHO POWER COMPANY

By (sgd) K. M. Robinson
President

Memo Sheet

Idaho Power Company - American Falls storage May 1, 1929-
Oct. 1, 1938, Lease Apr. 23, 1929, Ilr-543 /suspended by
contract Oct. 1, 1934, Ilr-801/
Idaho Power Co. and American Falls Reservoir District
lease June 1, 1931, Ilr-656
supplemental lease Oct. 31, 1932, Ilr-656
supplemental lease Dec. 1, 1933, Ilr-656
supplemental lease Nov. 1, 1934, Ilr-656
/expired Oct. 31, 1935/

Orr Affidavit

Exhibit 71

Letter from B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation, to R.W. Faris, Idaho State Commissioner of Reclamation (Jun. 21, 1937)

Third Orr Affidavit

EXHIBIT 13

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Reclamation

603 Post Office Building
Portland, Oregon
June 21, 193[illegible]

STATE OF IDAHO
COUNTY OF ADA
SS.
I, JOHN BA[illegible]A, CLERK OF THE DISTRICT COURT OF THE FOU JUDICIAL DIS[illegible]T OF THE STATE OF IDAHO, IN AND FOR COUNTY OF ADA, DO HEREBY CERTIFY THAT THE FOREGOING TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFF
IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND FIXED MY OFFICIAL SEAL THIS [illegible] DAY [illegible] 19[illegible]
JOHN BASTIDA, CLERK
BY [illegible] DEP

Mr. R. W. Faris,
State Commissioner of Reclamation
Boise, Idaho.

My dear Mr. Faris:

In letter under date of June 18, 1937 (copy of which is enclosed), Mr. Lynn Crandall, District Engineer of the Geological Survey and Watermaster in charge of District No. 36, has called our attention to two printed notices which are now being published, giving notice of proof of completion of works and application of water to beneficial use by the Idaho Power Company.

The first of these notices is for 300 c.f. per second of the waters of Snake River under Permit 18107. The place where water is used is designated as Lower Salmon Falls, Gooding County. This proof, it is stated in the notice, is to be made at 11 o'clock a.m. on June 29 at Boise, Idaho, before M. E. Hughes, notary public, at 1220 Idaho Street.

The second notice is for 1500 c.f. per second of the waters of Snake River under Permit 17070. The place where this water is used is designated as "at the Twin Falls Power Station in Lot 3 of Section 4, in Township 10 South of Range 18 East B. M., in Twin Falls County, Idaho". The date of priority claimed in connection with this right at the Twin Falls power plant is referred to as April 2, 1929.

In this connection we wish to call attention to the fact that both of these power developments of the Idaho Power Company are located in whole or in part on public lands and that the license issued by the Federal Power Commission in connection with the Twin Falls Power Plant of the Idaho Power Company contains, among other things, the following stipulation and agreement, which is set out as article 14, of the license issued by the Federal Power Commission to the Company:

"Article 14. As a condition of this license, the Licensee, for itself, its successors and assigns, hereby stipulates and agrees that all rights to the use of water for power purposes heretofore or hereafter acquired for the development of power at the site of this project shall be held and considered at all times to be subject, inferior, and subordinate to all rights, heretofore or hereafter acquired by the United States or other parties for irrigation purposes, except (a) the right to use for power development at this project the water from the 45,000 acre feet of primary storage capacity which the Licensee holds in American Falls

Reservoir under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923, and the discharge of which it may control under the terms of said contract; (b) the right to use for power development at this project the seepage, percolation, drainage, spring or springs, waste, and/or other influent waters which do not flow or spill over Milner Dam but which enter in, arise in, and flow in and along the channel of Snake River between the down-stream toe of Milner Dam in Snake River, Idaho, and the site of the project covered by this license. Licensee further agrees, for itself, its successors and assigns, to forego any and all claims which it might otherwise have for damages or other relief, in connection with any power rights at the site of this project, other than those mentioned in (a) and (b) above and which are necessary for irrigation purposes, and it is actually agreed by the parties hereto that this license neither expressly nor impliedly has modified, relinquished, abandoned, or surrendered, nor does hereby modify, relinquish, abandon, or surrender any of the Licensee's rights and privileges under said contract of June 15, 1923, or any of its rights and privileges heretofore or hereafter acquired to the use of water or waters for power purposes at any other point or points.

This stipulation and agreement shall be considered as a covenant running with the title to the said power plant at Twin Falls, and all rights in connection therewith, and the Licensee agrees to execute and acknowledge under authority of a suitable resolution of its board of directors, a recordable contract or deed embodying the provisions, conditions, and limitations set out in the foregoing stipulation and agreement, so that the same may be recorded in the counties in which said power sites are located.

This stipulation shall be effective to bind the Licensee and its successors and assigns, without signature or execution by or on behalf of the United States, and shall become effective for such purposes upon the execution of the license."

When the license in question was under consideration, we insisted on the above quoted stipulation for the protection of the present and future irrigators of the Snake River Valley. It seems to us that it would be contrary to sound public policy to allow any additional power rights to attach for use in the Snake River Canyon to such an extent as would require the waste of water over Milner Dam, since all the water available in Snake River above the Milner Dam is needed for irrigation purposes even at the present time (especially so in low water years when there have been serious water shortages even for the lands now under irrigation) and with increasing irrigation requirements, and construction of additional reservoirs to store flood water and to carry over excess water of high water years for use in low water years, the need to conserve all the available water above Milner Dam for irrigation purposes will become more and more evident as the years go on. On the other hand there are many places in the State of Idaho where additional power can be developed without infringing on the water supply that is needed for irrigation purposes.

It seems to us that any license or certificate issued by the State should contain limitations similar to those imposed by the Federal Power Commission and as the company has expressly agreed to such limitations in its license from the Federal Power Commission, it should not object to having a similar limitation inserted in any license or certificate issued by the State.

It is noticed that the date of priority claimed for the 1500 second feet at Twin Falls is earlier than the date of priority secured for the water filings for the Island Park Reservoir, now approaching completion on the North Fork of Snake River, and also prior to the permit issued by the State Engineer of Wyoming for the small reservoir at Grassy Lake, both of which reservoirs are highly important to the people on the North Fork of Snake River and in the Teton Valley. Attention is also called to the fact that for several years past the people in the Upper Snake River Valley have been urging the government to construct another reservoir on the South Fork of Snake River. Any additional power rights which would require the waste of water over Milner Dam would conflict with both of these propositions and any other reservoirs which may be built in future years to conserve water for irrigation purposes in the Snake River Valley above the Milner Dam.

It may be that by means of the stipulation already inserted in the licenses issued by the Federal Power Commission that we may be able to protect the water users of the Snake River against any claim of the power company for additional water over Milner Dam but I think that the water users of the Snake River Valley should also have the additional protection of a similar provision in any license or certificate issued by the State Engineer, at least to the extent of recital in such certificate or license of the limitations which have been imposed by the Federal Power Commission and which have been agreed to by the company.

Another thing which I think we should all keep in mind with reference to any future applications for power rights at sites where no irrigation benefits will accrue from the proposed development is this. It will probably be found that in most cases future irrigation developments in southern Idaho, particularly large and expensive reservoirs, will be so costly that it will be essential to the feasibility of the project that a very substantial part of the cost be paid out of power revenues secured as incidental to the construction of the irrigation works. As the power market in southern Idaho is a very limited one and all the growth in such market that is likely to occur during this generation might very well be supplied from the power which may be developed in connection with and incidental to the proposed irrigation developments, the sale of which would be essential to the feasibility of the irrigation project, I believe that no more power permits should be issued at sites in southern Idaho where there are no irrigation benefits to be derived, until we can ascertain whether the available market likely to be developed in the near future cannot be fully supplied from the power to be developed in connection with irrigation works.

Very truly yours,

/s/ B. E. STOUTEMYER
District Counsel

enol
cc - Mr. Crandall

412.12

Legal
D & M
Rasch/Horn

603 Post Office Building
Portland, Oregon
June 21, 1937

Mr. R. W. Paris,
State Commissioner of Reclamation,
Boise, Idaho.

My dear Mr. Paris:

In letter under date of June 16, 1937 (copy of which is enclosed), Mr. Lynn Crandall, District Engineer of the Geological Survey and Watermaster in charge of District No. 36, has called our attention to two printed notices which are now being published, giving notice of proof of completion of work and application of water to beneficial use by the Idaho Power Company.

The first of these notices is for 200 c.f. per second of the waters of Snake River under Permit 16197. The place where water is used is designated as Lower Salmon Falls, Gooding County. This proof, it is stated in the notice, is to be made at 11 o'clock a.m. on June 29 at Boise, Idaho, before E. E. Hughes, notary public, at 1220 Idaho Street.

The second notice is for 1500 c.f. per second of the waters of Snake River under Permit 17070. The place where this water is used is designated as "at the Twin Falls Power Station in Lot 3 of Section 4, in Township 10 South of Range 16 East B.M., in Twin Falls County, Idaho". The date of priority claimed in connection with this right at the Twin Falls power plant is referred to as April 2, 1928.

In this connection we wish to call attention to the fact that both of these power developments of the Idaho Power Company are located in whole or in part on public lands and that the license issued by the Federal Power Commission in connection with the Twin Falls power plant of the Idaho Power Company contains, among other things, the following stipulation and agreement, which is set out as article 14 of the license issued by the Federal Power Commission to the company:

COPY-National Archives-Rocky Mountain Region

Article 14. As a condition of this license, the Licensee, for itself, its successors and assigns, hereby stipulates and agrees that all rights to the use of water for power purposes heretofore or hereafter acquired for the development of power at the site of this project shall be held and considered at all times to be subject, inferior, and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation purposes, except (a) the right to use for power development at this project the water from the 45,000 acre-feet of primary storage capacity which the Licensee holds in American Falls Reservoir under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923, and the discharge of which it may control under the terms of said contract; (b) the right to use for power development at this project the seepage, percolation, drainage, spring or springs, waste, and/or other influent waters which do not flow or spill over Milner Dam but which enter it, arise in, and flow in and along the channel of Snake River between the down-stream toe of Milner Dam in Snake River, Idaho, and the site of the project covered by this license. Licensee further agrees, for itself, its successors and assigns, to forego any and all claims which it might otherwise have for damages or other relief, in connection with any power rights at the site of this project, other than those mentioned in (a) and (b) above and which are necessary for irrigation purposes, and it is actually agreed by the parties hereto that this license neither expressly nor impliedly has rectified, relinquished, abandoned, or surrendered, nor does hereby modify, relinquish, abandon, or surrender any of the licensee's rights and privileges under said contract of June 15, 1923, nor any of its rights and privileges heretofore or hereafter acquired to the use of water or waters for power purposes at any other point or points.

This stipulation and agreement shall be considered as a covenant running with the title to the said power plant at Twin Falls, and all rights in connection therewith, and the licensee agrees to execute and acknowledge under authority of a suitable resolution of its board of directors, a recordable contract or deed embodying the provisions, conditions, and limitations set out in the foregoing stipulation and agreement, so that the same may be recorded in the counties in which said power sites are located.

This stipulation shall be effective to bind the licensee and its successors and assigns, without signature or execution by or on behalf of the United States, and shall become effective for such purpose upon the execution of the license."

COPY-National Archives-Rocky Mountain Region

When the license in question was under consideration, we insisted on the above quoted stipulation for the protection of the present and future irrigators of the Snake River Valley. It seems to me that it would be contrary to sound public policy to allow any additional power rights to attach for use in the Snake River Canyon to such an extent as would require the waste of water over Milner Dam, since all the water available in Snake River above the Milner Dam is needed for irrigation purposes even at the present time (especially so in low water years when there have been serious water shortages even for the lands now under irrigation) and with increasing irrigation requirements, and construction of additional reservoirs to store flood water and to carry over excess water of high water years for use in low water years, the need to conserve all the available water above Milner Dam for irrigation purposes will become more and more evident as the years go on. On the other hand there are many places in the State of Idaho where additional power can be developed without infringing on the water supply that is needed for irrigation purposes.

It seems to us that any license or certificate issued by the State should contain limitations similar to those imposed by the Federal Power Commission and as the company has expressly agreed to such limitations in its license from the Federal Power Commission, it should not object to having a similar limitation inserted in any license or certificate issued by the State.

It is noticed that the date of priority claimed for the 1500 second-feet at Twin Falls is earlier than the date of priority secured for the water filings for the Island Park Reservoir, now approaching completion on the North Fork of Snake River, and also prior to the permit issued by the State Engineer of Wyoming for the small reservoir at Grassy Lake, both of which reservoirs are highly important to the people on the North Fork of Snake River and in the Teton Valley. Attention is also called to the fact that for several years past the people in the Upper Snake River Valley have been urging the government to construct another reservoir on the South Fork of Snake River. Any additional power rights which would require the waste of water over Milner Dam would conflict with both of these propositions and any other reservoirs which may be built in future years to conserve water for irrigation purposes in the Snake River Valley above the Milner Dam.

It may be that by means of the stipulation already inserted in the license issued by the Federal Power Commission that we may be able to protect the water users of the Snake River against any claim of the power company for additional water over Milner Dam but I think that the water users of the Snake River Valley

COPY-National Archives-Rocky Mountain Region

should also have the additional protection of a similar provision in any license or certificate issued by the State Engineer, at least to the extent of recital in such certificate or license of the limitations which have been imposed by the Federal Power Commission and which have been agreed to by the company.

Another thing which I think we should all keep in mind with reference to any future applications for power rights at sites where no irrigation benefits will accrue from the proposed development is this. It will probably be found that in most cases future irrigation developments in southern Idaho, particularly large and expensive reservoirs, will be so costly that it will be essential to the feasibility of the project that a very substantial part of the cost be paid out of power revenues secured as incidental to the construction of the irrigation works, as the power market in southern Idaho is a very limited one and all the growth in such market that is likely to occur during this generation might very well be supplied from the power which may be developed in connection with and incidental to the proposed irrigation developments, the sale of which would be essential to the feasibility of the irrigation project. I believe that no more power permits should be issued at sites in southern Idaho where there is no irrigation benefits to be derived, until we can ascertain whether the available market likely to be developed in the near future cannot be fully supplied from the power to be developed in connection with irrigation works.

Very truly yours,

R. E. Stoutemyer
District Counsel

encl

cc - Mr. Crandell

cc (with encl) - Washington
Denver
Burley
Ashton
Boise

COPY-National Archives-Rocky Mountain Region

Orr Affidavit

Exhibit 72

Letter from Lynn Crandall, U.S. Geological Survey District Engineer, to B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation (Jun. 18, 1937)

Third Orr Affidavit

EXHIBIT 12

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o
p
y

UNITED STATES
DEPARTMENT OF THE INTERIOR
Geological Survey

Idaho Falls, Idaho
June 18, 1937

Mr. B.E. Stoutemyer
603 Post Office Bldg.,
Portland, Oregon.

Dear Mr. Stoutemyer:

Herewith is a clipping from the Twin Falls News relative to proof of completion of works and application of water to beneficial use by Idaho Power Co. at Twin Falls and Lower Salmon Falls with dates of priority of April 2, 1929 and March 20, 1935, respectively.

I understand that when the Federal Power Commission granted a license for the development at Twin Falls a provision was made that any water rights acquired would not be adverse to future storage rights above Milner. I do not know whether a similar provision applies to the increased development at Lower Salmon Falls.

If my understanding of this matter is correct I wonder if it wouldn't be desirable for you to file a request with the Commissioner of Reclamation asking that he include a provision in his license to the Power Co. reciting the restriction in the Federal Power Commission license.

I suppose the latter would control anyhow but it seems to me that it would be desirable to have it reaffirmed in the State water right license so that it will be clearly evident that the date of priority applies only to rights below Milner and is not adverse to subsequent developments above Milner.

Yours truly,

/s/ LYNN CRANDALL
District Engineer.

COPY-National Archives-Rocky Mountain Region

Orr Affidavit

Exhibit 73

Letter from B.E. Stoutemyer, District Counsel, U.S. Reclamation Service, to Commissioner, U. S. Bureau of Reclamation (Sept. 5, 1939)

223.02

PALISADES DAM

SEP - 9 1939

Portland, Oregon, September 5, 1939

AIR MAIL

From: District Counsel

To Commissioner

Subject: Request for renewal of existing American Falls storage leases. Minidoka Project, Idaho

Dear Sir:

1. Please find enclosed copy of letter just received from Mr. W. A. Heise, president of the North Side Canal Company, Ltd., concerning the proposed new lease contract for leasing surplus water in American Falls reservoir. Also enclosed is copy of my reply, together with copy of letter I am writing to Mr. Crandall today and copy of enclosure.

2. The enclosed form is not intended to be final but will be sufficient to feel out the situation and find out which companies are willing to bind themselves to make the necessary saving of winter water. We are going to have some trouble in getting the necessary contracts subscribed to for saving the water, but as the Chief Engineer reports that such saving of winter water is essential to the feasibility of the Grand Valley project I think that we have no alternative but to insist that such contracts must be executed before the new reservoir is constructed. Eighteen million dollars is a big investment for the government to make and surely it is reasonable that the parties who wish us to make that investment should do their part in saving the water which is essential to the feasibility of the project.

3. Another matter which I would like to have you consider in this connection is the question whether in drafting the new lease contract we should give the Burley District another chance to get back on the list of parties participating in the rental of water. My idea on this point is that, now, that we have won our lawsuit, it would be good policy for us to be somewhat magnanimous in giving the district another chance to secure the rental water if it so desires.

4. It is my idea concerning the new lease contract that we might make it for another 5 years, but it should not be longer than 5 years on account of the changing situation, particularly if the Grand Valley reservoir is constructed. I do not have in mind any radical changes in the proposed form of lease contract except the possible insertion of a provision that no part of the leased water shall beffurnished to any company or district except those that have subscribed to the agreement to save the winter flow.

- - -

encs.

B.E.STOUTEMYER

cc - Denver
Comm.
Burley
Ashton
with enclosures
by regular mail

File 223.02-Minidoka

JRP008319

Orr Affidavit

Exhibit 74

Letter from Watermaster Lynn Crandall to E.V. Berg, Idaho State Commissioner of Reclamation (Sept. 25, 1941)

301.

PALISADES DAM

Page	
Bashore	
Cheadle	
Sanford	
Kubach	
Nelson	
Warne	
Golze	
McCurdy	

SNAKE RIVER BASIN

Twin Falls, Idaho
Sept. 25, 1941

Mr. E.V.Berg,
Commissioner of Reclamation,
Boise, Idaho

Dear Mr. Berg,-

Replying to yours of the 24th inst. relative to water supply for the Palisade Reservoir,-

It is generally conceded that the winter diversion of water on Snake River is a wasteful practice that should, as a matter of public policy, be discontinued. I think the Bureau of Reclamation feels that the construction of the Palisade Reservoir and the ultimate disposal of the American Falls lease water is the last means by which it can exert any pressure on the Snake River Canals to cease the winter diversion of water. Accordingly the Bureau has adopted the requirement that all companies purchasing space in the Palisade Reservoir will have to agree to cease winter water diversions within 5 years from the date that construction starts on the dam. I think the Bureau will make the same requirement in connection with the permanent disposal of the present leased space in American Falls Reservoir. In an arid region where development is limited by water supply no impartial observer can quarrel with these requirements.

The need for stored water by the Twin Falls North Side Project is sufficiently great that, on a showdown, it would probably be obliged to cease winter water diversions rather than lose the stored water now being rented under the American Falls lease. There is an ample supply of domestic water of good quality underneath that tract and the only problem is one of the cost of drilling wells. It has been estimated that it would cost about $1,000,000 to provide wells for all farms on the North Side Project that are not now equipped with them. The Farm Security Administration is loaning money to needy farmers to drill wells and there is no more real need to run winter water on the Twin Falls North Side Project than on the Big Wood River Project, for example.

On the Twin Falls South Side Project, however, the situation is different. The ground water there is generally of poor quality, several towns use the canal water for domestic supply and the Canal Company's need of its lease water is not great enough to compel it to give up its winter water use in order to continue to receive the amount of stored water represented by its existing lease.

Mr. Page suggested several years ago that it might be possible to build a pipe line from Milner or Hurtaugh Lake to carry domestic water over the tract as has been done on the Deschutes Project in Oregon. It seems to me that it might be desirable for the Bureau to make an estimate of the cost of such a project and see if enough interest could be aroused among the South Side Twin Falls residents to stand part of the cost of such a distribution system.

The average water supply available for the proposed Palisades Reservoir depends on what period of years is taken in making the computations. Stream flow records are available for 50 years since 1890. The only period during this 50 year record

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when more than one dry year occured in succession was from 1931 to 1935,incl. and the amount of water that can be stored in the future depends largely on how often a recurrence of similar years to 1931-35 can be expected.

The Bureau of Reclamation has taken the period of 22 years from 1918 to 1939 and by assuming certain increases in existing diversions, including full use each year of all its available storage by the Fremont-Madison Irrigation District, has computed that the average annual yield of the proposed Palisade Reservoir under existing conditions of winter use will be 125,000 acre feet for a series of years such as 1918 to 1939. If the 1931-35 period were left out the yield would be greater, or if the years prior to 1918 were included it would also be greater.

It is my opinion that in practice the reservoir will do better than this because with individual credits possible in the reservoir the companies will reduce their present un-necessary use appreciably, and because the experience of the Fremont Madison District during the past 3 years demonstrates that in ordinary years it will not exhaust its present storage supply. There is a common feeling among the companies now that they might as well use the water as to have it go to someone else or spill down the river. If space was available in which the water could be saved I think there would be substantial reductions in early and late season use . From upper valley canals that have agreed to eliminate winter water diversions if Palisade reservoir is built an annual increase in storable run-off of 75,000 acre feet can be expected. The Twin Falls North Side Project also diverts about 125,000 acre feet each winter which can probably be eliminated.

Assuming that the Bureau of Reclamation adheres to its policy of compelling purchasers of Palisade space or Am. Falls lease space to cease winter water diversions within 5 years I feel that an average annual yield of 250,000 acre ft. can conservatively be expected from the new reservoir without regard to any water that might become available from cessation of winter use on the Twin Falls South Side Project. I think it is highly desirable that some plan be worked out, if possible, to do away with winter water on that tract but the Palisade Reservoir is quite feasible, in my opinion,even if that cannot be accomplished. The Canal Cos. who have subscribed for space are willing to take their chances on the yield as in most cases it is for supplemental and insurance water and is feasible for this purpose where more question might arise if it was their only water right .Assuming that the average annual yield of Palisade Reservoir is 250,000 acre feet, the Canal Companies who will subscribe for the space will get 90% of their average diversions from other sources. They have lived thru the past dry years withput the Reservoir and they are confident that if the space can be procured at reasonable cost it will be well worth while to them, even if they only fill it occasionally and then hold it for the dry years.

In connection with the development of the Palisade Reservoir Project the Bureau of Reclamation will have to make some permanent disposition of its lease space at American Falls, as the Canal companies will need to know what is going to happen to their present lease space before they can definitely determine how new reservoir space they will require. If the Gov't. offers the leased space for sale it will be besieged with requests aggregating 5 times as much space as is available, and more or less ill feeling will result from the allocation to the favored companies. On this account it has been suggested that the leased space (433,593 acre feet) be combined with the Palisade Reservoir space (@ 1,300,000 acre feet) and sold in combination. If this is done the anticapt

JRP006240

yield, assuming winter use still continues on the Twin Falls South Side tract, would be as follows,-

Palisade Reservoir,	1,300000	ac. ft of space, annual yield	250,000	ac.ft.
Am.Falls lease	433,593	" " " "	368,000	"
		Total yield	618,000	"

The total yield would be 35.7% of the combined space and we have recommended to purchasers of space that they buy an amount of space equal to 3 times their annual requirements. The applications for space already made have been on this basis.

Assuming that the irrigation cost of 1,300,000 acre feet of space in Palisade Reservoir will be $7,794,000 as set out in the estimate by the Bureau of Reclamation and that the American Falls leased space of 433,593 ac.ft. will be sold at cost of $4.50 per acre ft., the total combined irrigation cost would amount to about $5.65 per acre ft. of space or abou $17 per acre ft. of average annual yield. I think the Bureau should be willing to figure the American Falls space in at cost as it has been collecting rent on it for 11 years at an annual rate equal to what the payments would have been under the terms of the Reclamation Act.

While the amount of water actually consumed by persons or livestock during the winter months under the Twin Falls North and South Side Canals is not over 2% of the amount diverted, the canal operators say that they have to keep water spilling at the end of each canal and lateral otherwise they will freeze dry during cold snaps, the ice fall in the ditch and they cannot get the water thru again until spring. This point has been discussed with them for years without accomplishing anything of value, hence I do not feel that there is any likihood of getting the quanities reduced except by shutting the canals dry

Yours truly,
Lynn Crandall.

Watermaster

C.C. to Bof R:
Wash
Denver
Boise
Portland

JRP006241

Orr Affidavit

Exhibit 75

"Status Report – Workings of Palisades Water Savings Agreement," by the U.S. Bureau of Reclamation, Boise, Idaho (Aug. 5, 1968)

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STATUS REPORT

WORKINGS OF PALISADES WATER SAVINGS AGREEMENT

p. 8 Summ

U. S. Bureau of Reclamation

Boise, Idaho
August 5, 1968

Reclamation's
Exhibit No. 7014

STATUS REPORT
WORKINGS OF PALISADES WATER SAVINGS AGREEMENTS

This is a status report on important gains in the efficiency of total water use in the entire Upper Snake River Basin through the workings of Palisades water savings and exchange agreements that were entered into by some 57 water user entities as a part of the Palisades Dam Project-authorization package.

The report also brings out (1) the complex nature of surface-ground water relationships existing in the entire Upper Basin, and (2) the necessity for evaluating individual project hydrologic operations as part of an integrated whole. The characteristics of the Upper Snake River hydrologic regimen are unique in Idaho, as well as the Northwest, and without consideration of the above-listed factors, certain indicated diversions for the purpose of manipulating ground water levels may appear to be excessive when related to irrigation diversion in the traditional manner.

The Palisades Project was initially authorized in 1941 as the Palisades Dam Project by the presentation to the President and the Congress of a report and findings of feasibility by the Secretary of the Interior on December 9, 1941 (H. Doc. No. 457, 77th Congress, 1st Session), under the provisions of section 9 of the Reclamation Project Act of 1939 (53, Stat. 1187). That finding incorporated the report of the Commissioner of Reclamation to the Secretary of the Interior, dated November 1, 1941. The supporting engineering and economic report of the Bureau of Reclamation was the product of investigations begun by the Bureau in 1932 to study means of providing urgently needed supplemental storage in the Upper Snake River Valley.

The report of the Commissioner of Reclamation to the Secretary of the Interior, noted above, stated that the success of the Palisades Reservoir would depend on the conservation of 135,000 acre-feet of water annually then being lost to the reservoir system because of winter diversions for stock and domestic purposes. The Bureau of the Budget, speaking for the President, approved the project with the reservation that submission of estimates of appropriations needed for construction be withheld until local interests had given satisfactory assurance to the Secretary of the Interior that winter diversions in certain areas above American Falls Dam would be eliminated.

A thorough investigation of water uses and requirements in the Upper Snake River Valley was made by the Bureau of Reclamation during the 1940's subsequent to the time the project was first authorized. The primary purpose of this investigation was to provide factual information to serve as a basis for the negotiation of agreements with water users of the Valley covering the elimination of water loss caused principally by winter operation of canals. An associated objective was to gather factual material from which to determine a proper distribution of the 433,593 acre-feet of reserved space in American Falls Reservoir. When the American Falls Reservoir, 120 miles downstream from Palisades, on the main stem of the Snake, was completed in 1927, the contemplated use of that space was for new land developments. For a number of years shortly following completion of American Falls Dam, the reservoir failed to fill because of an unprecedented drought. The reserved space was, therefore, leased to existing water users.

A report covering the results of the above investigation, entitled "Water Supply for Palisades Reservoir Project, Idaho" (Project Planning Report No. 1-5.17-1), was issued by the Bureau of Reclamation in October 1946. The report presented the results of extensive water supply studies of the Upper Snake River Valley, together with a proposed winter water-saving program and a plan for development of new land. After the issuance of this report, the Bureau of Reclamation carried on lengthy negotiations with the water users in an effort to obtain the maximum possible conservation of water and also to obtain agreement as to an equitable distribution of the reserved space in American Falls Reservoir.

The practice of diverting water into the canals in winter for stock and domestic purposes, established many years ago, was deep rooted and difficult to alter. Various proposals were made by the United States, out of which a compromise evolved. The compromise involved these principal points: (1) the elimination by the water users at their own expense of winter diversions in order to conserve water for storage in Palisades and American Falls Reservoirs; (2) the curtailment of the use of water for power generation at Minidoka Dam for the financial account of the Minidoka Project to conserve additional water for storage in American Falls, Island Park, and Palisades Reservoirs; (3) the coordinated operation of the reservoir system for maximum storage water yields; (4) the establishment of uniform storage holdover privileges in all reservoirs; (5) a permanent exchange of contract storage rights between American Falls and Jackson Lake Reservoirs to reduce storage delivery losses; (6) the distribution of American Falls Reservoir space as follows: 315,000 acre-feet to existing lessees, 47,593 acre-feet to the North Side Pumping Division of the

Minidoka Project, and 71,000 acre-feet to the Michaud area; (7) the recognition of existing rights to the diversions made during periods of flood flow; (8) the commitment of Palisades users to allow that reservoir to be pooled with the next 300,000 acre-feet of storage added to the system; and (9) the clarification of storage and diversion rights in connection with American Falls Reservoir.

The winter water-saving program involves the elimination of the long-standing practice of supplying domestic and stock water to farmsteads by operating irrigation canal systems throughout the year. A substantial portion of the water diverted into the canals during the winter percolates to the underlying groundwater reservoir which is not tributary to the Snake River above Milner Dam. Hence, the elimination of winter seepage losses from the canals in such nontributary areas increases the amount of water available for storage. State of Idaho water rights to divert water in winter for stock and domestic purposes were clearly established by actual use over many years. Reliance on the canals for domestic and stock water was continued for many years because of the high cost of drilling deep wells and pumping water from them and because it is more convenient to water livestock from canals than from wells. Furthermore, there was no real incentive to save water until Palisades Reservoir was constructed on the Snake River because the water would otherwise spill past Milner Dam. Since the water users involved in the winter water-saving program incurred considerable expense in equipping their farmsteads with wells and lost the convenience of watering livestock from canals, it was understood among all prospective participants that those water users who make possible the saving would be entitled to a special right to store the saved water to the extent required to fill their share of the storage capacity in American Falls and Palisades Reservoirs.

By coordinating the operation of all reservoirs in the system, the maximum volume of storage water can be carried over in the reservoir system from wet cycles to dry cycles. The amount of that carryover is substantially greater than would be the case if Palisades were operated independently from the existing system. Through this coordination, Jackson Lake can be operated primarily as a holdover reservoir, and only limited irrigation water is drawn from it until Palisades Reservoir has been emptied. The additional, usable return flow made available from application of this holdover storage will augment further the supply of irrigation water during drought periods. Operation studies of the reservoir system, taking account of these factors, show that storage in Palisades Reservoir and the elimination of winter diversions and curtailment of power at Minidoka Dam would have made enough additional water available to eliminate all shortages on existing projects during the past 79 years, except those in the extremely

dry years of 1934 and 1935. Even in those years, however, an appreciable reduction would have been made in the shortages.

Resolutions giving assurance that the water users would agree to water saving provisions which would satisfy the conditions of the authorizing document for Palisades Dam were obtained in 1949 from the governing bodies of the interested water user groups. On the basis of these resolutions some preliminary construction contracts were executed late in fiscal year 1949. In the early 1950's, these resolutions were confirmed by formal contracts with the water users. Over 50 contracts, generally referred to as the "Palisades Contracts," were negotiated over a period of several years. In addition to the annual water saving of 135,000 acre-feet, established as a prerequisite to the beginning of construction of Palisades Dam, these contracts provide a basis for possible maximum annual savings of 276,000 acre-feet by curtailment of winter diversions by canals diverting at Milner Dam.

Under the contracts each of 41 irrigation districts and companies agreed to eliminate winter diversions for a period of 150 consecutive days during the November 1 through April 30 period each year. The estimated average annual saving from such curtailment is 143,000 acre-feet, of which 135,000 acre-feet is attributable to curtailment by canals above American Falls Dam and 8,000 acre-feet by those diverting below that point. Under the contracts, such curtailment was to begin with the 1958-1959 storage season. Partial curtailment of winter diversions actually began 4 or 5 years prior to this time and increased gradually throughout this period. The full annual saving of 143,000 acre-feet has been accomplished each storage season, beginning with the 1958-1959 storage season.

In addition to the mandatory annual savings of 143,000 acre-feet above, the contracts provide a basis for an additional savings by curtailment of winter diversions by the North and South Side Twin Falls canals diverting at Milner Dam. The possible maximum annual savings is estimated to be 276,000 acre-feet. Although this water saving is exercised only at the option of the two companies, winter diversions have been substantially reduced each winter, beginning with the winter of 1960-61. It appears that the companies' decision to exercise this option during the 1960-61 storage season was prompted by the low storage levels in the reservoir system at the end of the 1960 irrigation season. This decision was indeed timely in view of the fact that streamflow in 1961 was much below normal, the reservoir system failed of filling by a substantial amount, and a number of areas experienced irrigation water shortages. Without Palisades Reservoir and winter water saving actually accomplished, the shortages would have

been much more severe. Had the curtailment of winter diversions at Milner Dam been started in 1959 the water shortages in 1961 would probably have been eliminated.

Winter diversions at Milner Dam have been substantially reduced each winter since 1961. The amount of the reduction varies from year to year, ranging from a maximum of 260,000 acre-feet in the winter of 1961-62 to a minimum of 198,000 acre-feet in the winter of 1965-66. In addition to the obvious benefits from saving water for storage in the reservoirs the maintenance of the canal system is more effective and less costly when the canals are shut off in winter. For this reason, it is expected that such savings will be increased in future years and eventually the maximum annual savings of 276,000 acre-feet will probably be realized with the canals shut off from November 1 to April 1 in all years.

Under the Palisades contracts the water saved by curtailment of winter diversions is first credited to the company or district making the saving until the reservoir space owned by the particular district or company is filled. When this occurs the saved water accrues to the remaining unfilled space in the reservoir system. Thus, the water saving program provides benefits to the entire irrigated area which has interests in the reservoir system.

The Palisades contracts have a third water saving feature. These contracts provide for limiting the use of water for power generation at American Falls and Minidoka Dams below the amounts that would accrue to rights for power production at these two dams. Such curtailment in the exercise of power rights at Minidoka Dam will result in a loss of generation of units 1 to 6 of that powerplant but will result in saving of water for storage for irrigation use. The water so saved is credited to American Falls, Island Park, and Palisades Reservoirs. In compensation for such losses in power generation, replacement power is provided to the Minidoka Power system, and, based on a moving average of the net annual amount of replacement power and energy required, the costs thereof are charged to the beneficiaries of the resultant water saving and the financial benefit is credited to the water users of the Minidoka Project. This provision for sharing the cost by water users actually benefited provided an equitable solution to a long-standing controversy.

The extent of water savings from curtailment of power rights varies from year to year. The saving is fully effective only during prolonged cycles of low streamflow when the available streamflow is insufficient to fill the reservoirs and the water can be stored and used. In a number of years there is enough streamflow to fill the reservoirs without any water saving.

During a prolonged cycle of low runoff such as occurred 1930-35, it is estimated that the effective saving from curtailment of power rights would be 2,700,000 acre-feet or an average of 450,000 acre-feet annually.

The water saving from curtailment of power rights actually overlaps the water savings from curtailment of winter diversions at Milner Dam to the extent that power releases can be used to satisfy diversion requirements at Milner Dam. Out of the estimated average annual saving of 450,000 acre-feet from curtailment of power rights during low runoff cycles up to a maximum of 276,000 acre-feet may be creditable to curtailment of winter diversions at Milner Dam. Thus, the net annual increase in storable water from curtailment of power rights is 174,000 acre-feet.

The Palisades contracts provide for maximum annual water savings during prolonged cycles of low streamflow as follows:

	Acre-feet
Elimination of winter diversions above American Falls Dam and at Minidoka Dam	143,000
Curtailment of winter diversions at Milner Dam	276,000
Curtailment of power rights at Minidoka Dam	174,000
Total annual savings	593,000

Thus, the potential savings for a six-year drought period such as occurred 1930-35 would be in excess of 3.5 million acre-feet.

It was recognized in the negotiations that led to the water savings and exchange arrangements necessary for the construction of Palisades Reservoir that these arrangements would require adjustments in the court decrees that govern the distribution of water in the Upper Snake River Valley, Water District 36. All the water users agreed to the arrangements on the basis that this would be accomplished and that all the compromises agreed to in the negotiations would be included in the resulting court decree.

Records of irrigation diversions in the Henrys Fork Valley indicate annual diversion rates in excess of 10 acre-feet per acre in many areas. To those not understanding Upper Snake River surface water-ground water relationships, these high diversion rates may appear unreasonable and imply poor management and inefficient application of water. It should be recognized that present practices evolved from past failures in attempting

to irrigate the area by conventional means and that so far subirrigation is the only method fully demonstrated to be practical in this area. If reuse of return flow and the use of groundwater in the nearby Mud Lake area is considered the overall diversion rate compares favorably with those elsewhere on the Snake River.

The present heavy use of water in the Henrys Fork Valley results from subirrigation of about 70,000 acres of land in that area. An additional 40,000 acres is irrigated by conventional surface irrigation. The practice of subirrigation was established during the early stages of development, after irrigation by customary surface methods proved a failure. A wide variety of crops is grown by maintaining the water table within reach of the plant roots during the summer instead of by spreading water on the surface of the ground in the usual manner. The hydraulic properties of the underground reservoir permit the raising and lowering of the water table by varying the flow of water in the canals. The canals must be operated at partial capacity during winter to hold the water table at a level from which it can be raised to the plant roots in the spring after the ice and snow in the canals have melted. Present schedules of annual diversion to the subirrigated lands have been evolved through the experience of over 60 years in manipulating the water table to give maximum crop production during the relatively short growing season in that area.

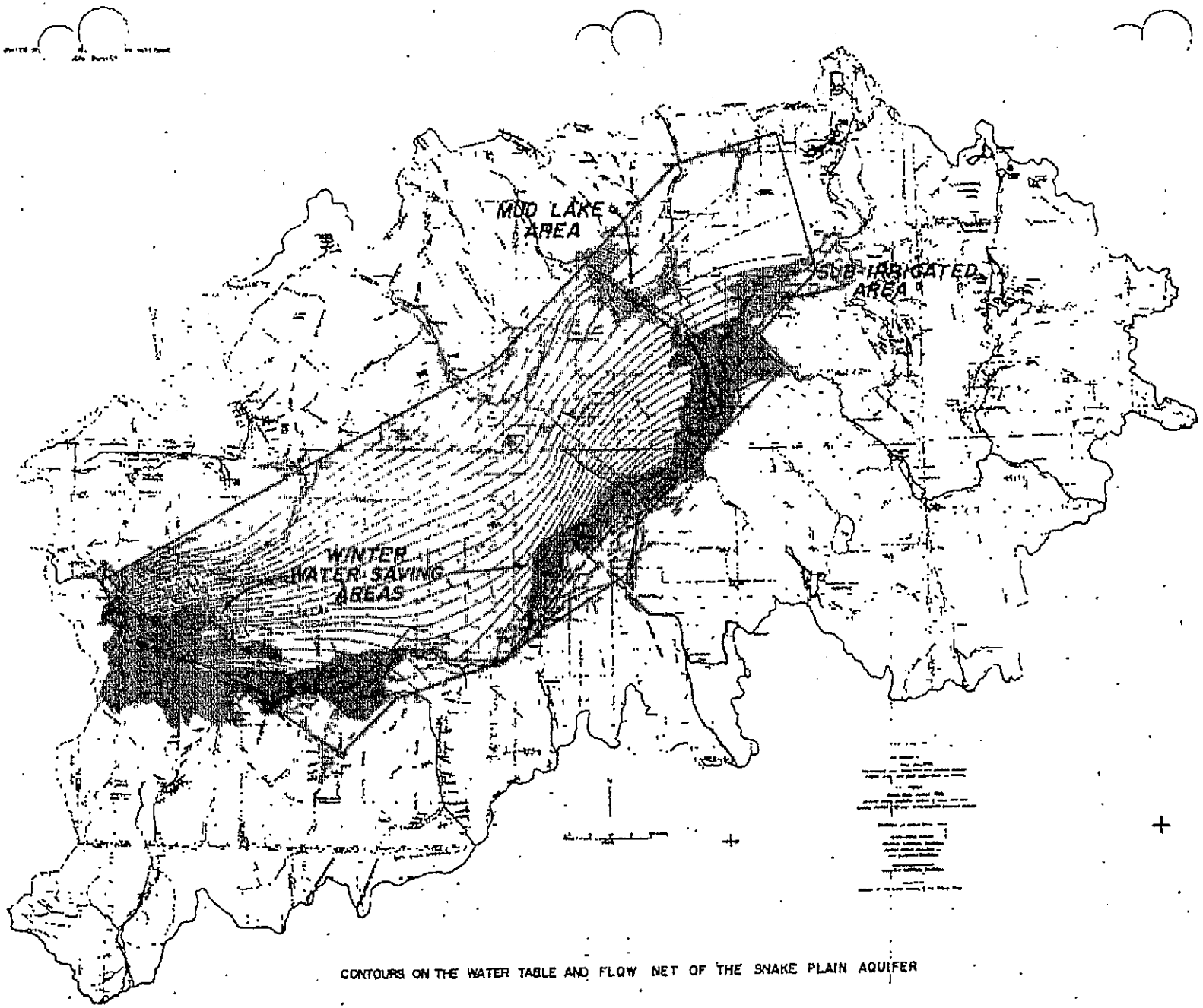
Hydrographic studies have shown that relatively large quantities of groundwater move westward toward Mud Lake as a result of maintaining high water tables in the Henrys Fork Valley. This is well illustrated by the attached chart, "Contours on the Water Table and Flow Net of the Snake Plain Aquifer." This groundwater movement has caused a phenomenal increase in the inflow to Mud Lake since 1900 and is the major source of supply for approximately 75,000 acres now irrigated in that area. If in addition to the approximately 110,000 acres actually irrigated in the Henrys Fork Valley credit is also given for the 75,000 acres irrigated in the Mud Lake area and for reuse of return flow in the Henrys Fork Valley, the overall diversion efficiency is comparable to that elsewhere on Snake River. For example, the total diversion from Fall River, Henrys Fork River, and Lower Teton River during 1967 was 1,017,000 acre-feet. The irrigation season return flow was 186,000 acre-feet. On this basis, the net diversion for 185,000 acres in the general area, including Mud Lake, was 4.35 acre-feet per acre. In view of these facts, any alteration in the present use of water in the Henrys Fork Valley would affect not only the established irrigation economy in that valley, but also that in the Mud Lake area.

Summary

From the very inception of Water District 36 (1916) and the Committee of Nine (1919) the area can be credited with many innovations of progressive water management which can best be summarized as a water banking operation. These include operation of storage reservoirs as a system rather than a collection of individual reservoirs. Although there is a strict paper accounting of water accruals to individual reservoirs by priority dates, advantage has been taken of the physical diversity of the system by holding carryover storage as far upstream as possible to the advantage of all. Much litigation was avoided and a smooth-running operation resulted from agreement on such factors as evaporation and conveyance losses and bank storage. The area pioneered water exchanges in Idaho, culminating in a future ground water-surface water exchange imbedded in the Lower Teton Project authorization. A continuation of this principle will be the salvation of the Salmon Falls, Oakley Fan, and other water-deficient areas in Upper Snake River Basin.

The elimination of winter water runs for stock and domestic use, the establishing of uniform storage water holdover privileges, the coordinated system-wide operation of reservoirs, the subordination of winter power production to conserve storage, and the exchange of storage space to effectuate its use closer to points of diversion, all have resulted in better distribution and utilization of the waters of Snake River. These water conservation practices will provide a water savings in excess of 600,000 acre-feet annually to augment dry-year supplies. This is a significant step in the direction of obtaining full use of the available water supplies in Snake River. In the future more needs to be done in water saving through added cooperation among all water users. These include additional reservoirs, canal lining programs, further water exchanges, including ground water, improved management of water distribution, and increased efficiency of on-farm application and use of water.

This is the situation as it exists today. However, as our technology of water use continues to expand and our available water supplies become more fully utilized, better and more efficient methods of irrigating the lands in the Snake River Valley can be developed. Certainly we should endeavor to make the most efficient use of all our natural resources and as new and better techniques are developed we should put them to their maximum use. The accomplishments so far have resulted from the cooperative effort of the entire area. Future developments for the conservation and use of Idaho's land and water resources will require similar mutual understandings and cooperation by all concerned parties.



CONTOURS ON THE WATER TABLE AND FLOW NET OF THE SNAKE PLAIN AQUIFER

Orr Affidavit

Exhibit 76

"Information Bulletin On A Study Of Water Resource Development Possibilities – Upper Snake River Basin," by the U.S. Army Corps of Engineers and the U.S. Bureau of Reclamation (Sept. 29, 1960)

Fourth Orr Affidavit
Exhibit 13:

Information Bulletin on a Study of Water Resource Development Possibilities – Upper Snake River Basin (U.S. Bureau of Reclamation & U.S. Army Corps of Engineers) (Sept. 29, 1960)

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Boise State University

P.W. Upper Snake

U. S. Bureau of Reclamation
Region 1 - Box 937
Boise, Idaho

U. S. Army Engineer District, Walla Walla
Building 602, City-County Airport
Walla Walla, Washington

September 29, 1960

STATUS OF
UPPER SNAKE RIVER BASIN INVESTIGATION

Pursuant to resolution adopted 19 March 1954 by the Committee on Public Works of the United States Senate, directed to the Corps of Engineers, and in accordance with the authority granted by Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388 and acts amendatory thereof or supplementary thereto), a joint study was undertaken by the Corps and Bureau of Reclamation to investigate and report on the need for and potential of development of the land and water resources of the Snake River Basin from its headwaters in Wyoming downstream to and including the Powder River in Oregon.

A series of preliminary hearings were held in February 1955 for the purpose of obtaining views and comments of those interested in water resource development.

A resume of the resultant findings of the Upper Snake River Basin study to date, together with limited project information on water resource development possibilities, are presented in the attached information bulletin.

A summary report on the Upper Snake River Basin, which will present the findings of the study in much more detail, will be made available for public examination in the near future. Following release of this report and in order that all interested parties may be afforded an opportunity to express their views concerning the development possibilities or other water resource potentials that are pertinent, additional public hearings will be held jointly by the District Engineer, U. S. Army Engineer District, Walla Walla, and the Regional Director, Region 1, Bureau of Reclamation, Boise, Idaho. These hearings are tentatively scheduled to be held in Idaho Falls and Boise, Idaho, in December. Definite dates will be announced later.

Persons having specific questions on the studies as summarized in the bulletin are invited to correspond with or visit the office of the Regional Director or District Engineer, preferably in advance of the hearings.

Please bring the foregoing to the attention of persons known to you to be interested in the matter.

Harold T. Nelson
Regional Director, Region 1
U. S. Bureau of Reclamation
P. O. Box 937
Boise, Idaho

Paul H. Symbol
District Engineer
U. S. Army Engr. Dist., Walla Walla
Bldg. 602, City-County Airport
Walla Walla, Washington

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INFORMATION BULLETIN ON A STUDY OF WATER RESOURCE DEVELOPMENT POSSIBILITIES UPPER SNAKE RIVER BASIN

The Upper Snake River Basin investigation, a joint effort by the Corps of Engineers and the Bureau of Reclamation, covers an area of about 73,000 square miles drained by Snake River and tributaries from its headwaters in Wyoming downstream to and including the Powder River in Oregon. Included are the streams in southeast Idaho north of Snake River which are tributary from a ground-water standpoint but do not reach Snake River as surface flows. This reach of Snake River drains western Wyoming, all of south Idaho except the extreme southeast corner, the extreme northwest corner of Utah, the northeast corner of Nevada, and the southeastern part of Oregon.

Objectives of this investigation are to identify unused and uncontrolled components of water and land resources and to set forth development possibilities to meet the many related needs of the area.

The investigation was begun using as a starting basis the physical data, development plans, and reports accumulated over the past half century by public and private agencies and individuals having responsibilities for water and land-resource development.

From this extensive record, the knowledge of the area by the Bureau of Reclamation, the Corps of Engineers, and other interested State and Federal agencies, and from consultation with other organizations and individuals, a master listing of all identified developments was compiled. This listing included over 500 potentials. Study criteria were formulated and applied to this inventory and available information on physical characteristics and limitations was considered. Alternatives were evaluated and situations where developments were found mutually exclusive were analyzed. This elimination process reduced the listing to some 100 possibilities which were then given more thorough study.

Essential physical data not available from earlier project-type studies were obtained. Subsurface explorations were performed at 27 dam and other major structure sites. About 45 reservoir and damsites were mapped topographically. A land-resource inventory covering nearly 9,000,000 acres was performed. Flood damage data were collected, and streamflow conditions studied. From this investigative effort, design and water supply studies, and preliminary identification of project benefits the list was further refined. Engineering, hydrologic, power, flood control, and other specific studies were then performed to more definitely determine the characteristics of each development possibility.

Unused ground-water resources were recognized early in the investigation as an important water-supply factor, the extent and nature of which

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would determine to an important degree the amount of future irrigation that might be possible in some major areas. To evaluate the ground water potential for various uses, it was necessary to determine so far as possible the quantity of ground water available in various parts of the basin, depth to water, water quality, quantity that could be withdrawn, and the effects that would result from making sizable withdrawals. The Ground Water Branch of the Geological Survey undertook this determination on a cooperative basis.

Studies relating to other uses of the water resources were undertaken in collaboration with other agencies such as the National Park Service, Fish and Wildlife Service, Public Health Service, Soil Conservation Service, and the Forest Service. Agencies cooperating in the investigation were kept informed and their work guided by preliminary data as such data became available.

BASIN RESOURCES

Land elevations in the basin range from 13,700 feet, the highest peak in the Grand Tetons, to 1845 at the mouth of the Powder River. The total fall of the river from Jackson Lake Reservoir downstream to Brownlee pool is about 4,700 feet. Runoff is largely of snowmelt origin and is subject to forecasting.

Control of many reaches of the Snake River and its tributaries against flooding has been accomplished by levee and channel works and storage regulation. There are now over 100 miles of levee and channel works scattered throughout the basin, protecting highly developed urban and agricultural areas. In addition, three multipurpose storage projects have authorized flood control features while many others built primarily for irrigation effect considerable flood regulation.

There are about 3,190,000 acres now under irrigation in this basin. Of this total, some 1,462,000 acres are irrigated from the surface waters of the Snake River and tributaries above Milner Dam. This includes the service areas from those streams which enter the plain from the north but which do not reach the Snake River as surface flows. In this reach above Milner, there are about 478,000 acres that are irrigated, using underground water as a supply. Below Milner, there are 1,178,000 acres served from surface waters and 72,000 acres served from ground water.

Some 49 reservoirs with a capacity greater than 5,000 acre-feet each have been developed over the years. They have a total capacity of 9,900,000 acre-feet, of which some 8,600,000 acre-feet are considered as usable. The greatest share of this capacity is operated to meet irrigation requirements.

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Production of power is an important water-resource use in the basin and some 18 non-Federal hydroelectric plants with a total capacity of about 362,200 kilowatts have been installed. There are five Federal hydroelectric plants with a total capacity of 163,900 kilowatts. Other important water uses are for municipal, industrial, sanitation, fish and wildlife, and recreational purposes.

It is estimated that there are about 5,800,000 acres of unirrigated arable lands in the basin which have favorable physical characteristics for irrigation if water could be made available. Most of these lands are in southern Idaho. Some 800,000 acres of this total are now dry farmed to the extent that natural precipitation and accumulated soil moisture will support crops. About 2,300,000 acres of the total are within that part of the drainage basin above Milner Dam and the remainder of 3,500,000 acres are below. The individual areas of greatest significance to future development occur in the broad flat valley of Raft River, the Salmon Falls area, the Bruneau Plateau, the Mountain Home Plateau, and portions of the plain north of Snake River. Soils of the arable areas, for the most part, are fine-textured loessal type with high mineral fertility and excellent water-holding capacity. The abundant production from sustained irrigation of similar lands over more than half a century attest to the high capability of such soils under irrigation.

The historical runoff of Snake River, adjusted to reflect the present stage of development, averages 1,020,000 acre-feet annually at Moran, Wyoming. The average runoff under the same conditions at Weiser, Idaho, is some 11,700,000 acre-feet. Between these two points, there are wide variations in runoff. The flow of the river in below-normal years is largely stored and diverted above Milner Dam for irrigation uses. Below Milner, return flows from irrigation and the outflow of a large number of springs enter the Snake River to largely make up the flow measured at King Hill. Average annual runoff of the river at King Hill is estimated at 6,760,000 acre-feet. Discharge of the springs which enter mostly between Twin Falls and Bliss averages 6,500 cubic feet per second, or 4,700,000 acre-feet per year. The inflow from the Bruneau, Owyhee, Boise, Payette, Malheur, and Weiser Rivers, together with lesser tributaries, combine to make up the total average flow at Weiser.

The present water-resource picture of the Snake River is generally one of complete surface water utilization in dry periods above Milner Dam, with quick recovery in the river from inflows below Milner Dam. These inflows represent a sizable usable water supply that increases progressively downstream from Milner Dam.

Another water resource of great importance to future land development is underground water. That part of the Snake River Plain, principally on the north side of the river, from the upper topographic limits of the plain down to the Thousand Springs area near Bliss, Idaho, includes

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a large ground-water resource. This comprises a hydraulic system in which aquifers of the Snake River basalts and interbedded sediments serve both as a vast storage reservoir and as a ground-water conduit. Transmissibilities are high, and the virtually evaporation-free storage capacity is tremendous. The plain itself is about 250 miles long, averages 60 to 70 miles wide, and includes some 13,000 square miles. Tributary valleys furnish the principal recharge to the aquifers of the plain which also receive substantial contributions from percolating irrigation water.

DEVELOPMENT NEEDS

There are many well-recognized needs for an orderly continuing program of development of unused water and land resources.

Opportunities for establishing new farm families, economic growth, greater agricultural production for an expanding population and stabilization of farming in supplemental water areas are among such needs for the expansion of irrigation. During 1957 crops valued at an estimated $257,000,000 were produced from the irrigated lands in the investigated area of the Snake River Basin. This production and the related economic activity in the communities and agricultural product processing industries are a measure for judging the value of future irrigation.

Residential, commercial, and agricultural developments at a number of locations in the basin suffer flood damages. Greatly increased demands are predicted by private utilities and public agencies concerned with power development for future power requirements in the Snake Basin area. Power demand is expanding as a result of many factors, including unprecedented growth of irrigation pumping, population increases, increased per capita power consumption, industrial expansion, and greater variety of domestic uses. It is strongly apparent that the hydroelectric potential of the area will be utilized as rapidly as it can be developed under any presently foreseeable schedule. Municipal and industrial water needs are climbing as cities grow and new commercial activity becomes established.

There is tremendous interest in water-associated sports, and pressures on fish and wildlife habitat that depend on surface waters and watersheds are at an alltime high and increasing. Increasing urban populations have made pollution control and provision of safe water supplies a problem of great importance in many communities in the basin.

DEVELOPMENT PROBLEMS AND CONSIDERATIONS

The mature stage of present development together with the unique physical characteristics of the area will have a strong influence on future development in the Snake River Basin. Surface waters are fully

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used during dry periods at some locations, and most of the readily attainable, inexpensive developments for irrigation, flood control, and power have been in operation for many years. Future development is now limited to the fairly difficult, intricate, and costly situations.

From a land and water resource development standpoint, the Basin is divided at Milner Dam. Above Milner, all of the surface water in dry cycles is already storable, appropriated and used for the present development.

During the period 1928 through 1957, with the present development in the Snake River Basin, estimated flows past Milner Dam would average 1,305,000 acre-feet a year. Studies show that the only flows passing Milner Dam during the dry periods of 1931-1938 and 1940-1942 would be those required to satisfy prior downstream rights. Including a small amount of spill in 1930 and 1939, the flows past Milner Dam would average only about 260,000 acre-feet a year during the entire 13-year dry period (1930-1942). If the flows now passing Milner Dam were stored and held for irrigation use, an additional 685,000 acre-feet of water a year would be required to satisfy the new water requirements in the 13-year dry period. Holdover storage was considered as a possible means of meeting these depletions. It was determined that nearly 9,000,000 acre-feet of active capacity in new storage reservoirs would be required. Because of the lack of feasible reservoir sites where large amounts of relatively inexpensive storage could be provided, other means of meeting these water shortages are required.

There are several opportunities for obtaining a new water supply for irrigation use above Milner Dam during dry years. The most promising source is the ground-water resource known to exist beneath the Snake River Plain. In a sense, the ground water is storage. In considering future development it could be used much as a conventional surface storage reservoir. However, the use of ground water raises new problems. Most of the ground water occurs where there are no suitable lands that can be served directly or it occurs beneath lands now irrigated. This creates a need for exchanging ground water for present surface-water uses so that the surface water might be diverted to new developments in that part of the area served by diversion above Milner.

Most new developments above Milner, because of their location and elevation, must be served by pumping. Because of this factor and use of ground water on an exchange basis, double pumping is required with high annual costs and heavy demands for power.

These requirements have led to consideration of plans to use storage in the periods of normal or wet years and ground water during the dry periods. The complimentary use of surface and ground water would permit irrigation development to proceed in Upper Snake Basin. Also, surface

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waters could be used in wet years on lands now served exclusively from ground water to relieve overdrafting of local ground-water supplies. In such situations ground water would be the dry year water supply. These concepts of combined ground and surface water applications would achieve a fuller use of the basin water resources.

Even though the existing 4½ million acre-feet of usable storage above Milner Dam affords a good degree of stream regulation during flood periods, there are many reaches still subject to flood damage. Multiple-purpose storage is the most desirable way of affording additional control. Such storage, together with the presently undeveloped head, would also help to meet future power needs in the area.

In the area below Milner Dam, problems also stem from the relative location of land to water supply. For example, to reach the arable land area of the Bruneau Plateau in the vicinity of Thousand Springs, pump lifts of up to 600 feet would be involved. The Mountain Home Plateau is more than 800 feet in elevation above the pool of C. J. Strike Reservoir.

Further the tributary streams below Milner Dam have their own peculiarities. On the Boise River there is a high degree of present water use with little remaining water, but there are large blocks of irrigable land nearby needing a water supply. The 1928 through 1957 annual average runoff at the Boise River Diversion Dam is 1,890,000 acre-feet. The present water requirements at Boise Diversion Dam are estimated to be 1,450,000 acre-feet, leaving a surplus of 440,000 acre-feet.

In contrast, there is presently an average of 2,074,000 acre-feet annually which flows from the Payette River Basin. Even if irrigation of all lands that have a potential for development in the Payette Basin was accomplished, 1,400,000 acre-feet of unused water would still pass Black Canyon Dam annually.

On the Owyhee River, the Owyhee Reservoir with present development would have spilled in only 12 years during the 30-year period from 1928 through 1957. In contrast, there is an estimated 724,000 acre-feet of water annually leaving the Weiser River Basin with only very minor remaining undeveloped land areas.

With this varying range of stream control and water utilization there are still many areas in the basin below Milner Dam in need of additional regulation for irrigation, flood control, and other multiple uses. For instance, flood control facilities are needed on the lower valleys of most of the tributaries and along Snake River from Marsing to Weiser. Also, sites below Milner Dam, both in the Snake River channel and on major tributary streams, offer excellent opportunities for development of the hydroelectric power potential. In addition to regulation of the Payette River for local use and protection, control of this stream at critical times of flooding in the lower Columbia River will afford measurable downstream benefits.

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In considering the future basin development potentialities, it was found necessary to establish some criteria to guide the planning process. Six basic premises are as follows:

1. There would be no export or import of water between the Snake River Basin and neighboring drainages.

2. All existing irrigation and domestic water rights and uses would be recognized and fully provided for in any analysis of future developments and in determining resources available for new uses.

3. That development plans would not be formulated on the basis of projects being completed on a predetermined time schedule but the possibilities presented would represent the full level of development considered practical from a physical and engineering viewpoint.

4. That economic justification on current levels would not be a limiting criteria for including or excluding particular development possibilities in the overall plans.

5. Water and land-resource development possibilities evaluated and considered for the future would not be located within National Parks or Monuments.

6. That plans for potential land development would be formulated with anticipation that an exchange of water source between new and existing uses could be expected.

POTENTIAL PROJECTS

The attached tabulation is a summary of 80 potential developments analyzed for this study which meet the criteria established. Taken together they represent a rather full utilization of the land and water resources of the Basin. Some of the development possibilities listed are not presently feasible or acceptable and their development or an alternate may not come about for many years in the future.

The tabulation includes a total of 46 reservoirs, most of which are multipurpose and have a combined active capacity of 7,041,000 acre-feet. Granite Creek, Elbow, Alpine and Burns Creek Reservoirs, all above Heise, could supplement the existing Jackson Lake and Palisades Reservoirs for irrigation, power, and regulation of floods from near Heise to the mouth of Henrys Fork. Driggs and Fremont Reservoirs on Teton River could be operated for local irrigation and to regulate floods on lower Teton River and adjacent Henrys Fork reaches. Warm River and Ashton are primarily power projects and together with Driggs and Fremont could be used

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to reduce floods on Henrys Fork near Rexburg. These reservoirs would provide additional regulation on the Snake River above American Falls to create irrigation, flood control, power, recreation, fish and wildlife, and related benefits.

Below Milner Dam, Clear Lakes Reservoir could provide storage for major irrigation development. The potential Thousand Springs Reservoir could provide storage for power and limited flood control. The Guffey Reservoir, with irrigation and power facilities, could also make possible the exchange of Boise River water supply for use on a large irrigable area. The potential Twin Springs Reservoir and a power installation at existing Lucky Peak Dam could afford additional and more flexible utilization of all storage on Boise River for irrigation, flood control, and power production. Duncan Ferry Reservoir on Owyhee River and Mason Dam and Reservoir on Powder River could provide additional irrigation water supply and local flood control. On Payette River, the Garden Valley Reservoir could provide a substantial water supply for new lands, flood control both local and downstream on Columbia River, and a large quantity of power. Storage on the Weiser River would be for irrigation and local flood control. There are a number of additional reservoirs throughout the Basin which could provide local irrigation and flood control benefits. The control of floods would be accomplished without detriment to primary use of the projects for irrigation and with only minor effect on operation of the projects for other uses.

Seventeen projects included in the tabulation have been found practical for producing hydroelectric power and could have a total installed capacity of 1,241,500 kilowatts. This future power potential would greatly expand the present generating capacity in the Basin. The Brownlee, Oxbow, Hells Canyon plants, just downstream from the basin area, will have 1,138,000 kilowatts of capacity. The total hydroelectric capacity available to the area with these projects would be some 2,874,000 kilowatts.

When compared to the load growth as analyzed by the Federal Power Commission for this study, the potential plants, in combination with the existing system, would be adequate for only about 20 years of growth, or until about 1980. It is understood, of course, that the potential power facilities cannot be realized in such a short space of time, and accordingly, a large segment of future load growth for the Basin must be supplied from other sources. Analysis of the irrigation pumping power requirements for the possible future irrigation projects presented in the table indicates that such a load will consume on an average about 35 to 40 percent of the incremental power production at the listed potential hydro plants. Accordingly, economical hydroelectric power development must precede or accompany the development of new irrigation projects.

For the area diverting above Milner Dam, there are some 294,000 acres of new lands, located principally south of Snake River and including such

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areas as Fremont, Raft River, Oakley Fan and Salmon Falls, considered to be within practical reach of identified water sources. There are also 823,000 acres requiring supplemental water that might be served. A replacement or exchange water supply is considered prerequisite to development of most of these new and supplemental lands. The most reasonable approach to providing a water supply to serve identified lands would be through a combination of ground-water pumping and storage. Ground water would be utilized when surplus surface waters were not available. Exchange or replacement water could be obtained in three selected ground-water pumping areas in the plain, and by pumping from two streams that enter below Milner Dam.

An optimum level of irrigation development can be achieved only on the basis of a coordinated and integrated group or system of projects involving both surface storage and ground-water pumping. This group or system would have to be considered as a single development composed of land areas, multipurpose storage reservoirs, and facilities for producing the exchange and replacement water supplies at various locations.

Associated with the vast underground reservoir beneath the plain is the possibility of artificially recharging it by diverting surplus flows, beyond requirements of existing and future developments, from the Snake River during the flood season into highly permeable areas of raw volcanics. In this manner, drawdown from expanded pumping could be decreased, the flow of the river might be smoothed out to the benefit of downstream power, and a measure of flood control could be realized from diversion of springtime flow peaks.

Of the total area above Milner Dam, there are 3,250 acres of new land and 26,000 acres requiring supplemental water in Wyoming that could be developed under terms of the Idaho-Wyoming Compact.

Expansion of private ground-water development of 245,000 acres in Snake Plain is anticipated.

Below Milner Dam multipurpose developments primarily for irrigation appear possible for the Bruneau Plateau; on the broad upland between the Boise and Snake Rivers near Mountain Home; and in the basins of Payette, Weiser, Owyhee, Burnt, Malheur, and Powder Rivers. Also, there are developments for the future which appear practical in the basins and on the alluvial fans of the streams north of the plain which sink into the lavas before reaching Snake River above Milner Dam. Altogether, optimum development in these areas would provide for the irrigation of about 591,000 acres of new lands and provide supplemental or replacement water to about 278,000 acres.

There are six levee and channel projects scattered throughout the Basin to protect particular local flood problem areas which need such

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local protective works in addition to any storage facilities, existing or proposed.

SUMMARY

For the basin area as a whole, and from an engineering and physical viewpoint only, it appears that 1,130,000 acres of new lands could be served, and a supplemental water supply provided to 1,101,000 acres now in need of supplemental water. The 46 new reservoirs, included in the tabulation, with a total capacity of 7,041,000 acre-feet, in addition to serving irrigation requirements, could afford much needed flood control, increase recreational opportunities, and allow for the production of substantial blocks of hydroelectric power at some 17 powerplants with an estimated capacity of 1,241,500 kilowatts.

Snake River runoff past Milner Dam under 1960 conditions of development and water use are estimated to average 1,305,000 acre-feet per year. Further depletions of streamflow by the development of additional lands as presented in this study would amount to an estimated average of 910,000 acre-feet annually. Existing and future flow conditions past Milner, assuming a repetition of the 1928 through 1957 runoff pattern, are illustrated on the accompanying chart titled "Flows past Milner." A similar reduction and reregulation of flows in the Snake River below Thousand Springs would be experienced. The present runoff at the Murphy gage, below Guffey damsite, estimated to average 7,048,000 acre-feet annually for the same 30-year period, would be reduced by about 1,471,000 acre-feet annually. This reduction is illustrated on the attached typical monthly flow chart titled "Monthly Runoff - Snake River below Guffey Damsite."

Full utilization of the land and water resources of the Upper Snake Basin will require a great many years; however, additional incremental or stage development can be achieved as economic conditions dictate. Any consideration of full comprehensive development must recognize that there are many complex and very difficult water use, economic, and legal problems that must be solved. Foremost among them is agreement to the water exchanges involved.

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POTENTIAL PROJECTS
UPPER SNAKE RIVER BASIN

Project	Total Res. Capacity Ac.-Ft.	Active Res. Capacity Ac.-Ft.	Power Plant Capacity Kilowatts	Area Served Acres New	Area Served Acres Supp.	Exchange Water Ac.-Ft.	Source of Water Supply	Construction Cost Dollars	Remarks
Jackson Hole Irrig. Proj.	-	-	-	2,010	4,300	-	Snake Riv.	800,000	
Lower Jackson Hole Channel Proj.	Levee and channel work - Flat Cr. to South Fork Pond Grounds.							416,000	
Granite Cr. Dam & Res.	410,000	401,000	16,000	-	-	-	Hoback	17,810,000	
Snake-Narrows Proj.	1,018,000	818,000	110,000	-	(650,000)	-	Snake Riv.	101,840,000	
Alpine Irr. Proj.	-	-	-	1,100	-	-	Snake Riv.	611,000	
Elbow Dam & Res.	408,000	310,000	14,000	-	-	-	Greys Riv.	30,130,000	
Upper Star Valley Proj.	17,000	14,100	-	-	11,700	-	Crow Cr.	4,140,000	
Swan Valley Proj.			-	400	1,100	-	Snake Riv.	190,000	
Palisades Proj, Burns Cr. Dam, Res. & Power Plant	134,000	111,000	90,000	-	650,000	-	Snake Riv.	42,112,000	
Moss Falls Proj.	-	-	15,000	-	-	-	Henrys Fork	6,110,000	
Warm River Proj.	140,000	15,000	30,000	-	-	-	Henrys Fork	21,476,000	
Ashton Res. Projects	48,100	40,000	11,000			-	Henrys Fork	1,428,000	Rebuild & enlarge existing dam & power plant.
Squirrel Meadows Proj.	10,140	10,000	-	3,300	3,000		Squirrel Cr.	2,145,000	
Snake Plain Recharge	Diversion of flood flows up to 1,500 cfs maximum from Henrys Fork or Snake River from St. Anthony to about Shelley.								
Upper Teton Proj.	10,000	35,000	-	15,200	11,800	-	G.W. & Teton Riv.	14,[illegible] 000	Pump 25,000 a-f from G.W. for 17,800 acs. eastside lands.
Alta Proj.	3,420	1,400	-	-	1,400	-	Teton Cr.		Small project sponsorship.
Lower Teton Dev. Proj. Fremont Dam & Res.	111,000	100,000	11,000			-	Teton R.	11,570,000	
Irrigation Proj.				19,000	30,000	-	Teton R.	11,030,000	
Moler-Roberts Channel Proj.	Levee and channel works - Moler to Henrys Fork.							1,194,000	
Kirla Brook Dev. Proj. Kirla Dam & Res.	115,000	115,000	-			-	Willow Cr.	5,420,000	
Irrigation Proj.	-	-	-	4,150	-	-	Willow Cr.	1,180,000	Storage in Kirla Res.
Water Replacement Works Jerome-Wendell Area						110,000	G.W.	1,900,000	
Blaylock Area						110,000	G.W.	1,810,000	
Roberts-Moreland Area						600,000	G.W.	4,250,000	
Rock Creek Surface Water						90,000	Rock Cr.	1,640,000	
Blackfoot Riv. Res.	451,000	451,000	-	-	-	-	Blackfoot R.	601,000	Enlarge exist. Res..by 38,000 a-f
Fort Hall Indian Reservation	11,500	9,000	-	14,900	600	-	G.W., Blackfoot R, Bannock Cr & Misc.		Bureau of Ind. Affairs.
St. Anthony-American Falls W.Side Area	-	-	-	145,000	-	-	G.W.		Probable development Scattered tracts by private interests.
Minidoka Proj., American Falls Power Div.	-	-	30,000	-	-	-	Snake R.	10,130,000	
Eagle Rock Power Proj.	-	-	10,000	-	-	-	Snake R.	11,190,000	
Rockland Proj.	1,300	6,500	-	560	1,140	-	Rock Cr.	2,550,000	
Lake Channel Proj.	-	-	-	1,500	-	-	Snake R.	690,000	
Raft River Proj.			-	96,000	-	-	Snake R.	79,680,000	
Almo Proj.	1,100	3,000	-	-	5,100	-	Raft R.	1,455,000	
Cassia Cr. Proj.	1,000	1,000	-	-	11,000	-	Cassia Cr.		2 small reservoirs (small proj. auth.)
Oakley Fan Proj.	-	-	-	62,000	1,000	-	Snake R.	51,190,000	
Saloon Falls Proj.	-	-	-	11,600	61,800	-	Snake R. & G.W.	86,130,000	
Mud Lake & Little Lost Irrig. Dev.	-	-	-	30,000	11,500	-	G.W.		Probable development by private interests.
Medicine Lodge Proj.	11,110	12,000	-	-	5,040	-	Med.Lodge Cr.	1,110,000	
Birch Cr. Proj.	14,000	11,000	-	6,100		-	Birch Cr.	5,124,000	
Big Lost Riv. Proj. Arco Div.	8,000	1,500	-	-	16,000	-	Antelope Cr.	3,190,000	
G.W. Division	-	-	-	9,000	-	-	G.W.	6,110,000	
Big Lost Riv. Channel Proj.	Levee and channel work vicinity Arco.							187,000	

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POTENTIAL PROJECTS
UPPER SNAKE RIVER BASIN

Project	Total Res. Capacity Ac.-ft.	Active Res. Capacity Ac.-ft.	Power Plant Capacity Kilowatts	Area Served Acres New	Area Served Acres Supp.	Exchange Water Ac.-ft.	Source of Water Supply	Construction Cost Dollars	Remarks
Brunneau Proj.	1,070,000	186,000	-	187,000	-	-	Snake R.	205,500,000	Pumping from Snake R.
Brunneau Div.	115,000	102,000							
Thousand Springs	750,000	400,000	150,000	-	-	-	Snake R.	80,884,000	
Boulder Flats Dam & Res.	61,500	60,000	-			-	Big Wood	7,270,000	
Big Wood Div. Proj.	-	-	-	-	15,000	-	G.W. or Big Wood	790,000	G.W. pumping
Big Wood Div. Channel Proj.			Levee and channel works vicinity Hailey and Bellevue.					160,800	
Bennett Cr. Proj.	2,600	2,300	-	-	1,500	-	Bennett Cr.	762,000	
Snake River Proj.									
Mt. Home Div., Guffey, & Long Tom, & Hillcrest Units	530,000	27,000	85,000 25,000 30,000	119,140	12,460	 52,000	Snake R. Boise R. & G.W.	172,655,000	
Twin Springs Proj.	410,000	285,000	40,000			-	M.F. of Boise R.	19,700,000	
Lucky Peak Power Plant	-	-	(60,000)	-	-	-	Boise R.	17,249,000	Addition to existing dam & res.
Snake River Project									
Garden Valley Div:									
Cold Fork Unit	80,000	78,000	-	9,210	18,150	-	Cold Fork	6,600,000	
Loon & Round Valley Unit	-	-	-	9,600	10,500	-	N.F. Payette	7,060,000	Pump from Cascade Res.
Garden Valley & Lariver Cr. Units	2,400,000	1,940,000	368,500	-	-	-	Payette R.	159,890,000	
Meotour N & S Units	-	-	-	2,500	-	-	Payette R.	1,485,000	
Northside Unit	6,500	6,000	-	25,000	-	-	Payette R.	34,582,000	
Willow Cr. Unit	-	-	-	10,000	-	-	Payette R.	9,860,000	
Snake River Proj.									
Mt. Home Div									
Initial Butte Unit	-	-	-	82,000	-	-	Payette R.	157,040,000	Involves Boise R. exchange
Boise Proj.									
Payette Div									
Payette Heights Unit	-	-	-	1,145	-	-	Payette R.	675,000	
Council Proj.	50,500	49,200	-	2,656	2,560	-	Lost Cr.	2,165,000	
Hornet Cr. Proj.	2,000	1,900	-	-	1,760	-	Hornet Cr.	655,000	
Main Weiser Proj.	250,000	200,000	-	14,270	5,150	-	Weiser R.	27,120,000	
Little Weiser Div. Irr. Proj.	12,450	12,200	-	2,000	-	-	L. Weiser Riv.	2,770,000	
Mann Cr. Proj.	15,000	11,000	-	595	4,465	-	Mann Cr.	2,865,000	
Indian Cove Proj	-	-	-	5,620	-	-	Snake R.	5,865,000	
Edgington Proj	-	-	-	8,060	-	-	Snake R.	6,120,000	
Brunneau Proj.			-	56,950	1,800	-	Snake &	16,170,000	
Wirkahoney Div.							Brunneau R.		
Castle Ct. Proj.	8,700	7,500	-	830	570	-	Castle Cr.	5,430,000	
Sinker Ct. Proj.	5,000	2,500	-	-	860	-	Sinker Cr.	1,370,000	
Sucker Cr. Proj.	8,000	7,200	-	-	1,600	-	Sucker Cr.	1,517,000	
Sucker Ct. Channel Proj.			Channel and levee work vicinity Homedale.					150,000	
Duck Valley Irr. Proj.	95,500	95,000	-	19,400	16,800	-	Owyhee R.		Bur of Indian Affairs Proj.
Upper Owyhee Proj.									
Jordan Cr Dam & Res.	60,000	57,000	-	-	8,860	-	Jordan Ct.	4,528,000	
Duncan Ferry Dam & Res	1,000,000	745,000	14,000	-	118,000	-	Owyhee R.	22,475,000	
Jacobsen Ditch Proj.	-	-	-	4,660	-	-	Snake R.	5,210,000	
Burar R. Proj.									
N.F. Div	6,600	6,000	-	200	1,350	-	N.F. Burnt R.	1,500,000	
S.F. Div.	11,000	10,000	-	800	5,700	-	S.F. Burnt R.	1,575,000	
Bark Canyon Div.	5,500	5,000	-	1,270	680	-	Burnt R.	5,270,000	
Baker Project									
Upper Div.	100,000	95,000	-	4,010	13,990	-	Powder R.	6,550,000	
Wolf Cr. Div.	17,800	16,400	-	-	5,600	-	Wolf Cr.	5,050,000	
Powder Div. Channel Proj.			Local protection through and below Baker.						

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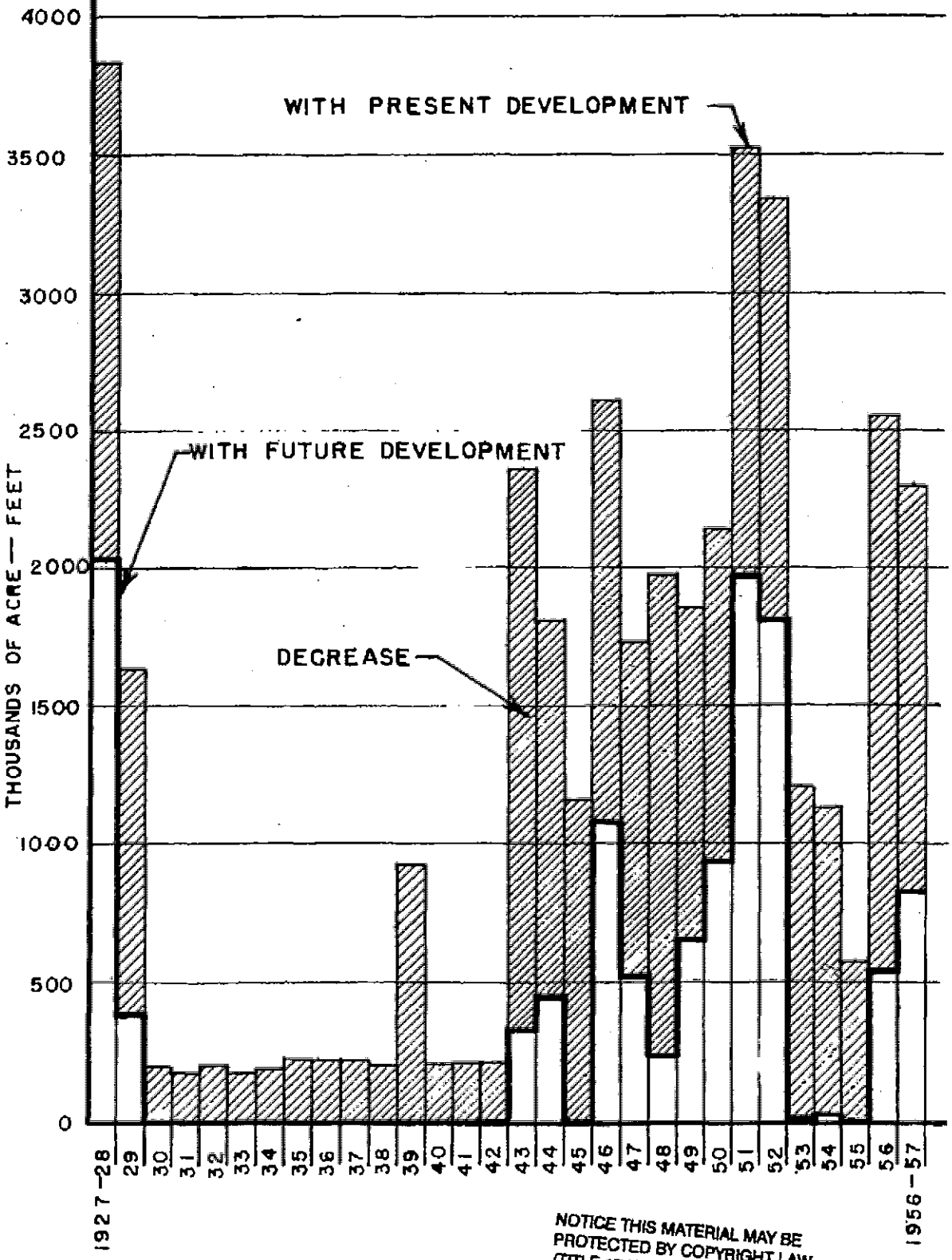
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SNAKE RIVER – FLOWS PAST MILNER DAM

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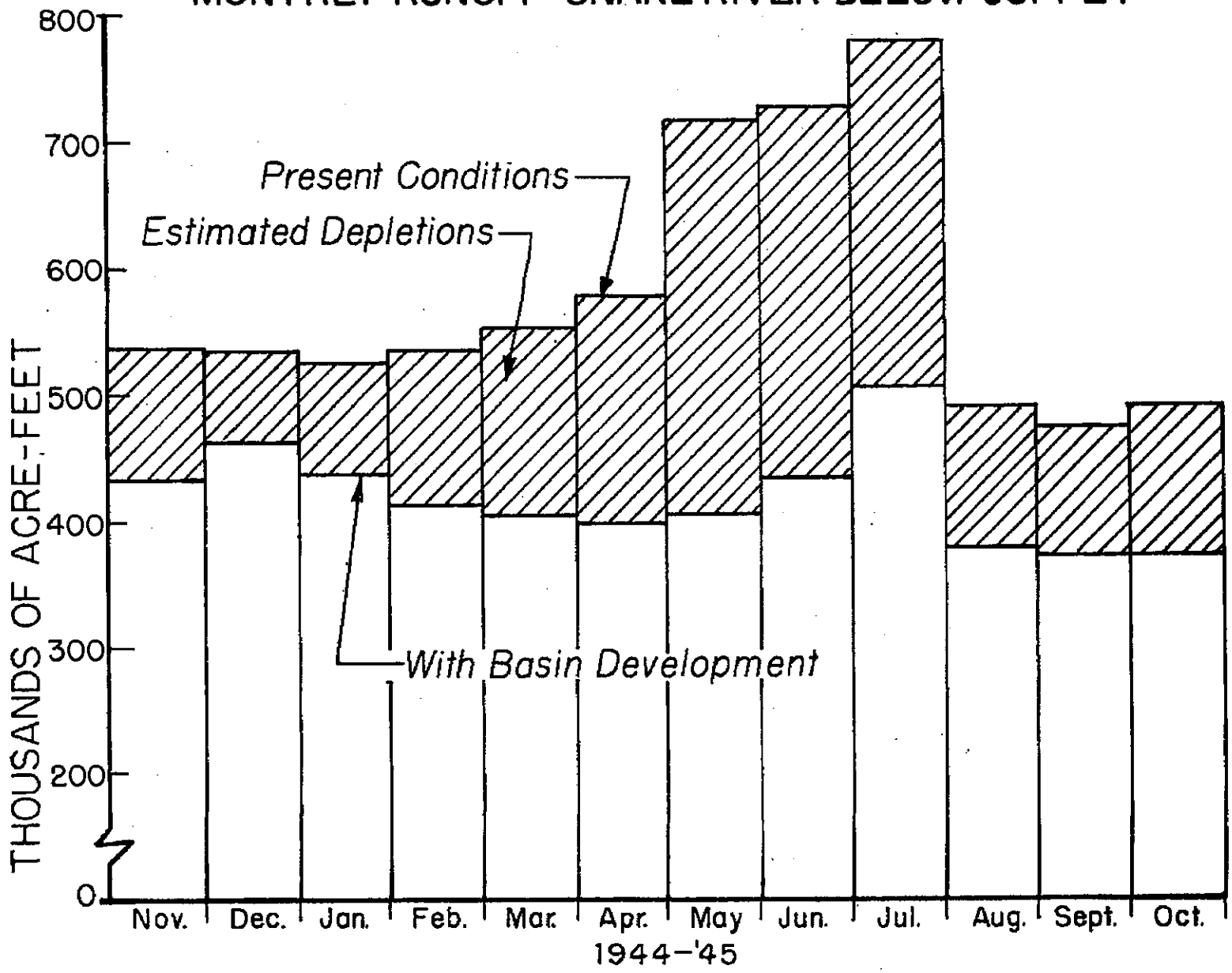


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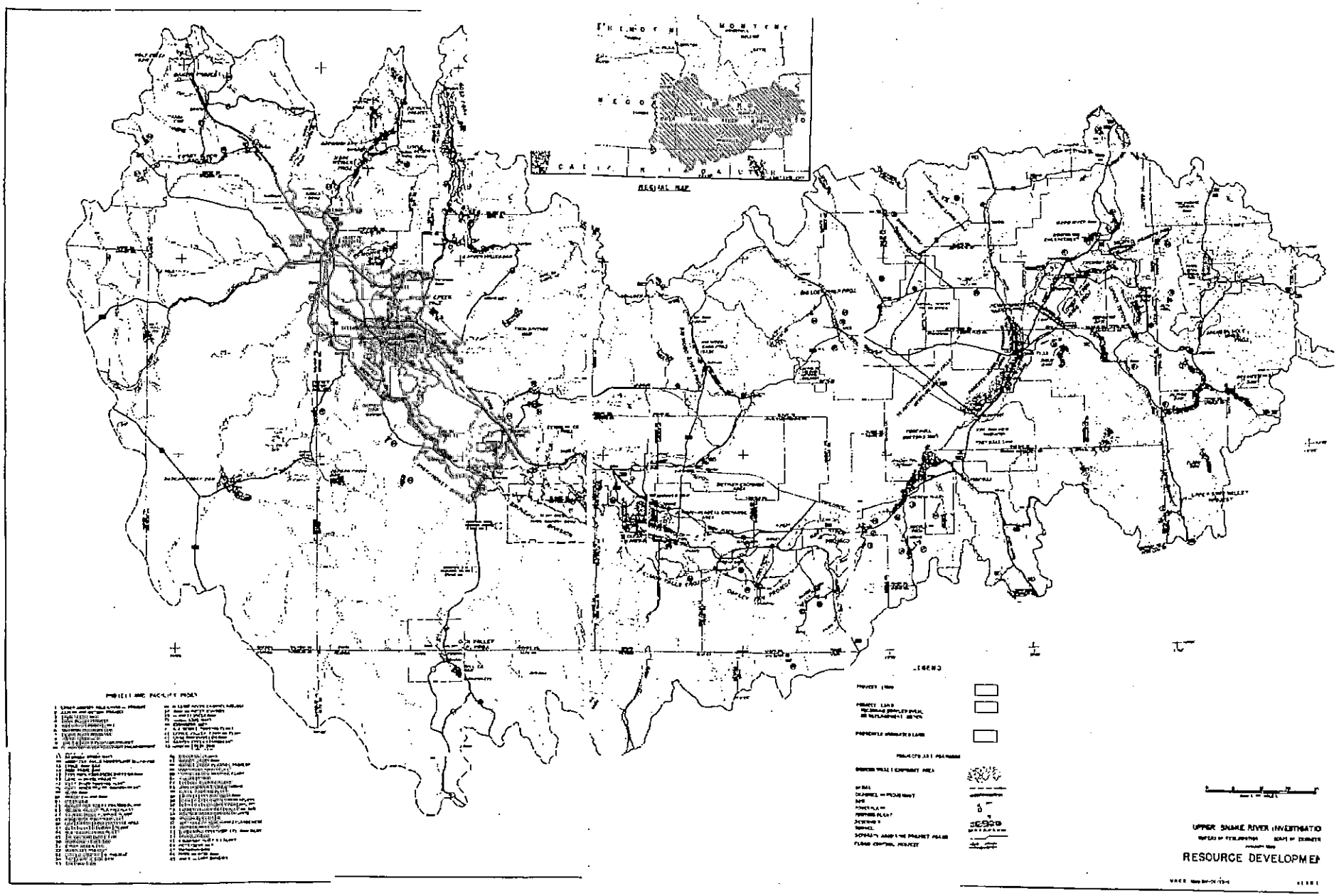
MONTHLY RUNOFF-SNAKE RIVER BELOW GUFFEY



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COPY

P W.
Upper Snake River Valley Basin

October 25, 1960

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Series 1.1 Box 123 Folder 13

Mr. J. A. Brown
The College of Idaho
Athletic Department
Caldwell, Idaho

Dear Mr. Brown:

I have received your recent letter in which you urge me to support and actively promote legislation to get the Guffey Irrigation Project underway.

On September 29, Col. Paul H. Symbol, of the Corps of Engineers, delivered to me a preliminary report on the joint studies which are being made by the Corps of Engineers and the Bureau of Reclamation on water resources of the Upper Snake River. The report states that there are about 80 potential development projects for the Upper Snake River Basin which, from an engineering and physical viewpoint, appear capable of adding some 1,130,000 acres of irrigable land, which would result from the creation of 46 new storage reservoirs with a total capacity of 7,041,000 acre feet, and which would allow for the production of 1,241,500 kilowatts of electricity. Among the projects included in this group are the Guffey, Long Tom, and Hillcrest units (all dependent upon the Guffey power and storage reservoir), which would irrigate 119,140 new acres, and provide supplemental water for an additional 12,460 acres of land. Total cost for these projects is now estimated at $172,635,000. The report states that their feasibility hinges upon agreements for water exchanges.

Now my position is this: I favor the maximum development and utilization of the water and land resources of the Upper Snake River Valley. When the studies now underway are completed, I expect to favor authorization of the various projects which prove to be feasible, as funds become available, and as the need for new crop land and hydro-electric power arises. I think the order of development should depend chiefly upon technical considerations, and I am not prepared at this time to assign a specific priority to the Guffey and related projects. In this, I will be guided, in part, by the recommendations of the experts in the Corps and in the Bureau. Idaho's growth and prosperity are clearly dependent upon the orderly development of these vast unused resources, however, and you may be sure that I will work for that objective.

Sincerely,

Frank Church

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JAC/WH/ag

JRP014001

Orr Affidavit

Exhibit 77

Letter from Norman H. Moore, Assistant Regional Director, U.S. Bureau of Reclamation, to Dr. Robert R. Lee, Director, Idaho Water Resource Board (Oct. 27, 1967)

Fourth Orr Affidavit
Exhibit 17:

Letter from letter from Norman H. Moore, Assistant Regional Director, United States Bureau of Reclamation, to Dr. Robert E. Lee, Director, Idaho Water Resource Board (Oct. 27, 1967)

cc: Imhoff & Robertson 10-30-67
cc: All 35 Members + Congress Delegation 10-30-67

Idaho Water Res. Bd

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
REGIONAL OFFICE, REGION 1
BOX 8008
BOISE, IDAHO 83707

IN REPLY REFER TO: 700

		INI.	DATE
	DIRECTOR	RRL	10/31
	CHAIRMAN		
	BOARD		
	PLANNING	Ed	10/31
	ENGINEERING		
	ECONOMICS		
	HYDROLOGY	AR	10/30
	LAND CLASS.		
	REPORTS		
	DEVELOPMENT		
	FILE		

RECEIVED
OCT
IDAHO WATER RESOURCE

Dr. Robert R. Lee, Director
Idaho Water Resource Board
Statehouse
Boise, Idaho 83707

Dear Dr. Lee:

At the meeting of the Idaho Water Resource Board, Thursday, October 19, 1967, Mr. F. M. Warnick responded to the questions set out in your letter of October 6, 1967. Additional questions from members of the Board were answered by Regional Director Nelson and Mr. Warnick. To complete your record, we are setting forth in this letter our answers to the questions in your October 6, 1967 letter.

Question 1. Review the quantity and location of the total estimated potentially irrigable lands in the Upper Snake River Basin.

Although no accurate information is available on the potentially irrigable land in the Upper Snake River Basin, reconnaissance studies of the Bureau have identified about 2,300,000 acres in addition to the 2,400,000 acres now irrigated. Large blocks of potentially irrigable land are located west of the Snake River from St. Anthony to American Falls Dam (250,000 acres). These lands lie adjacent to presently irrigated lands. South of the Snake River along Raft River, Goose Creek, and westward to Salmon Falls Creek are equally large blocks of potentially irrigable lands (225,000 acres). Along the many tributaries of the Snake River are smaller acreages that would respond to irrigation. Upwards of 1,000,000 acres of the presently irrigated area needs supplemental water. Areas experiencing frequent and substantial shortages are located along tributary streams where storage is lacking. Less severe shortages are experienced by some irrigated lands of the Snake Plain receiving water directly from the Snake River.

Questions 2 and 5. Areas that could be served by increased storage at Lynn Crandall Reservoir or American Falls Reservoir. The water supply situation with and without American Falls Dam enlargement.

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Uncontrolled and unused surface flows of the Snake River passing Milner Dam average 1,250,000 acre-feet annually, including Idaho Power Company primary and secondary rights passing the dam, although there were eight consecutive years in the 1930's when no water would be available for new uses. This quantity of water, if fully controlled and utilized, would supply only a fraction of the future needs in the basin. It therefore appears that major land and water resource development will only be possible with coordinated and complementary use of the unused surface and ground water supply. New storage space is needed for control and use of wet year surface flows and ground water pumping is required to meet the dry year deficiencies.

The attached chart shows more clearly the flows that pass Milner Dam, exclusive of Power Company water, that is uncommitted. If other developments are undertaken and placed in operation, such as Lynn Crandall Reservoir and Snake Plain Recharge, then uncommitted flows passing Milner Dam would average about 232,000 acre-feet. This is the water that may be stored in an enlarged American Falls Reservoir.

Question 3. What are the advantages and disadvantages of ground water recharge and ground water exchange?

The ground water resource beneath the Snake River Plain could be benefited by artificial recharge. Artificial recharge would consist of diverting surplus surface flows of wet years from Snake River or Henrys Fork to infiltration areas where this water would enter the porous materials of the Snake Plain aquifer. Thus, both the transient storage provided by the aquifer and the surplus surface water that is now unused would be beneficially joined.

If the concept of artificial recharge is considered in the light of present and future water resource developments in the Upper Snake River Basin above Bliss, it would have the following effects;

(a) Put underground in an evaporation-free reservoir, surplus flows of Henrys Fork and Snake River that would otherwise spill past Milner unused;

(b) Increase the flow from the aquifer into Snake River at various places between Idaho Falls and Bliss;

(c) Make available water for a variety of purposes that might not otherwise be usable in this reach of the river;

(d) Moderate a declining water level in some areas and forestall this trend in other areas; and

(e) Provide flood control by diversion of peak flows of Henrys Fork and Snake River.

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As might be imagined, arriving at monetary benefits and identification of project beneficiaries to a sufficient degree for contracting repayment of project annual and construction costs, are questions perhaps more difficult to resolve than the physical relationships of getting excess surface water under ground. A disadvantage of artificial recharge is the inability to regulate the ground water storage reservoir. Additional pumping from the aquifer would have some adverse effect on present individual pumpers in localized areas because of lowering water tables; however, the aquifer as a whole is far from being fully developed and much further pumping can take place without mining the resource.

Question 4. What is the timing of the Bureau's studies on the American Falls Dam, the Lynn Crandall Dam, and the Snake Plain Recharge Project?

A report on replacement of American Falls Dam is to be completed in February 1968. The proposed report on Lynn Crandall is scheduled for completion in December 1968, and the proposed report on Snake Plain Recharge is scheduled for completion in August 1969. Because of the condition of the concrete in American Falls Dam, it no longer meets the standards of safety expected of a structure of this type. The primary problem there is replacement of the present structure as soon as it can be reasonably accomplished. Whether this replacement is the same size as the existing dam or is a larger dam is a decision which must be made. Whatever decision is made, the replacement should not be delayed pending authorization of Lynn Crandall or Snake Plain Recharge.

Question 6. What is the potential for irrigating lands in the Portneuf River Drainage by exchange from Blackfoot Reservoir, presuming that the Lynn Crandall Reservoir would supply the replacement water? The problem with respect to obtaining Indian approval and competition for water in downstream areas should be discussed.

During the investigations for the Upper Snake River Basin report, completed jointly by the Bureau of Reclamation and Corps of Engineers, the Bureau of Reclamation made an inventory of the land resources in the Portneuf River Basin. This inventory showed there are about 75,000 acres that are dry farmed or idle that could be irrigated if sufficient water could be made available. In addition, there are about 47,000 acres presently irrigated which need supplemental water. It is physically possible to divert water from Blackfoot River below Blackfoot Reservoir into the headwaters of the Portneuf River Basin. Blackfoot Reservoir has usable capacity of 413,000 acre-feet. Operating limitations imposed by the Bureau of Indian Affairs limit the storage to about 340,000 acre-feet. Our preliminary studies indicate that the average annual yield from this reservoir is about 125,000 acre-feet. Physically, all this water is divertible to the Portneuf River Basin. This amount of water could be completely replaced to the Indian Reservation by use

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of storage in Lynn Crandall Reservoir during the wet years and ground water pumping in dry years. To accomplish this exchange, the Reservation Canal would have to be enlarged from Snake River to the point where the canal intersects Blackfoot River. The problems connected with this exchange are obtaining Indian approval to the exchange and competition for the water for downstream areas where there are more favorable growing seasons.

We appreciated the opportunity to discuss with your Board the replacement of American Falls Dam. If additional information is needed to aid in your consideration of this problem, please contact us.

Sincerely yours,

Norman H. Moore

Regional Director

Assistant

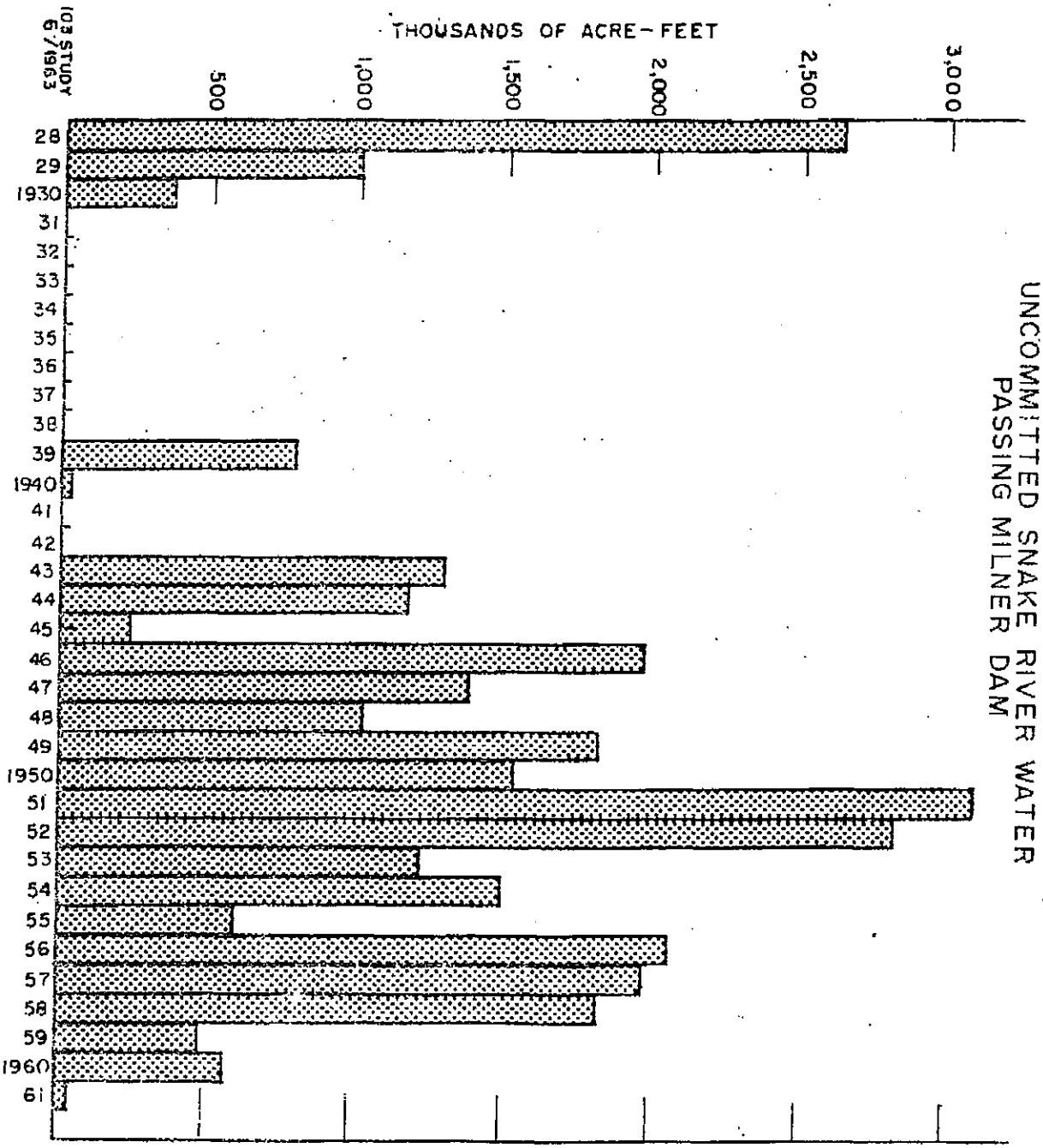
Attachment

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JRP018151

Orr Affidavit

Exhibit 78

Excerpted pages of the "Minutes of Meeting No. 4-72" (Idaho Water Resource Board) (Jun. 13, 1972)

CECIL D. ANDRUS, Governor

BOARD
JOHN F. STREIFF, Chairman, Lewiston
GEORGE L. YOST, Vice Chairman, Emmett
FERRIS M. KUNZ, Montpelier
CHARLES J. MARSHALL, Jerome
JOSEPH H. NETTLETON, Murphy
THOMAS OLMSTEAD, Twin Falls
SCOTT W. REED, Coeur d'Alene
EDWIN C. SCHLENDER, Malta
R. KEITH HIGGINSON, Boise
Ex-officio Member
(Director, Department of Water Administration)

STATE OF IDAHO

IDAHO WATER RESOURCE BOARD
STATEHOUSE
BOISE, IDAHO 83707

DR. ROBERT R. LEE, Director

CERTIFIED

MINUTES OF MEETING NO. 4-72
Idaho Water Resource Board
Twin Falls, Idaho
June 13, 1972

Meeting No. 4-72 of the Idaho Water Resource Board was called to order by Vice Chairman George L. Yost at 9:00 a.m., Tuesday, June 13, 1972, in the Holiday Inn, Twin Falls. (Reel 75, Sides 1 & 2, and Reel 76, Side 1.)

PRESENT:

George L. Yost, Vice Chairman
Ferris M. Kunz, Member
Charles J. Marshall, Member
Joseph H. Nettleton, Member
Thomas Olmstead, Member
Scott W. Reed, Member
Edwin C. Schlender, Member
R. Keith Higginson, ex-officio Member
(Director, Department of Water Administration)

ABSENT:

John F. Streiff, Chairman

STAFF PRESENT:

Director: Dr. Robert R. Lee
Counsel: Nathan W. Higer
Secretary: V. F. Sullivan
Other Staff Members: W. T. Haas, V. G. King, A. C. Robertson, L. E. Trumbull, W. P. Gotsch, M. C. Edson, W. D. Reynolds.

OTHERS PRESENT: Representatives of the Press; Clair Loosli, Bonneville Power Administration; Hal K. Hall, U.S. Geological Survey, Boise; Lee Woods, Department of Administrative Services; C. E. Brockway, University of Idaho; R. B. Porter, Utah Power and Light; Wes Coryell, Idaho Power Company; W. G. Jenkins, Oneida County Water Resource Board; John Rosholt, of Parry, Robertson, Daly & Larson, Twin Falls; Ella Nelson, League of Women Voters, Twin Falls; John Pastoor, and Elmer Parrott, of Salmon River Canal Company; and others.

On Thursday, June 12, 1972, the Board and Staff toured the Thousand Springs Area.

Agenda Item No. 1. Approval of minutes of Meeting No. 3-72 of the Idaho Water Resource Board.

It was moved by Mr. Olmstead, and seconded by Mr. Kunz, that the draft minutes of Meeting No. 3-72 be approved as circulated. Motion carried by voice vote; Mr. Streiff absent. (ATTACHMENT NO. 1.)

Roll call vote resulted as follows: Kunz, Aye; Marshall, Aye; Nettleton, Aye; Olmstead, Aye; Reed, Aye; Schlender, Aye; Yost, Aye; Streiff, absent. 7 Ayes, 1 absent. Motion carried. (ATTACHMENT NO. 4.)

Agenda Item No. 4. Development Program Status Report.

Tamarack Project.

Mr. King reported on the Tamarack Project which will be a major recreation development near Council, Idaho, that also provides supplemental irrigation water for approximately 4,000 acres. The application for an EDA Technical Assistance Grant for a feasibility study of this project was still in the EDA Washington office on June 2, 1972.

Snake Plain Pilot Recharge Project.

Mr. King reported that the Snake Plain Pilot Recharge Project, located near St. Anthony is the forerunner of a massive recharge project that will provide general public benefits. A contract agreement with the St. Anthony Union Canal Company on the Snake Plain Pilot Recharge Project was completed on May 3, 1972, and an agreement was also completed with William L. Roan on May 18, 1972, to do aerial topographic work of the recharge site. The water permit should be issued soon. A special use permit from the Bureau of Land Management for construction of the project is at the Idaho Falls District Office where it will be approved with stipulations.

Mr. Higginson stated that in the last Board meeting in Boise when the pilot recharge project was discussed, the Chairman seemed to be quite concerned about some prior studies that had been made of areas adjacent to the planned areas of study under the pilot recharge project. When he was asked if the Department of Water Administration has information concerning the infiltration rate in the general area, he said the Chairman seemed surprised that the information is available. For this reason, Mr. Higginson requested that the minutes indicate that the data he has are from a study made largely by Mr. Mundorff of the U.S. Geological Survey in cooperation with the U.S. Bureau of Reclamation. The study was made in about 1960, and two areas were studied--one is the present Egin Lakes, which all the Board Members have seen. The water level in the lake was determined, test holes were drilled, and the seepage rate from the lake was determined to be .256 acre feet of water per acre of surface area per day, which is therefore recharged to the groundwater system. A similar test was conducted by pumping water from a well just a mile or a mile and a half south of the proposed area of the Board's pilot recharge project. In that area, the seepage rate was .29 acre feet of water per acre per day. Mr. Higginson requested that the foregoing be entered in the record.

Dr. Lee replied that staff is aware of that data and, in fact, the test well is shown on the second chart, but we are concerned about whether or not the recharge rate would be the same for that area as for pond number one. The area is somewhat variable with fractured basalt and sands. One test well in the number two area cannot be relied upon to go ahead with any major structural investment in recharge facilities that might follow this initial, very small diversion into Egin Lake, and into the recharge pond.

Mr. Reed stated that although he had not attended the last Board meeting, based on the information contained in the minutes, he understood that Mr. Higginson felt the recharge project was a waste of money. He asked if this were still Mr. Higginson's view; Mr. Higginson replied in the affirmative.

Dr. Lee said he thought it best to ask why. Mr. Higginson said he thought we already have all the information to be gained by a pilot recharge project, and he did not feel that the Board should spend any additional public funds to duplicate the information we already have. Mr. King explained that as much as 85,000 acre feet in one year might be recharged through this pilot project and at the same time we would be able to gain some additional information which is needed and helpful in preparing for the larger recharge project.

Mr. Higginson said he did not intend to debate the advisability of the project--he only wanted to insert in the record the two figures that Chairman Streiff seemed surprised that we had. The information is a result of prior studies that have been made in areas adjacent to the one we have been talking about.

Mr. Reed said he did not intend to debate the advisability of the project either, but just wished to note again for the record, that in view of what Mr. Higginson has said, had he attended the previous Board meeting he would have voted against the project.

Dr. Lee said he thought it was important again, for the people to know the relationship of this recharge project to the Thousand Springs area and to the long-run picture of water management in the entire Upper Snake System. This really represents an alternative to capture waste water that is now spilling down the Snake--water that does no one virtually any good, and at this time it is causing a lot of damage downstream. It is an alternative to future dams in the area. The St. Anthony recharge area is tributary to the Thousand Springs, which has an important trout industry.

Mr. Marshall remarked that just because a recharge project works in one area, does not mean that it will work in all areas, because of obstructions, it must be tried in the respective areas.

Dr. Lee said if the project does not work out it means we will have invested $2,500 of Board funds in the project.

Swan Falls-Guffey Project.

Mr. King reviewed the Swan Falls-Guffey joint-venture hydro-power project to be constructed on the Snake River Southwest of Boise. Efforts are being made to gather additional information needed to complete the environmental study by Utah State University, and the recreational study by the Parks Department is underway. The study is being made by a consultant, Don Partridge. The information required for the FPC license application will be prepared and the license application completed by December 1, 1972.

Legal action for testing the legality of the joint-venture contract with the Idaho Power Company, as questioned by the Attorney General's office during the past legislative session, will be ready for filing with the District Court about August 1, 1972, and a request to the Internal Revenue Service for a ruling on the tax exempt nature of the revenue bonds for this project will be ready by August 1, 1972.

Orr Affidavit

Exhibit 79

Excerpted pages of the "Minutes of the Meeting on Snake River Flood Control Problems" (Dec. 16, 1957)

MINUTES OF THE MEETING
ON SNAKE RIVER FLOOD CONTROL PROBLEMS

Jackson, Wyoming
December 16, 1957

The meeting was held in the Wort Hotel in Jackson among interested parties of both Idaho and Wyoming. A list of the persons in attendance is as follows:

Milward L. Simpson	Governor of Wyoming	Cheyenne, Wyoming
Keith Thomson	Rep. from Wyoming	Cheyenne, Wyoming
E. L. White	Bureau of Rec.	Boise, Idaho
Harold T. Nelson	Bureau of Rec., Director, Region 1	Boise, Idaho
Glenn H. Simmons	Bureau of Rec.	Burley, Idaho
Leo D. Murdock	Committee of Nine	Blackfoot, Idaho
Alex Coleman	Committee of Nine	St. Anthony, Idaho
N. V. Sharp	Committee of Nine	Fyler, Idaho
Mark R. Kulp	Idaho Governor's Rep.	Boise, Idaho
William F. Hart	Corps of Engineers	Walla Walla, Wash.
Howard A. Preston	Corps of Engineers	Walla Walla, Wash.
Willis Walker	Committee of Nine	Rexburg, Idaho
Lloyd Van DeBurg	Rancher	Jackson, Wyoming
Burce Porter	State Senator, Teton County	Jackson, Wyoming
Harry Barker, Jr.	State Representative, Teton County	Moose, Wyoming
R. P. Parry	Attorney	Twin Falls, Idaho
James L. Bowman	Bureau of Rec.	Moran, Wyoming
Orvil Nielson	American Falls Reservoir District No. 2	Gooding, Idaho
William Kerner	American Falls Reservoir District No. 2	Shoshone, Idaho
Rovert W. Ferebarell	American Falls Reservoir District No. 2	Shoshone, Idaho
Lynn Crandall	Snake River Watermaster	Idaho Falls, Idaho
L. F. Thornton	Natural Resource Board	Thermopolis, Wyo.
E. B. Hitchcock	Natural Resource Board	Rock Springs, Wyo.
Walter W. King	Chamber of Commerce	Wilson, Wyoming
Lee Lundy		Wilson, Wyoming
Eugene P. Linn	Rancher	Wilson, Wyoming
Byron Jenkins	Rancher	Jackson, Wyo.
J. G. Imeson	Rancher	Jackson, Wyo.
H. C. Richards		Jackson, Wyo.
C. B. Goring	Protective Union Board	Blackfoot, Idaho
E. Roy Stanger	Progressive Irr. Dist.	Idaho Falls, Idaho

He doubted whether they would be sympathetic to making a cash contribution to the operation and maintenance of flood protection works in the Jackson area.

Mr. R. P. Parry then spoke as representative of the water users in the lower Snake River Valley below American Falls Reservoir. Mr. Parry also recognized the problem of the Wyoming users and stated that if possible Idaho would be most willing to co-operate. He brought out that since there is such a large portion of government ownership within the county, the Federal government should participate in the cost of operation and maintenance of the flood control works. He stated that the possibilities of obtaining financial assistance from the water users in Idaho would be guesswork at this time. It would not be possible for the Committee of Nine to make any committments--they could only put forth an expression of their opinion. Also, the question of how Idaho might be able to obtain money to help in such a situation is open to question. Mr. Parry re-emphasized his point that the Federal government should co-operate on the flood control works and offered his assistance in contacting the authorities in the state of Idaho and their Congressional delegation in this regard.

Congressman Thomson pointed out that from his discussions with the Federal government, there was little possibility of the various agencies requesting funds for such a purpose as maintaining flood protection works that were outside of the area of their immediate jurisdiction. He also stated that there is the opinion that the Federal government is contributing the initial construction cost and therefore, has done their share. Congressman Thomson expressed his idea of making power revenues available for paying the operation and maintenance charges.

Mr. Parry stated that he doubted if this could be done from Palisades; however, it might be possible with the Burns Creek Project. There would be sufficient power revenuss from that project to take care of flood control operation and maintenance--all that would be needed would be the authorizing legislation.

Mr. William Holden, Attorney for the water users on the upper river in Idaho, re-emphasized the difficulties involved in obtaining assessments from the fifty or sixty water users groups in Idaho. He doubted the legality of such a move and also the practicality of it. He stated that the group present at the meeting did not want to give any assurances of their ability to make a financial contribution when they were not sure it could be done. He suggested that the Corps of Engineers investigate the possibility of making a different interpretation to the law requiring financial ability of the local district.

Orr Affidavit

Exhibit 80

Excerpted pages of the "Minutes of Meeting, Bureau of Reclamation and Advisory Committee" (Dec. 29, 1960)

Fourth Orr Affidavit
Exhibit 10:

Minutes of Meeting, Bureau of Reclamation and Advisory Committee, Burley, Idaho, Dec. 29, 1960

MINUTES OF MEETING
Bureau of Reclamation and Advisory Committee

Burley, Idaho - December 29, 1960 - 11:00 a.m.

Present:

U. S. Bureau of Reclamation: Harold Nelson, William Burpee, Merrill Martz, Harold Hafterson, Richard Lindgren, H. R. Gray, Glenn Simmons, Howell Gnau.

Committee of Nine: Leonard Graham, C. N. Scoresby, Frank Redfield, Al Peters, and Henry Eagle, Watermaster

R. P. Parry, Lynn Crandall, Earl W. Larsen, Lovell Holyoak, Carroll Wilcomb.

Harold Nelson reviewed the river operation for period October 1 to December 31, 1960. During this period the releases from Palisades have been from 1,000 to 1,200 cfs, which have permitted a water savings of about 120,000 acre-feet at a cost of about $45,000. This cut the power production as low as 8 megawattas for some days. If such operation is continued thru January, the cost of replacement power will be about $38,000. Since it appears that there would be about 150,000 acre-feet of vacant space in American Falls Reservoir on April 1, under present operations, it is proposed that Palisades releases be increased to 1,500 cfs for the month of January.

Pat Parry presented two criteria which he believed should determine river operation:

1. Have water at the beginning of the irrigation season in those reservoirs where the best use can be made of it.

2. Spill no water to waste past Milner.

Mr. Crandall pointed out the following: Since the time when Palisades studies were made conditions have changed. With increased water available the upper valley diversions have been greater and there is now a greater return flow to American Falls Reservoir. This causes a spill at Milner during many years if Palisades power plant is run at the 15 megawatts permitted in Palisades studies. The solution to this problem would be the raising of American Falls dam to allow the storage of another 300,000 acre-feet.

With the present natural flow at Irwin and the plan of operation proposed by Mr. Nelson, American Falls would probably not be quite full on April 1 and there would be about 200,000 acre-feet of storage to credit to preferred space in Palisades reservoir.

Mr. Parry stated that there should be 235,000 acre-feet of preferred space in Palisades to fill the 135,000 acre-feet rights of upper valley canals and 100,000 acre-feet which is estimated savings of North Side Canal Co.

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JRP016112

Pat Parry moved that releases at Palisades be increased to 1,500 cfs for the month of January with the following conditions be met:

1. The commitment of the Bureau of Reclamation to have 235,000 acre-feet of preferred space in Palisades Reservoir be realized.

2. A review of conditions be made near end of January and any needed revisions in operations for February and March be adopted.

Mr. Nelson agreed that the 235,000 acre-feet of space would be available.

The above motion was adopted by common consent.

Meeting adjourned 11:50 a.m.

COPY-National Archives-Rocky Mountain Region

Orr Affidavit

Exhibit 81

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

Fourth Orr Affidavit
Exhibit 15:

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

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

AUG 30 1962

Dear Mr. Swidler:

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

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

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

FEDERAL POWER COMMISSION
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AUG 30 1962
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of this Department, it is essential that the license contain appropriate provisions with respect to the requirements of the Idaho Power Company in connection with its operation of the American Falls plant constructed by it.

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

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

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

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

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

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

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

The Shoshone Falls plant of the Idaho Power Company proposed to be licensed under Application No. 2258 is immediately downstream from the Twin Falls plant of the company which was licensed under Project No. 18. The Twin Falls plant, like the Shoshone Falls plant, involves the utilization of public lands of the United States. The Shoshone plant is located downstream from Milner Dam, the control point for the utilization of the waters of the Snake River for development of public lands of the United States through irrigation. The Idaho Power Company officials have been repeatedly advised, beginning with the early negotiations concerning the development of stored water for irrigation at American Falls, that the best development of the waters of the Snake River require there be no power developments below Milner Dam which rely upon flows of water past Milner Dam for power production. The United States, acting through this Department, has constructed upstream from Milner a reservoir system in excess of 4,500,000 acre-feet, all of which is operated with the objective of conserving the water to minimize spills past Milner Dam. This matter was the subject of extended negotiations with the Idaho Power Company in connection with the issuance of the license under Project No. 18 at the Twin Falls site. In view of this long history of the obvious need for the conservation of water above Milner Dam, and in view of the many public statements of the officials of the Idaho Power Company, including those made to your Commission in connection with the issuance of the license in the Hells Canyon reach of the Snake River, there should be no objection, and it is in the public interest, that the license for the Shoshone Falls plant should clearly subordinate the water supply for that plant to the use of water for development of irrigated areas upstream. Accordingly, it is recommended that any license contain provisions along these lines:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely yours,

[redacted]

Secretary of the Interior

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

Enclosure

Orr Affidavit

Exhibit 82

Letter from U.S. Bureau of Reclamation Commissioner Floyd Dominy to Senator Len Jordan (Jan. 5, 1968)

MSS 6 LEN B. JORDAN COLLECTION
Box 45 Folder 21

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

IN REPLY
REFER TO: 736

JAN 5 - 1968

UNITED STATES SENATOR
RECEIVED
DEC 1967
LEN B. JORDAN

Hon. Len B. Jordan
United States Senate
Washington, D. C.

Dear Senator Jordan:

Your letter of December 14 to Regional Director H. T. Nelson at Boise, Idaho, requesting a copy of Mr. Moore's speech to the Idaho Water Resource Board at the June 22, 1967, meeting in Idaho Falls has been forwarded to this office.

The Regional Director reports that Mr. Moore did not have a prepared statement for his presentation to the board; however, for your information, the following paragraphs present a brief resume of the major items included in his presentation and of material furnished to the Idaho Water Resource Board at a later date.

To prevent flooding of additional Fort Hall bottom lands by an enlarged American Falls Reservoir would require a dike about 56 miles long along the contour of the high water line of the present reservoir. An alternative and more practical solution would be a dike about 14 miles long cutting across country to protect most of the Fort Hall bottoms (13.5 miles for a 6-foot enlargement and 14.6 miles for a 13-foot enlargement). However, the shorter dikes would require the purchase of additional Indian lands over and above those which our Bureau now has rights to flood and thus would continue to involve the Indians on the question of requiring additional Indian lands.

The justification for providing dikes and pumping to avoid additional inundation of Fort Hall bottom lands must be based on the incremental benefit between replacement to the existing capacity and the enlarged reservoir. In any case, the cost of dikes would have to bear a reasonable relationship to the value of the land being protected. Rough studies indicate a number of technical problems are involved with any diking plan. These problems may prove to be difficult and costly to resolve.

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JRP013560

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Box 45 Folder 21

The Regional Director has not made any studies nor does he have estimates of the cost of a dike to protect the Indian lands. He estimates a reconnaissance study to obtain information on a dike would cost as much as $200,000 and require approximately 3 years to make. The Indians would also have to allow access to the area for field surveys. Such a study would not only involve the dike itself, but also water collection systems and pumping plants to assure proper drainage of the Fort Hall bottoms. Utilizing the limited information now available, the diking proposal will be discussed in the Regional Director's report on American Falls Dam.

Lynn Crandall Dam is not considered an alternative to enlargement of American Falls Reservoir. To utilize fully the water resource in the upper Snake River above Milner Dam would require storage capacity greater than that which could be provided at the Lynn Crandall site.

The Regional Director's latest operation studies, which include storage in Ririe, Lower Teton, and Lynn Crandall Reservoirs, show that there still would be an average of 635,000 acre-feet passing Milner Dam annually during the 1928-1961 study period. (The Idaho Power Company's primary right of 45,000 acre-feet was deducted in arriving at this figure.) Taking into account an average of 155,000 acre-feet to meet Idaho Power Comapny secondary power rights and an additional 117,000 acre-feet released to meet water quality control objectives, an annual average of 363,000 acre-feet of water would pass Milner in excess of all downstream requirements. These excesses range from nothing in 17 of the 34 years of study to over 2,000,000 acre-feet in 1951.

If potential diversions for the Snake Plain Recharge Project are deducted (83,000 acre-feet in St. Anthony area and 165,000 acre-feet in Idaho Falls area), the average annual surplus at Milner Dam would be 115,000 acre-feet.

If it is determined that American Falls Dam should not be enlarged, alternatives should be investigated to control and utilize uncommitted flows passing Milner Dam. These can be programed for study as funds are available. Some of the possibilities that should be considered and evaluated are as follows:

(1) Storage at downstream reservoir sites.
(2) Enlargement of Lake Walcott.
(3) Offstream storage sites to be filled by pumping from the Snake River.

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(4) Development of the ground-water resource in the Upper Snake Plain, thereby reducing flows returning to the Snake River upstream and at American Falls Reservoir.

While criteria now in use indicate that none of the foregoing alternatives to enlarging American Falls Dam are attractive, changes in economic conditions, national policy, and time may permit a plan being formulated at some future date which could control most of the uncommitted flows above Milner Dam. Such a plan would probably combine the use of storage, ground-water recharge, and ground-water pumping into a feasible and acceptable project and insure that spills past Milner Dam would not be lost to the Upper Snake River Basin. In any event, considering potential uses downstream from Milner Dam, the spills would not be lost to the State of Idaho.

In the event American Falls Reservoir is enlarged, the present spaceholders would pay costs based on replacement to the existing size. The incremental cost of raising the dam would be assigned to the beneficiaries of the additional space. Actually, with additional beneficiaries participating, annual operation and maintenance costs to present spaceholders most likely could be reduced.

The Regional Director has also pointed out that there would not be any interference with existing water rights in an enlarged American Falls Reservoir. Our Bureau has no authority to infringe on existing water rights.

Sincerely yours,

Commissioner

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JRP013562

Orr Affidavit

Exhibit 83

House of Representatives Report No. 94-531, "Tax Exempt Status Of Obligations Used To Provide Certain Irrigation Facilities" (House Ways And Means Committee) (Oct. 3, 1975) (94th Congress, 1st Session)

94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 94-531

TAX EXEMPT STATUS OF OBLIGATIONS USED TO PROVIDE CERTAIN IRRIGATION FACILITIES

OCTOBER 3, 1975.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ULLMAN, from the Committee on Ways and Means, submitted the following

REPORT

[To accompany H.R. 9968]

The Committee on Ways and Means, to whom was referred the bill (H.R. 9968) to amend section 103 of the Internal Revenue Code of 1954 with respect to certain obligations used to provide irrigation facilities, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

I. SUMMARY

The bill, H.R. 9968, deals with the tax-exempt status of obligations the proceeds of which are to be used to reconstruct the American Falls Dam in Idaho. The dam is used for irrigation purposes but the water also has a subordinate use in generating electric energy. Under present law, an industrial development bond whose proceeds are used to build a dam that stores water for irrigation purposes may be eligible for tax-exempt status. However, in this case where the water has a subordinate use in generating electric energy, the eligibility of the bond issue for tax-exempt status is uncertain.

The American Falls Dam is under the supervision of the Bureau of Reclamation of the Department of Interior and has been restricted to two-thirds of its capacity because of certain structural defects. The Federal Government might well eventually appropriate the funds to reconstruct the dam. However, the American Falls Reservoir District is undertaking the reconstruction project now in order to make the dam fully operational. In addition, the Idaho Power Company is assisting the financing of the project and is to use the water for electric energy generation. It is the interrelationships of the use of the dam for furnishing water for irrigation purposes and the use of the water for electric energy that raises questions with the interpretation of the present exceptions to industrial development bond treatment. In view of

H 783-24

the special circumstances in this case, your committee believes it is appropriate to except the obligations for the reconstruction of the American Falls Dam from industrial development bond treatment which would allow these obligations to receive tax-exempt status.

Present Law

Present law provides that interest on obligations of State and local governments generally is exempt from Federal income tax. In 1968 tax-exempt status was withdrawn from industrial development bonds which State and local governments were using to finance and attract private industrial development within their jurisdictions.

Industrial development bonds are generally considered to be State or local obligations, a major portion of the proceeds of which are to be used in, and repaid by, a taxable trade or business. Such bonds are normally issued to acquire a facility for private business in which the beneficial ownership of the facility remains in the private trade or business, although (in order to secure repayment of the bonds) legal title normally remains with the State or local unit issuing the obligations.

When the industrial development bond limitation was enacted, exceptions were provided for certain small issues (sec. 103(c)(6)) and for certain specified public activities (sec. 103(c)(4)) in which cases tax-exempt status was continued. As initially enacted, one of the public activities for which an exemption was provided (sec. 103(c)(4)(E)) was "sewage or solid waste disposal facilities or facilities for the local furnishing of electric energy, gas or water."

In 1971, Congress amended the exception in subparagraph (E) to delete "water" and added the present law subparagraph (G) which extends the exception to "facilities for the furnishing of water, if available on reasonable demand to members of the general public."

As a result, in those cases where obligations are issued for facilities for the furnishing of water which meet the exception (under sec. 103(c)(4)(G)) but where the water is also used to generate electricity, it is uncertain as to whether the obligations would qualify for exempt status unless the use of the electric energy meets the "local" furnishing test (under sec. 103(c)(4)(E)), which has been interpreted to cover an area of two contiguous counties.

Reasons for the Bill

The American Falls Reservoir District applied to the Internal Revenue Service in June 1974 for a ruling that bonds to be issued to finance the replacement and rehabilitation of the American Falls Dam would qualify as a tax-exempt issue under section 103(c)(4)(G). The Internal Revenue Service, however, had questions of interpretation with respect to the interrelationship of the exceptions for facilities for furnishing of water and the local furnishing of electric energy and their application to the specific facts of this case. The committee reviewed the facts involved, as described below, and believed it is appropriate to specifically except the bond issue in this case as a result of the special circumstances.

The original American Falls dam was constructed in 1927 by the Bureau of Reclamation. The dam was restricted to two-thirds of its

1.7 million acre-foot capacity in 1972 by the Bureau of Reclamation of the Department of the Interior for safety reasons because of excessive pressures on the dam which were caused by an alkali-aggregate reaction and deterioration in the concrete.

Legislation was enacted on December 28, 1973, to permit replacement and rehabilitation of the American Falls dam by the American Falls Reservoir District, which is a political subdivision of the State of Idaho. Replacement of the existing dam by the American Falls Reservoir District is an action to be taken in lieu of waiting for a Federal appropriation that would enable the Bureau of Reclamation to build the replacement dam.

The Act of December 28, 1973, also provides that upon completion of construction the United States shall take title to the dam as a feature of the Minidoka Project, located in the upper Snake River basin, Idaho.

As the constructing agent, the American Falls Reservoir District was authorized to contract with an electric utility for the use of the falling water at the dam for hydroelectric power generation. Revenues from such a contract will help defer the costs of constructing the dam. Prior to the adoption of the Act of December 28, 1973, the Idaho Power Company, which is a spaceholder in the reservoir and which owns and operates a powerplant below the existing dam, expressed interest in the execution of a falling water contract. Subsequent to the adoption of the Act, the District, as the constructing agency, entered into negotiations with the Secretary of the Interior, the Idaho Power Company and the other water users for the preparation of various contracts including a contract for the use of falling water.

It was intended that in normal circumstances, substantially all of the falling water would be made available to the Power Company only when water was released from the dam for irrigation purposes. There has been no intention to release water specifically for use by the Idaho Power Company to generate electricity, except for 45,000 acre-feet (2.65 percent of the storage capacity) whose release the power company can schedule for the purpose of generating electric energy. Thus, the use of water for electric energy would be subordinated to the use of the water for irrigation.

Although the Federal Government might well eventually completely finance the reconstruction of the American Falls Dam, the American Falls Reservoir District is undertaking the reconstruction now in order to make the dam fully operational for the spaceholders (rather than the present restricted two-thirds capacity). If it were not for the use of the water by the Idaho Power Company for hydroelectric power generation, any bonds issued by the Reservoir District would presently qualify for tax-exempt status. In this case the Idaho Power Company has a limited spaceholder right (under 3 percent) and is financing a large portion of the debt to assist the reconstruction of the dam and has use of the falling water for its hydroelectric power generation purposes. In addition, since the dam is to be turned over the the Federal Government after its reconstruction for ownership and operation, in effect, this financing can be viewed as saving the Federal Government the expenditure it would have had to make to reconstruct the dam several years in the future. In view of these special circumstances, your committee believes it is appropriate to extend tax-exempt status to the bonds to be issued to finance the reconstruction of the dam.

Explanation of the Bill

Your committee's bill adds a new exception to industrial development bond treatment to specifically allow tax-exempt status for the bonds issued to reconstruct the American Falls Dam. This exception is to apply to obligations for a dam which furnishes water for irrigation purposes which has a subordinate use in connection with the generation of electric energy by water if substantially all of the stored water is contractually available for release from the dam for irrigation purposes and if the water released is available on reasonable demand for members of the general public.

The committee intends that subordinate use of water for generating electric energy means that less than 10 percent of the normal supply of stored water may contractually be scheduled for release by the power company and used for generating electric energy. "Normal" refers to conditions that generally prevail in the service area of this reservoir, and it is recognized that unusually wet or dry weather can cause a significant distortion in the 2.65 percent of water contractually scheduled for release to be used for generating electric energy. The committee intends that such unusual circumstances not be guiding in determining the subordinate use of water. In addition, "normal" use does not include a temporary increase in water released for the power company following contractual default by a spaceholder and his water share being made available to other spaceholders under the terms of the contract for the construction and operation of the dam and its facilities.

Thus, the provision applies the requirements of subsection (c)(4)(G) where substantially all of the stored water (under normal weather and climatic conditions) is available for release to be used for irrigation in the American Falls Reservoir District. The requirement that the released water be available on reasonable demand to members of the general public is retained in the new subsection (e). The committee understands that the American Falls project conforms with this requirement.

Your committee's bill is to apply to obligations issued after the date of the enactment of this Act.

IV. Effect on the Revenues of the Bill and Vote of the Committee in Reporting the Bill

In compliance with clause 7 of Rule XIII of the Rules of the House of Representatives, the following statement is made relative to the effect on the revenues of this bill. Your committee believes that the changes made by this bill will result in an annual revenue loss of about $1 million in each of the five fiscal years following the current fiscal year. No revenue loss is expected in the current fiscal year. The Treasury Department agrees with this statement.

In compliance with clause 2(l)(2)(B) of Rule XI of the Rules of the House of Representatives, the following statement is made relative to the vote by the committee on the motion to report the bill. The bill was ordered reported by a unanimous voice vote.

V. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

INTERNAL REVENUE CODE OF 1954

* * * * * * *

Chapter 1—Normal Taxes and Surtaxes

* * * * * * *

Subchapter B—Computation of Taxable Income

* * * * * * *

Part III—Items Specifically Excluded From Gross Income

* * * * * * *

Sec. 103. Interest on Certain Governmental Obligations.

(a) GENERAL RULE.—Gross income does not include interest on—

(1) the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing, or of the District of Columbia;

(2) the obligations of the United States; or

(3) the obligations of a corporation organized under Act of Congress, if such corporation is an instrumentality of the United States and if under the respective Acts authorizing the issue of the obligations the interest is wholly exempt from the taxes imposed by this subtitle.

(b) EXCEPTION.—Subsection (a) (2) shall not apply to interest on obligations of the United States issued after September 1, 1917, other than postal savings certificates of deposit, to the extent they represent deposits made before March 1, 1941, unless under the respective Acts authorizing the issuance thereof such interest is wholly exempt from the taxes imposed by this subtitle.

(c) INDUSTRIAL DEVELOPMENT BONDS—

(1) SUBSECTION (a)(1) NOT TO APPLY.—Except as otherwise provided in this subsection, any industrial development bond shall be treated as an obligation not described in subsection (a)(1).

(2) INDUSTRIAL DEVELOPMENT BOND.—For purposes of this subsection, the term "industrial development bond" means any obligation—

(A) which is issued as part of an issue all or a major portion of the proceeds of which are to be used directly or indirectly in any trade or business carried on by any person who is not an exempt person (within the meaning of paragraph (3)), and

(B) the payment of the principal or interest on which (under the terms of such obligation or any underlying arrangement) is, in whole or in major part—

(i) secured by any interest in property used or to be used in a trade or business or in payments in respect of such property, or

(ii) to be derived from payments in respect of property, or borrowed money, used or to be used in a trade or business.

(3) EXEMPT PERSON.—For purposes of paragraph (2)(A), the term "exempt person" means—

(A) a governmental unit, or

(B) an organization described in section 501(c)(3) and exempt from tax under section 501(a) (but only with respect to a trade or business carried on by such organization which is not an unrelated trade or business, determined by applying section 513(a) to such organization).

(4) CERTAIN EXEMPT ACTIVITIES.—Paragraph (1) shall not apply to any obligation which is issued as part of an issue substantially all of the proceeds of which are to be used to provide—

(A) residential real property for family units,

(B) sports facilities,

(C) convention or trade show facilities,

(D) airports, docks, wharves, mass commuting facilities, parking facilities, or storage or training facilities directly related to any of the foregoing,

(E) sewage or solid waste disposal facilities or facilities for the local furnishing of electric energy or gas,

(F) air or water pollution control facilities, or

(G) facilities for the furnishing of water, if available on reasonable demand to members of the general public.

(5) INDUSTRIAL PARKS.—Paragraph (1) shall not apply to any obligation issued as part of an issue substantially all of the proceeds of which are to be used for the acquisition or development of land as the site for an industrial park. For purposes of the preceding sentence, the term "development of land" includes the provision of water, sewage, drainage, or similar facilities, or of transportation, power, or communication facilities, which are incidental to use of the site as an industrial park, but, except with respect to such facilities, does not include the provision of structures or buildings.

(6) EXEMPTION FOR CERTAIN SMALL ISSUES.—

(A) IN GENERAL.—Paragraph (1) shall not apply to any obligation issued as part of an issue the aggregate authorized face amount of which is $1,000,000 or less and substantially all of the proceeds of which are to be used (i) for the acquisition, construction, reconstruction, or improvement of land or property of a character subject to the allowance for depreciation, or (ii) to redeem part or all of a prior issue which was issued for purposes described in clause (i) or this clause.

(B) CERTAIN PRIOR ISSUES TAKEN INTO ACCOUNT.—If—

(i) the proceeds of two or more issues of obligations (whether or not the issuer of each such issue is the same)

are or will be used primarily with respect to facilities located in the same incorporated municipality or located in the same county (but not in any incorporated municipality),

(ii) the principal user of such facilities is or will be the same person or two or more related persons, and

(iii) but for this subparagraph, subparagraph (A) would apply to each such issue.

then, for purposes of subparagraph (A), in determining the aggregate face amount of any later issue there shall be taken into account the face amount of obligations issued under all prior such issues and outstanding at the time of such later issue (not including as outstanding any obligation which is to be redeemed from the proceeds of the later issue).

(C) RELATED PERSONS.—For purposes of this paragraph and paragraph (7), a person is a related person to another person if—

(i) the relationship between such persons would result in a disallowance of losses under section 267 or 707(b), or

(ii) such persons are members of the same controlled group of corporations (as defined in section 1563(a), except that "more than 50 percent" shall be substituted for "at least 80 percent" each place it appears therein).

(D) $5,000,000 LIMIT IN CERTAIN CASES.—At the election of the issuer, made at such time and in such manner as the Secretary or his delegate shall by regulations prescribe, with respect to any issue this paragraph shall be applied—

(i) by substituting "$5,000,000" for "$1,000,000" in subparagraph (A), and

(ii) in determining the aggregate face amount of such issue, by taking into account not only the amount described in subparagraph (B), but also the aggregate amount of capital expenditures with respect to facilities described in subparagraph (E) paid or incurred during the 6-year period beginning 3 years before the date of such issue and ending 3 years after such date (and financed otherwise than out of the proceeds of outstanding issues to which subparagraph (A) applied), as if the aggregate amount of such capital expenditures constituted the face amount of a prior outstanding issue described in subparagraph (B).

(E) FACILITIES TAKEN INTO ACCOUNT.—For purposes of subparagraph (D)(ii), the facilities described in this subparagraph are facilities—

(i) located in the same incorporated municipality or located in the same county (but not in any incorporated municipality), and

(ii) the principal user of which is or will be the same person or two or more related persons.

For purposes of clause (i), the determination of whether or not facilities are located in the same governmental unit shall be made as of the date of issue of the issue in question.

(F) CERTAIN CAPITAL EXPENDITURES NOT TAKEN INTO ACCOUNT.—For purposes of subparagraph (D)(ii), any capital expenditure—

(i) to replace property destroyed or damaged by fire, storm, or other casualty, to the extent of the fair market value of the property replaced,

(ii) required by a change made after the date of issue of the issue in question in a Federal or State law or local ordinance of general application or required by a change made after such date in rules and regulations of general application issued under such a law or ordinance, or

(iii) required by circumstances which could not be reasonably foreseen on such date of issue or arising out of a mistake of law or fact (but the aggregate amount of expenditures not taken into account under this clause with respect to any issue shall not exceed $1,000,000),

shall not be taken into account.

(G) LIMITATION ON LOSS OF TAX EXEMPTION.—In applying subparagraph (D)(ii) with respect to capital expenditures made after the date of any issue, no obligation issued as a part of such issue shall be treated as an obligation not described in subsection (a)(1) by reason of any such expenditure for any period before the date on which such expenditure is paid or incurred.

(H) CERTAIN REFINANCING ISSUES.—In the case of any issue described in subparagraph (A)(ii), an election may be made under subparagraph (D) only if all of the prior issues being redeemed are issues to which subparagraph (A) applies. In applying subparagraph (D)(ii) with respect to such a refinancing issue, capital expenditures shall be taken into account only for purposes of determining whether the prior issues being redeemed qualified (and would have continued to qualify) under subparagraph (A).

(7) EXCEPTION.—Paragraphs (4), (5), and (6) shall not apply with respect to any obligation for any period during which it is held by a person who is a substantial user of the facilities or a related person.

(d) ARBITRAGE BONDS.—

(1) SUBSECTION (a)(1) NOT TO APPLY.—Except as provided in this subsection, any arbitrage bond shall be treated as an obligation not described in subsection (a)(1).

(2) ARBITRAGE BOND.—For purposes of this subsection, the term "arbitrage bond" means any obligation which is issued as part of an issue all or a major portion of the proceeds of which are reasonably expected to be used directly or indirectly—

(A) to acquire securities (within the meaning of section 165(g)(2)(A) or (B)) or obligations (other than obligations described in subsection (a)(1)) which may be reasonably expected at the time of issuance of such issue, to produce a yield over the term of the issue which is materially higher (taking into account any discount or premium) than the yield on obligations of such issue, or

(B) to replace funds which were used directly or indirectly to acquire securities or obligations described in subparagraph (A).

(3) EXCEPTION.—Paragraph (1) shall not apply to any obligation—

(A) which is issued as part of an issue substantially all of the proceeds of which are reasonably expected to be used to provide permanent financing for real property used or to be used for residential purposes for the personnel of an educational institution (within the meaning of section 151(e)(4)) which grants baccalaureate or higher degrees, or to replace funds which were so used, and

(B) the yield on which over the term of the issue is not reasonably expected, at the time of issuance of such issue, to be substantially lower than the yield on obligations acquired or to be acquired in providing such financing.

This paragraph shall not apply with respect to any obligation for any period during which it is held by a person who is a substantial user of property financed by the proceeds of the issue of which such obligation is a part, or by a member of the family (within the meaning of section 318(a)(1)) of any such person.

(4) SPECIAL RULES.—For purposes of paragraph (1), an obligation shall not be treated as an arbitrage bond solely by reason of the fact that—

(A) the proceeds of the issue of which such obligation is a part may be invested for a temporary period in securities or other obligations until such proceeds are needed for the purpose for which such issue was issued, or

(B) an amount of the proceeds of the issue of which such obligation is a part may be invested in securities or other obligations which are part of a reasonably required reserve or replacement fund.

The amount referred to in subparagraph (B) shall not exceed 15 percent of the proceeds of the issue of which such obligation is a part unless the issuer establishes that a higher amount is necessary.

(5) REGULATIONS.—The Secretary or his delegate shall prescribe such regulations as may be necessary to carry out the purposes of this subsection.

(e) CERTAIN IRRIGATION DAMS.—A dam for the furnishing of water for irrigation purposes which has a subordinate use in connection with the generation of electric energy by water shall be treated as meeting the requirements of subsection (c)(4)(G) if—

(1) substantially all of the stored water is contractually available for release from such dam for irrigation purposes, and

(2) the water so released is available on reasonable demand to members of the general public.

[(e)] (f) CROSS REFERENCES.—

For provisions relating to the taxable status of—

(1) Bonds and certificates of indebtedness authorized by the First Liberty Bond Act, see sections 1 and 6 of that Act (40 Stat. 35, 36; 31 U.S.C. 746, 755);

(2) Bonds issued to restore or maintain the gold reserve, see section 2 of the Act of March 14, 1900 (31 Stat. 46; 31 U.S.C. 408);

(3) Bonds, notes, certificates of indebtedness, and Treasury bills authorized by the Second Liberty Bond Act, see sections 4, 5 (b) and (d), 7, 18 (b) and 22(d) of that Act as amended (40 Stat. 290; 46 Stat. 20, 775; 49 Stat. 291, 1310; 55 Stat. 8; 31 U.S.C. 752a, 754, 747, 753, 757c);

(4) Bonds, notes, and certificates of indebtedness of the United States and bonds of the War Finance Corporation owned by certain nonresidents, see section 3 of the Fourth Liberty Bond Act, as amended (40 Stat. 1311, § 4; 31 U.S.C. 750);

(5) Certificates of indebtedness issued after February 4, 1910, see section 2 of the Act of that date (36 Stat. 192; 31 U.S.C. 759);

(6) Consols of 1930, see section 11 of the Act of March 14, 1900 (31 Stat. 48; 31 U.S.C. 751);

(7) Obligations and evidences of ownership issued by the United States or any of its agencies or instrumentalities on or after March 28, 1942, see section 4 of the Public Debt Act of 1941, as amended (c. 147, 61 Stat. 180; 31 U.S.C. 742a);

(8) Commodity Credit Corporation obligations, see section 5 of the Act of March 8, 1938 (52 Stat. 108; 15 U.S.C. 713a-5);

(9) Debentures issued by Federal Housing Administrator, see sections 204(d) and 207(i) of the National Housing Act, as amended (52 Stat. 14, 20; 12 U.S.C. 1719, 1713);

(10) Debentures issued to mortgagee by United States Maritime Commission, see section 1105(c) of the Merchant Marine Act, 1936, as amended (52 Stat. 972; 46 U.S.C. 1275);

(11) Federal Deposit Insurance Corporation obligations, see section 15 of the Federal Deposit Insurance Act (64 Stat. 890; 12 U.S.C. 1825);

(12) Federal Home Loan Bank obligations, see section 13 of the Federal Home Loan Bank Act, as amended (49 Stat. 295, § 8; 12 U.S.C. 1433);

(13) Federal savings and loan association loans, see section 5 (h) of the Home Owners' Loan Act of 1933, as amended (48 Stat. 133; U.S.C. 1464);

(14) Federal Savings and Loan Insurance Corporation obligations, see section 402(c) of the National Housing Act (48 Stat. 1257; 12 U.S.C. 1725);

(15) Home Owners' Loan Corporation bonds, see section 4(c) of the Home Owners' Loan Act of 1933, as amended (48 Stat. 644, c. 168; 12 U.S.C. 1463);

(16) Obligations of Central Bank for Cooperatives, production credit corporations, production credit associations, and banks for cooperatives, see section 63 of the Farm Credit Act of 1933 (48 Stat. 267; 12 U.S.C. 1138c);

(17) Panama Canal bonds, see section 1 of the Act of December 21, 1904 (34 Stat. 5; 31 U.S.C. 743), section 8 of the Act of June 28, 1902 (32 Stat. 484; 31 U.S.C. 744), and section 39 of the Tariff Act of 1909 (36 Stat. 117; 31 U.S.C. 745);

(18) Philippine bonds, etc., issued before the independence of the Philippines, see section 9 of the Philippine Independence Act (48 Stat. 463; 48 U.S.C. 1239);

(19) Postal savings bonds, see section 10 of the Act of June 25, 1910 (36 Stat. 817; 39 U.S.C. 760);

(20) Puerto Rican bonds, see section 3 of the Act of March 2, 1917, as amended (50 Stat. 85 (; 48 U.S.C. 745);

(21) Treasury notes issued to retire national bank notes, see section 18 of the Federal Reserve Act (38 Stat. 268; 12 U.S.C. 447);

(22) United States Housing Authority obligations, see sections 5(e) and 20(b) of the United States Housing Act of 1937 (50 Stat. 890, 898; 42 U.S.C. 1405, 1420);

(23) Virgin Islands insular and municipal bonds, see section 1 of the Act of October 27, 1949 (63 Stat. 940; 48 U.S.C. 1403).

VI. Other Matters Required To Be Discussed Under House Rules

In compliance with clauses 2(l)(3) and 2(l)(4) of Rule XI of the Rules of the House of Representatives, the following statements are made.

With regard to subdivision (A) of Clause 3, the Committee advises that its oversight findings led it to the conclusion that an amendment to the Internal Revenue Code is necessary to establish the eligibility of bons issued by the American Falls Reservoir District for a dam and related facilities for tax-exempt status as industrial development bonds.

In compliance with subdivision (B) of Clause 3, the committee states that the change made in section 103 of the Internal Revenue Code will produce an annual revenue loss of about $1 million at current tax rates for the period of maturity during which the bonds to be issued will be outstanding. Alternatively, the cost to the Federal Government of construction of this project as a direct expenditure presently is estimated at about $8 million.

With respect to subdivisions (C) and (D) of Clause 3, the Committee advises that no estimate or comparison has been prepared by the Director of the Congressional Budget Office relative to any of the provisions of H.R. 9968, nor have any oversight findings or recommendations been made by the Committee on Government Operations with respect to the subject matter contained in H.R. 9968.

In compliance with clause 2(l)(4) of Rule XI, the Committee states that the bonds to be issued followed enactment of H.R. 9968 are not expected to have an inflationary impact on prices and in costs in the operation of the national economy.

○

Orr Affidavit

Exhibit 84

Senate Report No. 94-570, "Tax Exempt Status Of Obligations Used To Provide Certain Irrigation Facilities" (Senate Finance Committee) (Dec. 16, 1975) (94th Congress, 1st Session)

Calendar No. 546

94TH CONGRESS } SENATE { REPORT
1st Session } { No. 94-570

TAX EXEMPT STATUS OF OBLIGATIONS USED TO PROVIDE CERTAIN IRRIGATION FACILITIES

DECEMBER 16 (legislative day, DECEMBER 15), 1975.—Ordered to be printed

Mr. LONG, from the Committee on Finance, submitted the following

REPORT

[To accompany H.R. 9968]

The Committee on Finance, to which was referred the bill (H.R. 9968) to amend section 103 of the Internal Revenue Code of 1954 with respect to certain obligations used to provide irrigation facilities, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

I. SUMMARY

H.R. 9968 would clarify the tax-exempt status of obligations the proceeds of which are to be used to reconstruct the American Falls Dam in Idaho.

Present law provides that an industrial revenue bond whose proceeds are used to build a dam to store water for irrigation purposes may be eligible for tax-exempt status. Where, however, the water also has a subordinate use in generating electricity, the status of the bonds is not clear under existing law. The American Falls Dam is used principally for irrigation purposes, but the water has a subordinate use in generating electricity. H.R. 9968 provides that industrial revenue bonds issued in such a case may qualify for exempt status if substantially all of the stored water is contractually available for irrigation purposes and the water is available on reasonable demand to members of the general public.

II. GENERAL EXPLANATION OF THE BILL

Present law provides that interest on obligations of State and local governments generally is exempt from Federal income tax. In 1968 tax-exempt status was withdrawn from industrial development bonds

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which State and local governments were using to finance and attract private industrial development within their jurisdictions.

Industrial development bonds are generally considered to be State or local obligations, a major portion of the proceeds of which are to be used in, and repaid by, a taxable trade or business. Such bonds are normally issued to acquire a facility for private business in which the beneficial ownership of the facility remains in the private trade or business, although (in order to secure repayment of the bonds) legal title normally remains with the State or local unit issuing the obligations.

When the industrial development bond limitation was enacted, exceptions were provided for certain small issues (sec. 103(c)(6)) and for certain specified public activities (sec. 103(c)(4)) in which cases tax-exempt status was continued. As initially enacted, one of the public activities for which an exemption was provided (sec. 103(c)(4)(E)) was "sewage or solid waste disposal facilities or facilities for the local furnishing of electric energy, gas or water."

In 1971, Congress amended the exception in subparagraph (E) to delete "water" and added the present law subparagraph (G) which extends the exception to "facilities for the furnishing of water, if available on reasonable demand to members of the general public."

As a result, in those cases where obligations are issued for facilities for the furnishing of water which meet the exception (under sec. 103(c)(4)(G)) but where the water is also used to generate electricity, it is uncertain as to whether the obligations would qualify for exempt status unless the use of the electric energy meets the "local" furnishing test (under sec. 103(c)(4)(E)), which has been interpreted to cover an area of two contiguous counties.

The American Falls Reservoir District applied to the Internal Revenue Service in June 1974 for a ruling that bonds to be issued to finance the replacement and rehabilitation of the American Falls Dam would qualify as a tax-exempt issue under section 103(c)(4)(G). The Internal Revenue Service, however, had questions of interpretation with respect to the interrelationship of the exceptions for facilities for furnishing of water and the local furnishing of electric energy and their application to the specific facts of this case. The committee reviewed the facts involved, as described below, and believed it is appropriate to specifically except the bond issue in this case as a result of the special circumstances.

The original American Falls Dam was constructed in 1927 by the Bureau of Reclamation. The dam was restricted to two-thirds of its 1.7 million acre foot capacity in 1972 by the Bureau of Reclamation of the Department of the Interior for safety reasons because of excessive pressures on the dam which were caused by an alkali-aggregate reaction and deterioration in the concrete.

Legislation was enacted on December 28, 1973, to permit replacement and rehabilitation of the American Falls Dam by the American Falls Reservoir District, which is a political subdivision of the State of Idaho. Replacement of the existing dam by the American Falls Reservoir District is an action to be taken in lieu of waiting for a Federal appropriation that would enable the Bureau of Reclamation to build the replacement dam.

The Act of December 28, 1973, also provides that upon completion of construction the United States shall take title to the dam as a feature of the Minidoka Project, located in the upper Snake River basin, Idaho.

As the constructing agent, the American Falls Reservoir District was authorized to contract with an electric utility for the use of the falling water at the dam for hydroelectric power generation. Revenues from such a contract with help defer the costs of constructing the dam. Prior to the adoption of the Act of December 28, 1973, the Idaho Power Company, which is a spaceholder in the reservoir and which owns and operates a powerplant below the existing dam, expressed interest in the execution of a falling water contract. Subsequent to the adoption of the Act, the District, as the constructing agency, entered into negotiations with the Secretary of the Interior, the Idaho Power Company and the other water users for the preparation of various contracts including a contract for the use of falling water.

It was intended that in normal circumstances substantially all of the falling water would be made available to the Power Company only when water was released from the dam for irrigation purposes. There has been no intention to release water specifically for use by the Idaho Power Company to generate electricity, except for 45,000 acre-feet (2.85 percent of the storage capacity) whose release the power company, in its capacity as a space holder in the irrigation district, can schedule for the purpose of generating electric energy. Thus, the use of water for electric energy would be subordinated to the use of the water for irrigation.

Although the Federal Government might well eventually completely finance the reconstruction of the American Falls Dam, the American Falls Reservoir District is undertaking the reconstruction now in order to make the dam fully operational for the spaceholders rather than the present restricted (two-thirds capacity). If it were not for the use of the water by the Idaho Power Company for hydroelectric power generation, any bonds issued by the Reservoir District would presently qualify for tax-exempt status. In this case the Idaho Power Company has a limited spaceholder right (under 3 percent) and is financing a large portion of the debt to assist the reconstruction of the dam and has use of the falling water for its hydroelectric power generation purposes. In addition, since the dam is to be turned over to the Federal Government after its reconstruction for ownership and operation, in effect, this financing can be viewed as saving the Federal Government the expenditure it would have had to make to reconstruct the dam several years in the future. In view of these special circumstances, the committee believes it is appropriate to extend tax-exempt status to the bonds to be issued to finance the reconstruction of the dam.

The bill adds a new exception to industrial development bond treatment to specifically allow tax-exempt status for the bonds issued to reconstruct the American Falls Dam. This exception is to apply to obligations for a dam which furnishes water for irrigation purposes which has a subordinate use in connection with the generation of electric energy by water if substantially all of the stored water is contractually available for release from the dam for irrigation pur-

poses and if the water released is available on reasonable demand for members of the general public.

The committee intends that subordinate use of water for generating electric energy means that less than 50 percent of the normal supply of stored water may contractually be scheduled for release by the power company and used for generating electric energy. Normal refers to conditions that generally prevail in the service area of this reservoir, and it is recognized that unusually wet or dry weather can cause a significant distortion in the 2.65 percent of water contractually scheduled for release to be used for generating electric energy. The committee intends that such unusual circumstances not be guiding in determining the subordinate use of water. In addition, normal use does not include a temporary increase in water released for the power company following contractual default by a shareholder and his water share being made available to other shareholders under the terms of the contract for the construction and operation of the dam and its facilities.

Thus, the provision applies the requirements of subsection (c)(4)(G) where substantially all of the stored water (under normal weather and climatic conditions) is available for release to be used for irrigation in the American Falls Reservoir District. The requirement that the released water be available on reasonable demand to members of the general public is retained in the new subsection (e). The committee understands that the American Falls project conforms with this requirement.

The bill is to apply to obligations issued after the date of the enactment of this Act.

III. Costs of Carrying Out the Bill and Effect on the Revenues of the Bill

In compliance with section 252(a) of the Legislative Reorganization Act of 1970, the following statement is made relative to the costs to be incurred in carrying out this bill and the effect on the revenues of the bill.

The committee estimates that the bill, relating to the tax-exempt status of obligations used to provide certain irrigation facilities, will result in an annual revenue loss of about $1 million in each of the five fiscal years following the current fiscal year. No revenue loss is expected in the current fiscal year.

IV. Vote of Committee in Reporting the Bill

In compliance with section 133 of the Legislative Reorganization Act, as amended, the following statement is made relative to the vote of the committee on reporting the bill. This bill was ordered favorably reported by the committee without a rollcall vote and without objection.

V. Changes in Existing Law

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as

reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

INTERNAL REVENUE CODE OF 1954

* * * * * * *

Chapter 1—Normal Taxes and Surtaxes

* * * * * * *

Subchapter B—Computation of Taxable Income

* * * * * * *

Part III—Items Specifically Excluded From Gross Income

Sec. 103. Interest on Certain Governmental Obligations.

(a) GENERAL RULE.—Gross income does not include interest on—

(1) the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing, or of the District of Columbia;

(2) the obligations of the United States; or

(3) the obligations of a corporation organized under Act of Congress, if such corporation is an instrumentality of the United States and if under the respective Acts authorizing the issue of the obligations the interest is wholly exempt from the taxes imposed by this subtitle.

(b) EXCEPTION.—Subsection (a)(2) shall not apply to interest on obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit, to the extent they represent deposits made before March 1, 1941), unless under the respective Acts authorizing the issuance thereof such interest is wholly exempt from the taxes imposed by this subtitle.

(c) INDUSTRIAL DEVELOPMENT BONDS.—

(1) SUBSECTION (a)(1) NOT TO APPLY.—Except as otherwise provided in this subsection, any industrial development bond shall be treated as an obligation not described in subsection (a)(1).

(2) INDUSTRIAL DEVELOPMENT BOND.—For purposes of this subsection, the term "industrial development bond" means any obligation—

(A) which is issued as part of an issue all or a major portion of the proceeds of which are to be used directly or indirectly in any trade or business carried on by any person who is not an exempt person (within the meaning of paragraph (3)), and

(B) the payment of the principal or interest on which (under the terms of such obligation or any underlying arrangement) is, in whole or in major part—

(i) secured by any interest in property used or to be used in a trade or business or in payments in respect of such property, or

(ii) to be derived from payments in respect of property, or borrowed money, used or to be used in a trade or business.

(3) EXEMPT PERSON.—For purposes of paragraph (2)(A), the term "exempt person" means—

(A) a governmental unit, or

(B) an organization described in section 501(c)(3) and exempt from tax under section 501(a) (but only with respect to a trade or business carried on by such organization which is not an unrelated trade or business, determined by applying section 513(a) to such organization).

(4) CERTAIN EXEMPT ACTIVITIES.—Paragraph (1) shall not apply to any obligation which is issued as part of an issue substantially all of the proceeds of which are to be used to provide—

(A) residential real property for family units,

(B) sports facilities,

(C) convention or trade show facilities,

(D) airports, docks, wharves, mass commuting facilities, parking facilities, or storage or training facilities directly related to any of the foregoing,

(E) sewage or solid waste disposal facilities or facilities for the local furnishing of electric energy or gas,

(F) air or water pollution control facilities, or

(G) facilities for the furnishing of water, if available on reasonable demand to members of the general public.

(5) INDUSTRIAL PARKS.—Paragraph (1) shall not apply to any obligation issued as part of an issue substantially all of the proceeds of which are to be used for the acquisition or development of land as the site for an industrial park. For purposes of the preceding sentence, the term "development of land" includes the provision of water, sewage, drainage, or similar facilities, or of transportation, power, or communication facilities, which are incidental to use of the site as an industrial park, but, except with respect to such facilities, does not include the provision of structures or buildings.

(6) EXEMPTION FOR CERTAIN SMALL ISSUES.—

(A) IN GENERAL.—Paragraph (1) shall not apply to any obligation issued as part of an issue the aggregate authorized face amount of which is $1,000,000 or less and substantially all of the proceeds of which are to be used (i) for the acquisition, construction, reconstruction, or improvement of land or property of a character subject to the allowance for depreciation, or (ii) to redeem part or all of a prior issue which was issued for purposes described in clause (i) or this clause.

(B) CERTAIN PRIOR ISSUES TAKEN INTO ACCOUNT.—If—

(i) the proceeds of two or more issues of obligations (whether or not the issuer of each such issue is the same) are or will be used primarily with respect to facilities located in the same incorporated municipality or located in the same county (but not in any incorporated municipality),

(ii) the principal user of such facilities is or will be the same person or two or more related persons, and

(iii) but for this subparagraph, subparagraph (A) would apply to each such issue,

then, for purposes of subparagraph (A), in determining the aggregate face amount of any later issue there shall be taken into account the face amount of obligations issued under all prior such issues and outstanding at the time of such later issue (not including as outstanding any obligation which is to be redeemed from the proceeds of the later issue).

(C) RELATED PERSONS.—For purposes of this paragraph and paragraph (7), a person is a related person to another person if—

(i) the relationship between such persons would result in a disallowance of losses under section 267 or 707(b), or

(ii) such persons are members of the same controlled group of corporations (as defined in section 1563(a), except that "more than 50 percent" shall be substituted for "at least 80 percent" each place it appears therein).

(D) $5,000,000 LIMIT IN CERTAIN CASES.—At the election of the issuer, made at such time and in such manner as the Secretary or his delegate shall by regulations prescribe, with respect to any issue this paragraph shall be applied—

(i) by substituting "$5,000,000" for "$1,000,000" in subparagraph (A), and

(ii) in determining the aggregate face amount of such issue, by taking into account not only the amount described in subparagraph (B), but also the aggregate amount of capital expenditures with respect to facilities described in subparagraph (E) paid or incurred during the 6-year period beginning 3 years before the date of such issue and ending 3 years after such date (and financed otherwise than out of the proceeds of outstanding issues to which subparagraph (A) applied), as if the aggregate amount of such capital expenditures constituted the face amount of a prior outstanding issue described in subparagraph (B).

(E) FACILITIES TAKEN INTO ACCOUNT.—For purposes of subparagraph (D)(ii), the facilities described in this subparagraph are facilities—

(i) located in the same incorporated municipality or located in the same county (but not in any incorporated municipality), and

(ii) the principal user of which is or will be the same person or two or more related persons.

For purposes of clause (i), the determination of whether or not facilities are located in the same governmental unit shall be made as of the date of issue of the issue in question.

(F) CERTAIN CAPITAL EXPENDITURES NOT TAKEN INTO ACCOUNT.—For purposes of subparagraph (D)(ii), any capital expenditure—

(i) to replace property destroyed or damaged by fire, storm, or other casualty, to the extent of the fair market value of the property replaced,

(ii) required by a change made after the date of issue of the issue in question in a Federal or State law or local

ordinance of general application or required by a change made after such date in rules and regulations of general application issued under such a law or ordinance, or

(iii) required by circumstances which could not be reasonably foreseen on such date of issue or arising out of a mistake of law or fact (but the aggregate amount of expenditures not taken into account under this clause with respect to any issue shall not exceed $[illegible]),

shall not be taken into account.

(G) LIMITATION ON LOSS OF TAX EXEMPTION.—In applying subparagraph (D)(ii) with respect to capital expenditures made after the date of any issue, no obligation issued as a part of such issue shall be treated as an obligation not described in subsection (a)(1) by reason of any such expenditure for any period before the date on which such expenditure is paid or incurred.

(H) CERTAIN REFINANCING ISSUES.—In the case of any issue described in subparagraph (A)(ii), an election may be made under subparagraph (D) only if all of the prior issues being redeemed are issues to which subparagraph (A) applies. In applying subparagraph (D)(ii) with respect to such a refinancing issue, capital expenditures shall be taken into account only for purposes of determining whether the prior issues being redeemed qualified (and would have continued to qualify) under subparagraph (A).

(7) EXCEPTION.—Paragraphs (4), (5), and (6) shall not apply with respect to any obligation for any period during which it is held by a person who is a substantial user of the facilities or a related person.

(d) ARBITRAGE BONDS.—

(1) SUBSECTION (a)(2) NOT TO APPLY.—Except as provided in this subsection, any arbitrage bond shall be treated as an obligation not described in subsection (a)(1).

(2) ARBITRAGE BOND.—For purposes of this subsection, the term "arbitrage bond" means any obligation which is issued as part of an issue all or a major portion of the proceeds of which are reasonably expected to be used directly or indirectly—

(A) to acquire securities (within the meaning of section 165(g)(2) (A) or (B)) or obligations (other than obligations described in subsection (a)(1)) which may be reasonably expected at the time of issuance of such issue, to produce a yield over the term of the issue which is materially higher (taking into account any discount or premium) than the yield on obligations of such issue, or

(B) to replace funds which were used directly or indirectly to acquire securities or obligations described in subparagraph (A).

(3) EXCEPTION.—Paragraph (1) shall not apply to any obligation—

(A) which is issued as part of an issue substantially all of the proceeds of which are reasonably expected to be used to provide permanent financing for real property used or to be

used for residential purposes for the personnel of an educational institution (within the meaning of section 151(e)(4)) which grants baccalaureate or higher degrees, or to replace funds which were so used, and

(B) the yield on which over the term of the issue is not reasonably expected, at the time of issuance of such issue, to be substantially lower than the yield on obligations acquired or to be required in providing such financing.

This paragraph shall not apply with respect to any obligation for any period during which it is held by a person who is a substantial user of property financed by the proceeds of the issue of which such obligation is a part, or by a member of the family (within the meaning of section 318(a)(1)) of any such person.

(4) SPECIAL RULES.—For purposes of paragraph (1), an obligation shall not be treated as an arbitrage bond solely by reason of the fact that—

(A) the proceeds of the issue of which such obligation is a part may be invested for a temporary period in securities or other obligations until such proceeds are needed for the purpose for which such issue was issued, or

(B) an amount of the proceeds of the issue of which such obligation is a part may be invested in securities or other obligations which are part of a reasonably required reserve or replacement fund.

The amount referred to in subparagraph (B) shall not exceed 15 percent of the proceeds of the issue of which such obligation is a part unless the issuer establishes that a higher amount is necessary.

(5) REGULATIONS.—The Secretary or his delegate shall prescribe such regulations as may be necessary to carry out the purpose of this subsection.

(c) CERTAIN IRRIGATION DAMS.—A dam for the furnishing of water for irrigation purposes which has a subordinate use in connection with the generation of electric energy by water shall be treated as meeting the requirements of subsection (c)(4)(G) if—

(1) substantially all of the stored water is constructually available for release from such dam for irrigation purposes, and

(2) the water so released is available on reasonable demand to members of the general public.

(c)(d) CROSS REFERENCES.—

For provisions relating to the taxable status of—

(1) Bonds and certificates of indebtedness authorized by the First Liberty Bond Act, see sections 1 and 6 of that Act (40 Stat. 35, 36; 31 U.S.C. 746, 755);

(2) Bonds issued to restore or maintain the gold reserve, see section 2 of the Act of March 14, 1900 (31 Stat. 46; 31 U.S.C. 408);

(3) Bonds, notes, certificates of indebtedness, and Treasury bills authorized by the Second Liberty Bond Act, see sections 4, 5 (b) and (d), 7, 18 (b) and 22(d) of the Act as amended (40 Stat. 290; 45 Stat. 20, 775; 40 Stat. 291, 1310; 55 Stat. 8; 31 U.S.C. Tabs. 751, 747, 753, 757c);

(4) Bonds, notes, and certificates of indebtedness of the United States and bonds of the War Finance Corporation owned by certain nonresidents, see section 3 of the Fourth Liberty Bond Act, as amended (40 Stat. 1311, § 4; 31 U.S.C. 750);

(5) Certificates of indebtedness issued after February 4, 1910, see section 2 of the Act of that date (36 Stat. 192; 31 U.S.C. 760);

(6) Consols of 1930, see section 11 of the Act of March 14, 1900 (31 Stat. 48; 31 U.S.C. 751);

(7) Obligations and evidences of ownership issued by the United States or any of its agencies or instrumentalities on or after March 28, 1942, see section 4 of the Public Debt Act of 1941, as amended (c. 147, 61 Stat. 180; 31 U.S.C. 742a);

(8) Commodity Credit Corporation obligations, see section 5 of the Act of March 8, 1938 (52 Stat. 108; 15 U.S.C. 713a-5);

(9) Debentures issued by Federal Housing Administrator, see sections 204(d) and 207(i) of the National Housing Act, as amended (52 Stat. 14, 21; 12 U.S.C. §§ 1710, 1713);

(10) Debentures issued to mortgagees by United States Maritime Commission, see section 1105(c) of the Merchant Marine Act, 1936, as amended (52 Stat. 972; 46 U.S.C. 1275);

(11) Federal Deposit Insurance Corporation obligations, see section 15 of the Federal Deposit Insurance Act (64 Stat. 890; 12 U.S.C. 1825);

(12) Federal Home Loan Bank obligations, see section 13 of the Federal Home Loan Bank Act, as amended (49 Stat. 295, § 8; 12 U.S.C. 1433);

(13) Federal savings and loan association loans, see section 5 (h) of the Home Owners' Loan Act of 1933, as amended (48 Stat. 133; U.S.C. 1464);

(14) Federal Savings and Loan Insurance Corporation obligations, see section 402(e) of the National Housing Act (48 Stat. 1257; 12 U.S.C. 1725);

(15) Home Owners' Loan Corporation bonds, see section 4(c) of the Home Owners' Loan Act of 1933, as amended (48 Stat. 644, c. 168; 12 U.S.C. 1463);

(16) Obligations of Central Bank for Cooperatives, production credit corporations, production credit associations, and banks for cooperatives, see section 63 of the Farm Credit Act of 1933 (48 Stat. 267; 12 U.S.C. 1138c);

(17) Panama Canal bonds, see section 1 of the Act of December 21, 1904 (34 Stat. 5; 31 U.S.C. 743), section 8 of the Act of June 28, 1902 (32 Stat. 484; 31 U.S.C. 744), and section 39 of the Tariff Act of 1909 (36 Stat. 117; 31 U.S.C. 745);

(18) Philippine bonds, etc., issued before the independence of the Philippines, see section 9 of the Philippine Independence Act (48 Stat. 462; 48 U.S.C. 1239);

(19) Postal savings bonds, see section 10 of the Act of June 25, 1910 (36 Stat. 817; 39 U.S.C. 760);

(20) Puerto Rican bonds, see section 3 of the Act of March 2, 1917, as amended (50 Stat. 855; 48 U.S.C. 745);

(21) Treasury notes issued to retire national bank notes, see section 18 of the Federal Reserve Act (38 Stat. 268; 12 U.S.C. 447);

(22) United States Housing Authority obligations, see sections 5(c) and 20(b) of the United States Housing Act of 1937 (50 Stat. 890, 898; 42 U.S.C. 1405, 1420);

(23) Virgin Islands insular and municipal bonds, see section 1 of the Act of October 27, 1949 (63 Stat. 940; 48 U.S.C. 1403).

○

Orr Affidavit

Exhibit 85

Excerpted pages of the "Contract between The United States Of America and The American Falls Reservoir District for Construction And Operation And Maintenance Of The American Falls Replacement Dam Program, Dated as of March 31, 1976."

[CONFORMED COPY]

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CONTRACT

between

THE UNITED STATES OF AMERICA

and

THE AMERICAN FALLS RESERVOIR DISTRICT

for

CONSTRUCTION AND OPERATION
AND MAINTENANCE OF
THE AMERICAN FALLS REPLACEMENT DAM PROGRAM

Dated as of March 31, 1976

Contract No. 14-06-100-9041

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Minidoka Project, Idaho-Wyoming

CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE AMERICAN FALLS RESERVOIR DISTRICT FOR CONSTRUCTION AND OPERATION AND MAINTENANCE OF THE AMERICAN FALLS REPLACEMENT DAM PROGRAM

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Minidoka Project, Idaho-Wyoming

CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE AMERICAN FALLS RESERVOIR DISTRICT FOR CONSTRUCTION AND OPERATION AND MAINTENANCE OF THE AMERICAN FALLS REPLACEMENT DAM PROGRAM

THIS CONTRACT, made this 31st day of March, 1976, between the UNITED STATES OF AMERICA, hereinafter referred to as the "United States," acting through the Regional Director, Pacific Northwest Region, Bureau of Reclamation, upon authorization of the Secretary of the Interior and pursuant to the Act of Congress approved December 28, 1973 (87 Stat. 904), and the AMERICAN FALLS RESERVOIR DISTRICT, an instrumentality of the State of Idaho, with its offices in Twin Falls, Idaho, hereinafter referred to as the "Constructing Agency;"

WITNESSETH, THAT:

EXPLANATORY RECITALS

2. WHEREAS, the United States has constructed the Existing Dam of the Minidoka Project pursuant to the Federal Reclamation Laws primarily for the furnishing of water for irrigation purposes and, due to alkali-aggregate reactions in the concrete portions of the Existing Dam, the United States is operating the Existing Dam at less than full active capacity; and

3. WHEREAS, continued operation at less than full active capacity could result in irrigation water shortages to some 900,000 acres of land which obtain a water supply from the Existing Dam; and

4. WHEREAS, the Constructing Agency pursuant to the Act of December 28, 1973, desires to undertake the replacement of the Existing Dam on behalf of all the Spaceholders by financing and constructing the American Falls Replacement Dam Program and to issue Bonds to finance all or part of the costs thereof pursuant to the provisions of Chapter 22, Title 43, Idaho Code, as amended, and upon substantial completion thereof to transfer title to the Replacement Dam to the United States to be operated and maintained primarily for the furnishing of water for irrigation purposes as a feature of the Minidoka Project; and

5. WHEREAS, the Constructing Agency pursuant to the Act of December 28, 1973, entered into a Falling Water Contract of even date herewith with the Idaho Power Company to utilize for power generation at the Powerplant the water released from the Replacement Dam (which utilization shall be subordinate to the furnishing of water for irrigation purposes) in consideration for the Falling Water Payments in order to pay part of the costs of financing and constructing the American Falls Replacement Dam Program and the Federal Power Commission has granted to the Idaho Power Company a License to construct, operate, and maintain the Powerplant attached to the Replacement Dam for such purpose; and

6. WHEREAS, an appropriate number of the Waterusers satisfactory to the Secretary and the Constructing Agency have entered into Spaceholder Contracts of even date herewith to pay their proportionate share of the total cost of the American Falls Replacement Dam Program; and

7. WHEREAS, this Government Contract is entered into for the purpose of authorizing the Constructing Agency to finance and provide for the construction of the American Falls Replacement Dam Program, to provide for the operation and maintenance of the Replacement Dam and Related Facilities,

and to make provision for the disposition of the storage space of those Waterusers which have not entered into Spaceholder Contracts, but only upon satisfaction of the conditions set forth herein;

NOW, THEREFORE, in consideration of the mutual and dependent stipulations and covenants herein contained, it is agreed by and between the parties hereto as follows:

PART I

DEFINITIONS AND PURPOSE AND TERM

(Articles 8-9)

DEFINITIONS

8. The following terms, whenever used in this Government Contract, shall have the following respective meanings:

"Act of December 28, 1973" shall mean the Act of Congress approved December 28, 1973 (87 Stat. 904).

"Advisory Committee" shall mean the committee presently designated in the existing contracts between the United States and the Waterusers as the "Committee of Nine" or its successors.

"American Falls Replacement Dam Program" shall mean the program to be undertaken by the Constructing Agency consisting of the Replacement Dam including the two-lane highway on the crest of the Replacement Dam, the two-lane highway bridge located immediately downstream from the Replacement Dam, the Related Facilities, the Recreation and Fish and Wildlife Mitigation Facilities, and the Water Quality Facilities to be accomplished pursuant to the Act of December 28, 1973, and under the authority of Section 43-2201(A), Idaho Code, which provides for the reconstruction, rehabilitation, replacement, and improvement of dams and other related structures and works together with all necessary appurtenances related thereto.

"Bonds" shall mean bonds and interim notes issued, and to be issued, by the Constructing Agency to pay the costs of the American Falls Replacement Dam Program.

"Constructing Agency" shall mean the American Falls Reservoir District, an instrumentality of the State of Idaho, being an irrigation district organized and existing under the provisions of Title 43, Idaho Code, as amended, and its successors and assigns.

"Construction Work Schedule" shall mean a schedule showing each item of major construction activity of the American Falls Replacement Dam Program including detailed coordination arrangements for the construction of the Powerplant with the construction of the Replacement Dam, and the time period within which each item is proposed to be started and concluded.

"Contracting Officer" shall mean the Regional Director, Pacific Northwest Region, Bureau of Reclamation, or his duly authorized representative.

"Defaulted Spaceholder(s)" shall mean the Spaceholders determined to be in default in all or any part of the Spaceholder Payments required to be made under a Spaceholder Contract, in accordance with the provisions of Article 29(a) thereof.

"Director of Design and Construction" shall mean the Director of Design and Construction, United States Department of the Interior, Bureau of Reclamation, Office of Design and Construction, Engineering and Research Center, Denver, Colorado.

"Existing Dam" shall mean the American Falls Dam and Reservoir owned by the United States located on the Snake River in southern Idaho adjacent to the City of American Falls, Idaho.

(d) Upon acceptance of all the final transfer review memoranda and the correction of the construction deficiencies therein specified and the submission of the documents and equipment specified in (c) of this Article, the Secretary shall give notice to the Constructing Agency, the Trustee, and the Idaho Power Company that construction of the Replacement Dam, the Related Facilities, and the Water Quality Facilities has been completed.

Operation and Maintenance of the Replacement Dam, the Related Facilities, and the Water Quality Facilities

15. (a) Upon substantial completion of construction of the Replacement Dam and the Related Facilities, the United States will operate and maintain the Replacement Dam and the Related Facilities as a part of the Minidoka Project for the beneficial use of the water on the land within the service areas of the Spaceholders pursuant to Section 8 of the Reclamation Act of June 17, 1902 (32 Stat. 388). The Constructing Agency is responsible for the operation and maintenance of the Water Quality Facilities and has entered into the Water Quality Facilities Agreement to provide for such operation and maintenance, which agreement is acceptable to the Secretary. The Water Quality Facilities Agreement may not be amended, supplemented, terminated, or assigned without the approval of the Secretary.

(b) The United States shall continue an annual program for the correction and prevention of erosion related to the Replacement Dam or for the full and adequate compensation of adjacent landowners, including owners of land subject to a flowage easement for the Replacement Dam, if such erosion cannot be corrected or prevented. The costs thereof shall be billed to the Spaceholders as a part of the operation and maintenance charges as provided in (c) of this Article.

(c) Commencing with the year that the first Spaceholder Bond Payments are due under the Spaceholder Contracts the operation and maintenance costs of the Existing Dam and the Replacement Dam and the Related Facilities will be returned to the United States in the manner provided in the Spaceholder Contracts.

Operating Criteria

16. The Replacement Dam will be operated by the United States in a manner so that (1) the present proportionate storage rights of the Spaceholders shall not be altered or changed except as provided herein and in the Spaceholder Contracts, (2) the water surface elevation of the Replacement Dam shall not exceed a maximum of 4354.5 feet above mean sea level U.S.C.&G.S. datum, and (3) the primary irrigation purpose and the incidental purposes of the Minidoka Project shall not be impaired by the subordinate utilization for power generation at the Powerplant of the water released from the Replacement Dam. The United States is not obligated to operate the Replacement Dam in a manner to have water in the Replacement Dam at elevations for power generation or to operate to increase the head in the Replacement Dam for power generation.

PART IV

DELIVERY OF WATER AND CONTRACT WITH THE IDAHO POWER COMPANY FOR FALLING WATER

(Articles 17-18)

Delivery of Water

17. (a) The delivery of water pursuant to this Government Contract is contingent upon the execution of a Spaceholder Contract and the continued fulfillment of the obligations thereunder. The Constructing Agency and the United States have executed Spaceholder Contracts with the Waterusers listed on *Exhibit A*, in substantially the form attached as *Exhibit C*. Spaceholder Contracts have not

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Water Quality Facilities Operation and Maintenance Payments assignable to the Fort Hall Indian Reservation shall be returned as provided in its Spaceholder Contract.

(g) Although the parties hereto do not believe that any grounds exist for the awarding of damages to a Non-Participating Wateruser, if as a result of the application of this Article 17, a final determination of a court of competent jurisdiction holds that a Non-Participating Wateruser, whose use of space is permanently terminated, is nevertheless entitled to damages from the United States for the loss of such space, money in the construction fund (as defined in the Falling Water Contract), not necessary to pay other costs of construction of the American Falls Replacement Dam Program shall be used for such purpose, otherwise such amount shall be reimbursed to the United States as part of the Spaceholder Replacement Dam Operation and Maintenance Payments. In all other instances, to the extent related to the cost of the American Falls Replacement Dam Program, where a final determination of a court of competent jurisdiction holds that a Non-Participating Wateruser is entitled to damages from the United States as a result of the application of this Article 17, such amount shall be reimbursed to the United States as part of the Spaceholder Replacement Dam Operation and Maintenance Payments.

FALLING WATER CONTRACT WITH THE IDAHO POWER COMPANY

18. (a) The Idaho Power Company has acknowledged acceptance of all of the provisions, terms, and conditions of the License and the Constructing Agency and the Idaho Power Company have entered into the Falling Water Contract, approved by the Secretary and attached as *Exhibit D,* to utilize for power generation at the Powerplant the water released from the Replacement Dam in return for the Falling Water Payments, which utilization is and shall continue to be subordinate to the furnishing of water from the Replacement Dam for irrigation purposes, in that less than 10 percent of the water accruing to the active storage capacity in the Replacement Dam may be contractually scheduled for release by the Idaho Power Company, except for temporary increases resulting from the securing of water accruing to the storage space of a Defaulted Spaceholder or a Non-Participating Wateruser as provided for in (b) of this Article or arising from unusually wet or dry weather in the service area of the Replacement Dam. So long as the Idaho Power Company is not in default under the provisions of the Falling Water Contract, during the term of its License or any continuation or renewal thereof, the Idaho Power Company shall be entitled, subject to the limitations of this Article and Article 16 hereof and in accordance with the provisions of its License or any continuation or renewal thereof, to utilize for power generation at the Powerplant the water released from the Replacement Dam: *Provided,* That the approval of the Falling Water Contract by the Secretary does not preclude the Secretary from making any recommendations or comments in respect to the License or any continuation or renewal thereof.

(b) Subject to the limitations of this Article and Article 16 hereof, the Idaho Power Company shall also be entitled to schedule for release and to utilize for power generation at the Powerplant and at the downstream powerplants of the Idaho Power Company the water accruing to the storage space of a Defaulted Spaceholder or a Non-Participating Wateruser that is made available under the procedures of Article 17 hereof: *Provided, however,* That any such water may be utilized only during the period of May 15 through December 31 of the year in which such water is made available and only under a schedule of release so that the quantity of such water released during the period of November 1 through December 31 without regard to other released water, will not result in releases of water at the Minidoka Dam and Reservoir in excess of the hydraulic capacity of the Minidoka Powerplant as it now exists or as it may be enlarged in the future.

(c) The Contracting Officer, upon notice from the Constructing Agency or the Trustee that the Idaho Power Company is in default under the provisions of the Falling Water Contract, shall suspend any and all rights of the Idaho Power Company to the use of the water released from the Replacement Dam and during such suspension shall operate the Replacement Dam to bypass water around the Powerplant. The Contracting Officer, acting with the consent of either the Constructing Agency or the Trustee, may without further notice to the Idaho Power Company grant any or all of the suspended rights to any person or entity for the duration of the suspension.

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Orr Affidavit

Exhibit 86

Excerpted pages of the "Falling Water Contract Dated as of March 31, 1976 by and between American Falls Reservoir District and Idaho Power Company."

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OFFICE OF THE SECRETARY
JUN 9 1 55 PM '77
FEDERAL
POWER COMMISSION

FALLING WATER CONTRACT

Dated as of March 31, 1976

by and between

AMERICAN FALLS RESERVOIR DISTRICT

and

IDAHO POWER COMPANY

CONTRACT

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JRP010599

FALLING WATER CONTRACT

BY AND BETWEEN

AMERICAN FALLS RESERVOIR DISTRICT

AND

IDAHO POWER COMPANY

THIS CONTRACT, entered into this 31st day of March, 1976, between the AMERICAN FALLS RESERVOIR DISTRICT, an instrumentality of the State of Idaho, with its offices located in Twin Falls, Idaho, hereinafter referred to as the "Constructing Agency", and the IDAHO POWER COMPANY, a corporation organized under the laws of the State of Maine, authorized to do business in the State of Idaho, with its principal office therein located in Boise, Idaho, hereinafter referred to as "Idaho Power Company";

WITNESSETH:

WHEREAS, the existing American Falls Dam and Reservoir ("Existing Dam") was constructed on the Snake River in southern Idaho adjacent to the City of American Falls, Idaho, by the United States ("United States"), and was placed in operation in 1927 as a part of the Minidoka Project, Idaho-Wyoming, and the United States contracted with certain organizations and individuals ("Waterusers") for various amounts of the storage space of the Existing Dam and which Waterusers agreed to pay the United States their proportionate share of the cost of the Existing Dam and the United States has retained ownership of the Existing Dam and has operated and maintained the Existing Dam primarily for the furnishing of water for irrigation purposes; and

WHEREAS, the Existing Dam provides irrigation storage water for beneficial use on approximately 900,000 acres of land in southern Idaho to which said water is appurtenant; and

WHEREAS, the United States has determined the Existing Dam to be no longer structurally competent, and in 1972 restricted storage in the top 11.3 feet of the Existing Dam on a year-round basis for safety reasons, and additional restrictions may possibly be required to continue to meet applicable safety standards as the deterioration of the Existing Dam advances, which present and future storage restrictions have and will cause severe economic losses to the Waterusers, reductions in recreational benefits and adverse effects on fish and wildlife facilities associated with the Existing Dam; and

WHEREAS, Chapter 22 of Title 43, Idaho Code, as amended, ("State Act"), authorizes the Constructing Agency, for the purpose of preserving, restoring, protecting and maintaining rights of storage, diversion and delivery of water necessary and appurtenant to the purposes for which the Constructing Agency and other like similarly situated irrigation districts were organized: (1) to reconstruct, rehabilitate, replace and improve dams and other related structures and works together with all necessary appurtenances related thereto whether located within or without its boundaries and whether or not legal title thereto is owned by it, including without limitation as a part thereof the reconstruction and relocation of all roads, bridges and highways made necessary by reason of such reconstruction, rehabilitation, replacement and improvement, the construction of penstocks and other facilities related to hydroelectric production plant which are made necessary in order to carry out the provisions of this Falling Water Contract and facilities for flood control, public recreation and fish and wildlife mitigation purposes made necessary in order to comply with applicable state and Federal requirements; (2) to enter into all necessary agreements, contracts and other legal arrangements with the United States and its agencies and departments, the State of Idaho and its agencies, departments and political subdivisions, and public and private persons, firms, corporations and associations in order to carry out such reconstruction, rehabilitation, replacement and improvement; and (3) to issue its Bonds ("Bonds") in the manner provided therein for the purpose of paying all or part of the cost of such reconstruction, rehabilitation, replacement and improvement, together with all expenses preliminary and incidental thereto; and

WHEREAS, the State Act provides that any Bonds issued and sold pursuant to the provisions thereof shall be payable solely out of a special fund into which the Constructing Agency shall be obligated to deposit, as from time to time received: (1) the proceeds of the collection of certain assessments to be levied and collected by the Constructing Agency on lands contained within its boundaries; (2) payments pursuant to contracts to be entered into by the Constructing Agency with other irrigation districts; (3) payments pursuant to contracts to be entered into by the Construction Agency with other public or private persons, firms, corporations and associations; and (4) when so authorized by Act of Congress, the proceeds from the sale or use of falling water released from the dam to be so reconstructed, rehabilitated, replaced and improved, pursuant to a contract for the use of such falling water for power generation to be entered into by the Construction Agency with a public or private person, firm, corporation or association; and

WHEREAS, pursuant to the provisions of the Act of Congress of December 28, 1973 ("Act of December 28, 1973"), the United States, acting through the Regional Director, Pacific Northwest Region, Bureau of Reclamation ("Contracting Officer") upon authorization of the United States Secretary of the Interior ("Secretary") has entered into an agreement with the Constructing Agency ("Government Contract") of even date herewith, authorizing the Constructing Agency to finance and provide for the construction of a new dam ("Replacement Dam") and related structures and works to replace the Existing Dam (which Replacement Dam and related structures and works, together with the storage reservoir to be created behind the Replacement Dam, are hereinafter collectively referred to as the "American Falls Replacement Dam Program"); and

WHEREAS, the Government Contract provides that delivery of water is to be contingent upon the execution by each Wateruser of a contract with the Constructing Agency and the United States (which contracts are collectively referred to as "Spaceholder Contracts") providing for the repayment by such Wateruser of its proportionate share of the total costs to be incurred by the Constructing Agency for engineering, financing, designing and constructing the American Falls Replacement Dam Program not returned by this Falling Water Contract, and providing that the delivery of water to each Wateruser shall be contingent upon the fulfillment of the obligations thereunder, said Spaceholder Contracts being otherwise consistent with the terms of the various existing contracts between the Secretary and the Waterusers for the delivery of water from and the payment of costs associated with the Existing Dam; and

WHEREAS, an appropriate number of the Waterusers satisfactory to the Secretary and the Constructing Agency have entered into Spaceholder Contracts of even date herewith to pay their proportionate share of the cost of the American Falls Replacement Dam Program (which Waterusers which have entered into Spaceholder Contracts being herein referred to as "Spaceholders"); and

WHEREAS, the Act of December 28, 1973, also authorizes the Constructing Agency to contract with a non-Federal entity, as herein provided, for the use by such non-Federal entity for power generation of the falling water released from the Replacement Dam for irrigation and other purposes incidental thereto, which contract shall provide for a monetary return to the Constructing Agency to defray in part the costs of financing and constructing the American Falls Replacement Dam Program and for the coordination of the construction of hydroelectric power facilities with the construction of the Replacement Dam, provided said contract shall be approved by the Secretary and shall not impair the efficiency of the Replacement Dam to serve the other purposes of the Minidoka Project; and

WHEREAS, the State Act provides that the contract for the use of falling water may contain such provisions as are contemplated in the Act of December 28, 1973, providing for the reconstruction, rehabilitation, replacement and improvement of such dam and other related structures and works and appurtenances, the coordination of the construction of the hydroelectric power facilities, the conditions under which the non-Federal entity shall make payments to the Construction Agency, the rights and remedies of the parties to such contract in the event of a failure of the non-Federal entity to make the required payments, and the securing of all necessary permits and licenses required in connection therewith; and

WHEREAS, the Idaho Power Company is a Wateruser and is also the owner and operator of a hydroelectric generating powerplant located on the Snake River below the Existing Dam adjacent to the City of American Falls, Idaho pursuant to a license issued by the Federal Power Commission on March 31, 1975, for Project No. 2258; and

WHEREAS, the construction and operation by Idaho Power Company of a new hydroelectric generating facility ("Powerplant") attached to the Replacement Dam will increase power generation over that produced by the existing powerplant by utilizing the additional head and more of the water released from the Replacement Dam for irrigation and other purposes incidental thereto; and

WHEREAS, as contemplated in Section 4 of the Act of December 28, 1973 and in the State Act (Section 43-2201(D)(4), Idaho Code), the Idaho Power Company heretofore proposed to pay an amount necessary to amortize, at a tax exempt interest rate in 40 approximately equal annual installments, for utilization by it for power generation at the Powerplant of falling water released from the Replacement Dam for irrigation and other purposes incidental thereto, within the limitations specified in the Government Contract, $19,550,000 of the principal amount of the cost of financing and constructing the American Falls Replacement Dam Program, and subsequently further agreed to increase such amount by the cost of the facilities included in the American Falls Replacement Dam Program for the purpose of meeting the amended State of Idaho water quality dissolved oxygen standard as approved on April 17, 1975, by the United States Environmental Protection Agency for water released from the Replacement Dam ("Water Quality Facilities") and if necessary by approximately 50% of the costs of financing and constructing the American Falls Replacement Dam Program in excess of $38,000,000; and

WHEREAS, under the provisions of Section 4 of the Act of December 28, 1973, and the provisions of the State Act (Section 43-2201(D)(4), Idaho Code), the Constructing Agency and the Idaho Power Company have agreed to enter into this falling water contract (hereinafter referred to as the "Falling Water Contract"), but only upon satisfaction of the conditions set forth herein; and

WHEREAS, the Constructing Agency has made provision for the estimation of the cost of financing and constructing the American Falls Replacement Dam Program, and, as required in the State Act, the allocation of the costs of financing and constructing the American Falls Replacement Dam Program as between the sums to be paid pursuant to this Falling Water Contract and the Spaceholder Contracts, and has made provision for a determination as to the actual amount of Bonds of the Constructing Agency to be issued, depending upon the amounts to be prepaid pursuant to the provisions of the several Spaceholder Contracts, it being contemplated that the United States will, pursuant to Section 7 of the Act of December 28, 1973, pay, as provided in the Michaud Division, Fort Hall Indian Reservation Spaceholder Contract entered into between the Constructing Agency and the United States, the proportionate share of the Michaud Division, Fort Hall Indian Reservation of the total cost of financing and constructing the American Falls Replacement Dam Program not returned pursuant to this Falling Water Contract; and

WHEREAS, pursuant to authority contained in the State Act the Constructing Agency has heretofore authorized the issuance of not to exceed $44,750,000 Bonds of the Constructing Agency for the purpose of paying all or part of the costs of financing and constructing the American Falls Replacement Dam Program, and further the Constructing Agency has called and held an election at which the Constructing Agency was authorized to impose assessments on lands within the Constructing Agency, approving said assessments, and was authorized to execute a Spaceholder Contract with the United States and to execute the Government Contract; and

WHEREAS, the Constructing Agency will institute proceedings pursuant to the provisions of the State Act for the purpose of obtaining confirmation decrees approving this Falling Water Contract, the Spaceholder Contracts, the Government Contract, and the levy and collection of the assessments, which confirmation proceedings will, prior to the issuance of the Bonds, be completed in accordance with the provisions of the State Act; and

WHEREAS, the Constructing Agency has entered into an agreement dated November 27, 1974, with the State of Idaho, acting by and through the Department of Transportation, Division of Highways, providing for construction of a two-lane highway on the crest of the Replacement Dam and construction of a two-lane highway bridge located immediately downstream from the Replacement Dam, and providing for the payment by the Constructing Agency of 50% of the total cost of the construction of said highway and bridge as part of the American Falls Replacement Dam Program; and

WHEREAS, the Constructing Agency has entered into an agreement dated July 2, 1974, with the Idaho Fish and Game Department providing for the payment by the Constructing Agency of costs relating to the mitigation of anticipated loss of existing recreational and fish and wildlife resources and constituting the Recreation and Fish and Wildlife Mitigation Facilities (as hereinafter defined); and

WHEREAS, it is provided in the Act of December 28, 1973, that this Falling Water Contract shall be approved by the Secretary and all requirements and conditions of the Act of December 28, 1973 have or will have been satisfied prior to the delivery of any of the Bonds of the Constructing Agency herein contemplated to be issued; and

WHEREAS, the Idaho Power Company has received a fifty (50) year license for Project No. 2736 issued March 31, 1975 by the Federal Power Commission authorizing it to construct, operate, and maintain the Powerplant; and

WHEREAS, the Constructing Agency has executed the Government Contract with the United States, as contemplated in the Act of December 28, 1973, to which Government Contract a copy of this Falling Water Contract is attached as an exhibit, and by the execution of the Government Contract the Secretary, in accordance with the provisions of the Act of December 28, 1973, approves this Falling Water Contract as though incorporated in and made a part of the Government Contract; and

WHEREAS, the Constructing Agency and the Idaho Power Company desire to provide that the issuance, sale and delivery by the Constructing Agency of its Bonds pursuant to the authority contained in the State Act, in an amount which shall be sufficient to pay the estimated cost of financing and constructing the American Falls Replacement Dam Program not paid in advance by Spaceholders pursuant to the Spaceholder Contracts, shall be a condition precedent to the obligation of the Idaho Power Company to make the payments to the Constructing Agency provided for in this Falling Water Contract in consideration of the utilization by the Idaho Power Company at the Powerplant for power generation, within the limitations specified in the Government Contract, of the falling water released from the Replacement Dam for irrigation and other purposes incidental thereto; and

WHEREAS, the Idaho Power Company and the Constructing Agency desire to enter into an arrangement hereunder whereby the Constructing Agency, having entered into the Spaceholder Contracts and the Government Contract, and as a Spaceholder having imposed assessments on lands within its boundaries, will issue and sell its Bonds for the purpose of paying the costs of financing and constructing the American Falls Replacement Dam Program not paid in advance by the Spaceholders, and whereby the Idaho Power Company in accordance with the provisions of the Federal Power Commission license, will finance, construct and own the Powerplant, and will make the payments to the Constructing Agency contemplated hereunder; and

WHEREAS, the Constructing Agency and the Idaho Power Company wish to delineate their mutual responsibilities and to set forth the terms and conditions for the use of the Falling Water by the Idaho Power Company, for the engineering, financing, construction, ownership and operation of the American Falls Replacement Dam Program and the Powerplant and the coordination of the construction of the Powerplant with the construction of the Replacement Dam;

NOW, THEREFORE, in consideration of the mutual and dependent stipulations and covenants herein contained, it is agreed by and between the parties hereto as follows:

JRP010603

The Constructing Agency will execute such conveyances of title of the Replacement Dam, the Related Facilities, and the Water Quality Facilities as shall be necessary to vest title thereto in the United States, pursuant to the requirements of the Act of December 28, 1973, and the Government Contract. The Constructing Agency agrees that it will recognize, in any such instruments or conveyances of title to the Replacement Dam, the Related Facilities and the Water Quality Facilities, the continued right of the Idaho Power Company during the term of its License or any continuation or renewal thereof, to utilize the Falling Water at the Powerplant for power generation in accordance with the provisions of the License or any continuation or renewal thereof, within the limitations specified in the Government Contract, pursuant to Section 4 of the Act of December 28, 1973, and Articles 18(a) and (b) of the Government Contract, so long as the Idaho Power Company is not in default under the provisions of this Falling Water Contract. The Idaho Power Company recognizes that title to the Replacement Dam during the term of its License or any continuation or renewal thereof, shall be vested in the United States.

As provided in Article 14(d) of the Government Contract, upon the acceptance of the final transfer review memoranda, the correction of any construction deficiencies therein specified, the submission of the documents and equipment specified in Article 14(c) of the Government Contract and the giving of notice by the Secretary to the Constructing Agency, the Trustee and the Idaho Power Company, construction of the Replacement Dam, the Related Facilities and the Water Quality Facilities shall be deemed to have been completed. The determination of completion of construction by the Secretary in accordance with the applicable provisions of the Government Contract shall be binding upon the Idaho Power Company. The Idaho Power Company agrees to cooperate with the Constructing Agency, the Secretary and the Authorized Representatives in the furnishing of any or all of the documents or copies thereof and equipment set forth in Article 14(c) of the Government Contract as shall be necessary to aid in the determination of the Secretary that construction of the Replacement Dam, the Related Facilities and the Water Quality Facilities is complete.

SECTION 4.6. *Operation and Maintenance of Replacement Dam by United States.* The Idaho Power Company agrees to the provisions of the Government Contract governing operation and maintenance of the Replacement Dam. The following Articles of the Government Contract are incorporated herein and made a part hereof as follows:

(A) Article 16 which reads:

> The Replacement Dam will be operated by the United States in a manner so that (1) the present proportionate storage rights of the Spaceholders shall not be altered or changed except as provided herein and in the Spaceholder Contracts, (2) the water surface elevation of the Replacement Dam shall not exceed a maximum of 4354.5 feet above mean sea level U.S.C. & G.S. datum, and (3) the primary irrigation purpose and the incidental purposes of the Minidoka Project shall not be impaired by the subordinate utilization for power generation at the Powerplant of the water released from the Replacement Dam. The United States is not obligated to operate the Replacement Dam in a manner to have water in the Replacement Dam at elevations for power generation or to operate to increase the head in the Replacement Dam for power generation.

(B) Article 18(d) which reads:

> In the event that the Contracting Officer determines that the water being released from the Replacement Dam through the Powerplant does not meet the amended State of Idaho water quality dissolved oxygen standard, as approved on April 17, 1975, by the United States Environmental Protection Agency, the Contracting Officer, after oral notice to the Idaho Power Company's American Falls Powerplant Chief Operator, may bypass part or all of such water around the Powerplant until satisfactory arrangements are made to meet such standard. The Contracting Officer in such circumstances will attempt to bypass only the amounts of water necessary to meet such standard. As contemplated in the Water Quality Facilities Agreement the Constructing Agency, the Contracting Officer, and the Idaho Power Company shall develop

Exhibit 27

Excerpted pages of "Palisades Dam and Reservoir Project In Idaho – Letter from the Secretary of the Interior transmitting A Supplemental Report On The Allocation And Repayment Of Costs Of The Palisades Dam And Reservoir Projects In Idaho, Pursuant To Public Law 864, 81st Congress"
(House Document No. 720, 81st Conrgess, 2d Session)
(Nov. 27, 1950)

81st Congress, 2d Session - - - - - House Document No. 720

PALISADES DAM AND RESERVOIR PROJECT IN IDAHO

LETTER

FROM THE

SECRETARY OF THE INTERIOR

TRANSMITTING

A SUPPLEMENTAL REPORT ON THE ALLOCATION AND REPAYMENT OF COSTS OF THE PALISADES DAM AND RESERVOIR PROJECT IN IDAHO, PURSUANT TO PUBLIC LAW 864, 81ST CONGRESS



NOVEMBER 27, 1950.—Referred to the Committee on Public Lands and ordered to be printed, with illustrations

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LETTER FROM THE BUREAU OF THE BUDGET TO THE SECRETARY OF THE INTERIOR

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington 25, D. C., July 17, 1950.

The honorable the SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: This will acknowledge receipt of your letter dated March 4, 1950, requesting advice as to the relationship to the President's program of the proposals contained in your Department's accompanying supplemental report entitled "Palisades Dam and Reservoir Project, Idaho, Allocation and Repayment of Costs," prepared by the regional director, region 1, and dated June 1949. Enclosed with your letter were copies of the comments on the report received from the State governments and interested Federal agencies to whom the report was submitted for review. It is understood that the report is to provide the basis for amendatory legislation which would authorize an increase in the scope of the project by enlarging and adding to the purposes which it would serve.

The Palisades project, as initially authorized by the Secretary of the Interior's report and findings dated December 9, 1941 (H. Doc. 457, 77th Cong., 1st sess.), would be a multiple-purpose development providing for a dam and reservoir on the main stem of the Snake river in eastern Idaho, for conservation of supplemental irrigation water supply, flood control, and for hydroelectric power generation and transmission. As revised, the present plan provides for expansion of the power installation from 30,000 kilowatts to 112,500 kilowatts, increase in the capacity of the outlet works of the dam and, in addition, the installation of fish and wildlife facilities at Grays Lake, Idaho, and of recreation facilities at the Palisades Reservoir. The estimated cost of the proposed project as authorized in 1941 was $24,092,000, while the total estimated cost of the development, as presently proposed, is $76,601,000 based on January 1, 1949, price levels. The increase is attributed to higher costs of construction, the expansion of facilities, and the addition of fish and wildlife and recreational facilities.

The report states that the only water which would be stored in the Palisades Reservoir is the above-average stream flow which could be carried over to years of below-average stream flow together with whatever water is saved by the proposed elimination of present wasteful winter diversions. Existing reservoirs in the Upper Snake River Valley are considered to have capacities sufficient to hold all the presently storable water in years of average or less than average stream flow. The operation plan proposed for Palisades Reservoir is expected to result in providing supplemental irrigation water for about 650,000 acres of land in the Upper Snake River Valley and thus eliminate all shortages on existing projects except during extremely dry years. In this connection, it is noted that an average of 210,000 acre-feet of additional water is proposed to be made available annually by the project which would amount to only approximately 4 inches per acre per year for the 650,000 acres assuming that 100 percent of the water would reach the land. Average annual irrigation benefits are estimated to be $1,981,000.

In his letter dated June 17, 1949, the Commissioner of Reclamation states that the success of the project is dependent on having continued

assurances that average annual water savings of 135,000 acre-feet will be realized, which is expected to be accomplished by means of contractual arrangements with the water users of the Snake River Valley above American Falls Reservoir, whereby they will agree to curtail certain wasteful winter water diversions. While tentative commitments on this matter have been given by resolutions of the governing bodies of interested water users' organizations, which the Commissioner regards as sufficient to justify initiation and continuation of construction he points out that it may be desirable to have some additional means of bringing about the translation of these commitments into contractual assurances before the project is completed. The Commissioner also states that of the reimbursable construction costs allocated to irrigation, a maximum of $10,305,600 can and should be repaid by the water users in a repayment period of 40 years and that a higher amount should be required to be repaid if that period is lengthened. He proposes that the balance of the costs allocated to irrigation amounting to $11,419,000, be repaid out of power revenues by application of the interest component on the commercial power investment and of such additional power revenues as may be required.

The report states that the production of power at the Palisades Dam will be entirely incidental to the operation of the reservoir for irrigation and flood control and that the production of firm power is possible only because a certain amount of water must be passed through the reservoir during the winter to fill the prior storage right of the American Falls Reservoir. During spring and summer months the releases for flood control and for irrigation will be utilized for production of secondary commercial power and irrigation pumping power to the extent of turbine capacities. Total annual power benefits are estimated to be $1,621,000.

The report states that additional detailed studies, made by the Bureau of Reclamation and the Corps of Engineers since the project was authorized, show that Palisades Reservoir can provide greater control of major floods than was originally contemplated without adversely affecting the value of the reservoir for irrigation purposes. These studies have resulted in agreement by both agencies on an operating plan on a forecast basis, whereby the entire active space in the reservoir (1,200,000 acre-feet) will be used jointly for flood control and irrigation purposes under regulations to be prescribed by the Secretary of the Army for use of storage space allocated to flood control, in accordance with section 7 of the Flood Control Act of 1944. It is estimated that average annual flood control benefits would amount to $899,330.

It is proposed that the yield of irrigation water from 55,000 acre-feet of storage space in Palisades Reservoir be substituted for the water supply now drawn from Grays Lake for the Fort Hall Indian Reservation, in order to restore Grays Lake to its natural state and to control its level to create optimum wildlife environment. It is also proposed to develop a wildlife management area at Grays Lake at a total estimated cost of $350,000, nonreimbursable, for construction of buildings and other facilities and the acquisition of approximately 9,300 acres of private land. An additional 3,500 acres of public land would also be set aside for this purpose. The annual cost of operation and maintenance of these and other proposed facilities is estimated to be $15,000. It is explained that studies by the Fish and

LETTER FROM THE OFFICE OF THE CHIEF OF ENGINEERS, UNITED STATES ARMY

DEPARTMENT OF THE ARMY,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, November 23, 1949.

The Honorable the SECRETARY OF THE INTERIOR.

DEAR MR. SECRETARY: Reference is made to your letter of recent date from the Acting Commissioner, Bureau of Reclamation, inclosing for my information and comment, copies of your supplemental report, Palisades Dam and Reservoir project, allocation and repayment of costs.

The Palisades project, as initially authorized in 1941, provides for a multiple-purpose reservoir on Snake River in eastern Idaho and western Wyoming for conservation of supplemental irrigation water supply, hydroelectric power generation and distribution, and flood control. An earth-fill dam 260 feet high would create a total storage capacity of 1,400,000 acre-feet of which 1,200,000 acre-feet would be used jointly for flood control and irrigation purposes in coordination with other reservoirs on this stream and 200,000 acre-feet would be dead storage. Power would be dependent upon water releases for irrigation and downstream rights. Provisions are also included for installation of recreational facilities and improvements for fish and wildlife. The cost of the project as now planned is estimated at $76,601,000 of which $54,537,400 is for the dam and reservoir, $21,565,600 is for power generation and transmission, $350,000 is for fish and wildlife, and $148,000 is for recreation. The corresponding annual cost is estimated at $3,548,355 and annual benefits at $4,871,215 which results in a ratio of benefits to cost of 1:37.

Among the benefits estimated to accrue as a result of the project are $899,330 in the interests of flood control. The amount of $899,330 was arrived at in consultation between representatives of the Bureau of Reclamation and the Corps of Engineers, and I am pleased to advise you that I concur in that estimate as the amount of flood-control benefit to be expected if the project is operated in accordance with the plan outlined in appendix A of your report. I am also able to advise that the Palisades project as planned fits in with the comprehensive plan for the Columbia River Basin recently reported on by the Department of the Army.

My concurrence in the estimate of flood-control benefits and in the suitability and desirability of the project should not be construed, however, as concurrence in the allocation of costs proposed in your report. The practice of allocating to flood control and certain other purposes amounts equal to the capitalized value of the benefits to those purposes is not consistent with the desirable objective of making allocations in which each purpose shares equitably in the economies effected by combining the several functions in a multiple-purpose project. The Corps of Engineers and your Department are now participating, through the Federal Inter-Agency River Basin Committee, in studies which are expected to lead to adoption of mutually acceptable principle for benefit cost determination and cost allocation.

Opportunity to review this report is appreciated.

Sincerely yours,

R. C. CRAWFORD,
Major General, Acting Chief of Engineers.

LETTER FROM THE DEPARTMENT OF AGRICULTURE

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
Washington, November 21, 1949.

The honorable the SECRETARY OF THE INTERIOR.

DEAR MR. SECRETARY: This is in reply to your request of July 8, 1940, for the views of this Department on the Bureau of Reclamation's supplemental report on Palisades Dam and Reservoir project, Idaho.

This supplemental report for the most part contains a revision of the estimates of costs and benefits for the Palisades project originally authorized in December 1941. The present proposal calls for enlarging and adding to the purposes which the project will serve. Apparently the benefits to irrigation water users under the revised plan are about the same as under the original proposal. Due largely to increased construction costs the allocation of costs to irrigation is now $21,724,000 as compared with $10,210,000 in the 1941 proposal. However, the plan calls for only $10,305,000 of the present irrigation cost allocation to be repaid by water users. The remainder is to be repaid out of power revenues. This results in proposed repayments by water users that do not appear excessive in relation to their prospective financial ability.

The use of the so-called national income approach in evaluating both direct and indirect irrigation benefits results on a material overstatement in the amount of these benefits because of the inclusion of certain labor and capital costs as benefits. Although the amount of these costs is not given, it is noted that an acre-foot of water was valued at $9.17 in estimating irrigation benefits (p. 18) and at only $2 in determining project financial feasibility (p. 30).

We note that in order to make the Palisades project feasible from the standpoint of yield of irrigation water, it is necessary to eliminate winter diversions in the upper part of the valley. The present practice is for water users to divert water in the winter for domestic and livestock use. If farm operators are to stop this practice they must drill deep wells at considerable expense to obtain needed water. The Bureau of Reclamation plan requires that the water users will eliminate winter diversions at their own expense. No data are given on the cost to private water users except that it will be considerable. Such costs are not considered as a part of the construction cost of the project and therefore do not enter into the calculations showing economic justification of the project. Yet these are real costs which must be incurred if the proposed project is to be feasible.

It is not possible to determine from the information in the report what effect correction of these procedural errors in computing benefits and costs would have with respect to the conclusion as to the economic justification of the project as a whole or its irrigation component.

The water conservation aspect of the Palisades proposal is highly complex. Cyclic storage and integrated operation of Palisades, Jackson Lake, and American Falls are involved. The conservation of water through the elimination of winter diversions for stock water seems to be a step in the right direction. Our experience in soil conservation districts in the upper Snake River Basin indicates that further very significant water savings could be accomplished through

jointly for irrigation and flood control on the basis of runoff forecasts, and 200,000 acre-feet would be reserved as dead storage for power head. Tunnels in the left abutment of the dam would provide flood control outlet capacity and servo for penstock purposes for a power plant to be constructed at the site with an ultimate installed generating capacity of 112,500 kilowatts, operating under heads varying between 245 and 122 feet.

The production of hydroelectric power at Palisades Dam would be entirely incidental to the operation of the reservoir for irrigation and flood control. However, the production of firm power would be possible because a certain amount of water would have to be passed through the reservoir during the winter to satisfy the prior storage right at American Falls Reservoir downstream. The regional director's report indicates that, when operated in conjunction with the proposed power plant at the American Falls Dam, the Palisades power plant would have an average annual output of 521,400,000 kilowatt-hours, of which 411,800,000 kilowatt-hours would be salable, including 164,400,000 kilowatt-hours of firm energy. The annual revenue from the sale of firm and secondary energy is estimated in the report to be $1,175,400. The rates assumed in the report as a basis for this estimate are: 4 mills per kilowatt-hour for firm energy; 3 mills for irrigation pumping energy; and 2 mills for nonfirm energy. The corresponding over-all-average revenue would be 2.85 mills per kilowatt-hour.

The above estimates of power, and of revenue from its sale, have been based upon the maintenance of 200,000 acre-feet of dead storage to assure the assumed minimum power head. The reports make reference to a possible future demand for water for miscellaneous purposes, including municipal, and in this connection consider a maximum utilization of 85,000 acre-feet of storage space. The reports do not attempt to give the answer at this time to that possible future problem. The Commission staff points out that encroachment on the dead storage to provide any part of this water supply would impair the values assigned to power in the report.

The Commission staff has not undertaken to comment on the methods used for the allocation of costs to the several purposes of the project. It has, however, necessarily considered costs in relation to power which is the principal revenue-producing project function. The estimated total cost of construction of the project given in your report and in the report of the regional director is $76,601,000. The allocations to flood control, recreation, and fish and wildlife are the same in the two reports. The allocation in your report to irrigation is $198,400 less than in the report of the regional director, and correspondingly greater to power. This amount is relatively inconsequential and since his report is in greater detail, the figures of the regional director are used in the discussion which follows.

The costs as shown in the regional director's report may be segregated as follows:

Function	Direct costs	Cost allocated to functions
Considered as nonreimbursable:		
Flood control		$22,735,300
Recreation	$118,000	6,296,900
Fish and wildlife	375,000	2,603,600
Subtotal	493,000	31,634,300
Reimbursable:		
Irrigation:		
From water users		19,266,960
From power		11,419,400
Power:		
Irrigation pumping power		8,986,500
Commercial power	21,555,000	14,055,800
Subtotal	21,555,000	44,760,700
Total	22,053,000	76,601,000

The importance of power to the project is evidenced by the fact that it carries the largest allocation of the three principal functions and would be responsible for 77 percent of the reimbursable costs.

Upon the basis of the regional director's estimates of benefits and costs, summarized as follows in table 9, page 28, of his report, the Palisades project is well justified.

Function	Annual costs	Annual benefits	Ratio of benefits to costs
Irrigation	$644,473	$1,931,500	2.35–1.00
Power	1,434,050	1,931,000	1.13–1.00
Flood control	897,930	897,930	1.00–1.00
Fish and wildlife	136,915	136,915	1.00–1.00
Recreation	344,915	344,915	1.00–1.00
Total	3,458,235	4,571,215	1.37–1.00

The annual costs in this table are computed upon the basis of amortization of the construction cost in 50 years at 3 percent interest, and include operation, maintenance, and replacements. The Commission staff advises that, for purposes of benefit-cost analysis of the power function, it has utilized as a basis the power value, for the Pacific Northwest, arrived at cooperatively in the field by representatives of the Bonneville Power Administration, the Corps of Engineers, and the Commission. On this basis the staff computes the value of the power benefits at Palisades, with 112,500 kilowatts installed as proposed, to be $1,564,500 or $129,850 in excess of the annual costs shown. The actual revenues, however, which are shown as $1,175,400 in the reports, are substantially less than these estimates of benefits.

The report shows that the estimated power revenues are sufficient to meet the costs to be paid out of power revenues, on the basis of payout proposed. The Commission staff understands that this basis includes as costs, operation, maintenance, and replacements of power facilities; the payment of $8,986,500 allocated to irrigation pumping power in equal installments over a 56-year period, without interest; and interest on and amortization of the $14,055,800 allocated to commercial power over a 56-year period, with the interest element being utilized in the repayment of the $11,419,400 irrigation costs allocated to be paid from power revenues.

UNITED STATES DEPARTMENT OF THE INTERIOR
Julius A. Krug, Secretary

SUPPLEMENTAL REPORT
PALISADES DAM AND RESERVOIR PROJECT
IDAHO

BUREAU OF RECLAMATION
Michael W. Straus, Commissioner

REGION 1
R. J. Newell, Regional Director

Boise, Idaho, June 1949

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SEE FOLDOUT NO 17

After determining the average benefits per acre-foot of additional water for the five sample areas, similar values were assigned to all other areas in the Upper Snake River Valley for which requests for storage space in Palisades Reservoir have been made. These benefits were weighted by the acre-feet of space applied for by the various areas in order to secure a weighted average benefit per acre-foot of water; the weighted average benefit amounted to $9.17 based on farm prices of the period 1939–44. The average benefit per acre-foot multiplied by the average annual additional supply from the project (216,000 acre-feet) results in total average annual irrigation benefit of $1,981,000. This is the monetary evaluation of the total annual irrigation benefit from the project. It includes the benefit from the yield of Palisades Reservoir as well as that from the additional water made available through the integrated operation of existing reservoirs in the valley, winter water-saving measures, and increased return flows.

The studies relating to irrigation benefits presented above and repayment ability presented in part IV were directed toward the determination of benefits and repayment ability associated with storage space. All related expenses, including estimated reservoir operation, maintenance, and costs associated with the delivery of water to the farms, were considered as costs in the farm budget analysis. Therefore, further account need not be taken of such costs in the present allocation report, except to show that such costs will exist.

POWER

The production of power at Palisades Dam will be entirely incidental to the operation of the reservoir for irrigation and flood control. The production of firm power is possible only because a certain amount of water must be passed through the reservoir during the winter to fill the prior storage right of American Falls Reservoir. During the spring and summer months, the releases for flood control and for irrigation will be utilized for production of secondary commercial power and irrigation pumping power to the extent of the turbine capacities. Operation studies of the reservoir show that a continuous or firm output of 15,300 kilowatts could have been maintained through the most critical drought in the 60-year period of stream-flow records, except for a 4-month period in 1935 when firm output would have averaged 8 percent less than the above figure. During the peak of the irrigation season and at times when storage is being evacuated for flood control, the plant normally could be operated at its full capacity (112,500 kilowatts).

The average annual production of power during a representative 20-year period (1928–47) would amount to 521,395,000 kilowatt-hours. The distribution in terms of average kilowatts is shown in table 3.

TABLE 3.—*Palisades power plant production, Palisades Dam and Reservoir project*

Month	Critical stream flow (average of 3 lowest years)	20-year average	Month	Critical stream flow (average of 3 lowest years)	20-year average
	Thousands of kilowatts	*Thousands of kilowatts*		*Thousands of kilowatts*	*Thousands of kilowatts*
October	17.05	23.66	April	24.10	33.37
November	10.23	33.90	May	48.69	52.07
December	15.09	28.01	June	79.71	103.16
January	15.89	37.93	July	66.96	105.66
February	15.33	55.83	August	43.64	90.71
March	12.65	47.40	September	35.60	71.16

Power demands in eastern Idaho have shown a steady increase, particularly during the postwar period, and have now reached the point where Diesel-driven generators are being installed by some distributors to relieve power shortages. The city of Idaho Falls (a municipal system) has indicated its desire to purchase all the firm power available from Palisades, and REA cooperatives in this area have also requested power from this project. As further indication of prospective power demands, the recently announced proposal of the Atomic Energy Commission to build an atomic reactor plant west of Idaho Falls still further adds to the general demand for power, not only for the reactor plant, but also for neighboring communities whose population and business will be increased by establishment of that plant. Thus, it is evident that the present demand for Palisades firm power exceeds the firm capability of the plant.

In addition to the above demands, prospective irrigation pumping will require a large amount of seasonal energy. The recommended North Side pumping division of the Minidoka project will require approximately 34,000 kilowatts of reliable seasonal pumping power, and the contemplated Michaud Flats development would require about 7,000 additional kilowatts. Other potential pumping loads in the area may require an additional 15,000 kilowatts of summer power. This large pumping load exceeds the supply that would be available from Palisades alone. However, studies of potential power production indicate that the combination of the proposed 30,000-kilowatt American Falls power plant and the Palisades power plant would furnish a reliable power supply well suited in seasonal pattern for irrigation pumping loads.

As is characteristic of hydroelectric power plants, energy in excess of firm power production can be generated in off-peak periods and in periods of high runoff. By appropriate transmission interconnections and interchange agreements, this energy can be utilized to replace energy generated at fuel plants and to reduce storage drafts in hydroelectric power reservoirs. The proximity of Palisades to the high energy-consuming phosphate developments near Pocatello creates an ideal opportunity to utilize Palisades surplus energy in the above manner. The replacement would also reduce transmission losses.

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 28

Order Granting Petition To Appear As Amicus Curiae, Order Setting Deadline For Comments and Special Master Report And Recommendation, SRBA Subcase Nos. 00-92002GP, 02-0200, 02-0201, 02-0223, and 02-0224
(Nov. 20, 2009)

278

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

NOV 20 2009

By _____ Clerk

_____ Deputy Clerk

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	**Subcases 02-200, 02-201, 02-223, 02-224 (State of Idaho) and Basin 02 GP #4 (00-92002GP)**
Case No. 39576	**ORDER GRANTING PETITION TO APPEAR AS AMICUS CURIAE, ORDER SETTING DEADLINE FOR COMMENTS and SPECIAL MASTER REPORT AND RECOMMENDATION**

Findings of Fact

Director's Recommendations

The Director of the Idaho Department of Water Resources filed his *Director's Report, Irrigation & Other Uses, Reporting Area Basin 02* on December 29, 2006. The Director recommended claim 02-200 to the State of Idaho, Idaho Water Resource Board, 322 E. Front Street, P.O. Box 83720, Boise, Idaho, 83720-0098, for year-'round minimum stream flowwith a priority date of December 29, 1976, based on a statute, § 42-1736B, Idaho Code, Policy 32. Under quantity, the Director recommended: "The quantity of this right is the average daily flow of zero (0) cfs measured by the Milner gauging station at river mile 638.7 downstream."

The same date, the Director recommended the following *Basin 02 General Provisions*, number 4:

> The minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second. The Milner gauging station is located at Latitude 42° 31'41", Longitude 114° 01'06"(revised), (NAD83), in the SW1/4 NE1/4 of section 29 in Township 10 South, Range 21 East, Boise Meridian, Twin Falls County Hydrologic Unit 17040212, on the left bank 200 ft downstream from the highway bridge at Milner, 0.4 mile downstream from Milner Dam, at mile 638.7.

Objections and Response

The Idaho Ground Water Appropriators, Inc., and the Ground Water Districts filed an *Objection* on December 5, 2007, in subcase 02-200 and "to the General Provisions in Basin 02" objecting to quantity and place of use. The same date, Idaho Power Company filed an *Objection* in subcase "[Basin 02] General Provision 4" alleging the General Provision should not be included in the Director's Report or in any decree.

The Twin Falls and North Side Canal Companies (Canal Companies) were granted leave to file a late response in subcases 02-200 and Basin 02-General Provision #4 on February 4, 2009. Idaho Power was granted leave to file a late objection in subcases 02-200, 02-201, 02-223 and 02-224 on February 20, 2008, objecting to all the elements and alleging the water rights should not exist.

State's Motion for Partial Summary Judgment

The State filed its *Motion for Partial Summary Re: Milner Zero Minimum Flow* in the above subcases on October 19, 2009, arguing the following language should be substituted for Basin 02 General Provision #4 and included under "other provisions" in subcase 02-200:

> 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 administration, of the flow of the Snake River or surface and ground water tributary to the Snake River upstream from Milner Dam.

Joinder, Statement, Memoranda, Responses and Reply

The Ground Water Districts filed their *Joinder in the State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow* on October 28, 2009, and their *Summary Judgment Reply Brief* on November 13, 2009. The United States Bureau of Reclamation filed its *Statement of Agreement with the Relief Sought by the State of Idaho's Motion for [Partial] Summary Judgment Re: Milner Zero Minimum Flow* on November 4, 2009.

Idaho Power Company lodged its *Memorandum in Opposition to State of Idaho's Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow* on November 5, 2009, and the Canal Companies lodged their *Memorandum in Opposition* the same date. The City of Pocatello filed its *Response* on November 6, 2009, and the State filed its *Reply in Support* on November 12, 2009.

Petition to Appear as Amicus Curiae

The Fremont-Madison Irrigation District, Egin Bench Canal Company, Idaho Irrigation District and New Sweden Irrigation District filed their *Petition to Appear as Amicus Curiae* on November 12, 2009.

Hearing

A hearing on the State's *Motion* and the *Petition to Appear as Amicus Curiae* was held on November 19, 2009. Clive J. Strong and Michael C. Orr appeared for the State; James C. Tucker and James S. Lochhead appeared for Idaho Power; Thomas J. Budge appeared for the Ground Water Districts; David W. Gehlert appeared for the USDI/BOR; Travis L. Thompson and Shelley M. Davis appeared for the Canal Companies; Josephine P. Beeman appeared for the City of Pocatello; Robert L. Harris appeared for Fremont-Madison Irrigation District, *et al.*; and Michael B. Schwarzkopf appeared for Resource and Range and the Harpers.

Discussion

The first order of business was whether anyone opposed the *Petition to Appear as Amicus Curiae*. No one opposed the *Petition*.

The next matter was a concern over the authority of the Special Master to consider matters related to Basin 02 General Provisions, some portions of which are now before SRBA Presiding Judge John M. Melanson. To clarify the matter, it was proposed that Judge Melanson enter a ***Supplemental Order of Reference Appointing Terrence A. Dolan to Preside over Recommended General Provision 00-92992GP and all Related Matters Pertaining to the General Provision on Flows at Milner Dam.*** Because counsel attending the hearing did not have sufficient time to consider the proposed ***Order***, the best solution is to provide notice to all parties by copy of the proposed ***Order*** and give them time to respond in writing.

To the merits of the State's *Motion for Partial Summary Judgment*, the parties in court had the opportunity to discuss possible settlement beforehand and they agreed on a possible solution. Two sentences from the 1996 Idaho State Water plan and from I.C. § 42-203B(2) would be combined into one paragraph which would then be substituted for Basin 02 General Provision #4 and included in the "other provisions" element of water right 02-200 if that claim is decreed. The language is as follows:

> The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero. 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.

The Canal Companies suggested that it is superfluous to include such language but they did not oppose the resolution. That being said, the Canal Companies waived their objections and argument in opposition to the settlement. The remaining parties in court agreed. It was understood that the State thereby withdrew the language requested in its *Motion for Partial Summary Re: Milner Zero Minimum Flow*. It was further understood that only matters addressed herein are Basin 02 General Provision #4 and a remark to be included in the "other provisions" element of subcase 02-200 if that claim is valid.

Conclusions of Law

The State has shown good cause to have the settlement language entered as Basin 02 General Provision #4 and included in the "other provisions" element of subcase 02-200 if that claim is valid.

Order

THEREFORE, IT IS ORDERED that:

1. The *Petition to Appear as Amicus Curiae* filed by the Fremont-Madison Irrigation District, *et al.*, is **granted**;

2. Copies of the proposed ***Supplemental Order of Reference*** shall be served along with this ***Order***. Parties may submit comments in writing to the SRBA Court **no later than Friday, December 4, 2009,** after which the proposed ***Supplemental Order*** and comments, if any, will be submitted to the Presiding Judge; and

3. The State's *Motion for Partial Summary Re: Milner Zero Minimum Flow* is **granted** to the extent that the language requested therein has been withdrawn and the settlement language should be substituted for Basin 02 General Provision #4 and included in the "other provisions" element of subcase 02-200 if that claim is valid.

Recommendation

THEREFORE, IT IS RECOMMENDED that:

1. The Presiding Judge order the above settlement language as Basin 02 General Provision #4 in lieu of the language recommended by IDWR; and

2. The same settlement language be included in the "other provisions" element of subcase 02-200 if that claim is valid and partially decreed.

DATED November 20, 2009.

Terrence A. Dolan

TERRENCE A. DOLAN
Special Master
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 Case No. 39576	**SUPPLEMENTAL ORDER OF REFERENCE APPOINTING TERRENCE A. DOLAN TO PRESIDE OVER RECOMMENDED GENERAL PROVISION 00-92002GP AND ALL RELATED MATTERS PERTAINING TO THE GENERAL PROVISION ON FLOWS AT MILNER DAM**

On June 4, 2007, this Court issued ***Order of Reference Appointing Terrence A. Dolan as Special Master for Irrigation and Other Claims in IDWR Administrative Basins 02, 03, 47, 73 and 75***, which included the following authority:

> **General Provisions – Contested or Uncontested:** Identify and preside over any objections filed to the recommended general provision for the above-captioned basin. Following a review of the objections if it is determined that the recommended general provision was uncontested then issue a ***Special Master's Report and Recommendation*** notifying the Court that the general provision was not contested. Alternatively, if the recommended general provision is contested then following proceedings on objections, issue a ***Special Master's Report and Recommendation*** consistent with the outcome of the proceedings.

Thereafter, *Objections* and *Responses* were filed to the general provision recommendations for Basin 02, including the recommendation regarding flows at Milner Dam. The subcase relating to the general provision is designated as Subcase 00-92002GP.

One of the issues before the Special Master involves the scope of application of the general provision outside of Basin 02. This ***Supplemental Order*** clarifies that the

June 4, 2007, ***Order of Reference*** confers the authority to preside over all related matters including application of the general provision, if any, outside of Basin 02.

DATED: _____.

DRAFT

JOHN M. MELANSON
Presiding Judge, *Pro Tem*
Snake River Basin Adjudication

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
NOV 20 2009
By _____ Clerk
_____ Deputy Clerk

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	NOTICE OF ISSUANCE OF SPECIAL MASTER'S RECOMMENDATION Water Right(s): 00-92002GP

On November 20, 2009, Special Master TERRENCE A. DOLAN issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED November 20, 2009.

DIANA R DELANEY
Deputy Clerk

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING PETITION; SETTING DEADLINE FOR COMMENTS; SPECIAL MASTER REPORT & RECOMMENDATION was mailed on November 20, 2009, with sufficient first-class postage to the following:

NORTH SIDE CANAL CO LTD
Represented by:
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113 MAIN AVE W, STE 303
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Phone: 208-733-0700

ABERDEEN AMERICAN FALLS
BINGHAM GROUND WATER DISTRICT
BONNEVILLE-JEFFERSON GROUND
CLARK JEFFERSON GROUND WATER
MADISON GROUND WATER DISTRICT
MAGIC VALLEY GROUND WATER
NORTH SNAKE GROUND WATER
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BASIN & RANGE RESOURCE CO LLC
INTERESTED WATER USERS
JEFF C & JACKIE HARPER
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STATE OF IDAHO
Represented by:
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STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
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ABERDEEN AMERICAN FALLS
BINGHAM GROUND WATER DISTRICT
BONNEVILLE-JEFFERSON GROUND
CLARK JEFFERSON GROUND WATER
CLARK JEFFERSON GWD
FREMONT MADISON GROUND WATER
FREMONT MADISON GWD
IGWA INC
MADISON GROUND WATER DISTRICT
MAGIC VALLEY GROUND WATER DIST
NORTH SNAKE GROUND WATER DIST
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(Certificate of mailing continued)

USDI BUREAU OF RECLAMATION
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
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BOISE, ID 83724

STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
322 E FRONT ST
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

BASIN 02 -- GENERAL
PROVISIONS

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 29

Minutes of the Senate Resources and Environment Committee (Jan. 21, 1985)

RESOURCES AND ENVIRONMENT COMMITTEE

PUBLIC HEARING

MINUTES

TIME: January 21, 1985, 7:00 P.M.

PLACE: Room 420, Statehouse, Boise, Idaho

SUBJECT: SB 1006 and SB 1008 RELATING TO SWAN FALLS AGREEMENT

PRESENT: All members of the Senate Resources Committee except Senator Kiebert. Fourteen members of the House Resources Committee were also present.

The hearing was chaired by Senator Laird Noh who explained the hearing was for the purpose of hearing testimony on the multi package agreement dealing with Swan Falls. The main two bills for consideration tonight are SB 1006 and SB 1008. Briefly SB 1008 would implement the state's authority under the 1928 amendment to the Idaho Constitution to limit and regulate the use of water for power purposes. It would also add notice and publication requirements when the Department of Water Resources receives a water right application and sets out the nature and extent of water rights for power purposes.

SB 1006 is to provide statutory authority to the Director of the Department of Water Resources to suspend issuance of water right permits or other action on permits or permit applications when necessary. The bill would also give the Director the authority to promulgate rules and regulations.

There were nine people who signed up to testify before the meeting with two more asking to testify at the meeting. There were approximately 75 people in attendance. The three parties who worked on the agreement were also represented; Pat Kole from the Attorney General's office, Tom Nelson, representing Idaho Power and Pat Costello from the Governor's office.

PAT COSTELLO, the Governor's chief legal advisor, explained the bills are part of a larger compromise package that was arrived at between the Governor and Idaho Power and Attorney Jim Jones this summer and late fall. The agreement came about from a controversey over hydroelectic assets and other beneficial uses, especially agriculture. In the past several years interests have been at odds at how we should allocate the water of Snake River. After years of struggling over this issue the Governor concluded it was essential at this point to end this controversey if possible and to try and come up with a fair compromise that balanced the interests. The five pieces of legislation that have been introduced so far in the legislature as well as one that will be introduced in the next week or so, are the core of the agreement thatwas entered into. In order to implement the agreement, all of these pieces of this legislation need to pass. Mr. Costello at this point briefly went over the legislation pointing out the various features of the agreement and the reasoning behind them. A final

benefit in this agreement is that hopefully agreement can be reached without enormous litigation costs to the state and power company and ultimately to the ratepayers and without an inordinate delay. If the legislation is adopted, the Water Resources Department by the end of the year will be able to begin processing applications for water uses on the Snake under the new management criteria we have proposed.

PAT KOLE, from the Attorney General's office, said three results were attempted in the negotiations. The first, to give effect to the philosophy that Idaho water belongs primarily in the state of Idaho and used here. Secondly, that decisions as to the use and allocations of Idaho water must be made here by Idaho public officials and third in the future in order to protect Idaho from potential threats not only from the federal government but from our downstream sister states, we needed to get this issue resolved and present a united front to protect our water users. I believe the agreement that we have arrived at achieves all three of these goals. The important thing is that where the line is drawn is not magic, but what has been achieved is if the line has been drawn in the wrong spot, the legislators will be able to come back and redraw the line in the future at a different spot. Believe that is an important element of this package. It restores control over Idaho water to members of the legislature.

TOM NELSON, attorney for Idaho Power, believes there is one thing to keep in mind on this. The approval of this package is necessarily chopped up, so you only see pieces of it now and then in the legislature. Remember it was negotiated by us and approved by the principles as a package and should be accepted or rejected as a package. For your information as to where the rest of the conditions for implementation are, a petition has been filed with the Idaho PUC by the Power Company. The PUC has deferred action on that petition until the legislature has acted. A petition has been filed with the FERC and the time for intervention has run and to my knowledge there has been one intervention by the National Marine Fishery Service at the Federal Energy Regulatory Commission. The bill on adjudication was introduced for printing today in the House and a bill on PUC is in the Senate State Affairs. The Company determined that no filing was needed with the PUC of Oregon so none has been made. The amendments to the state water place have been proposed to the Water Resource Board and they will be going to public hearings beginning next week. It is recognized there are pieces of this agreement no one loves, but as a package, it is a rational, well balanced, resolution of the litigation that fostered the negotiations.

MARJORIE G. HAYES, Idaho Consumer Affairs, spoke against the legislation and would like to see the Swan Falls water continue completely unsubordinated. (A copy of the testimony is attached)

SHERL CHAPMAN, Director of Idaho Water Users Association, Inc., spoke in favor of the legislation. In a recent convention of water users here in Boise, after much discussion, the members voted with the except of a few members, to support this package. It is the feeling it is time to settle this issue which he had fought long and hard, but now feels this agreement is a fair way to settle it. They urge favorable consideration of the bills.

HAROLD C. MILES, speaking for the Golden Eagle Audubon Society and the Idaho Wildlife Federation, was not in favor of the legislation as believes it does not serve the public interest of most Idahoans nor take steps to preserve its fisheries, recreation, riparian, water fowl and raptor values. Also the low electrical rates in the state due principally to the Company's large hydro generating capacity is an economic value to Idaho's economy. (A copy of the testimony is attached).

BEN CAVANESS, attorney from American Falls, speaking for himself, said SB 1006 is relatively non-controversial. Water users have no objections to this but hope that the Director of Water Resources would not keep a moritorium indefinitely but make some decisions on permits. As a water user and an attorney who works extensively in the water area, he felt that the overall package is a fair one for all concerned and as fairly as possible reconcils the conflicting uses for the limited resource of water in this state. He commended both bills and asked for a favorable consideration.

FRED STEWART, a water user, spoke against this agreement, as he believes it sets up a vehicle to give our water to California. Mr. Stewart's testimony covered a "wide" range; from the bills in question to the history of how this problem came about. He strongly opposes the agreement. (Some supporting information he handed out is attached).

FORREST HYMAS, speaking for the Idaho Water Rights Defense Group, made up of business people, agricultural interest, recreational interests, professional interests and domestic interests, spoke in support of the two pieces of legislation. He said not all the people in the lawsuit were released by Idaho Power, but they realize they will have to live by this agreement. When the people of the state look at this agreement, it would seem this is the best agreement for the people of the state.

SENATOR HORSCH, I am sure your group has analyzed this legislation. Do you see holes in this legislation that would give our water to California?

MR. HYMAS We do not see this as a problem as the public interest criteria would cover that.

JOHN HATCH, Director, Public Affairs for the Farm Bureau, said as a whole the Farm Bureau does support the agreement. The Bureau has been involved in this issue since its inception. It has been a very difficult issue for the farm community and it has been difficult for them to accept the package. It is a compromise and I would urge the Committee not to tamper with it. The following policy was adopted at our convention in December: "We support a state of Idaho negotiated settlement with Idaho Power as a solution to the Swan Falls issue. This should include a contractual agreement by Idaho Power to allow state appropriation of water for upstream development down to the statutory minimum flow of 3900 cfs in the summer and 5700 cfs in the winter at Murphy. This also should include complete adjudication of the Snake River and its tributaries above Lewiston to be paid for by an equitable distribution of the costs among all said parties."

JOHN RUNFT, attorney, representing the Salmon River Hydro Company. This company consists of 27 small hydropower projects. All of these projects are located on

the main reaches of the main Salmon and the Little Salmon, all well above Swan Falls. All of these projects have received preliminary permits from FERC or exemptions or have licenses pending. All are bonda fide projects that are under way. He is not here tonight to attack the agreement, but rather here to make some comments on the bills that he feels would add to the overall agreement and addressing concerns of the small hydropower projects. Mr. Runft felt several provisions affecting small hydros should be clarified or changed. He expressed concern about their water permits which might be too short to allow economic development. (Statement attached)

PAT FORD, speaking for himself, expressed support for SB 1006 and directed his comments toward SB 1008, looking at that bill from the point of fish and wildlife and recreation; specifically at the public interest criteria. He expressed that this was a fragile package and hoped his comments would be taken in the spirit of helping to make this bill a better one. His comments were directed toward the five criteria for public interest with regard to fish and wildlife and recreation which he feels have not been dealt with adequately and feels they can be dealt with without destroying the entire package. He urged the consideration of adding the criteria that does mention fish and wildlife and recreation in the same way hydropower is mentioned.

AL FOTERGILL, Director of Idaho Coalition, felt the electrical consumers would be paying a very high price for the benefit of new irrigation development and the agreement could be made fair with an amendment requiring other consumers to be fully compensated for the cost of reducing the Snake River's flow and for the cost of serving new irrigation or other major additions to energy demand created by reducing the river's flow. The PUC could determine what the costs are and impose charges on the new loads to recover the cost. In summary, the interest of consumers was ignored when this agreement was put together.

ART MARTINS, representing the Little Pilgrim Irrigation Company, believes this agreement is a job well done and the answer to a situation that has been unresolved for too many years. (Testimony attached)

There being no more people wishing to testify, the meeting was adjourned at 9:30 P.M.

Laird Noh, Chairman

Bev Mullins, Secretary



IDAHO CONSUMER AFFAIRS, INC.

AFFILIATE OF CONSUMER FEDERATION OF AMERICA

OLD BOISE / 106 NORTH 6TH / SUITE 3 / BOISE, IDAHO 83702

TELEPHONE: 208 / 343-3554

HEARING BEFORE THE LEGISLATURE ON THE SWAN FALLS ISSUE
January 21, 1955

Mr. Chairman... Gentlemen,

I appeared before you last year on this issue and was the next to the last to be heard... This gave me time to hear Mr Perry Swisher of the Idaho Public Utilities Commission as he gave his impassioned appeal to this body not to get into this Pandoras box because of the legal ramifications that would ensue from a "taking" of a water right from The Idaho Power Company . He warned that a Circuit Court Judge in San-Francisco would be making a determination upon a subject about which he had very little knowledge... That Judge would be determining the future of our water in Idaho... After he left, a lawyer, who had earlier identified himself as the legal counsel for a group of Irrigators, called out that Mr. Swisher did not know anything about water and this was picked up and repeated all around the room. I couldn't believe my ears, for water is the base of our hydro-electric system in Idaho and Mr. Swisher is one of our three Commissioners on Energy...To show his ability to assess a problem we now only have to look at a case that is on file at the Public Utilities Commission . A Declaratory Order there is awaiting the outcome of this Legislative Session, It states " Regarding Agreement Dated October 25, 1984, among the State of Idaho, by and through the Governor, John V. Evans, in his official capacity as Governor, Jim Jones in Official Capacity as Attorney General of the State of Idaho, and the Idaho Power Company... It would appear that the Idaho Power Company Officials are putting on public notice that any effect upon the Idaho Power Company's hydro generation by this taking process will not be grounds for a finding or an order reducing Idaho Power Company's present or future revenue requirement or any future rate, tariff, schedule or charge... One cannot help but admire Idaho Power Company's percipiency, for they are a business and must keep financially healthy, but I tremble for the rate payers in the Idaho Power territory, for we may very likely be paying for a dead horse, if this madness of dividing up another's resource continues.

Another aspect to this case is again in the legal area... If the Governor and the Attorney General of this State can take a water right that has been declared by the Supreme Court of the State (opinion # 49, 1983) as being unsubordinated to upstream diversion and consumptive use, what is going to stop them or any future Governor and Attorney General from doing the same to you, and you, and you? This is a dangerous precedent, both for now and for future generations.

There is another road that we can choose to follow... One which would maintain the 6,065 cfs, which has been the average minimum daily discharge at Murphy for the past twenty three (23) years(records of the United States Geological Survey) and let it work for us to help replace the very scarce capital that is the root of our struggle to meet the economic needs of our schools, our social programs, our build- industries, and our Service Organizations in Idaho.

For there is a very exciting movement taking place in the Northwest... Our own Peter Johnson, who as you know is the Director of the Bonneville Power Administration, is returning the cheaper preference power to the public to whom it was, by law, originally intended (see chp 720, 75th Congress, 1st Session, Aug 20, 1927). He is doing this through the Investor Owned Utilities of which Idaho Power Company, is one.

This is the essence of the plan that is being proposed:
" The Firm Displacement Power Concept was first proposed as a rate in BPA's 1985 Rate Case. The concept would allow utilities to buy power from BPA to serve their Pacific Northwest loads, displacing power from their own generating resources currently used to meet regional loads. This would increase the amount of power the utilities would have to sell to California on a firm basis."

The key to this concept is firm power; for the Northwest Utilities have been selling their surplus non-firm energy to California for years at unbelievably cheap rates... My husband and I attended an Energy Conference in Seattle, Washington where this concept was under discussion. We were told by one of California's Energy Commissioners that they were buying non-firm power for "mills", but would be willing to pay anywhere from five (5¢) to nine (9¢) a kw hr. (depending upon our skill in bargaining)for firm power... With firm power, a power upon which they could depend, they could moth-ball their costly oil fired plants... At the minimal five cent (5¢) per kw hr we could superinsulate every home and mobil home in the Pacific Northwest Utilities Service Areas. (thus generating an additional source of energy)... This should be done without cost to the Consumer, for they have initially paid, through their taxes, for the development of the preference power which will be sold by the BPA to make this plan possible.

A Bureau of Reclamation Water Report for Brownlee shows that over a fifty (50) year period there have been seven (7) dry years which leaves forty three (43) years with average or better water... In order for the Investor Owned Utilities to protect their own Concumers from rate increases during those short fall years a sum should be set aside to purchase power. The true interest, adjusted to inflation, could go to the Investor Owned Utilities for collecting, handling, and bookkeeping costs for this operation.

One more point... There is very likely a possibility that the Investor Owned Utilities will really get involved in going after energy to market. A very negative conotation would be a shift to the development of low head hydro in the anadromous fish spawning streams... These fish require pristine water for spawning and rearing purposes ... We should consider putting in place the following:

(1) A moratorium on any development in the anadromous fish spawning areas of our State for we are going to need to restore that high grade protien source for a rapidly expanding National and World Population.

(2) We are going to need stiff building codes to protect the integrity of a super-insulation program. It is my understanding from talking to some of the people at the Hood River Project that the States of Oregon and Washington already have these in place in anticipation of an early start.

In summary it would appear that we have the following choices to make,ie:

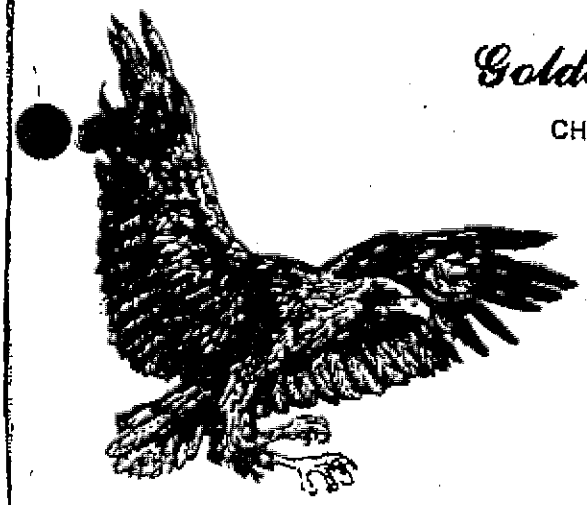
(1) To continue the subordination of the Swan Falls water, which by Court Decree has been determined to belong to another... A taking process.

(2) Leave this decision to a lower court, where it belongs, hoping that they will sustain the Supreme Court Decision for now ... letting this water stay in the Snake to help generate capital for our schools, our social programs, our building industries, and our service organizations... If, in fifteen (15) years or so, the vast agricultural surpluses have been reduced and we would not be further jeapordizing the price for farmers by over-production, we might take another look at this issue... for if the water is left in the Snake for the production of energy, it is not going anywhere... There is another very important factor to consider here... California is becoming desparate for water. If our hydro system is working to produce energy for them, they are not likely to cut their own throats to get at our water.

Marjorie G. Hayes

Marjorie G. Hayes
Idaho Consumer Affairs,Inc.

WE C'RE ABOUT YOU.



Golden Eagle Audubon Society

CHAPTER OF THE NATIONAL AUDUBON SOCIETY
P.O. BOX 8261, BOISE, ID 83707

January 19, 1985

TESTIMONY OF THE GOLDEN EAGLE AUDUBON SOCIETY & THE IDAHO WILDLIFE FEDERATION submitted to the Idaho Senate Resources and Environment Committee on Monday, January 21, 1985 in Boise, Idaho., by:

Mr, Harold C. Miles, Authorized spokesperson for both organizations.

Chairman Noh and members of the Committee.

My name is Harold C. Miles, residing at 316 Fifteenth Ave. South, Nampa, Idaho 83651, and I am representing the Golden Eagle Chapter of the National Audubon Society, and the Idaho Wildlife Federation affilliate of the National Wildlife Federation at this hearing concerning S.B. 1006 and S.B. 1008 in particular, consequently we wish to submit the following changes and comments to these proposed pieces of legislation; first, thanking the Committee for allowing us to present testimony concerning our views regarding the Swan Falls controversy.

Relative to S.B. 1006, we request that at the end of the sentence in Section 1 (3) instead of the period after the word "water" a comma be inserted and the following words be added, "to insure an adequate supply of water, at all times, in all major streams to support the game fish fishery."

As previously stated, we have grave concern regarding S.B. 1008, consequently, we propose the following additions and deletions to this bill's language.

Section 1 (5)(d) lines 30-32, we feel limiting water to only those with sufficient financial resources, as the language implies, will preclude small irrigators from further irrigation development.

Section 1 (5)(e) line 34, after the word use, a comma instead of a period, adding,"and maintaining the sport fishery in the local streams in accordance with the recommendations of the Idaho Department of Fish & Game".

Section 2 (1) line 5 after the words"minimum flow" insert a comma instead of a period and adding, "providing Idaho Power Co's (IPCo) water rights for its Swan Falls Dam are maintained in accordance with the 1983 opinion No. 49 of the Idaho Supreme Court."

Section 2 (2) line 16, after the word "Idaho." strike the following sentence which ends on line 18.

Section 2 (3) line 24, after the word "Idaho." strike the following sentence which ends on line 26.

Section 2 (5 & 6) strike these two subsections beginning on line 32 and ending on line 48.

Section 3 (2)(a) line 13 after words, "shall consider" remove ":" and add, "maintaining adequate stream flows to maintain the sport fishery in accordance with the latest stream survey of stream's reaches, or the recommendation of the Idaho Department of Fish & Game in the absence of a survey for that stream or its affected reaches;"

Section 3 (2)(a)(i) line 15 after word "economy" remove ";" and add "including fishery and recreational values;"

Section 3 (2)(a)(ii) line 19 after word "impact ;" remove ";) and add "such costs shall be fully born by the holders of any newly acquired water right;"

Section 3 (2)(a)(iii) line 20 after word"tradition;" remove ";" and add "to be defined as those persons living on the family farm or within 100 miles adjacent, thereto;"

Section 3 (2)(a)(v) line23 after the word"Murphy gauge" strike the remaining words of the sentence and the next sentence through line line 28 and insert the following "no additional water permits will be issued by the Director for new irrigated land development until such a time as all the agricultural acreage removed from agricultural production under any of the U.S. Department's acreage limitation programs are put back into agricultural production and the value of the crops raised thereon shall equal parity, based on the U.S.D.A's definition of parity."

Section 4(1) line 37 change "1985" to "1961".

We hold this proposed S.B. 1008 violates the "Public Trust Doctrine" relied upon by the Idaho Supreme Court in its 1983 Opinion No. 49, regarding the subordination of IPCo's water rights at Swan Falls. In this connection, we respectfully call the committee's attention to the fact that the U.S. Circuit Court for the District of Idaho decreed in 1907 that the Trade Dollar Mining Co. had a 10,000 CFS water right for their Swan Falls Dam, which IPCo acquired when it purchased Swan Falls Dam from the Trade Dollar Mining Co. In addition, IPCo acquired a 4,000 CFS water right. License No. 14,362, on July 29, 1919, which was 9 years before the Constitutional Ammendment to the Idaho Constitution was adopted in 1928, which Governor Evans referred to in his January 8, 1985, "State of the State" address to the Idaho Legislature.

The "Public Trust Doctrine" should not be violated by the Idaho Legislature. If it does, such action is tatamount to stealing navigable water, with its many beneficial uses, from All the people of the State of Idaho, in our view.

The Idaho Legislature does not have the Legal, let alone the MORAL right, to reduce the flow of the Snake River to the extent that such reduction seriously harms the Snake River fishery below Swan Falls Dam, in our opinion, and should take note of the 1976 survey made by the Idaho Fish & Game Department that a minimum average of 5,500 CFS is required in the Snake's reaches from Swan Falls to Brownlee Reservoir. In addition, we call the committee's attention to the fact that the average minimum daily flows of the Snake at Murphy from 1961 through 1983, was 6,065 CFS and the average instantaneo flow for this same time period was 5,616 CFS, according to USGS records. Thus, reducing the flow at Murphy will be catastrophic to not only the fishery below Swan Falls, but the hydroelectric generating capacity of IPCo's major generating facilitie since Brownlee requires 33,000 CFS to operate all 5 of its generators at full capacit and 20,400 to operate the 4 smaller units at full generating capacity. Also, on July 1, 1977 the inflow into Brownlee Reservoir would have been only 3,111 CFS if the flow at Murphy was 3,900 CFS. In addition, we would like to point out that on December 31, 1984, IPCo had 252,592 customers in Idaho, of which only 10,383 were irrigation customers, or 4% of IPCo's total Idaho customers. Furthermore, it is our view, any

IPCo irrigation customer, who does not intend to expand his irrigated land farming operation and where electrical rates affect his farm's profitability, is at great financial risk, if the Snake's flows are reduced to 3,900 CFS, for most assuredly IPCo's irrigation rates will dramatically increase, as will the rates to all of the other classes of IPCo's customers, if S.B. No. 1008 is enacted into law in its present form. Furthermore, the commodity prices irrigation farmers will receive, most likely will be less if additional acreage is put into irrigated production, especially in light of the proposed reduction in Federal price supports in the upcoming Federal farm bil

We again call the committee's attention, based on the required minimum flow for Brownlee Reservoir of 4,750 CFS, the minimum flow at Weiser Gauge, the active storag of Brownlee Reservoir can be drawn down in 17.4 days with all 5 generators operati at full hydraulic capacity, or in 31.5 days with only the 4 smaller units operating at full capacity. Will the upstream developers be willing to pay for the imported power IPCo will require to serve its customers during the rest of the summer season?

We regard it as the duty of the Legislature to protect ALL of Idaho's citizens' rights to adequate Snake River Water for preserving its fishery, recreation, riparian water fowl, and adjacent raptor values. In addition, the committee and legislature should take note that maintaining IPCo's low electrical rates, due principally to its large hydro generating capacity, is of as great an economic value to Idaho as is the raising of surplus agricultural crops, on which Idahoans as well as all U.S. citizens who pay Federal income taxes, are being taxed in the form of Federal Crop Subsidy payments, or other farm set aside programs, (see our exhibit No. 1), and noting further that in 1984, 677,948 acres in Idaho were held in the Federal PIK or ACR or ACP programs. Furthermore, the Zilog Company of Nampa recently has stated publicly that one of the reasons their plant was located there was due to the low rates of IPCo. Thus, low electrical rates for industry are beneficial for Idaho's economy.

Idaho's electrical ratepayers should not be made the sacrificial lambs of agricultural land developers. Therefore, Mr. Chairman and Committee members, we implore you to hold S.B. 1008 in committee, for by no stretch of the imagination can it be determined its passage will serve the "Public Interest" of most Idahoans. Thank You!

Respectfully submitted, Harold C. Miles

Harold C. Miles
Golden Eagle Audubon Society/Idaho Wildlife Federation testimony (4)

From: Fred R Stewart
Rt. 4, Box 482A
Jerome, Idaho 83338

To: Members of the first regular session of the 48th Idaho Legislature.

Date: Jan. 14, 1985

Subject: Implementation of Governor John V. Evans & Jim Jones Agreement with Idaho Power Company. Do not Implement.

Greetings:

As a defendant in Idaho Power Company v. State of Idaho, Ada County Civil Case No. 42237 (Swan Falls # 1) and in Idaho Power Company v. Idaho Department of Water Resources, Ada County Civil Case No. 81375(Swan Falls # 2) I say to you----

DO NOT IMPLEMENT THIS AGREEMENT

If you do you will place 200,000 holders of Idaho water rights in jeopardy. I refer you to page 41 State Water Plan Part Two. "About 215,000 or 85 percent of the existing uses of water are not on record and are subject to some future determination." This Water Plan was adopted by the Idaho Water Resource Board in December 1976 and declared to be the law by the Idaho Supreme court in Swan Falls # 1. In 1978 the Legislature passed Senate Bill no. 1622 , Idaho code 42-245(see enclosure) "Failure to file claim waives and relinquishes right". The cutoff date for fileing was set at 6-30-1983 then extended to 6-30-1984 then extended to 6-30-1985. To date only 9,000 have filed. If 6,000 more files by 6-30-1985 that leaves the 200,000 up for grabs to any claim jumper. Ken Dunn, State Water Resources Director, has testified that if this AGREEMENT is implemented that he will start adjudication on July 1, 1985, the day after the cut off date for fileing. At this date claim Jumping can commence.

I refer you to the AGREEMENT, page 4 Part 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." What a stranglehold Idaho Power will have on the people of Idaho. All they will have to do on July 1st is obtain a up to date computer read out from Ken Dunn on those that have filed and those that have not filed. You dont think they would do it??? Just considered the 7,000 water permit holders that they filed suit against in Swan Falls # 2. Ninety per cent of who had a superior right to their Dec. 1932 (their license expired in 1970 after 50 years and they were not issued a new one till 1982) They have held these 90% as hostage to try to force this AGREEMENT.

I refer you to Exhibit 4 of the AGREEMENT"AN ACT 61-502B. ALLOCATION OF GAIN UPON SALE OF WATER RIGHT." What SALE???? I also refer you to Exhibit 5 of the AGREEMENT SECTION 2 "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".

WHY SWAN FALLS ONE and SWAN FALLS TWO and this AGREEMENT???????

Answer---TO TAKE SNAKE RIVER WATER TO CALIFORNIA AND ARIZONA

Consider the following facts--

In 1963 after 20 years of litigation the U.S. Supreme Court awarded Arizona half of California's adjudicated right in the Colorado River. These waters will be taken at the completion of the CAP(Central Arizona Project) in the next two years.

cont

In 1964 a substantial number of massive interbasin water transfer schemes were spawned attempting to provide a solution for the water problems of the Pacific Southwest. See enclosure.

Aug. 29, 1964 Governor Robert E. Smylie called a extraordinary session of the thirty-seventh legislature. He, Governor Smylie, explained to the legislature that he had called the session primarily to discuss the outside threat to Idaho's waters and the means to combat this threat. As a result of this extraordinary session the Idaho Water Resource Board was created by Constitution amendment (Article XV, Section 7) They, the Board, was to formulate and implement a state water plan to protect Idaho's water.

Dec. 29, 1976 the State Water plan - Part Two was presented to the Citizens of Idaho.

Jan. 1977 the Legislative bodies of the First Regular Session Forty-fourth Legislature received and rejected the State Water plan. Senator Reed Budge echoed their feelings when he said "ten years ago I helped create the Water Resource Board and entrged them to protect Idaho's waters and now they have done diametrically opposite." The feelings of Senator Budge were so prevelant with the members of both the House and the Senate that they passed H.B. 14 (Section 42-1736, Idaho Code), which provide! that the State Water Plan should not become effective untill approved by the Legislature.

Jan. 1978 the Second Regular Session of the forty-fourth Legislature passed House Concurrent Resolution N. 48 (42-1736A Idaho Code) The Resolution No. 48 addressed each of the 37 policies of the State Water Plan makeing the necessary changes to protect Idaho waters and thusly all of Idaho. OR SO THE MEMBERS OF THE LEGISLATURE THOUGHT.

1977 Senator John Peavey filed a complaint against IPUC(Idaho public Utilities Commission) to force Idaho Power Co. to protect their Hydro Base from being depletated. Ida o Power then filed a Complaint (Case No. 4223?, commonly known as SWAN FALLS ON?) against Joh Peavey and all his petition signatories, the State of Idaho, the Water Resource Board, the IPUC a number Canal Companys, a number of individuals and JOHN DOE. This was a two part complaint. The first part addresed the water that the defendants supposedly was takeing from Idaho Power's hydro base. The second part contested the constitutionality of H.B. 14 that gave the legislature the overview of the State Water Plan. Both parts came before the District Court, Jesse A. Walter presiding, as separate entities. On the first part the Judge granted summary judgment holding, in essence, that the Plaintiff's Swan Falls water rights were subordinated to upstream depletion by the holders of junior water rights. Cross-appeals were therafter filed to the Supreme Court of the State of Idaho who reversed the lower court, holding that Idaho Power's Swan Falls water rights had not previously been subordinated to upstream depletion. and remanding the case for a factual determination as to whether those water rights although fully vested and not subordinated, had nevertheless been abandoned or forfeited, and, if so, to what degree. This action has now been put on a stay of motion until 7 days after this legislative session Both courts ruled that indeed H.B. 14 was unconstitutional and there fore everything that the legislature had done to protect Idaho waters was 'thrown out the window'. I ask you-- Why was Idaho Power Concerned about haveing these protections in the Water Plan???? Take water to California. How??? Consider the following--

Items allready outlined in the first part of this letter as pertaining to the AGREEMENT

cont

the second part of

1982 In his opinion on SWAN FALLS ONE Judge Allen Shepard goes to great length to show that FPC (Federal Power Comm. forerunner FERC) had insisted on subordinated of the Idaho Power's three Hells Canyon dams. But when the FERC issued the 40 years Swan Falls license in 1982 they would not subordinate it. HOW NICE FOR CALIFORNIA. Force the water past Swan Falls but it does not have to go past the three large dams except for the minimum stream flow. (refer to plat)

Dec. 15, 1982 Tom Nelson, lawyer for Idaho power, sent a letter(copy enclosed) to all the defendants counsels in SWAN FALLS ONE in which he says that none of the defendants are going to appeal the courts ruling on the subordination of the three lakes (why should the defendants? why not Idaho Power appeal?)da then they, Idaho Power would like to hook up some irrigation pumps between Swan Falls Damm and the three lower dams. What he does not say is if it is some farmer that wants to hook up a hundred horse power pump or California to hook up enough pumps to convey five to fifteen million acre feet of water to California as shown by the enclosed Modified Snake-Colorado Project plan.

Dec. 28, 1983 Idaho Power filed SWAN FALLS TWO (Case No. 81375) against 7,000 defendants. As stated earlier in this letter 90 percent of them should never been included. Any one with filings before Idaho Power received their 40 year licence in Dec. 1982 should never been included.

1968 a ten year moratorium on water diversion studies was put through the U.S. Congress. In 1978 this moratorium was extended for another ten years to run untill 1988.

1983 Rep Robert Lagomarsino, R-California introduced a bill to lift the rest of the moratorium.

1930's Powers from the Los Angles area legally stole the water from from the Owen River Valley. These are the same Powers that are after our waters.

I ask--Who has been in 'cahoots' with these Powers from California and Arizona to legally steal our waters. They should be apparent to anyone who will take the blinders off and look.

Is it too late to save our water??? Almost but not quite.

What to do???

1. Throw this John Evans, Jim Jones Idaho Power Company AGREEMENT in the trash can where it belongs.

2. ~~Repeal~~ Amend Senate Bill no. 1432 Idaho code 42-245(see enclosure) and thus preventing Idaho Power or any other 'high-binder' from claim jumping 200,000 Idaho water rights.

3. ~~Allow SWAN FALLS ONE to go back to the district court to see if whether or not Idaho Power has lost their rights.~~

4. ~~If the courts find that Idaho Power has not lost their rights~~ then the State should exercise its powers of eminent domain and buy the Swan Falls Dam from Idaho Power and thus put the State back in the drivers seat instead of Idaho Power. (I would like to point out that there is a world of difference in takeing through the powers of eminent domain and takeing through the subordination).

LETS SAVE IDAHO'S WATER FOR IDAHO

Fred M Stewart

filed shall be forwarded to the claimant by the department of water resources. Such claims may be corrected by the claimant only by filing of an amended claim in the same form as the original, which shall be recorded and numbered by the department the same as the original, and for which no additional filing fees shall be required. [I.C., § 42-225b, as added by 1967, ch. 338, § 3, p. 974; I.C., § 42-244, as changed and amended by 1978, ch. 345, § 7, p. 884.]

Compiler's notes. This section was formerly compiled as § 42-225b and was redesignated as § 42-244 by § 6 of S.L. 1978, ch. 345.

42-245. Failure to file claim waives and relinquishes right. — Any person claiming the right to divert or withdraw and use waters of the state who fails to file a claim as provided in section 42-243, Idaho Code, shall be conclusively deemed to have waived and relinquished any right, title or interest in said right. [I.C., § 42-245, as added by 1978, ch. 345, § 8, p. 884.]

42-246. Filing of claim not deemed adjudication of right — Evidence. — The filing of a claim does not constitute an adjudication of any claim to the right to use of waters as between the water use claimant and the state, or as between one (1) or more water use claimants and another or others. A statement of claim filed pursuant to section 42-243, Idaho Code, shall be admissible in a general adjudication of water rights as evidence of the times of use and the quantity of water the claimant was withdrawing or diverting as of the year of the filing, if, but only if, the quantities of water in use and the time of use when a controversy is mooted are substantially in accord with the times of use and quantity of water claimed in the claim. A claim shall not otherwise be evidence of the priority of the claimed water right. [I.C., § 42-246, as added by 1978, ch. 345, § 9, p. 884.]

42-247. Notice of chapter provisions — How given — Requirements. — To ensure that all persons referred to in sections 42-242 and 42-243, Idaho Code, are notified of the provisions of this chapter, the department of water resources is directed to give notice of the provisions of this chapter as follows:

(1) It shall cause a notice in writing to be placed in a prominent and conspicuous place in at least one (1) newspaper published and of general circulation in each county of the state, if there is such newspaper, otherwise in a newspaper of general circulation in the county, at least once each year for five (5) consecutive years.

(2) It shall cause a notice substantially the same as a notice in writing to be broadcast by each commercial television station operating in the state, and by at least one (1) commercial radio station operating from each county of the state having such a station, regularly, at six (6) month intervals for five (5) consecutive years.

(3) It shall cause a notice in writing to be placed in a prominent and conspicuous location in each county courthouse in the state.

Idaho Power Company

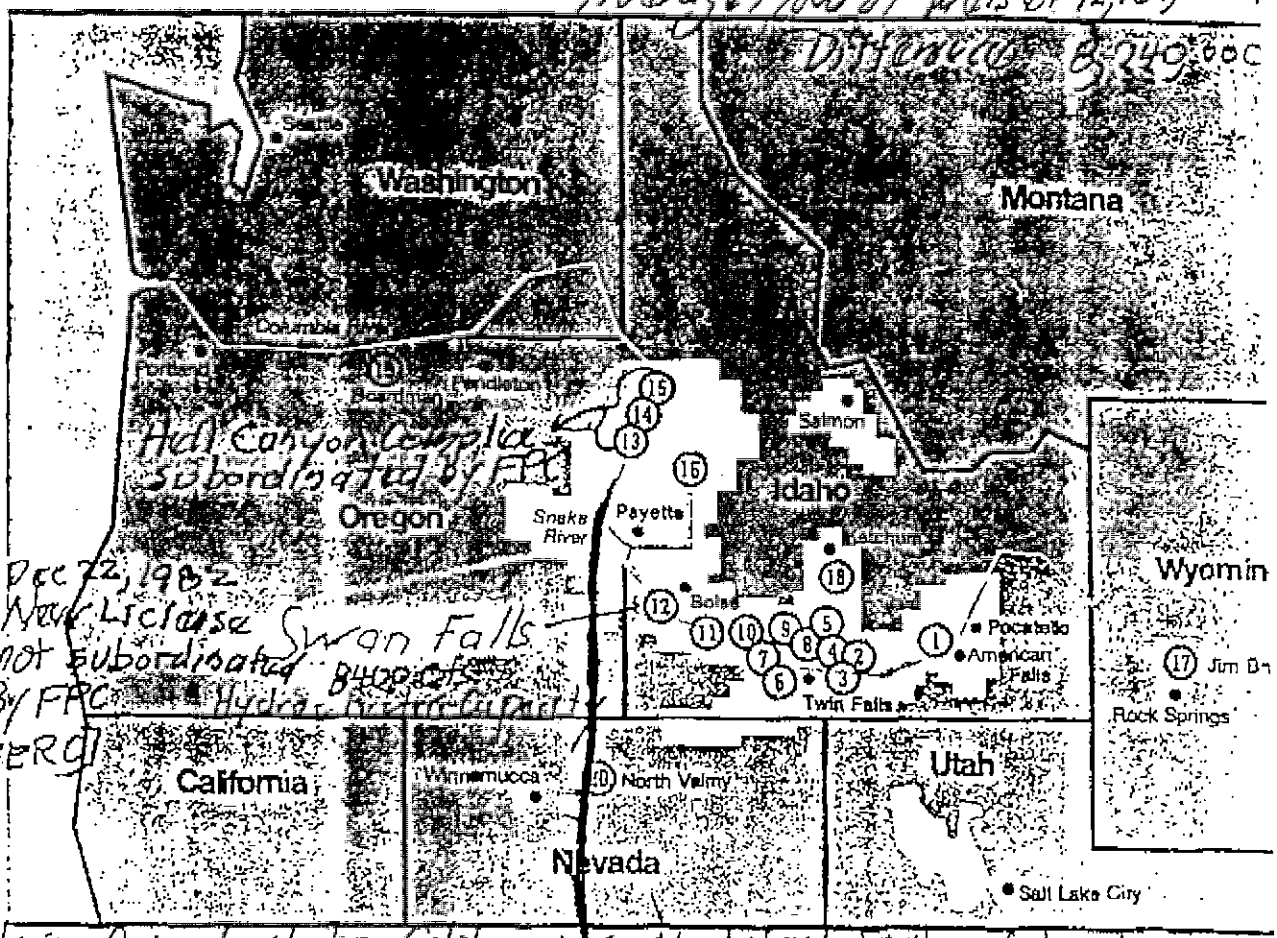
Service Area and Electric Generating Facilities

Min. Stream Flow at Weiser 4750 c FS
or 3,420,000 Acre Feet

Lines in service: Transmission, 4,712 miles;
overhead distribution, 16,843 miles;
underground distribution, 1,128 miles; total, 22,683 miles.

Average Flow at Weiser 12,160,000.

Difference 8,240,000 c



Hell Canyon Complex
Subordinated by FPC

Dec 22, 1982
New License Swan Falls
not subordinated 8420 cfs
By FPC Hydro Power Commission
[FERC]

5 million Acre feet to California ← Modified Snake-Colorado project
of Arizona [Dunn Plan]

Hydro Estimated Capacity

(1)	American Falls	92,340 Kw	(9)	Lower Malad	15,000 Kw
(2)	Twin Falls	10,000 Kw	(10)	Bliss	80,000 Kw
(3)	Shoshone Falls	12,500 Kw	(11)	C. J. Strike	89,000 Kw
(4)	Clear Lake	2,400 Kw	(12)	Swan Falls	12,000 Kw
(5)	Thousand Springs	8,000 Kw	(13)	Brownlee	675,000 Kw
(6)	Upper Salmon	39,000 Kw	(14)	Oxbow	220,000 Kw
(7)	Lower Salmon	70,000 Kw	(15)	Hells Canyon	450,000 Kw
(8)	Upper Malad	9,000 Kw	(16)	Cascade (under construction)	12,800 Kw

Thermal Capacity

(17)	Jim Bridger	698,077 Kw
(18)	Combustion Turbine	50,000 Kw
(19)	Boardman	53,000 Kw
(20)	North Valmy (second unit under construction)	126,950 Kw

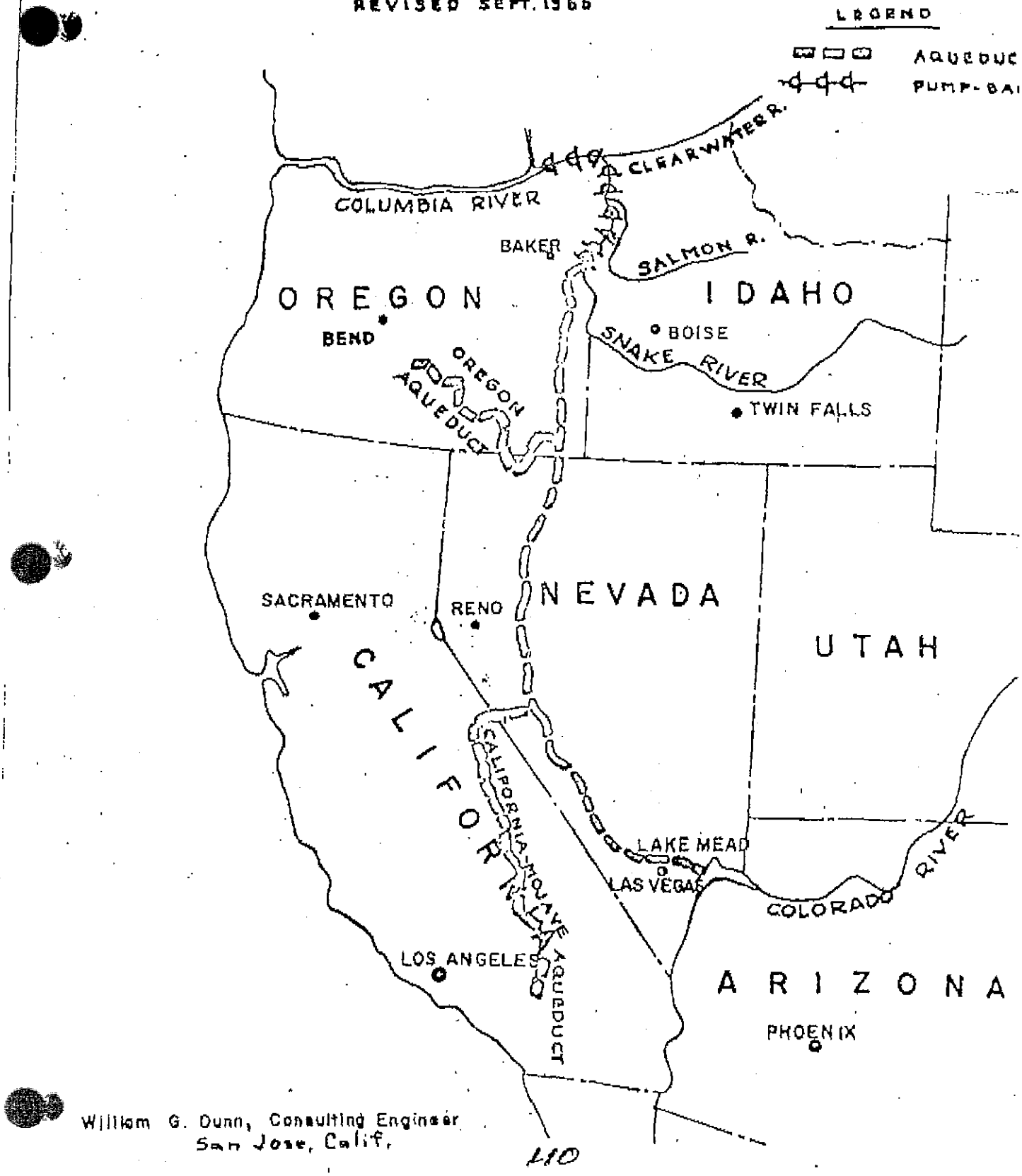
Central Division • Boise, Idaho
Western Division • Payette, Idaho
Southern Division • Twin Falls, Idaho
Eastern Division • Pocatello, Idaho

Idaho Power Hells Canyon Hydro Capacity 1,345,000 Kw
All others 446,000 Kw

MODIFIED

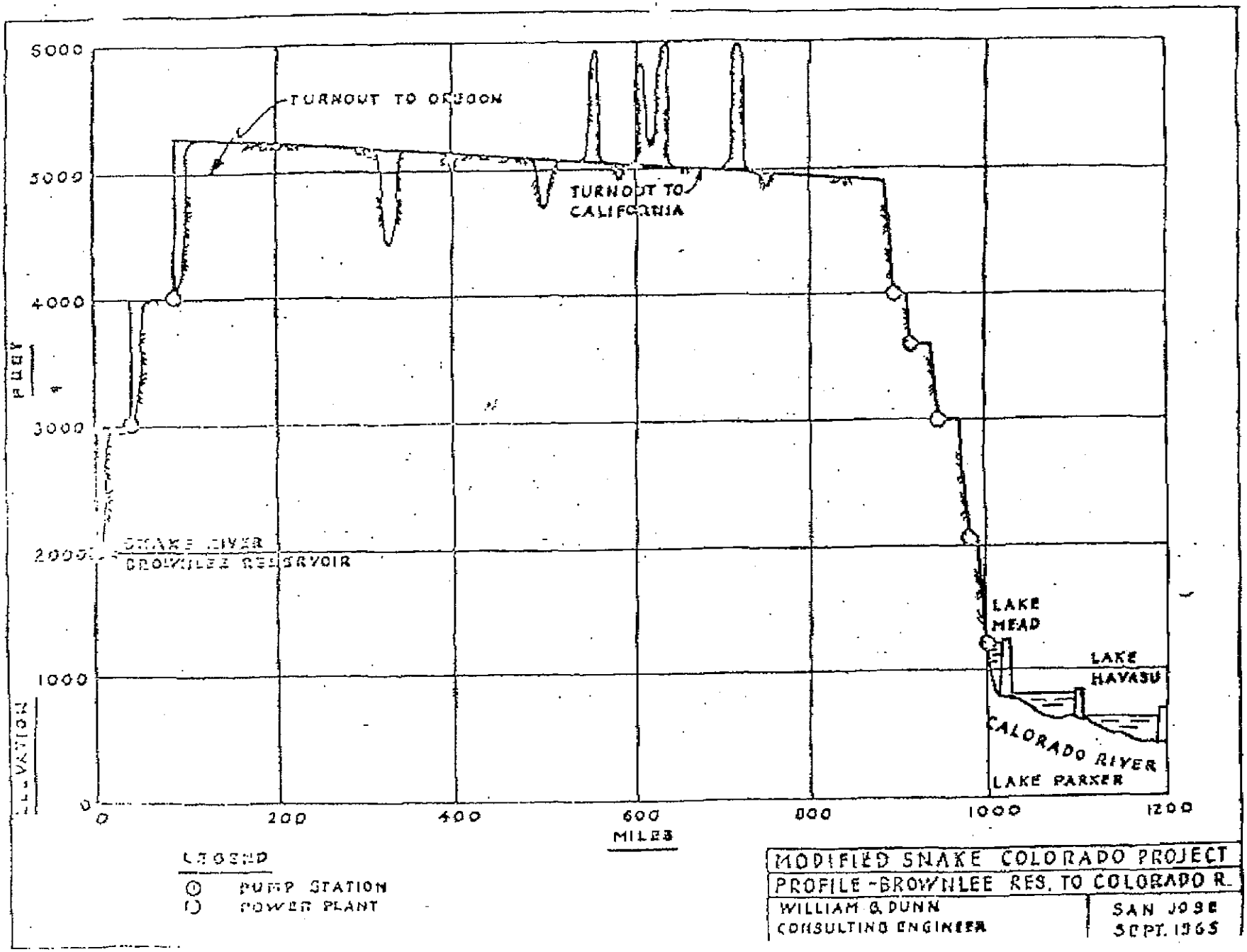
SNAKE - COLORADO PROJECT

REVISED SEPT. 1965



William G. Dunn, Consulting Engineer
San Jose, Calif.

110


5000
4000
3000
2000
1000
0
FEET
ELEVATION
TURNOUT TO OREGON
TURNOUT TO CALIFORNIA
SNAKE RIVER
BROWNLEE RESERVOIR
LAKE MEAD
LAKE HAVASU
COLORADO RIVER
LAKE PARKER
0
200
400
600
800
1000
1200
MILES
LEGEND
PUMP STATION
POWER PLANT
MODIFIED SNAKE COLORADO PROJECT
PROFILE - BROWNLEE RES. TO COLORADO R.
WILLIAM G. DUNN
CONSULTING ENGINEER
SAN JOSE
SEPT. 1965

NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER
Chartered
ATTORNEYS AT LAW
P.O. BOX 1906
TWIN FALLS, IDAHO 83301
TELEPHONE (208) 734-0700

THOMAS G. NELSON
JOHN A. ROSHOLT
J. EVAN ROBERTSON
STEVEN R. TOLMAN
JAMES C. TUCKER

SUN VALLEY-KETCHUM OFFICE
P.O. BOX 23
SUN VALLEY, IDAHO 83353
TELEPHONE (208) 726-4

December 15, 1982

To All Counsel

Re: Idaho Power Co. vs. State

Gentlemen:

The potential for an appeal on the question of the validity of the Hells Canyon FPC license subordination gives rise to a problem for Idaho Power Company. As you know, in December of 1977, the company placed a moratorium on new hook-ups which would deplete flows in the Snake River below Milner and above Hells Canyon.

Given the Supreme Court's decision upholding the validity of the FPC subordination, the basis for the moratorium below Swan Falls disappears, except insofar as it might remain in place while a party appeals on that issue.

The company does have a few requests for irrigation pumping service in that reach of the river. If no one is going to appeal on that issue, then there appears to be no reason not to hook up those applicants. In fairness to them, I would like to avoid a several month delay in letting them know the company's intentions.

I would appreciate hearing from each of you concerning your intention to seek review of the Idaho Supreme Court's decision affirming the validity of the FPC license subordination of the Hells Canyon project. I am not seeking, by this letter, any statement concerning intentions to seek review on other issues.

Yours very truly,

Thomas G. Nelson

THOMAS G. NELSON

TGN:cw

$500 in any one case) caused by the negligent operation of motor vehicles under such appropriations.
(June 25, 1946, ch 472, § 2, 60 Stat. 306.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:
This section formerly appeared as 31 USCS § 693, prior to the enactment of Title 31 into positive law by Act Sept. 13, 1982, P. L. 97-258, § 1, 96 Stat. 877.

CHAPTER 32. COLORADO RIVER BASIN PROJECT

§ 1511. Reconnaissance investigations by Secretary of the Interior; reports; 10 year moratorium on water importation studies

Pursuant to the authority set out in the Reclamation Act of June 17, 1902, 32 Stat. 388 and Acts amendatory thereof or supplementary thereto, and the provisions of the Water Resources Planning Act of July 22, 1965, 79 Stat. 244, as amended, with respect to the coordination of studies, investigations and assessments, the Secretary of the Interior shall conduct full and complete reconnaissance investigations for the purpose of developing a general plan to meet the future water needs of the Western United States. Such investigations shall include the long-range water supply available and the long-range water requirements in each water resource region of the Western United States. Progress reports in connection with these investigations shall be submitted to the President, the National Water Commission (*while it is in existence*), *the Water Resources Council, and to the Congress every two years.* The first of such reports shall be submitted on or before June 30, 1971, and a final reconnaissance report shall be submitted not later than June 30, 1977: Provided, That for a period of ten years from the date of the enactment of the Reclamation Safety of Dams Act of 1978 [enacted Nov. 2, 1978], any Federal official shall not undertake reconnaissance studies of any plan for the importation of water into the Colorado River Basin from any other natural river drainage basin lying outside the States of Arizona, California, Colorado, New Mexico, and those portions of Nevada, Utah, and Wyoming which are in the natural drainage basin of the Colorado River.
(As amended Oct. 3, 1980, P. L. 96-375, § 10, 94 Stat. 1507.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:
1980. Act Oct. 3, 1980, substituted "any Federal official" for "the Secretary".

§ 1528. Authorization of appropriations

(a) [Unchanged]

(b) There is also authorized to be appropriated $100,000,000 *for* construction of distribution and drainage facilities for non-Indian lands plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering and cost indices applicable to the types of construction involved therein from the date of the Colorado River Basin Project Act [enacted Sept. 30, 1968]: Provided, That the Secretary shall enter into agreements with non-Federal interests to provide not less than 20 per centum of the total cost of such facilities during the construction of such facilities. Notwithstanding the provisions of section 403 of this Act [43 USCS § 1543], neither appropriations made pursuant to the authorization contained in this subsection (b) nor revenues collected in connection with the operation of such facilities shall be credited to the Lower Colorado River Basin Development Fund and payments shall not be made from that fund to the general fund of the Treasury to return any part of the costs of construction, operation, and maintenance of such facilities.
(As amended Dec. 20, 1982, P. L. 97-373, § 1, 96 Stat. 1817.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:
1982. Act Dec. 20, 1982, in subsec. (b), substituted the sentence beginning "There is also authorized. . . ." for one which read: "There is also authorized to be appropriated $100,000,000 for construction of distribution and drainage facilities for non-Indian lands.".

REVISED AND SUPPLEMENTED TESTIMONY BY JOHN L. RUNFT
BEFORE THE IDAHO SENATE COMMITTEE ON RESOURCES AND ENVIRONMENT
January 21, 1985

Subject: Testimony regarding Senate Bills 1008 and 1006; Gold Room, Statehouse; 7:00 p.m. - January 21, 1985

Mr. Chairman and members of the committee, for the record my name is John L. Runft and I am an attorney practicing here in Boise, Idaho. This evening I come before you representing Salmon River Hydro Company, Inc., which consists of a group of developers of small hydroelectric facilities under the Public Utility Regulatory Practices Act (PURPA). My clients are presently developing 27 small hydro power projects, all of which are located on the reaches of the little and main Salmon Rivers, and all of which would be directly and materially impacted by the legislation proposed in Senate Bill 1008 and Senate Bill 1006. Let me emphasize for the purposes of this evening's hearing that these projects are located far downstream from the Swan Falls Dam and on a different river system.

In order to lay a proper foundation for the perspective from which my clients view the proposed legislation contained in Senate Bills 1008 and 1006, let me briefly review with you the status of their small hydro power projects. My clients have, every one of them, expended substantial money and time in an effort to develop their hydro electric projects as envisioned under PURPA. All 27 projects have been granted preliminary permits, or exemptions, or have licenses pending under the Federal Energy Regulatory Commission (FERC). Applications for water permits have either been accepted or have been granted on all of the projects by the Idaho Department of Water Resources. In summary, these are serious projects in which considerable engineering and development work has been done and in which citizens of Idaho have expended substantial sums of money and time.

We come before you with no claim of expertise on the subject legislation. We took no part in the ligitation or in the protracted negotiations for settlement of what has come to be called the Swan Falls controversy. Able counsel and technical experts have spent untold hours hammering out not only the settlement between the State of Idaho and Idaho Power Company on the question of subordinative water rights, but also many more hours in an effort to recognize and account for other interests and the rights of the public at large in working out the language of the two bills before this committee. As the witnesses on behalf of the parties to the controversy have made clear, the proposed legislation constitutes the last chapter of the settlement of that controversy, and they have urged that the subject legislation be considered as a "package" with that settlement.

We do not come to attack the fabric of the agreement that has been woven. Frequently, however, a fresh perspective on a "final rough draft" has value. It is, then, in this context of constructive criticism and recommendations for change that we address this committee with regard to Senate Bills 1008 and 1006. I will endeavor to limit my comments to the principal concerns of my clients by making one general observation and seven specific recommendations for change.

My general observation is that one is left with the impression that we have in Senate Bill 1008 a hybrid that may have been better left in two parts:

(a) A bill ratifying the agreements reached in the "Swan Falls" settlement and addressing the issues involved in that controversy;

(b) A bill relating to water rights for hydro power purposes generally and providing for true statewide criteria, standards and procedures for treating those rights.

An example of this dichotomy is the apparent failure of the bill to address those situations where the prospect of depletionary use of water does not exist upstream from water rights granted for power purposes. There are many such areas in our state. My clients with their mountain stream hydro projects fall into that category. The bill provides in Section 42-203B(5) that the Governor or his designee is authorized to enter into water rights agreements 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." The effect of this provision is that all water above the level of minimum stream flow in <u>all</u> rivers and streams in this state must be placed in the trust provided for in subsections (2) and (3) of this section. However, the purposes of the trust are expressly limited to be those of assuring "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." (See Section 42-203B(1)) Clearly, in stream reaches where use for power purposes is the only reasonable beneficiary use available, there is no need to place in trust that portion of the water above minimum stream flow. Such "protection" is not needed nor is it desired by hydro power developers in such circumstances. We submit that water users for power purposes should not be subjected to the provisions of this statute if their water rights are reasonably free from the possibility of upstream depletionary uses.

<u>We recommend</u> that authority be vested in the Governor or his designee to exempt such water rights granted for power purposes from subordination and from the authority of the director to limit such permits or licenses to a specific term. Exemptions for such hydro power water rights could be granted

after an appropriate investigation and hearing by the Department of Water Resources. Provision for such exemptions would properly limit the function of the water trust and the authority of the director to subordinate power water rights and to impose time terms on such rights to the real purposes of this legislation: i.e. to establish a means for handling conflicting depletionary (irrigation) and non-depletionary (power) uses of water in this state.

Let me turn now to some specific observations and recommendations regarding the proposed bills, beginning with Sentate Bill 1008:

1. **Section 42-203B(3).** With regard to setting minimum stream flows in the first sentence of subsection (3), the words "state action" would appear to be too broad.

We recommend that such state action should be specifically defined to mean approval by the Department of Water Resources (or the board) with legislative ratification.

2. **Section 42-203B(6).** We submit that the language granting the director "the authority to subordinate the rights" of license and permit holders is too broad. Even though the 1928 amendment to the Idaho Constitution vested in the state the power to regulate and limit the use of water for power purposes, water rights once granted still constitute property rights. Even though water rights for power purposes are subject to regulation and limitation by the state, such regulation and limitation must be made part of the right at the time it is granted or otherwise the exercise of such authority by the director could face the constitutional objection of taking of property without due process of law.

We recommend that the description of this authority be statutorily set forth so as to provide a guide for the promulgation of subsequent regulations.

3. **Section 42-203B(6).** Vesting authority in the director to limit a permit or license for power purposes to a specific term without any apparent limitation or guidelines is of the greatest concern to my clients. As mentioned above, where the issue of subordination of water rights for power purposes is not an issue, there should be an exemption for holders of water rights for power purposes. The mere existence of this broad statutory "authority to limit a permit or license for power purposes to a specific term" will have severe impact on the capability of small hydro developers to obtain financing. The primary economic reality regarding the small power projects is that the financing is based principally upon the viability of the project and not upon the financial well being of the developer. Central to the financial strength and viability of the project is the unconditional water right. Lenders and investors will simply not invest in a project where the underlying water right is subject to delimitation at any time by act of the director. Short term water rights (around 5 years) to cover the

period of return of capital or pay-off of the development loan will likewise not suffice. Frequently in these projects there are second levels of financing by the developers and their partners which must be taken care of after the institutional lenders have been paid. Such developmental partners cannot be acquired on the basis of short-term power rights.

Also, there are the terms of the power contracts to be considered. Virtually all of the contracts for sale of power with the major power companies necessarily contain severe recapture provisions if there is a default in the supply of power during the term of the contract, which is generally 35 years in length. To put it bluntly, time limitations on the water rights for power purposes will reek havoc on the projects of small hydro developers.

As above stated, we recommend that an exemption procedure be established for power water rights associated with projects on stream reaches were subordination to subsequent upstream beneficial depletionary uses will not be a factor. Such exempted water rights would not be subject to subordination or time limitation. This exemption process would also serve to properly limit the resolution of the Swan Falls controversy to the issues and circumstances actually involved therein.

We recommend that the statutory language be amended to require that limitation of a permit or license for power purposes shall not be for a term less than the term of the standard power purchase contract of the utility designated by the water right holder as the utility with which it will seek a power purchase contract. In the event there be no standard power purchase contract or standard contract term available as regards the designated utility, then, in the alternative, the water rights should be for 35 years, which term appears to be the industry standard.

We strongly urge the committee, at the very least, to provide that limitations of permits or licenses for power purposes to specific terms be for a period not less than 35 years. The impact of shorter terms on the economic viability has been discussed above. These economic ramifications not only negatively affect lenders, co-developers and the ability to perform under the power purchase contract, but also would have a deleterious effect on the ability of the developer to obtain a license from the Federal Energy Regulatory Commission (FERC). Economic viability of projects is one of the primary considerations of license grants by FERC. Moreover, imposition of terms shorter than 35 years on water rights for power purposes would clearly constitute state action severely curtailing the incentive for the development of small hydro power as a renewable resource, encouragement of which development is a primary purpose of the Public Utility Regulatory Policies Act of 1978. 16 U.S.C. 2601. See Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982).

4. **Section 42-203B(6).** The last sentence of this subsection provides that it "shall not apply to licenses which have already been issued as of the effective date of this act."

We recommend that permits should be so grandfathered as well as licenses. Water permits are a defeasible property right which may be terminated if the permit holder does not prove up on the development for which the right was granted. Permittees, such as my clients, have spent considerable sums of money in reliance upon their right to prove up on the permit and eventually secure a license. Likewise, other investors, lenders and governmental agencies (FERC) have acted in reliance upon the viability of these permits. We submit a serious issue of taking without due process of law could be raised by this ex post facto imposition of the provisions of subsection 6 on permits.

5. **Section 42-203C(1).** For clarification purposes, we recommend that the words "for upstream depletionary use" be inserted following the words "appropriate water" in the first line of subparagraph (1).

6. **Section 42-203C(2).** The criteria to be considered by the director in making a water reallocation decision present a problem from the standpoint of what weight to give to each of the listed criteria. The statutory language provides that no single factor "shall be entitled to greater weight." Yet at least two of the five criteria would never be applicable to hydro projects such as those of my clients in the mountain reaches of the Salmon River. Furthermore, the language of the statute would allow the director to give greater weight to factors not listed in his determination of the public interest.

We recommend deletion of the provision limiting the director from giving greater weight to any of the enumerated factors. A public interest determination made by the director under this section must include consideration of the listed factors as well as other matters brought up by the parties which are relevant to the statutory purposes.

7. **Section 42-203D.** This section provides that all permits presently in effect, except for those put to beneficial use prior to January 1, 1985, shall be reviewed for compliance with this new legislation.

As stated above, we recommend that permits already issued should be grandfathered along with licenses. In any event, if these issued permits are to be reviewed, they should all be subject to exemption from the provisions of the proposed legislation in all cases where no subordination issues are reasonably applicable to the uses involved.

The provisions of this section effectively grandfather all permits which can be put to beneficial use prior to July 1, 1985. One assumes the reason for this grandfathering is founded

upon the logic that those permit holders who have spent substantial sums on proving up their permit would be in a position of putting the permit to beneficial use by July 1, 1985. Such presumptions fail badly in the circumstances of small hydro developers, where the beneficial use of the water right cannot be accomplished until final approval by FERC and final agreement with the power company. As discussed above, after-the-fact impositions of restrictions and limitations upon a property right already granted, especially where considerable sums have been expended in reliance upon that right as granted, will most likely raise serious issues of taking property without due process of law.

It is our recommendation that the language of 42-203D be stricten and replaced with a section providing for procedures and standards whereby the director can exercise his authority to subordinate water rights in the future and for the granting of exemptions under appropriate circumstances.

8. Section 1006; Section 42-1805(7). We recommend that the director's authority to suspend the issuance or further action on permits or applications in order to ensure compliance with the provisions of Chapter 2, Title 42, Idaho Code, be limited to certain geographical areas faced with subordination problems (e.g. upstream from the Swan Falls Dam on the Snake River), and limited two certain type of permits or applications (e.g. old irrigation applications).

We recommend that this subsection 7 should be divided into two subsections, one of which would deal with suspension to ensure compliance with the provisions of Chapter 2, Title 42, Idaho Code (which would be limited as above recommended), and the other subsection to provide for suspension on a more broad basis to protect existing, vested water rights and to prevent violation of minimum flow provisions of the state water plan. These latter concerns are of statewide concern and application. The subordination issues contained in Chapter 2, Title 42 are of limited application and should be dealt with differently.

RESPECTFULLY SUBMITTED.

JOHN L. RUNFT, Legal Counsel to
Salmon River Hydro Company, Inc.
205 N. 10th Street - Suite 200
P.O. Box 1960
Boise, ID 83701
(208) 344-6100

Mr. Chairman, Ladies & Gentlemen

I represent Little Pilgrim Irrigation Co, a proposed development laying South & Southwest of the Bell Rapids Project in Elmore, Owyhee & Twin Falls Counties.

~~B~~ The project has been designed to utilize off-stream storage requiring a minimum of 125 CFS pumped from the river on a 12 month basis into a 55,000 acre feet storage reservoir. In addition to the System being totally self-Contained in underground pipe to reduce water losses, a hydro power plant located at the inlet sight of the reservoir would bring a net return of approximately

$1,000,000 N.York and make the project even more feasible.

Our Company feels that the advantages and benefits derived from a project such as this would far outweigh any increased power costs or other losses if there are to late Consider:

1. The increased tax base for the County and state, making more available for education, etc.

2. The increased employment, which would help local businesses and could help reduce money spent for welfare and increase Sales Tax Collections

3. With more money available, Magic

Valley, the State, & all the people would benefit.

Therefore, we as a Company, are 100% in favor of the Swan Falls Agreement and would like to urge those involved to favorably evaluate all the factors and support.

It is hard to give all the credit due to those individuals, whose time and efforts have made this agreement possible. I think it is a job well done and the answer to a situation that has been unresolved for far too many years.

Thank you

Affidavit of Michael C. Orr in Support of Idaho Water Resource Board's Motion for Summary Judgment

Exhibit 30

Minutes of the Senate Resources and Environment Committee (Jan. 25, 1985)

MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

JANUARY 25, 1985 — RM 433, 1:30 p.m.

PRESENT — Chairman Noh, Senators Budge, Little, Sverdsten, Carlson, Chapman, Ringert, Crapo, Kiebert, Beitelspacher, Peavey and Horsch.

Chairman Noh called the meeting to order. He explained the Secretary was working on the previous minutes, so there were none to be approved.

SB 1018 — AQUIFER RECHARGE DISTRICTS

Senator Noh explained this legislation would allow parties to serve as directors or officers of the district even though their place of residence was outside the district.

MOTION — Senator Horsch moved and Senator Ringert seconded the bill go out with a "do pass" recommendation. Motion carried.

Chairman Noh called upon the negotiators to discuss some of the concerns that were raised in the public hearing on January 21.

Tom Nelson I.P. — Mr. Nelson said he would start off the discussion and pointed out he had handed out a written statement in response to certain comments raised at the hearing. (Attached)

Pat Kole — Mr. Kole also handed out a written statement addressing concerns raised by John Runft, who testified at the public hearing on behalf of the small hydropower interests. (Statement attached)

Senator Ringert — Why do you need review authority on existing permits?

Pat Kole — It is our understanding there are enough permits out there, if they were all to be developed, to, in effect, take all of the water available for appropriation in the Snake River system. By reevaluating and looking at those permits in accordance with the new public interest criteria, we believe we will more effectively manage the resource and get additional development over that which could occur if we were to follow a strict priority approach.

Senator Ringert — What makes you believe that?

Pat Kole — I would like to defer that question to Mr. Dunn as he has completed the analysis of those permits.

Ken Dunn Water Res. — The number of outstanding permits, if all developed would lower the minimum flow of the Snake River to the present minimum flow

Ken Dunn — of 3,300 cfs and that is based on those permits on file in 1976. Since that time there have been a number of others that have been approved. Once you have put the lid on others may rush to develop because it is the last opportunity one may have. What we propose here starts making people develop economically that might not otherwise. So there are outstanding applications and permits to do that, if they were all developed.

Senator Ringert — Won't the priority system take care of the existing water rights and protect them or doesn't the priority system work any more?

Ken Dunn — The priority system works if it weren't for the moritoriums and other things involved. The moritorium I'm talking about is the Bureau of Land Management; their management of lands. As you know, the Desert Entry and Carey Act filings have not been approved for a number of years. That builds up a big backlog of things. The water right filings that have been made were a situation where people who were not going with the Carey Act or BLM and some were able to go around that, have developed and they have a later priority than some of these outstanding permits. It is just a fact of life, once you start managing a resource and you start approaching the end of the development, the priority system creates alot of additional problems. Later rights developed, earlier rights undeveloped and no water. If you develop the earlier one you have to go in and shut off the later one.

Senator Ringert — Isn't that the appropriators risk, Ken? He has his land available first, that is one thing, but shouldn't he recognize that if his permit is of a later priority date he runs the risk that he might wind up short of water if someone else comes on line in accordance with the priority of their permit?

Ken Dunn — That is right if you have a normal system operating, which we do not have. We have government in the process of having messed it up to begin with. The decision, right or wrong, was not to create a land rush; therefore, the development didn't occur.

Senator Ringert — Are we then adopting a policy in this state where land and not water sets priority?

Ken Dunn — With this bill we can do it different than that. You start setting the priorities in terms of economic development. For example, of the outstanding permits left, many are for extremely high lift pumping, directly out of the Snake River. Once that occurs you will have an immediate depletion and the amount of land you can develop shrinks dramatically because you don't have recurring flows. Economic expansion in the state is going to be very small. That is one of the reasons why in all of our discussions we have said the best development would be further upstream in the Snake system. The high level pumping is a direct diversion from the River, has an

immediate effect on hydropower and also requires substantial energy to lift the water. If somebody knows, whoever they are, that this is the last opportunity they will have to get water, they will do it now. You start driving the decision not based on good economics, but on fact if I put it in, I might make it, it's worth the change.

Senator Ringert — I personally doubt if there will be any more high lift projects of great consequence, particularly if they are direct diversion during irrigation season so they have to have enough capacity to pump their needs 24 hours a day throughout the irrigation season. Then are we coming to the point where your Department's assessment of economic feasibility, suitability and efficiency is going to determine the priority of use of water?

Ken Dunn — I think we are coming to the point in time in the Snake Basin where there isn't going to be enough water to meet the needs. In this situation we are not coming to the point where my Department is going to make the decision of priority, we are coming to the point where the legislation you pass, the rules and regulations I adopt and you approve, will set some general priorities of what has to be done in order for somebody to be able to use water in the state. It will not be a strict first in time, first in right. No matter what you get, the water is an extremely scarce resource. I think those changes are needed.

Pat Costello — I would just associate myself with the remarks of Mr. Kole and Mr. Nelson. The one additional point I would cover concerns comments at the public hearing, regarding the absence of mention in the public interest criteria in SB 1008 of uses other than agricultural. I would like to point out that you don't even reach those public interest criteria unless you first find that the proposed use would result in significant reduction of water available for hydropower. Most of the other uses, the non-agricultural uses, particularly domestic, commercial, municipal and industrial, are almost entirely non-consumptive and virtually all of those uses would never reach the public interest criteria. The only exception would be some particular industrial applications. Another hydro project would be strictly non-consumptive and the public interest criteria would not even come into play.

Senator Crapo — Did the negotiators get into what is meant by the term "significantly" reduced?

Pat Costello — No we did not. That would be left to be fleshed out by Department regulations as the criteria themselves would have to be further detailed.

Senator Crapo — I wonder if any of the negotiators even have any ideas or guesstimates of what that phrase means. For example, would it be a significant reduction if the well was going to have an impact 10 years down the line of some small amount? Is it defined in the terms of time, terms of amount or what is contemplated by the term?

Pat Costello: The phrase is "individually or cumulatively" with other uses. So, if you had a well pumping from the acquifer which would not impact the river for 10 years but you could project that if there were a number of wells in the same vicinity and that would have a result at Thousand Springs of "x" cfs in year 2000 or whatever, yes, it would be possible in my view to find it a significant impact.

Tom Nelson: I don't think that phrase is much different than the burden the Company faces in the existing lawsuit. I think in order to get relief from the courts it is incumbent on us to show a potential for a significant impact from either an area or group of people or however the court wanted to analysis it. To me when you look at the sophistication of the gauging systems on the Snake, you may be looking at something you could theorically measure in the river. We are now to the point where we are talking about 600 cfs. If you look at 1 cfs out of 600, that could be significant even if cumulative effects would have to be 2, 3 or 4. The problem we have is the hydrology of the basin is such that you can argue an isolated effect in a certain part of the acquifer. So significant reduction was intended to allow people to argue with the hydropower right holder that they are contributing in a significant sense, but then to get more specific than that because of the unknown. I think that is the burden we have right now. If we couldn't show the potential for significant effect in the pending lawsuit I don't think we would get any relief.

Senator Crapo: I am interested in seeing that the 600 cfs that is made available through the trust is made liberally available and I am wondering is that the intent of the negotiators or is it the intent that each time an appropriations is applied for there is going to be alot of hurdles that any prospective developer must go through. Maybe the only way to answer my question is to say yes or no. Do we intend for the legislature to make this something that is liberally available or are we going to make it restrictive? I really don't know what this is saying, but I want to know what we intend it to mean.

Tom Nelson: I can tell you where I came down when we were looking at how this would work. Concerns were expressed that you are going to have the Ma and Pa farm walk in and all of a sudden you have a hearing room full of people in there to oppose a 10 acre addition to their existing farm. That is addressed a couple of ways; (1) The burden on the protestor. The real protection against that kind of an administrative ambush if you will, is just the way the administrative process works. For example, any time you go to the PUC on an electric rate case, in theory, you can start at A and go to Z and litigate in front of the commission every issue that's possible to raise a utility rate case. The fact is, when you get there usually you are down to a couple of things like how are you going to measure the rate base and what is going to be your return on the power rate base. By and large the commission's previous decisions tell you what kind of a rate you are going to get if you want to litigate the other parts of that

rate case, so you don't litigate. In this situation I have the belief, based on conversation with my counterparts and Ken Dunn, that this is how it will develop. We will either have an area wide proceeding or a group entry proceeding. We won't be faced with a situation where every 10 acres comes up for a hearing on economic grounds. So the administrative part is not going to be a problem once we get use to it. On the issue of whether water is liberally or niggardly available, from our standpoint the fox is probably in the henhouse. The decision here is going to be made by a department that for 100 years has had no constraints except the availability of water on proving new developments. So this is a whole new ballgame for them. It is our belief that those decisions will be made on a relatively liberal basis if you can show the economics are there. It is not going to be a closed issue. For example one of the offers I made last year in the subordination fight was that we will subordinate and put these decisions in the Fish and Game Committee. The attitude of the Agency you are before determines alot of how things are done. In my view, if the economics are there for a particular use, it will probably be approved. This is not saying anything against Mr. Dunn and what he has been doing.

Pat Kole — Just to add one comment. As we went through the negotiations we tried to protect the small farmer. That is why we specifically mentioned the family farming tradition. The idea was that if somebody had started a development, they had 120 acres under cultivation but wanted to add 20 or 30 acres, that type of operation would have a little bit of advantage in the statutory process.

Senator Ringert — On the 42-203D review of permits, I am looking at that and also the fiscal note. Now I am sure you have some idea of how many permits are outstanding and what kind of review process will be necessary. Do you have anything for review; if so how long will it take and how much will it cost the state?

Ken Dunn — I do not look at the review as being a detailed review of every permit. We will have some area of claims that are going to be appliciable to alot of permits. The first few will be extensive by area and type and after that, as Mr. Nelson said if you have the answers on most of the things you start getting into the one or two items we will have to look at. My proposal is to raise the fees for water rights so that this will cover the major portion of that cost.

Senator Ringert — Will your present staff be adequate to handle the review and if you already have enough permits issued to use up all the water in the river, when can we expect to have money flowing in from new applications that will help offset some of the cost?

Ken Dunn — We do have sufficient applications to use up the 600 cfs. Timewise I would anticipate by the first of the fiscal year we would have rules and regulations developed with emergency rules so that we can get started and will proceed as rapidly as we can. We are

not going to clear all those up in the first six months. We have on file I would guess 3,000 water rights applicactions. I would not plan on adding any staff because it will be one of those heavy workloads and then back to the normal routine so we will just stretch it out a little longer. As far as fees, we presently have fees to get us through FY 1986 at the rate we have been spending and still are receiving applications.

Senator Sverdsten — Concerning the hydroelectric units on the Little Salmon, how will you proceed with those in relation to the bill. Are you holding them up to an extent; will they be handled soon or just what will you do in that area?

Ken Dunn — For non-consumptive uses such as that, fish farms, and others, we would process them and have been processing them in a normal time limit. This would not hold them up because they don't create problems of consumptive use.

Senator Crapo — At the hearing there was a concern raised if Idaho could protect its water for use in Idaho over other states. I am not sure if this is a legitimate concern or not and if it is possible for other states to get a hold of Idaho water. Would someone tell us how another state or entity outside Idaho would go about getting control of the water. Is this a real threat?

Tom Nelson — We didn't specifically deal with that. There is a court case dealing with ground water and the court made it pretty clear that the state's ability to discriminate in favor of its citizens opposed to citizens of other states is pretty limited. Let's take the specter that is raised about major diversions out of the Snake above the Hell's Canyon project for example. If we had a statute or even constitutional provison that says we flat can't divert water out of the Snake for use in other states, then you are wasting your time to even pass it. Bacically, the state's system of allocation and appropriation will be honored in that situation, as opposed to interstate equitably apportionment suit in the Supreme Court. I think that probably the most effective thing is the minimum flow and other existing rights on the Snake River which would be impacted by that kind of major diversion from the Snake, say by Arizona or California. We didn't address it and I don't think it can be addressed directly. I would point out that both the FCC and state license subordinate for all of the licenses at Hells Canyon, except maybe the Brownlee Reservoir, all say they are fully subordinated for uses only in the Snake River watershed. So anyone proposing a massive diversion for use outside the watershed would run headon into the 35,000 cfs water right at Brownlee and I think that would just about take up the Snake. I don't think it is a real concern given the policies we have in place in terms of minimum flows and existing water rights on the Snake.

Senator Crapo — My understanding then is that basically the state is protected by Idaho Power Company's water rights because they are not subordinated for uses outside the basin.

Tom Nelson — That is right.

Senator Crapo — I have heard figures, that even over a period of years even though there has been alot of water appropriated from the river, flows have not dropped significantly. I don't know if those figures are correct and that is probably a good reason to have a hydrologic study. If this study shows that some of the diversions we are using now, for say agricultural or other uses, appear to somehow recharge the acquifer and if that study shows we had more water available than we contemplate, would that have any impact on the ability of Idaho Power Company's water right to protect us from claims there was extra water available for out of state diversion?

Tom Nelson — My example of the Hell's Canyon water and the protection there is that the water would have to remain in the river in Idaho at least to those points. If it was determined the acquifer could safely yield more than our supposed 600 cfs, I don't see that as having any impact on the Hell's canyon issue. It may have an impact on how much you can develop. The agreement isn't written around the 600 cfs being available for development, it is written around the minimum flow. So if there is more than 600 cfs available for development, its available.

Senator Crapo — So, if I understand correctly, what we pass here today doesn't say that there is 600 cfs available, it says there may be 600, 500, or 1,000 or whatever, but the minimum flow can't drop below the established points at certain times of the year.

Tom Nelson — That is exactly right.

Senator Noh — Would anyone else care to comment on this?

Ken Dunn — I would like to talk about the other out of state diversion and that is water staying in the stream and appropriated by downstream state. The protection you have there is one, the power company rights remain in place until the water is used by users in the state so there is an existing right. Secondly, if there is a call on it, again the best protection is what the downstream water rights are. There have been some equitable apportionate cases in the U.S. and they vary back and forth as to what the court says. In some cases they say each state or each entity has a right to a good portion of that water. In a recent case in Colorado, Colorado wanted to require more efficient diversions downstream to make water available in Colorado and the court said no.

Senator Tominaga — The negotiators talk about protection for the small farmer. This irrigation company is thinking of picking up 5-10 acres here and there but the total would probably add up to 4 to 5,000 acres in a fairly concentrated area. Would that significantly reduce those flows and would that development not take place as by adding the cumulative up it would be significant but taken on an individual basis, it would not.

Pat Costello — It would clearly, to me, meet the significant reduction test and therefore you would have to pass the public interest criteria.

However, I think it would probably fare well under that criteria because the water would be used for a number of small farm operations within the irrigation company and probably fits the small farming preference.

Senator Tominaga: Then that could happen in a cumulative basis all across the state. If there is enough cumulative sooner or later the water will run out. How will that be handled?

Pat Costello: Eventually it will run out, but by giving preference to location primarily upstream and ground water rather than direct pumping, we hope to make it last as long as possible. There is an end point. At that point there won't be an end to development but will be under a market system rather than appropriation system.

Senator Noh: Senator Crapo has raised the question with me of developing some formal legislative intent to be inserted in the record.

Senator Crapo: It is my concern that when I first read the legislation I didn't really understand what the intent was and we have had 3 very good hearings now and think I pretty well understand the intent. I think in the future if this ever gets to court or the Department of Water Resources needs guidance on how to interpret different aspects of this, it would be very beneficial if we, as a committee, develop a statement of intent or legislative purpose to accompany this. I'm not sure this can be accomplished as there may be too much divergence among the committee. It seems if there is a divergence among the committee, it should be resolved now before the bill goes to the floor.

Senator Noh: Asked what the committee's pleasure was regarding this and said he wasn't opposed to appointing a committee of two to work on the intent. He didn't think it would be a good idea to hold the bills in committee since the statement of intent can be placed in the Journal at any time.

There was a fairly lengthy discussion by the Committee on the need and lack of need to develop this statement of intent. Senator Ringert explained that in most cases at the state level we do not establish a good statement of intent. If there are ambiguities in the bill, it becomes a statute and if there is a contest over it and goes to court, one effort in court is to try and figure out what the legislature intended when it used this work or phrase. A statement of intent is very helpful in that respect. In the federal congress, they print a formal committee report that becomes part of the permanent record and those reports go to the floor with the bill. So down the line when someone is looking at the bill, they can at least tell some of the expression when they voted on the measure.

MOTION: Senator Ringert moved and Senator Crapo seconded the legislation be held in committee for one week for the specific purpose of working on a statement of intent. Motion carried 8-4 after a submotion failed.

More discussion followed this motion on the pros and cons, and then Senator Peavey made the following motion:

SUB MOTION — Senator Peavey moved to send SB 1006 and SB 1008 to the floor, seconded by Senator Budge, with a do pass recommendation. The motion failed 6-6.

Once again there was discussion on the motion. Senator Budge said he had never heard of what was being attempted here today. He felt the letter of intent could be done from the floor and the rules allowed for that. Senator Beitelspacher also felt this letter of intent could be accomplished on the floor and felt like it was time to move the bills on. Senator Crapo felt another week for the bills in the committee was not too much when they are so important and if there was a difference of opinion, that was the place it should be discovered and could be worked on.

A short break was taken until Senator Little could be called back to the committee to vote.

The Chairman went over the motions for the benefit of the Committee before voting.

ROLL CALL VOTE ON SUBMOTION — Senators Beitelspacher, Budge, Kiebert, Noh, Peavey and Sverdsten voted YES. Senators Carlson, Chapman, Crapo, Horsch, Little and Ringert voted NO. Motion failed on tie vote of 6 to 6.

ORIGINAL MOTION — Senators Carlson, Chapman, Crapo, Horsch, Little, Noh, Ringert and Sverdsten voted YES. Senators Beitelspacher, Budge, Kiebert and Peavey voted NO. Moton carried 8-4.

Senator Noh appointed Senators Crapo and Peavey to work on the statement of intent and they are to report on a week from today.

RS 11082C1 — AUTHORIZING THE CONTINUATION OF IDAHO'S PARTICIPATION IN THE WESTERN STATES FORESTRY TASK FORCE.

Senator Kiebert briefly explained the legislation which would allow the state to continue to participate in the Western States Forestry Task Force which pursues several subjects important to forest management.

MOTION — Senator Beitelspacher moved and Senator Sverdsten seconded the RS be sent to print. Motion carried.

There being no further business before the committee, the meeting adjourned.

(Tapes are on file of this meeting)

Laird Noh, Chairman

Bev Mulling, Secretary

Supplemental Testimony of Attorney General Jim Jones
Before the Idaho Senate Committee on
Resources and Environment

Subject: Comments of Attorney John L. Runft.

On January 21, 1985, John L. Runft, Attorney at Law, appeared before the Committee and provided an analysis of Senate Bills 1006 and 1008. It is important that the Committee carefully analyze Mr. Runft's testimony because it raises several concerns about the agreement. The concerns raised by Mr. Runft were considered by the negotiators and were either rejected as incompatible with resolution of the Swan Falls controversy or provided for by the mechanisms in the agreement. It is my belief that upon careful reflection and thorough analysis that the Committee will find the points advanced by Mr. Runft have been addressed.

The first general observation made by Mr. Runft is that Senate Bill 1008 represents a hybrid that would be better left in two parts 1) resolution of the Swan Falls controversy and 2) standards and procedures for treating hydropower water rights. Mr. Runft's analysis is correct that the bill addresses both of these problems. Yet, the two problems are one in the same. Further, the reason for the structure of the agreement is to prevent future Swan Falls types of situations from arising and

to provide a mechanism under which current Swan Falls type problems can be resolved without expensive litigation. As pointed out earlier, the Spokane River is a prime example of another potential Swan Falls type controversy. The negotiators believed and still believe that a mechanism must be created in state law to provide a resolution process for addressing these problems.

Mr. Runft's second suggestion is to create an exemption process whereby certain hydropower water rights could be specifically exempted from a subordination provision. Senate Bill 1008 in conjunction with S.B. 1006 does in fact provide this type of mechanism. Under S.B. 1008 the director is granted the authority to specifically implement the 1928 constitutional amendment and limit and regulate hydropower water rights. The director has in fact been subordinating hydropower water rights since 1977 and has issued in excess of 252 such rights. What S.B. 1008 and S.B. 1006 do, is to require the director to set forth in rule and regulation form, standards under which hydropower water rights will or will not be subordinated. Those rules and regulations will, of course, come back to the legislature for their review. In effect, these two bills accomplish precisely what Mr. Runft desires; that is, 1) certainty for the holder of a hydropower water right, and 2) a procedure for evaluating whether or not the director's determination is consistent with the intent of the legislature or rather is arbitrary and capricious.

Mr. Runft's third point is that the words "state action" in section 42-203B(3) is to broad. Unfortunately, the analysis over looks the fact that minimum stream flows can only be set in accordance with state law. The negotiators specifically chose the words "state action" in contemplation of the passing of SJR 17 as this and future legislatures may wish to become more actively involved in the setting or review of minimum stream flows. We believe this latitude should be maintained.

Mr. Runft next submits that the authority to subordinate the hydropower water rights granted to the director is to broad. As noted above, when read in conjunction with S.B. 1006, it is clear that the director will be required to set standards that will be reviewed and analyzed by the Idaho Legislature. We suggest that the provision as currently phrased is adequate.

Mr. Runft next contends that the small hydro developer will be unable to obtain financing if the director has the authority to subordinate hydropower water rights. This argument is factually erroneous. To date, as mentioned above, the Department has issued over 216 subordinated water rights for power purposes. Not one of these projects had difficulty in obtaining financing and in fact many are now completing construction and are obtaining long-term financing.

Mr. Runft's objection to term permits is also without merit. The director has established a policy of issuing water right licenses for power purposes to a term consistent with the

Federal Energy Regulatory Commission license. To date both lenders and investors have found this practice to be satisfactory. We would strongly suggest that the original language remain in place as the factors cited by Mr. Runft are simply not accurate. Additionally, the director should maintain a certain amount of discretion in this area as the future predictability of the need for electrical energy or the need for additional water for agricultural purposes becomes apparent over a period of time in the future.

Mr. Runft next argues that 42-203B(6) should be amended to not affect permits which have been issued as of this date. His analysis overlooks the Hidden Springs Trout Ranch case, see 102 Idaho 623, which allows the State to restrict permits that have not yet been fully developed into property rights. There is simply no taking issue presented by 42-203B(6). The same argument would apply to Mr. Runft's suggested clarification of 42-203C(1).

Mr. Runft next recommends the deletion of the statutory language in section 42-203C(2) relating to the weight to be given to the various public interest criteria. As indicated in the earlier testimony provided by Mr. Nelson to the Committee, it is clear that if a factor does not apply, then the director would not consider it in making a determination. It is critical to a full and fair decision making process that some standard guiding the director in terms of weighing the various criteria be maintained.

Section 42-203D relates to permits not put to beneficial use prior to January 1, 1985. For consistency sake we believe that if agricultural permits are to be re-evaluated in relationship to the new law, water rights for power purposes should also be so re-evaluated.

Finally, Mr. Runft suggests that the authority of the director to suspend issuance of the permits or applications should be limited to the geographical area above Swan Falls dam. Once again this argument overlooks the fact that Swan Falls types of problems are developing throughout the State. Further, before the director may suspend issuance of permits he must make a finding of need, which is subject to judicial review. Thus, it is imperative that this legislature act to alleviate those type of problems now so that further problems are not brought forward and, of course, the resulting legal expenses to the State and private parties will thereby be avoided.

STATEMENT OF IDAHO POWER COMPANY
IN SUPPORT OF SENATE BILL 1008

Presented to the Senate Resources and Environment Committee

January 25, 1985

This statement is not intended to be a detailed analysis of the bill, but to respond to certain comments concerning it. As a preliminary explanation, the combining of certain exhibits to the Swan Falls Agreement into SB 1008 has made it somewhat awkward to define the Company's position on parts of the bill. Idaho Power Company is not required by the Swan Falls Agreement to support Section 2 of SB 1008, found on pages 2 and 3 of the printed bill, because its support of that Section could raise implications of a voluntary transfer of its water rights. In fact, the basis for Section 2 is the State's power to "regulate and limit" the use of water for hydropower purposes.

The application of Section 2 to the Idaho Power Company's rights deserves some discussion. Under the agreement of October 25, 1984, the Company's rights in excess of the seasonal minimum flows of 3900 cfs and 5600 cfs at the Murphy gage are unsubordinated but subject to reallocation pursuant to state law. The trust provisions of Section 2 do not change that status. The rights are still unsubordinated and still protectable from uses not in conformance with state law. The state, as trustee, can protect those rights, and so also can Idaho Power Company, as beneficiary of the trust and as user of the unsubordinated water right.

One further comment on this subject is in order. Testimony has been submitted on behalf of the Attorney General. Those comments were not reviewed by the other parties to the agreement and do not necessarily reflect the views of anyone but the Attorney General.

One acknowledged typographical error is on page 3, of the Attorney General's testimony, to the effect that the Governor, as trustee, would be empowered by Section 2 of SB 1008 to release trust water to new uses that comply with state law. Those decisions would be made by the Idaho Department of Water Resources under the criteria set out in §42-203C Idaho Code, not by the Governor as trustee.

Specific comments on SB 1008 are:

Section 1, Page 1, lines 37-40. A comment was made that this publication requirement was excessive. However, if 10 cfs were applied at the rate of one-half inch per acre, the 10 cfs would irrigate 1,000 acres. This is a substantial development, and is deserving of statewide notice.

Section 2, page 2, lines 42-48. Certain comments which have been made relating to this section are potentially misleading, in the context of due process concerns. A subordination condition inserted prior to development of a hydropower project is much different in effect than one sought to be inserted after license procedures and construction are complete. This distinction needs to be kept in mind when discussing this section, particularly if claims of violation of due process of law are advanced.

Section 3, lines 14-28. Some question was raised concerning the application of the criteria to non-irrigation uses. As written, and as intended by the parties to the agreement, the family farming tradition (iii) and the development cap (V) would have no application to non-irrigation uses and would be ignored in the review process. Irrigation uses not involving the area above Swan Falls also would not be subject to the 20,000 acre cap.

Concern was also expressed that (V) was a directive to allow development of 20,000 acres per year, regardless of the impact of the other criteria. This concern focuses only on he word "conforms" and ignores the words "up to" and also ignores the next sentence which prohibits giving more weight to one factor than another. The interpretation advanced as a matter of concern would give conclusive weight to (V) in derogation of the other factors listed. §42-203C(2)(a)(V) was intended as a cap, and does not compel the approval of any amount of development which does not meet the other criteria listed.

Another concern expressed was over the perceived need to weight the criteria. The criteria are weighted in the bill: "No single factor . . . shall be entitled to greater weight . . .". The weighting established by the bill is obviously that all factors are equal in weight.

The relationship of existing criteria under §42-203A to the criteria set forth in §42-203C has been questioned. §42-203C specifically requires a three-step process:

1. Review of the proposed use under existing criteria, including local public interest; (§42-203A)

2. Determination of the question of significant reduction of water available for hydropower purposes; (§42-203C)

3. Determination of public interest under §42-203C. It is clear that SB 1008 does not, and cannot, adversely affect use of existing local public interest criteria, since that review is required by SB 1008 to be separate from the §42-203C review.

If the existing local public interest standard of §42-203A is inadequate to permit review of all relevant factors, the parties to the Swan Falls Agreement did not address those issues in writing §42-203C. Any claimed inadequacies of existing standards should be addressed by separate legislation.