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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	)	
APPLICATION FOR PERMIT & LICENSE	)	
NO. 01-07011	)	
	)	
APPLICANT:	)	
Twin Falls Canal Company &	)	
North Side Canal Company	)	
	)	
	)	
	)	

	POST-HEARING BRIEFING IN
	SUPPORT OF CANAL
	COMPANIES' PROTEST OF
	TERM LIMIT CONDITION AND
	VOLUMETRIC LIMITATION
	ON WATER RIGHT LICENSE
	NO. 01-7011

COMES NOW, the North Side Canal Company and Twin Falls Canal Company, Petitioners, by and through their counsel of record, the law firm Barker Rosholt & Simpson, LLP, and hereby submit this Post Trial Memorandum following the hearing held on June 2, 2010. The hearing held on June 2, 2010, on the Protest and Petition for Hearing related specifically to the term limit condition and volumetric limitation included in the license issued October 20, 2008.

INTRODUCTION

The North Side and Twin Falls Canal Companies, (hereinafter “Canal Companies”) protested the license issued on October 28, 2008, because the license contained a new element, a new condition, and a substantially altered condition, that had never appeared in the permit issued

for the water right. When a party applies for and is granted a permit to develop a water right, it is anticipated that the party will be able to rely upon the restrictions and limitations contained in the permit to determine the feasibility and cost-effectiveness of developing the project for which the water will be applied to beneficial use. Even a holder of a hydropower water right permit is entitled to assurances that if the project is developed in conformance with the limitations contained in the permit, then the Department will fulfill its duties in a timely manner and issue a license in conformance with the permit.

In this case the Canal Companies made proof of beneficial use of the water right at the Milner hydroelectric facility in 1993. The permit for the Milner project was approved on June 29, 1977, and contained one condition requiring the Canal Companies to install a measuring device as part of the diversion works. Counsel for the Canal Companies, realizing that the permit did not contain a subordination condition, but anticipating that the Department may attempt to re-open the permit to insert such a condition contacted the Idaho Water Resource Board and the Department in 1982 to negotiate the terms of such a condition. An agreement with the Director of the Department as to the scope of the subordination condition was reached in 1987, but was never included in the permit. The Department did not at that time attempt to add a term limit condition to the permit. Neither did it claim that a volume limitation was anticipated for the project.

When the license was issued on October 20, 2008, the Department inserted a new condition, a substantially altered subordination condition, and a volume limitation. The Department had opportunities prior to licensure to either insert the new conditions in an amended permit, or to at least notify the Canal Companies that it intended to add new conditions at the time of licensure. It did neither. Idaho Code §§ 42-203B(6) and (7), and the Department's

Water Appropriation Rule, IDAPA 37.03.08.050.03 (hereinafter “Rule 50.03”) require that if the Director elects to add a term condition to a hydropower water right, the Director must add it to the permit. Waiting to add the term condition until licensure in violation of Idaho Code § 42-203B(6) and (7), and Rule 50.03, constitutes an abuse of the Director’s discretion. The Department’s calculation of the volume limitation added to the license, as demonstrated at the hearing on June 2, 2010, was exercised in an arbitrary and capricious manner, and was intended to serve the additional unauthorized purpose of a secondary level of subordination on the right. For these reasons, the license must be remanded to Director to be amended and re-issued without the term limit condition, and if a volume limit will apply, then the limit reflect the actual production capacity of the Milner hydroelectric plant confirmed by the proof of beneficial use made in 1993.

STATEMENT OF PERTINENT FACTUAL AND PROCEDURAL HISTORY

On March 30, 1977, the Canal Companies filed an application for a water right permit to develop a hydropower project at Milner Dam.¹ The application was approved on June 29, 1977 and a permit was issued containing one condition, requiring the Canal Companies to install a measuring device as part of the diverting work for the project.² The development of the Milner project began during the time that litigation concerning the subordination of Idaho Power’s water rights at its Swan Falls hydroelectric facility was ongoing. Counsel for the Canal Companies was concerned about the effect that a subordination condition in the Milner permit would have on the continued viability of the Milner project. In a letter to Reed Hansen, then Chairman of the Idaho Water Resource Board, Mr. Rosholt explained the necessity for clarification of the Board’s

¹ Affidavit of Shelley M. Davis in Support of Canal Companies’ Memorandum in Opposition to Idaho Water Resource Board, Upper Snake Water Users’ and Ground Water Districts’ Motions for Summary Judgment, already of record in this action, (hereinafter “Davis Aff.”), Ex.3, Application for Permit.

² *Id.*

position on subordination of the Milner project.³ He explained that in 1977 when “Permit No. 01-7011 was issued by the Department...no conditions attached...in other words, no subordination of power to irrigation was imposed as a condition of the issued permit.”⁴ Mr. Rosholt then requested that the Idaho Water Resource Board adopt a policy in support of the Milner hydroelectric project, and impose no subordination condition on the permit.⁵ At that time the Department took no action to inform the Canal Companies that it intended to either condition or not condition the water right with a term limit condition, subordination condition, or apply a volume limitation on the permit or license.

The Canal Companies on at least five occasions between 1977 and 1993, when proof of beneficial use was provided to the Department, re-opened the Milner hydropower permit.⁶ In September 1977, the Canal Companies sought an amendment of the permit to approve “alternate points of beneficial use for power purposes.”⁷ On four more occasion, in 1982, 1987, 1990 and 1992, the Canal Companies made applications for extensions of time to make proof of beneficial use because of delays in the Federal Energy Regulatory Commission licensing process.⁸ All of the extensions were approved by the Department. In response to the 1987 request, the Department modified the permit by including the following subordination provision:

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

³ Davis Aff., Ex. 7, May 3, 1982 letter from Rosholt to IWRB Chairman Hansen.

⁴ *Id.*

⁵ *Id.*

⁶ Davis Aff., Ex. 23, Final Order Issuing License No. 01-7011, Findings of Fact.

⁷ *Id.*

⁸ *Id.*

recharge within the Snake River basin of the state of Idaho initiated later in time than the priority of this permit.⁹

This subordination condition was the only condition that was ever included on the Milner hydropower permit no. 01-7011 after its initial approval in June 1977, despite the permit being reopened at least five times after it was initially approved.¹⁰

The Canal Companies submitted their initial application for a Federal Energy Regulatory Commission (hereinafter “FERC”) license in July, 1984.¹¹ The FERC Order Issuing the license for the Milner hydroelectric project was issued on December 15, 1988.¹² Proof of beneficial use was submitted by the Canal Companies, with an accompanying Beneficial Use Field Examination Report on October 29, 1993.¹³ The Department did nothing more concerning issuing a license until the Canal Companies on at least two occasions, in 2006 and 2007, requested that the Department issue the license. On July 27, 2006, then Director Dreher indicated in a letter that “the issuance of a license for the [Milner hydroelectric] water right is pending.”¹⁴ On October 20, 2008, the Department of Water Resources issued a Final Order issuing the Milner License No. 01-7011.¹⁵ The license contained the new subordination condition, an additional condition not contained in the permit, and a volumetric limitation that was not included in the permit.¹⁶ The Canal Companies filed their Protest and Petition for

⁹ Davis Aff., Ex.9, November 18, 1987 letter from Keith Higginson, Dir. IDWR to John Rosholt, counsel for the canal companies.

¹⁰ The permit was re-opened three times after the Idaho Water Resource Board adopted its resolution requesting term limit conditions to be added to hydropower permits in 1984, and after the adoption of Idaho Code §§ 42-203B(6) and (7) in 1985.

¹¹ Davis Aff., Ex. 10, Excerpted portions of the FERC Application.

¹² Davis Aff., Ex. 12.

¹³ Davis Aff., Ex. 13, Beneficial Use Field Examination Report.

¹⁴ Davis Aff., Ex.15, July 27, 2006 letter from Dir. Dreher to Sen. Coiner.

¹⁵ Davis Aff., Ex.23, Final Order Issuing License

¹⁶ *Id.*

Hearing on November 4, 2008.¹⁷ The Idaho Water Resource Board and certain ground water user entities sought intervention which was granted by the hearing officer.

The Intervenor moved for summary judgment on the question of the extent to which the Canal Companies' hydropower rights at the Milner hydroelectric plant could be subordinated to ground water recharge. This hearing officer issued his Opinion and Order Granting Motions for Summary Judgment and Recommendation on April 29, 2010. A hearing was held on the remaining protested condition and volumetric limitation on June 2, 2010. The Department of Water Resources submitted pre-filed testimony of Mr. Shelley Keen in support of its licensing position prior to the hearing. As part of that pre-filed testimony, the Department attached Exhibit 2, the Idaho Department of Water Resources Appellant's Brief in an appeal of the Third District Court Order remanding the Idaho Power Company license no. 03-7018 to be re-issued without the term limit condition. While some of the legal analysis in the two actions does overlap, the facts of the two actions are obviously different, and this Court should weigh the facts and applicable law of this license appeal independently of the arguments and issues raised in the Supreme Court appeal of the Brownlee hydropower license. This brief summarizes the argument and position of the Canal Companies as a result of the proceedings to date in this action and the hearing concerning license no. 01-7011.

STANDARD OF REVIEW

The actions of an agency will be overturned if the action was taken "(a) in violation of constitutional or statutory provisions, (b) in excess of the statutory authority of the agency; (c) [was] made on unlawful procedure; (d) [is] not supported by substantial evidence on the record as a whole; or (e) [is] arbitrary, capricious, or an abuse of discretion." I.C. § 67-5279(3). The

¹⁷ Davis Aff., Ex.24, Protest and Petition for Hearing.

agency action will be affirmed unless substantial rights of the appellant have been prejudiced.

I.C. § 67-5279(4).

ARGUMENT

The Director of the Idaho Department of Water Resources is not entitled to add a new term condition to a license for a hydropower water right, when the condition was never included in the application for permit, or the approved permit issued for the water right. Both Idaho Code § 42-203B(7) and the Department's own Rule 50.03, very clearly state that a term limit condition must be added to the "permit" for a water right. In this case, the permit was approved with one condition in 1977, and the Department had at least five opportunities initiated by the Canal Companies to review and revise the permit between 1977 and 1993, when proof of beneficial use was made. In 1987 the Director elected to add a subordination condition to the permit in response to one of the applications for extension of time to make proof of beneficial, but no other conditions were added. The Director cannot, fifteen years after proof of beneficial use is made, add new conditions to a license in violation of the Canal Companies' property rights.

Fundamental rules of equity also require the Department to give notice to a water right holder, prior to the time of licensure that the Department may elect to add a volume limitation at the time of licensing which could substantially reduce the amount of water that the licensee will be entitled to use at the project. Unless the Department adopts a rule announcing objective criteria to guide the Department's determination of the appropriate volume limit to apply to a license, any subjective determination based on unannounced and unpredictable criteria that the Department may rely upon to calculate such a limitation, is arbitrary and capricious. The Department's actions to calculate the volume limitation in this action were particularly egregious because the Department argues it was forced to choose at random what it believed to be a

representative water year on the Snake River due to faulty or malfunctioning USGS gauges during the time that proof of beneficial use was made. The volume restriction applied to license no. 01-7011 in this case was calculated and applied arbitrarily and capriciously, and would work to limit the amount of water available for generation at the Milner plant as a second level of subordination, affecting a substantial right of the Canal Companies.

The Department relies upon Idaho Code § 42-203B(6) to support its position that the Director has unfettered discretion to apply a term limit condition to a water right at the time of licensure. Idaho Code § 42-203(B)(6) states:

(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 [July 1, 1985] of this act.

I.C. § 42-203B(6). This code section authorizing the Director to subordinate and add term conditions to hydropower water rights, is also limited and modified by Idaho Code § 42-203B(7) specifically dealing with term limits to be added to hydropower water rights. It states:

(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 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.

I.C. § 42-203B(7), (emphasis added).

The Idaho Department of Water Resources adopted a Water Appropriation Rule, interpreting this statute on July 1, 1993. The rule states:

03. **Applications and Existing Permits That Are Junior and Subordinate.** Applications and existing permits approved for hydropower generation shall be junior and subordinate 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.

IDAPA 37.03.08.050.03, emphasis added. In this case, the Department of Water Resources never added a term condition to the Milner hydropower water right permit. It was not added until the *license* was issued, fifteen years after proof of beneficial use had been made. The Director violated the law when he applied the term condition to the Milner hydropower water right for the first time at licensure in violation of Idaho Code § 42-203B(7), and Rule 50.03, and affected a substantial property right of Idaho Power Company.

A water right holder who has complied with Idaho Code § 42-219 and proven up its water right, is entitled to more than a “mere hope” of a water right license. The licensing process for a hydropower water right is the same statutory process employed by the Director to license any other type of water right. Regardless of the type of the right, the Director has the same mandatory duty to timely issue a license for the water right in conformance with the permit. In

this case, the Director breached his obligation to issue such a license, and instead waited fifteen years after proof of beneficial use had been made by the Canal Companies. The Director then issued a license in derogation of the Department's own rule requiring that a term limit, or subordination condition, be included either in the application for permit or water right permit, and arbitrarily and capriciously calculated a volume limitation that was also not added until licensing of the right. These actions violate Idaho law and constitute an abuse of discretion by the Director of the Department prejudicing substantial rights of the Company. The action must be corrected in the final order.

I. The Director Abused His Discretion When he Added the Term Limit Condition and Volumetric Limitation to the Milner Hydropower Water Right For the First Time at Licensing:

A. The Director Violated Idaho Code §§ 42-203B(6) and (7):

Idaho Code § 42-203B(7) requires that in those instances where the Director elects to use his discretion afforded under Idaho Code § 42-203B(6) to condition a hydropower water right with a term limit, it must be done at the time of approval of the application for permit, or as soon thereafter as is practicable. I.C. § 42-203B(7). The Department's water appropriation Rule 50.03 also requires that any term limit condition that the Director may wish to impose on a hydropower water right be included at the time of permitting. IDAPA Rule 37.03.08.050.03. In this case, despite having at least five opportunities to add such a condition after the initial application was approved, the Director instead included the term limit condition and volumetric limitation for the first time at licensing. The Director's failure to follow the law of the state of Idaho and his own administrative rule to include such a condition on the permit amounts to an abuse of discretion and should be corrected through the final order. Furthermore, the term

condition purports to allow the Director to cancel the Canal Companies' Milner hydropower water right entirely, which prejudices a substantial property right of the Canal Companies. Therefore, the license must be remanded to be re-issued without the term condition.¹⁸

Idaho Code § 42-203B(7) was adopted as part of Idaho Code § 42-203B contemporaneously with § 42-203B(6). Where the language of a statute is unambiguous, the fact finder is bound to look only to the literal words of the statute, without resort to outside materials in order to construe the statute. *In re Idaho Department of Water Resources Amended Final Order Creating Water District No. 170, Thompson Creek Mining Co. v. Idaho Department of Water Resources*, 148 Idaho 200, 210-211, 220 P.3d 318, 328-329 (2009), *citing Friends of Farm to Market v. Valley County*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002). During the hearing in this case the Department attempted to convince this Hearing Officer to read Idaho Code § 42-203B(6) in a vacuum without the benefit of the accompanying code section, Idaho Code § 42-203B(7).¹⁹ However, Idaho Code § 42-203B(7) expressly dictates the manner in which the Department may apply term limits to hydropower water rights.

Idaho Code § 42-203B(6) gives the Department the authority to either condition, or not condition a hydropower water right permit or license by adding a subordination provision or term limit condition. However, Idaho Code § 42-203B(7) expressly requires that where the Department decides to add a term limit condition, the condition must conform to one of the prescribed time periods set forth in the code section, and it must be added to the permit at the time of issuance of the permit, or as soon as is practicable thereafter. I.C. §§ 42-203B(6) and 42-

¹⁸ The Canal Companies will not argue their interrelated position concerning the subordination condition that was the subject of this hearing officer's April 29, 2010, Opinion and Order Granting Summary Judgment in this brief. That matter is stayed pending the resolution of these proceedings concerning the term limit condition and volumetric limitation and will be addressed by the Canal Companies on Reconsideration when that subject is reopened in this matter.

¹⁹ Exhibit 1 attached hereto, Transcript of Hearing on Water Right Protest No. 01-7011, held June 2, 2010 (hereinafter "Transcript") p. 102, l. 1-p. 104, l. 19.

203B(7).²⁰ “Language of a particular statute need not be viewed in a vacuum. And all sections of applicable statutes must be construed together so as to determine the legislature’s intent.”

Friends of Farm to Market v. Valley County, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002), *citing* *Lockhart v. Dept. of Fish and Game*, 121 Idaho 894, 897, 828 P.2d 1299, 1302 (1992), additional citations omitted. “Statutes and ordinances should be construed so that effect is given to their provisions, and no part is rendered superfluous or insignificant.” *Friends, supra*, 137 Idaho at 197, 46 P.3d at 14 (2002). The authority to modify a hydropower water right holders rights by inserting a term condition is expressly limited by the time requirements in Idaho Code § 42-203B(7).

The Director, if he chooses to condition a hydropower water right with a term limit pursuant to Idaho Code § 42-203B(6), must add the condition the permit, or add it as soon thereafter as is practicable. In this case, despite having had five opportunities to add a term limit condition, and even exercising his authority to add a subordination condition pursuant to Idaho Code § 42-203B(6) in 1987, the Director never added the term condition to the permit. The Director’s discretion to condition hydropower water rights pursuant to Idaho Code § 42-203B(6) does not extend so far that he can exercise that discretion in violation of the law. For that reason, the term limit condition must be removed from the Canal Companies’ hydropower water right no. 01-7011.

B. The Director Violated Rule 50.03:

The Department also violated Rule 50.03 when it issued the license with new conditions never previously included in the permit for water right no. 01-7011. On July 1, 1993, the

²⁰ The requirement for inclusion of all terms and conditions that a particular water right holder will be subject to is necessary at the time of permitting because that permit will evolve into a water right license. A license is defined by the Department as “[t]he certificate issued by the director in accordance with Section 42-219, Idaho Code, 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*.

Department promulgated water appropriation Rule 50.03, the rule that governs the inclusion of subordination and term conditions on hydropower water rights. It states:

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.

IDAPA 37.03.08.050.03, emphasis added. The rule represents the Department's interpretation of how it would generally apply Idaho Code § 42-203B(6) and (7). The rule remains in effect as promulgated in 1993 and the Department has not amended it. "Administrative regulations are subject to the same principles of statutory construction as statutes." *Stafford v. Idaho Dept. of Health and Welfare*, 145 Idaho 520, 533, 181 P.3d 456, 459 (2008). Therefore, an unambiguous rule should not be construed, and each word must be given its plain and ordinary meaning. *Permit No. 36-7200 In the Name of Idaho Department of Parks and Recreation v. Higginson*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992). Further, statutes and rules should not be read in such a manner as to render any language thereof inoperable or superfluous. *In re Idaho Department of Water Resources Final Order Creating Water Dist. 170*, 148 Idaho 200, 210-211, 220 P.3d 318, 329 (2009), *citing Moreland v. Adams*, 143 Idaho 687, 690, 152 P.3d 558, 561 (2007), additional citations omitted. In this case the rule states that a permit "shall contain" a term limit condition, if one is to be applied. In this case, the Milner hydropower permit never contained a term limit condition, and therefore, the Director is precluded from adding such a condition at licensing.

Rule 50.03 states “[a] permit for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B, Idaho Code.” *Id.*, emphasis added. The Director cannot use the terms water right permit and a water right license interchangeably. The Department’s Beneficial Use Examination Rules, IDAPA 37.03.02, define a water right license as “[t]he certificate issued by the director in accordance with Section 42-219, Idaho Code, 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. In contrast, a permit is defined as “[t]he 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.” IDAPA 37.03.02.010.22. The Department’s Water Appropriation Rules, also set forth a number of additional circumstances under which the Director may modify or add additional conditions to a permit. See IDAPA 37.03.08.050.05-12. There is no rule or authority that gives the Director the discretion to add a new condition to a water right license that had never been included on the permit.

A review of the records of other hydropower water right licenses discloses that the Department understands that its authority to either condition or not condition a hydropower water right with subordination or term limit conditions must be exercised when the permit is issued, or as soon thereafter as is practicable, but at the very least, the license cannot contain conditions that have never before been added to the permit. In support of its position concerning the inclusion of a term limit condition on the Brownlee hydropower license no. 03-7018 for the first time at licensing, the Department issued a Statement of Position, in lieu of submitting to discovery. In it the Department stated:

The term review condition on Water Right License 03-7018 is used on water right licenses for power generation if the project requires Federal Energy Regulatory

Commission (FERC) approval. This particular term review condition, modified to refer to the specific FERC authorized project or license, also appears on at least 6 water right licenses issued by the Department. (See attachment 1.) The Department has employed a similar term review condition on 32 water right permits requiring FERC approval. (See Attachment 2.)²¹

A review of the Idaho Department of Water Resources back files for the 6 licensed hydropower water rights identified by the Department as containing the term limit condition indicates that for all of the hydropower water rights identified, except Idaho Power's water right no. 03-7018, and the Milner hydropower water right 01-7011, the term review condition was included in the permit initially issued by the Department, or was added sometime between the permit being issued, but before licensure. The Department has only attempted to issue a term condition at the time of licensing for two water rights, the Milner license, and license 03-7018, where the condition was declared to be added in violation of the law by a Washington County District Court.²²

The first license identified in the Department Statement of Position is hydropower water right no. 29-07578.²³ The application for the water right was submitted on March 31, 1981, prior to the adoption of Idaho Code §§ 42-203B(6) and (7). The permit for that water right was issued on September 24, 1990, and contained condition no. 13, a term limit condition that "[t]he diversion and use of water under this permit and any license subsequently issued is subject to

²¹ Exhibit 2 attached hereto, Department's Statement of Position Concerning water right no. 03-7018, emphasis added.

²² Application of the term limit condition is unconstitutional as the language inserted is vague, indefinite, arbitrary and capricious, and reserves the department broad unlimited discretion in the exercising of its powers and canceling of Idaho Power's license on a whim, without due process of law. To prove a statute is unconstitutional "as applied", the party must only show that, as applied to the defendant's conduct, the statute is unconstitutional. *State v. Korsen*, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003). Idaho Code §§ 42-203B (6) and (7) mandate that if the director is going to limit a permit or license for power purposes to a specific term the director shall designate the number of years through which the term of the license shall extend taking into consideration a minimum of four statutory factors. I.C. § 42-203B(7). The statute does not allow the director to arbitrarily determine when to review the license, and furthermore does not give an indefinite timeframe in which the license will be reviewed or modified. The director could not have given himself any broader terms in which to exercise his discretion to condition the license, including a provision allowing him to cancel a permit, "*upon appropriate findings relative to the interest of the public,*" which is vague at best, and does not provide any type of due process.

²³ *Id.*

review by the Director on the date of expiration of any license issued by the Federal Energy Regulatory Commission.”²⁴ It goes on to state that upon appropriate finding of the Director that the public interest requires it, “the Director may cancel all or any part of the authorized use herein and may revise, delete or add new conditions under which the right may be exercised.”²⁵ The license was issued on June 4, 2001 containing a modified condition at no. 8. The term limit condition was added to the permit prior to the Department’s adoption of Rule 50.03.

The next license identified was for hydropower water right no. 29-7772. It too contained the term limit condition at no. 13 in the permit issued September 24, 1990. The language of the term condition was identical to the language contained in the permit for water right no. 29-7578. The application for this water right was made on August 1, 1984, before the adoption of Idaho Code §§ 42-203B(6) and (7).²⁶

Two additional licenses, which turned out to be companion licenses, identified as containing the term limit condition were for water right nos. 32-7128 and 32-7136. These water right applications were protested by local interested individuals.²⁷ The Permit issued as a result of the conclusion of the protest proceedings and the Order issuing the permit included a term condition, at no. 11, for both permits, on March 27, 1985.²⁸ It was added prior to the adoption of Idaho Code §§ 42-203B(6) and (7), and prior to the adoption of Rule 50.03.

The final hydropower license identified by the Department as containing the term limit condition, water right no. 47-7768, also included the term condition in the permit when it was issued on October 31, 1986.²⁹ The term condition was added soon after adoption of Idaho Code

²⁴ Exhibit 3, Excerpted Portions of Water Right backfile for no. 29-7578.

²⁵ *Id.*

²⁶ Exhibit 4, Excerpted portions of water right backfile for no. 29-7772.

²⁷ Exhibit 5, Excerpted portions of water right backfiles for nos. 32-7128 and 32-7136.

²⁸ *Id.*

²⁹ Exhibit 6, Excerpted portions of water right backfile for no. 47-7768.

§§ 42-203B(6) and (7), but before adoption of Rule 50.03. The license was issued on March 6, 2008, and contained the term condition, slightly modified from the original version, as condition no. 5.³⁰

Additional review of the historical records of the Idaho Department of Water Resources demonstrates that the Department understood that the term and subordination conditions contemplated by Idaho Code § 42-203B(6) and (7) were required to be included in the permits prior to time of licensure, even if that required re-issuing an amended permit. For hydropower water right no. 01-7010 issued to the North Side Canal Company, the Department entered an order amending the permit that had been issued June 29, 1977, to add a term condition and a subordination condition to the already issued permit.³¹ In that order the Department specifically states:

WHEREAS, permit no. 01-7010 was issued prior to the date of the Idaho Water Resource Board's resolution of July 25, 1984 and is not conditioned with the language making the permit or subsequent license which may be issued subject to periodic local public interest review by the Director and to other conditions of approval traditionally placed on hydropower permits[.]

Id., emphasis added. In this statement the Department implicitly recognizes that a subsequent license must “confirm[] 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. In order to accomplish this goal, the Department notified North Side Canal Company, long before issuance of the license, and put the permit holder on notice that the license would be subject to additional conditions being inserted in the permit.

Finally, the Department issued a license for Idaho Power Company hydropower water right, no. 65-12096, on November 8, 1999, for its Cascade hydropower facility. Similarly to the

³⁰ *Id.*

³¹ Exhibit 7, Order in the Matter of Permit No. 01-7010 in the Name of the North Side Canal Company, Ltd.

Milner license, the Cascade license included a term limit condition in the license that had not been contained in the water right permit.³² Idaho Power petitioned the Department for reconsideration of inclusion of the term limit condition in the water right, arguing the constitutional amendment allowing regulation of hydropower water rights could not have intended to strip the water right holder of the underlying property value of the water right even if it could no longer be used for hydropower purposes, as I.C. § 42-203B(6) indicates may be possible. Importantly, the Department granted the Idaho Power's petition and re-issued the license without the term condition.³³ This is yet another example of the Department's understanding that its authority to either condition or not condition a hydropower water right with subordination or term limit conditions must be exercised when the permit is issued, or as soon thereafter as is practicable, but at the very least, the license cannot contain conditions that have never before been added to the permit.³⁴ Although the facts in this case are similar to the Cascade license, the Department has nonetheless attempted to add a term condition to the Milner license in violation of the law. The Department's inconsistent application of the law involving hydropower water right licenses cannot be sustained.

Both Idaho Code § 42-203B(7) and the Department's Rule 50.03 plainly state that a term condition to be applied to a hydropower water right must be included in the permit. The permit issued for the Milner hydropower water right no. 0-7011, approved on June 29, 1977 contained one conditions, requiring the installation of a measuring device.³⁵ In 1987, as a result of discussions beginning in 1982, and in response the Canal Companies application for an extension

³² Exhibit 8, Excerpts of the backfile for Cascade Hydropower water right no. 65-12096.

³³ During the June 2, 2010, hearing Mr. Keen recalled being involved with the Cascade petition for reconsideration, but was not privy to the determination to remove the term limit condition. Exh. 1, Transcript, p. 82, l. 7-p. 87, l.4; p. 104, l. 5-p. 105, l. 10.

³⁴ Importantly, the permit at issue in this proceeding, 03-7018 did include a subordination provision at the time the permit was issued allowing the Respondent to develop the project with "eyes wide open" as to that provision.

³⁵ Davis Aff., Ex. 3.

of time to demonstrate beneficial use, the Department added a subordination condition.³⁶ No amended permit was ever issued for the water right adding a term condition.

Where an agency's interpretation and application of the statute and rule contradict the clear and unambiguous expression of the legislature, then the agency's construction will not be followed. *Permit No. 36-7200 In the Name of Idaho Department of Parks and Recreation v. Higginson*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992), *also see J.R. Simplot Co. v. Idaho State Tax Commission*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991). Idaho Code §§ 42-203B(6) and (7) authorize the Director to either condition, or not condition, a hydropower water right with a subordination or term limit condition. If the Director elects to use his discretion to add such a condition, it must be done at the application for permit or permit stage of the process. The plain meaning of Rule 50.03 further requires the Department, if it intends to include a term condition in the license, to first include such a condition in the permit. The history of the Department's application of the statute and rule, the public policy of water rights appropriation, and the laws of the development of water rights in the State of Idaho, which assure to a water right holder who has complied fully with the terms of their water right permit a license confirming such use, also require that the license be remanded and issued again containing no term limit condition.

C. The Director Violated Idaho Law Concerning the Issuance of New Conditions in Licenses:

One important question before this Hearing Officer, is at what point does an applicant, permittee, or licensee, obtain a protectable property interest in its water right, one that the Department cannot fundamentally alter at the time of licensing. The Department invites the hearing officer to interpret § 42-203B(6) by itself without reference to the long line of pre-

³⁶ Davis Aff., Ex. 9.

existing statutes governing water rights appropriations representing the history of water law and the licensing process in Idaho. Nothing in Idaho Code § 42-203B, and in particular § 42-203B(6), can be interpreted as negating or rendering moot the other statutes or existing case law applying to water right appropriations. The law of the construction of statutes, and cases interpreting statutes, requires this Court to presume that Idaho Code § 42-203B was intended to work in unison with the pre-existing law of the state. The instant case implicates more than the statute, and involves the extensive history of water law, water rights, the permitting and licensing processes, and the overall policies enmeshed with the Idaho Constitution, Idaho Code, and the case law interpreting the same, which has developed over a hundred years.

Statutory interpretation cannot be read in a vacuum or in isolation as the Department urges. *Lockhart v. Dept. of Fish and Game*, 121 Idaho 894, 828 P.2d 1299 (1992). It is assumed that when the legislature enacts or amends a statute it has full knowledge of the existing judicial decisions and case law of the state. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 797 P.2d 1385 (1990). Furthermore, it is presumed that the legislature does not intend to overturn long established principles of law unless an intention to do so plainly appears by express declaration or the language employed admits of no other reasonable construction. *Id.*

The Canal Companies fully complied with the conditions of their permit, and the law of the state of Idaho when the Companies submitted proof of beneficial use for the project in 1993.³⁷ Nevertheless, the Director elected to add a new *discretionary* condition at the time of licensing in 2008. It is *discretionary*, because it is a condition that is not mandated to be inserted. Rather if the condition *had not* been inserted, the license would still comply with the law pursuant to I.C. §§ 42-203B and 42-219. The Department argues that because the hydropower water right no. 01-7011 is for hydropower purposes it can ignore its duties under

³⁷ Davis Aff., Ex. 13.

I.C. § 42-219. However, Idaho case law interpreting the development of a water right dictates otherwise.

Many Idaho cases suggest that when a water right permittee makes an application for a water right, or re-opens its permit prior to submitting proof of beneficial use, that party has nothing more than an inchoate right subject to subsequent legislation and conditions, but once that party has done all that it can do to be in full compliance with Idaho Code § 42-219, a water right holder has more than “a mere hope” that the license will issue in conformance with the terms of the permit. The matter was addressed at length in the Canal Companies Memorandum in Opposition to Idaho Water Resource Board, Upper Snake Water Users’, and Ground Water Districts’ Motion for Summary Judgment at pages 36 through 42. The Canal Companies incorporate that argument herein.

In their appellate briefing of the Washington County District Court’s decision on Idaho Power Company’s Brownlee hydropower license, submitted as part of the pre-filed testimony of Shelley Keen in this action, the Department of Water Resources cited to *In Re SRBA Case No. 39576 (Subcase No. 36-08099)*, Memorandum Decision and Order on Challenge; Order on State of Idaho’s Motion to Dismiss Claimants Notice of challenge, Snake River Basin Adjudication District Court Subcase No. 36-08099 (Jan. 11, 2000), (Addendum K), for the proposition that until a final license is issued for a water right, the water right represents nothing more than a mere hope for a water right. The case involved a hydropower water right for River Grove Farms, Inc., and contrary to the Department’s insistence, does not stand for the proposition stated by the Department. The application for permit by River Grove Farms, Inc., (hereinafter “River Grove”), was approved by the Department in October 1983, *containing* a subordination provision imposed by the Department. Addendum K, at p. 17. The SRBA court on review

stated, “[u]pon approval of the permit, River Grove’s predecessor-in-interest undertook construction of its hydropower facility with full awareness of the subordination condition imposed by IDWR. The permittee did not seek judicial review (of either the permit or the license) in accordance with the APA.” *Id.* at 17, (emphasis added).

Accordingly, the facts in *River Grove* are distinguishable from the facts in this case. Contrary to the applicant in *River Grove*, the Canal Companies were not provided any indication at any time prior to licensing that the Director would elect to exercise his discretion to add a term limit condition at licensing, in violation of Idaho Code §§ 42-203B(6) and (7), and Rule 50.03. This distinction is important, because the Department relied upon *River Grove* for the proposition that the court ruled that a water right vests when a license is issued. However, what the Department cites to is merely dicta and had no bearing on the outcome of the case. In deciding the case, the court actually concluded:

River Grove was issued a permit to appropriate water for hydropower purposes with the condition that any rights acquired under the permit would be subordinated to future rights for any other purpose. River Grove constructed its diversion works and hydropower facility in light of this condition. If River Grove was aggrieved by IDWR’s action, it should have protested this action when the permit was issued, and certainly before it broke the first soil in construction...

Addendum K, at p. 28. The court held that River Grove’s assertion was an improper collateral attack on the license, and that the applicant failed to exhaust its administrative remedies before the Department. As distinguished from the present case, the applicant in *River Grove* had notice from the outset of the conditions placed upon its permit and chose to move forward regardless. The rest of the court’s decision is simply dicta, which contradicts the SRBA court’s ruling in the case *Riley v. Rowan*.

Additionally the *Memorandum Decision in Riley v. Rowan*, issued by SRBA Judge Hurlbutt in 1997 continues to support the Canal Companies’ position that it had more than a

mere hope that the Department would issue a license in conformance with the permit.³⁸ In *Riley v. Rowan*, the application for a water right was made in 1978. Proof of beneficial use was made by the applicant in 1983, the beneficial use field report was submitted in 1983, and license issued in 1995. In *Rowan* the Department did not issue the license until 12 years after proof of beneficial use had been submitted, which was problematic because the license was issued in the names of the original applicants, who were then deceased, and the status of the when the permit became a license would impact the rights of the beneficiaries and parties in the case. Ultimately, the court concluded that, “The failure of IDWR to perform its statutory duty to issue the license in a reasonable time requires the finding that Water Permit 22-07280 became a license by operation of law,” on the date the applicant submitted proof of beneficial use in 1983. The Court reasoned:

IDWR’s breach of duty in issuing the license for this right caused the right to remain in a state of legal limbo. By holding the right in the permitting process, IDWR denied it the statutory recognition and benefits conveyed to licensed rights under Idaho Code § 42-220. IDWR’s failure to timely exercise its duty left the permitted water right as a personal property interest, thereby denying it the real property right status to which it was legally entitled. Had IDWR met its duty, the ownership dispute may never have ripened because a license would have issued and become appurtenant to the land. This dispute has spawned lawsuits in Madison County and the SRBA an administrative proceeding before the IDWR. Had IDWR fulfilled its statutory obligation, none of these actions, with their substantial expense, would likely have been filed.

IDWR’s breach of its duty to issue licenses in a timely manner takes on constitutional dimensions as well. The Idaho Constitution holds inviolate the right to appropriate water. Idaho Const. Art. 15 § 3. The lengthy delay in issuing this license denied the water users their constitutional right to appropriate water. By leaving the right in the vulnerable permit status, it is not accorded the statutory recognition of a fully protected water right, as it would be when licensed.³⁹

³⁸ Davis Aff., Ex. 38.

³⁹ Davis Aff., Ex. 38.

Judge Hurlbutt recognized that the duty of the department was to issue a license in a timely manner. He further understood that the failure to do so prejudices a substantial right of the water right holder.

In this case the Director failed to add the new condition, substantially altered condition, or water right volumetric limit to the permit prior to licensure. Even though the Canal Companies complied in all respects with the terms of the permit that was issued for the water right, at the time of licensure some fifteen years after proof of beneficial use was made, the Director altered those rights by issuing a license containing entirely new restrictions that had never before been disclosed to the Canal Companies. The Director's failure to add the conditions to the permit prior to licensure and then adding those conditions at licensing constitutes an abuse of discretion that severely impacts the property rights of Canal Companies. As such, the license must be remanded to be re-issued without the conditions added for the first time at licensing.

II. The Director Acted Arbitrarily and Capriciously When He Calculated the Volumetric Limit for the Milner Hydropower Water Right:

When the Department decided to issue a license for the Canal Companies' Milner hydropower water right no. 01-7011 in 2008, rather than set a volumetric limit equal to the proven beneficial use for the project, the Department explained that its policy instead is to attempt to determine what the 'average flow conditions' were when beneficial use was proven. In the case of the Milner water right, proof of beneficial use was made in October 1993 when the field examination report was filed. The Department chose the 1996 water year as representative of flow conditions it believed had been available in 1993 for a number of reasons, primarily a belief that the USGS gauging was unreliable for the time when the project was constructed and

proof of beneficial was made. However, none of those reasons are pertinent to this inquiry.

What the Department failed to provide is any authority that would allow the Department to issue a volume limitation for less than the proven beneficial use of a project fifteen years after the project has been operating, and then expect the water right holder to appropriate a second water right for the project to make it whole as the Department suggested would be the Canal Companies' remedy at the June 2, 2010, hearing. There is no logic in such a representation.

Mr. Keen, on behalf of the Department represented that the 1996 water year was chosen by the Department to calculate the volumetric limit for the permit because he believed it to be the similar to the 1993 water year and within the acceptable range of time after the beneficial use proof was made in order to calculate such a number.⁴⁰ He also explained that the Department made an effort to find a year when flows in excess of 4,000 cfs were available at least 30 days during the year, in order to make the investment in the second turbine unit "economically beneficial."⁴¹ Disturbingly, however, Mr. Keen goes on to assert that even though flows in addition to the volume limit may be available for use, if the Canal Companies were to use those flows then they would be in violation of the terms of their license, even though they are not using in excess of the approved beneficial use proven for the project.⁴² Their remedy he explains would be to file for an additional water right to make up the difference between the recommended facility volume and the proven beneficial use of the project, 5714 cfs.⁴³ Finally, Mr. Keen admitted that the volume limit is intended to work as a secondary form of subordination in the event that the Department's non-conforming subordination remark is

⁴⁰ Exh. 1, Transcript, p. 12, l. 10-p. 16, l. 24.

⁴¹ *Id.*

⁴² Exh. 1, Transcript, p. 28, l. 21-p. 31, l. 15, also see p. 112, ll. 1-6.

⁴³ *Id.*

removed from the license.⁴⁴ There is no basis in the law to include a contrived volume limitation as some sort of “subordination” of the water right.

In a 1999 opinion of the SRBA court, Judge Wood examined the Department’s inclusion of a volume limit on fish propagation water rights and found that adding a facility volume limit for non-consumptive water rights at the time of reporting those rights to the SRBA was impermissible.⁴⁵ In that case, the Department, when it recommended the rights to the SRBA added a remark limiting the volume of water to be used for certain fish propagation water rights.⁴⁶ Judge Wood determined that like hydropower, “fish production (pounds of fish raised) is, in reality, not dependent on the size of a given facility, rather production is mostly dependent on the flow rate of available water.”⁴⁷ He also found:

Additionally, the record is clear and it is uncontradicted that the particular water users at issue here use all available water from its source, not in excess of the limits of their respective licenses or beneficial use claims. The record is equally clear and uncontradicted that the available water from the respective sources fluctuates from time to time, either as a result of naturally occurring climatic conditions or by diversions of other users, or both....Lastly, it is universally agreed that these water uses for fish propagation are both beneficial and non-consumptive.⁴⁸

Judge Wood admonished the apparently ulterior motives of the Department for including such a remark and found that it violated the fundamental principles of water law. He said:

As such, the quantity element of the right (so long as it is applied to its intended beneficial use and is not wasted) could not be abused so long as the diversion rate did not exceed the allowable cfs, regardless of the number or size of the ponds, raceways, etc. It is also extremely curious to the Court that it is IDWR’s position that if additional ponds were added to a facility for the purpose of pollution control, this would not be considered an increase in facility volume, but if the ponds or raceways were to actually grow fish in, it would be an increase in facility

⁴⁴ Exh. 1, Transcript, p. 112 l. 7-p. 113, l. 3.

⁴⁵ Exhibit 9, Order on Challenge of “Facility Volume” Issue and “Additional Evidence” Issue, Subcase No. 36-02708, *et al.*

⁴⁶ *Id.*, pp. 6-9.

⁴⁷ *Id.*, p. 7.

⁴⁸ *Id.*, pp. 7-8.

volume. To this Court, this is at least a tacit admission by IDWR that its proposed facility volume remark has nothing to do with the quantity element, but is intended to directly deal with regulating production so that in the event of a future delivery call, and mitigation is sought, junior water users may be required to pay less. This position is contrary to at least two fundamental principles of water law: the prior appropriation doctrine and the goal of obtaining the maximum beneficial use of water.⁴⁹

The situation is extraordinarily analogous to the volume limitation issue presented to this hearing officer.

At hearing the Department admitted it did not have reliable information for the year 1993, and so, 15 years after proof of beneficial use had been demonstrated and the Canal Companies had been operating within the terms of their permit, the Department arbitrarily chose 1996, an average Snake River water year in the Department's opinion, as the volume limit for the facility. It also admittedly added a second layer of subordination in order to limit the amount of production at the plant. The consequence if that if the volume is met, water that could otherwise be beneficially used to generate power under water right 01-7011 must instead be bypassed, contrary to how the water right has been used from the time proof of beneficial use was made in 1993.⁵⁰ In any event, Judge Wood determined that such limitations by the Department are not supportable.

In other words, because the use is a non-consumptive, continuous flow use, the highest and greatest duty of the water would seem to encourage the grower to use his or her best efforts to maximize the crop obtained from using the water. And if this means the grower under these circumstances can economically produce 200 pounds of fish versus 100, there is no legitimate policy in water law for not allowing this to occur.⁵¹

⁴⁹ *Id.*, p. 9.

⁵⁰ The Department has in other proceedings taken the position that if the Department chooses to make good on the term limit threat, then the hydropower water right holder can sue the state for inverse condemnation. Perhaps the volume limitation at issue here is an attempt to limit the damages that might be due to the Canal Companies in the event that comes to fruition, as Judge Wood suspected in the facility volume case in relation to mitigation.

⁵¹ *Id.*, p. 17.

For the Department to assert in this case that if the Canal Companies meet the volume limit for the Milner hydropower plant and water is still available in the stream, then the Canal Companies must simply allow that water to pass through the facility without using it to produce power, is equally violative of both the prior appropriation doctrine, and the goal of obtaining the maximum beneficial use of water.⁵²

The Department states that Beneficial Use Examination Rule 37.03.02.035.01.j. (hereinafter “Rule 35.01.j.”) forms the requirement for the Department to add a volume limit to all licenses, except for municipal and fire protection uses.⁵³ The rule states: “[t]he field examiner does not need to show total volume water of for municipal and fire protection uses on the field examination report, unless the project works provide for storage of water.” However, there is nothing in the beneficial use examination rules defining a volume limit or calculation.

Importantly, Rule 35.01.o states that the “amount (rate and/or volume) of water shall be limited by the smaller of the permitted amount, the amount upon which the license examination fee is paid, the capacity of the diversion works or the amount beneficially used, including any statutory limitation of the duty of water.” This rule certainly suggests that rate and volume of diversion are interchangeable terms or concepts. It also implies that where the Department cannot determine with certainty, as happened in this case, the amount beneficially used in 1993, it has the discretion to allow the “capacity of the diversion works” as the appropriate rate or volume of water to be diverted.

It is equally curious that rule 35.01.o uses the terms “rate” and “volume” and interchangeably. If this is the case, then shouldn’t the volume and the rate of the water right represent the same figure? In this case, a rate of 5,714 cfs would equate to a volume of

⁵² Exh. 1, Transcript, p. 62, l. 25-p. 64, l.17.

⁵³ *Id.*, p. 38, l. 14-p. 39, l. 18.

4,136,807 acre feet per year, nearly twice the volume limit set by the Department at licensure in 2008. Jon Bowling, an employee for Idaho Power Company, testified at the hearing on June 2, 2010, that in 1997, one year after the year chosen by the Department to calculate volume limit, the Milner hydropower project beneficially used 3,600,000 afa, and in 1998, the project beneficially used 2,800,000 afa. Therefore, from 2008 forward, if the hearing officer were to uphold the volume limit applied by the Department, the Milner plant would have had to bypass the water, 1,200,000 afa in 1997, and 400,000 afa in 1998, and lose the power that was generated in those years. As Judge Wood found, such a limitation violates the goal of obtaining the maximum beneficial use of water, and would needlessly waste a source of renewable energy that could be provided for Idaho's citizens.

If the Hearing Officer does determine that a volume limit may be included on this right, the Canal Companies request the Hearing Officer advise the Department to undertake a rulemaking to establish a rule defining the purpose and application of the volume element. If the Department believes as it represents it does, that volume limits must be applied to all water rights except municipal and fire protection rights, then water right applicants are entitled to know how the Department calculates the volume limits and at what time and under what circumstances the volume limit will be applied to a permit.

An administrative agency is required to promulgate a rule where it intends to take action that will (1) be of wide coverage, (2) the action will apply generally and uniformly, (3) such action will operate only in future cases, (4) the action prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) the action expresses agency policy not previously expressed, and (6) the action is in response to interpretation of law or general policy. *ASARCO Inc. v. State of Idaho*, 138 Idaho 719, 725, 69 P.3d 139, 145 (2003), citing *Woodland Private*

Study Group v. State of New Jersey, 109 N.J. 62, 533 A.2d 387 (1987). Based on the testimony of Mr. Keen at the hearing of this matter, all of the above elements appear to be met in this case, requiring the Department to formally promulgate a rule to dictate the parameters and use of the volume limit. Rule 35.01.j cited by the Department as the basis for its inclusion of the volume limitation does not inform water right applicants, holders, or beneficial use examiners of the purpose for the volume limit, or describe any of the information relief upon by the Department to make its limitation calculation, or even what that calculation is.

There is nothing in the law of the state of Idaho, the Department's water appropriation rules, or the beneficial use examination rules that requires a volume limitation to be included as an element of water right. Nothing in Idaho Code § 42-217 describing the requirements for making proof of beneficial use requires such proof to include a volume limitation. Nothing in Idaho Code § 42-219 defining the elements of a license requires it to include a volume limitation. In fact, the beneficial use examination rules indicate that "rate" and "volume" are interchangeable terms for purposes of the permitting and licensing inquiry so to the extent the rate of water right is established, then any volume limitation should be equal to the licensed rate for the water right. No volume limit should have been added to this license for the first time at licensure, but if the hearing officer determines that a term limit may be included in the license, then it should reflect the licensed rate of diversion, capacity, of the plant in order to accomplish the goal of obtaining the maximum beneficial use of the resource.

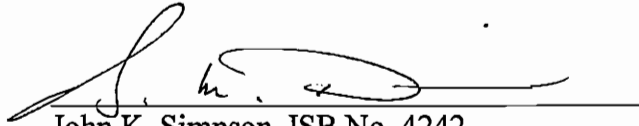
CONCLUSION

Based on the forgoing, the North Side Canal Company and Twin Falls Canal Company hereby request that this Court remand the License to the Department to remove the term limit

condition and volume limitation, or in the alternative, to remove the term limit condition and modify the volume limitation.

Dated this 30th day of June, 2010.

BARKER ROSHOLT & SIMPSON LLP

Handwritten signatures of John K. Simpson and Travis L. Thompson, written in black ink over a horizontal line.

John K. Simpson, ISB No. 4242

Travis L. Thompson, ISB No. 6168

Shelley M. Davis, ISB No. 6788

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Attorneys for North Side Canal Company and Twin
Falls Canal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June, 2010, I served a true and correct copy of the foregoing **POST-HEARING BRIEFING IN SUPPORT OF CANAL COMPANIES' PROTEST OF TERM LIMIT CONDITION AND VOLUMETRIC LIMITATION ON WATER RIGHT LICENSE NO. 01-7011** upon the following persons via the method indication below:

Hearing Officer Schroeder via Electronic Mail.

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Boise, Idaho 83720-0098

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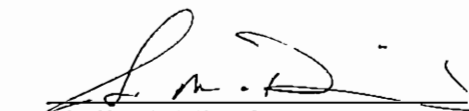

Shelley M. Davis

EXHIBIT 1

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF LICENSING W.R.) Application for Permit
01-07011.) and License No.
_____) 01-07011

COPY

THE HEARING BEFORE JUDGE SCHROEDER

June 2, 2010

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BEFORE THE DEPARTMENT OF WATER RESOURCES
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IN THE MATTER OF LICENSING W.R.) Application for Permit
01-07011.) and License No.
_____) 01-07011

THE HEARING BEFORE JUDGE SCHROEDER
June 2, 2010

TRANSCRIBED BY:

COLLEEN P. KLINE, CSR No. 345

Notary Public

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1 THE HEARING was taken BEFORE THE
2 HONORABLE GERALD SCHROEDER, THE HEARING OFFICER,
3 at the offices of Idaho Department of Water
4 Resources, located at 322 E. Front Street, Boise,
5 Idaho, on June 2, 2010, before Colleen P. Kline,
6 Certified Shorthand Reporter and Notary Public
7 within and for the State of Idaho, in the
8 above-entitled matter.
9 APPEARANCES:
10 For United States Bureau of Reclamation:
11 Office of Attorney General
12 Deputy Attorney General
13 Natural Resources Division
14 Chief Water Resources Section
15 BY MR. GARRICK BAXTER
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18 Boise, Idaho 83720-0098
19 For Twin Falls Canal Company, and North Side
20 Canal Company:
21 Barker Rosholt & Simpson, LLP
22 BY MR. JOHN SIMPSON
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Page 4

1 THE HEARING OFFICER: Take up at this
2 time the hearing in the matter of application for
3 permit and License No. 01-07011. The applicant
4 being Twin Falls Canal Company and North Side
5 Canal Company identified in the caption.
6 What remains are the two issues of the
7 term limit condition and the volumetric
8 limitation in the license issued in October 2008.
9 Counsel, would you each identify
10 yourselves for the record?
11 MR. SIMPSON: Yes. Good morning, Your
12 Honor. John Simpson appearing on behalf of Twin
13 Falls Canal Company and North Side Canal Company.
14 MR. BAXTER: Your Honor, this is
15 Garrick Baxter appearing on behalf of the
16 Department of Water Resources.
17 THE HEARING OFFICER: Are you each
18 ready to proceed at this time?
19 MR. BAXTER: Yes, Your Honor.
20 MR. SIMPSON: Yes, Your Honor.
21 THE HEARING OFFICER: If you'll call
22 your witness.
23 MR. BAXTER: Your Honor, we have
24 Shelley Keen here for the Department this
25 morning.

M & M COURT REPORTING

(208) 345-8800 (fax)

1 THE HEARING OFFICER: If you'll raise
2 your right hand, please.

3 SHELLEY KEEN,
4 first duly sworn to tell the truth relating to
5 said cause, testified as follows:

6 MR. BAXTER: Your Honor, if the witness
7 may be handed IDWR Exhibits 1 and 2, and the
8 pre-filed testimony in this matter.

9 DIRECT EXAMINATION
10 QUESTIONS BY MR. BAXTER:

11 Q. Good morning, Mr. Keen. How are you
12 doing today?

13 A. I'm doing well. Thank you.

14 Q. Good to hear. Now, you've just been
15 handed a brief regarding pre-filed testimony.
16 Could you please cite the caption of that brief?

17 A. That's this document (indicating)?

18 Q. Yes, that document right there.

19 A. The caption says, "In the Matter of
20 Licensing Water Right Permit Number 01-070011 in
21 the name of Twin Falls Canal Company and North
22 Side Canal Company, pre-filed testimony of
23 Shelley W. Keen."

24 Q. And did you participate in the creation
25 of that document, the pre-filed testimony?

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1 A. Yes, I did.

2 Q. And have you had a chance to review
3 that testimony therein?

4 A. Yes, I have.

5 Q. And if you turn into the document, I
6 believe that you signed the testimony related to
7 that, and have your signature notarized; is that
8 correct?

9 A. Yes, that is correct.

10 Q. Okay. And does that form the basis of
11 your understanding, or does that -- excuse
12 me -- does that document reflect your
13 understanding of the issues related to the volume
14 and the inclusion of term conditions in this
15 particular water right?

16 A. Yes, it does.

17 Q. Attached to that pre-filed testimony
18 was IDWR Exhibit No. 1. Have you seen that
19 document before?

20 A. Yes, I have.

21 Q. And what is that document?

22 A. The document is just a printout of a
23 spreadsheet used to facilitate the calculation of
24 the annual volume limitation put on the water
25 right license for 01-7011.

1 Q. And was that information collected by
2 the Department of Water Resources for purposes of
3 licensing?

4 A. Yes, the information was collected from
5 the Department of Water Resources from published
6 material on the website for the US Geological
7 Survey.

8 Q. Okay. Let's go ahead and turn to IDWR
9 Exhibit No. 2, then. Have you seen that document
10 before?

11 A. Yes, I have.

12 Q. And what is that document?

13 A. That document is the appellant's brief,
14 appeal from the District Court of the Third
15 Judicial District of the State of Idaho in and
16 for the County of Washington, the Honorable Susan
17 E. Wiebe, District Judge presiding in the matter
18 of Licensed Water Right No. 03-7018 in the name
19 of Idaho Power Company.

20 Q. And now that brief relates to a
21 different water right. But is it your
22 understanding that the legal issues raised in
23 that case are very similar to the legal issues
24 raised in this water right with regards to the
25 inclusion of a term condition at the time of

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1 licensing?

2 A. Yes.

3 MR. BAXTER: At this point, Your Honor,
4 I would move to have the pre-filed testimony of
5 Mr. Keen and IDWR Exhibit Nos. 1 and 2 admitted
6 into evidence.

7 MR. SIMPSON: No objection.

8 THE HEARING OFFICER: 1 and 2 are
9 admitted.

10 (Exhibits 1 and 2 admitted into
11 evidence.)

12 (Exhibit 3 marked.)

13 Q. (BY MR. BAXTER) Mr. Keen, I'm going to
14 hand you what has been marked as IDWR Exhibit
15 No. 3.

16 Now, let's talk a little bit about the
17 volumetric limit put on the particular water
18 right, and how the department reached or figured
19 out what was the appropriate number on the
20 volume. Because I think one of the questions you
21 are going to get today is: Well, how exactly did
22 the Department choose the particular year that it
23 chose over -- why didn't it pick up an earlier
24 year or a later year?

25 And so I think what this chart is

1 helpful in doing is explaining how the Department
2 came to the conclusions as to what was the
3 appropriate year.

4 Previously you talked a little bit
5 about IDWR Exhibit 1. What year was that
6 exhibit, the data taken from on IDWR Exhibit 1?

7 A. From IDWR -- on IDWR Exhibit 1, the
8 data is from the calendar year 1996.

9 Q. Okay. So keeping that in mind, why
10 don't you start walking us through this graph.
11 Could you maybe start by explaining the source of
12 the information that -- or the data that this
13 graph was used where -- where did the -- what was
14 the source of the information which this graph
15 was created from?

16 A. The information came from the US
17 Geological Survey website. It's published data
18 for measured river flows at the Snake River below
19 just downstream from Milner Dam.

20 Q. And so what is the title of the graph
21 here?

22 A. The title is USGS 13088000 Snake River
23 at Milner, Idaho. And then in parentheses (total
24 flow). And the number, the 13088000 refers to
25 the USGS gaging station that these measurements

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1 were taken at or represent.

2 Q. Okay. Now, there is a couple of
3 different colored lines there. Could you maybe
4 start with the brown. I'm going to say, maybe a
5 khaki or brown colored line there, and explain
6 what that line represents?

7 A. Yes. That brown or greenish brown
8 colored line represents the median daily
9 statistical flow of over 83 years. So it's
10 essentially the average year, if you will, and it
11 is imposed again, and again, and again over each
12 year from 1982 to 1998, which are the years
13 represented on the graph.

14 Q. So the brown line is just simply
15 showing again every year what the median was as
16 kind of as a baseline?

17 A. Yes.

18 Q. Okay. Now, let's talk a little bit
19 about the blue line. Can you tell us what the
20 blue line represents?

21 A. Yes, the blue line represents the daily
22 mean discharge at the Snake River at Milner,
23 Idaho. So the blue line represents what the flow
24 was in the Snake River over the period of years
25 shown in the graph from 1982 to 1998. And it

1 doesn't necessarily represent the highest flow of
2 each day. It's the daily mean discharge. So
3 there could have been flows slightly higher or
4 slightly lower than shown by the blue line on the
5 graph. But the graph represents the daily means
6 for that period from 1982 to 1998.

7 Q. So kind of hit on it already, but could
8 you describe what the axes are, the bottom and
9 the left axis, what they represent?

10 A. Sure. Across the bottom is the time
11 period 1982 to 1998. And then vertically, it's
12 discharge or daily flow in cubic feet per second
13 ranging from half a cubic foot per second to the
14 4,000 cubic feet per second.

15 Q. All right.

16 A. Actually, pardon me. I think that
17 says -- I said, 4,000. I believe that's 40,000
18 cubic feet per second.

19 Q. So going back then to IDWR Exhibit 1,
20 and you said that was based upon water year 1996,
21 I believe; is that correct?

22 A. Yes.

23 Q. Okay. So looking then on the graph
24 here as to 1996, would you please circle for the
25 Hearing Officer here then, what is the peak

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1 represented there? Just if you could circle
2 that, the peak, or maybe make an arrow pointing
3 to the peak at 1996 at the year that it's
4 represented at this data, or is consistent with
5 this data. Either circle it or put some mark
6 there showing it.

7 And if you could turn and show that to
8 the Hearing Officer here, please?

9 THE HEARING OFFICER: Thank you.

10 Q. (BY MR. BAXTER) Okay. So now, let's
11 take a step back, and talk about this application
12 for permit, and the years in which the permit was
13 developed, and proof of beneficial use was filed
14 on.

15 What is your recollection of the years
16 in which we are looking at for this water right,
17 the development of the water right in the years
18 of proof that beneficial use was submitted for?

19 A. Sure. The permit was issued in 1977.
20 And proof of beneficial use was submitted in the
21 fall of 1993. And it's my understanding that
22 power was first generated sometime in 1992. It
23 might have been a little bit before that. I'm
24 not certain of the dates. But that's my
25 understanding is sometime around that time

1 period.

2 Q. And so looking at the time period of
3 generation to proof of beneficial use that -- or
4 proof of beneficial use in 1992, what year was
5 the beneficial use exam completed for this water
6 right?

7 A. The examination report was completed
8 also in 1993, and submitted with the proof of
9 beneficial use statement in the fall of 1993.

10 Q. So when the Department normally goes
11 out and issues a water right, and establishes
12 proof of beneficial use, would the Department
13 normally look at those years under which that
14 system was operating?

15 A. Yes, the Department's normal practice
16 would be to look backwards in time from the proof
17 of beneficial use date to see what was actually
18 diverted and put to beneficial use in accordance
19 with the permit prior to submitting proof of
20 beneficial use.

21 Q. Okay. So when the Department did that
22 for this water right, what did it find?

23 A. We found a couple of things that
24 created a dilemma for the Department. One, was
25 that apparently, the data from the USGS is not

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1 really very good for that period from 1992 into
2 1993. And I think there was some calibration
3 going on and whatnot. And the other problem that
4 we found was that as the graph that we're looking
5 at shows, the flows for those years, the daily
6 mean discharge, were typically well below normal
7 water years.

8 Q. So if I'm understanding your testimony
9 correctly, you normally would have looked at
10 those earlier years. But there was an issue with
11 regards to the calibration, and the fact that
12 those were particularly low water years. So did
13 the Department go with a volume from those for
14 those years or not?

15 A. The Department did not. Ideally, we
16 would have looked backwards from when proof of
17 beneficial use was submitted, found a full
18 calendar year with good data where power was
19 being produced by the water right holder. And
20 that would have been occurring at full
21 operational levels, because there would have been
22 at least the normal water year. And the
23 Department would have used that period to
24 calculate an annual volume limit for the license,
25 because that would have been the amount of water

1 actually put to beneficial use during the
2 development period.

3 Q. So that would have resulted in a
4 very -- a much smaller volume than what was
5 actually originally -- or was put in the license?

6 A. That's absolutely right.

7 Q. So instead of going with that year
8 then, what did the Department view as reasonable,
9 and what approach did the Department take?

10 A. The approach that the Department took
11 in calculating the volume was to look for a year
12 where there was a full record of good
13 measurements where power was being produced, and
14 try to have that be as close to the authorized
15 development period ending in 1993 as possible.

16 And in reviewing the data what we found
17 was, that 1996 seemed to be most representative
18 of the flows that the right holders would have
19 designed the system and expected during -- during
20 the period when they were preparing to put water
21 to beneficial use.

22 1994 and 1995, while they were good
23 measurements, really didn't seem to be
24 representative of the water years that the right
25 holder would have designed for. If you look on

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1 the graph at 1996, it's a pretty similar water
2 year to years throughout the 1980s. And --

3 Q. So if you start on the left hand,
4 taking up from 1982, are you saying that the
5 peaks from '82 to a little after '86, are about
6 the same as the peak there in '96?

7 A. Not merely the peak. Yes, the peak,
8 but also the duration of high flows. And so I
9 think that the threshold that the Department
10 applied was a year in which flows exceeding 4,000
11 cfs occurred at least 30 days during the year.

12 And the reason that 4,000 cfs is
13 significant, is that the right holders main
14 generating facility has a turbine that operates
15 at 4,000 cfs, and one that operates at 1,000 cfs.
16 And there has to be a significant period of time
17 of flows in excess of 4,000 cfs to make the
18 investment in the 1,000 cfs turbine, you know,
19 economically feasible for the right holder.

20 And the Department looked at that as
21 being, you know, about 30 days or more would be
22 that threshold in which that would -- operating
23 the 1,000 cfs turbine over and above the 4,000
24 cfs would be economically beneficial.

25 MR. BAXTER: Okay. With that, Your

1 Honor, I would move to have IDWR Exhibit No. 3
2 admitted into evidence.

3 MR. SIMPSON: No objection.

4 THE HEARING OFFICER: No. 3 is
5 admitted.

6 (Exhibit 3 admitted into evidence.)

7 MR. BAXTER: And then I think I will
8 turn it over to Mr. Simpson for
9 cross-examination, unless, Mr. Schroeder, you
10 have any questions of either myself or the
11 witness here before we --

12 THE HEARING OFFICER: Not at this time.

13 Do you want to wait until your witness
14 gets here before you conduct your
15 cross-examination?

16 MR. SIMPSON: No, I think I'll get
17 started, Your Honor.

18 THE HEARING OFFICER: Okay.

19 MR. SIMPSON: And maybe on some
20 preliminary matters, but we'll move forward to
21 try to get this completed.

22 THE HEARING OFFICER: Okay.

23 CROSS-EXAMINATION

24 QUESTIONS BY MR. SIMPSON:

25 Q. Mr. Keen, I'm just going to ask you

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1 some general questions, first of all, on Exhibit
2 3, perhaps background that would be helpful.

3 With respect to Exhibit 3, and it
4 identifies the USGS gage at Milner; correct?

5 A. Yes.

6 Q. Okay. Can you generally describe the
7 practice of the USGS in obtaining measuring
8 devices, installing measuring devices, collecting
9 data, and how that data is utilized by the
10 Department?

11 A. Sure.

12 Q. And I -- just before you start, it's
13 just try to give a brief overview for the Hearing
14 Officer so he understands how the Department
15 relies upon the data that's gathered by, in this
16 case, USGS gage, and in other cases, other gages
17 throughout the Snake River Basin, if that's
18 helpful?

19 A. Yes. Thank you. Yes, the US
20 Geological Survey maintains a network of stream
21 flow gages on streams throughout the United
22 States, and including Idaho. And they -- "they"
23 being the US Geological Survey, make regular
24 measurements at those stream flow gages, and
25 compile that data and publish that data via their

1 internet website and other means. And the
2 Department will access that data via the website,
3 can download that data as we have done in the
4 spreadsheet, that's IDWR 1.

5 And then we can -- "we" being the
6 Department of Water Resources, can use that data
7 to determine a number of things related to stream
8 flow, including water that is available to be put
9 to beneficial use at locations downstream from
10 those stream flow gages.

11 In this particular case, the gage is
12 actually below where the water is diverted. It's
13 below Milner Dam. But the flow at this location
14 wouldn't represent discharge from the turbines
15 and system use for generating power, as well as
16 spill, which would be flow that is in excess of
17 the amount that the right holder is able to put
18 to beneficial use, or spill could also be flows
19 so small that they are not able to be put to
20 beneficial use by the right holder.

21 Q. And with respect to the USGS gage at
22 Milner, it identifies at that point the total
23 flow in the river from whatever source; correct?

24 A. Yes. This particular gage is
25 interesting in that, as I understand what I've

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1 read on the USGS website, the flows up through
2 maybe the late 1980s or early 1990s are direct
3 measurements from a gage that was maintained at
4 that location. And then after the installation
5 of the power production facilities, the flows are
6 actually the sum of what's measured flowing in
7 the river below the dam; and the outflow from the
8 power generation facilities, the 4,000 and the
9 1,000 cfs turbines use to generate power.

10 So the left side of this graph is, as I
11 understand it, represents a single measurement,
12 and the right side represents the sum of
13 measurements taken. But essentially, it does
14 provide the total flow of water in the river.

15 Q. They just modified how that total flow
16 was measured and calculated?

17 A. Correct.

18 Q. Thank you. But there has been no
19 disagreement as to whether the pre-facility
20 installation calculations were accurate, or were
21 they not?

22 A. Not that I'm aware of.

23 Q. Okay.

24 A. But maybe I should answer that. I
25 don't know for sure.

1 Q. Okay. You haven't heard of any of that
2 discussion anyway?

3 A. That's right.

4 Q. And in looking at Exhibit 3, I think
5 your testimony a few moments ago, you identified
6 that the years, '82, '83, '84 through it appears
7 '87, were generally years in which the flows were
8 similar to flows in the later years '96 through
9 '98?

10 A. Correct.

11 Q. Okay. And that time frame '82 through
12 '87 was a period of time when the permit had been
13 issued, but the project had yet to be
14 constructed; correct?

15 A. Yes.

16 Q. Okay. And so that would have been a
17 time frame in which the permit holders were
18 looking at the feasibility of the project in
19 terms of acquiring any permits or other legal
20 documents that it required to then construct the
21 facility?

22 A. I believe that's right.

23 Q. If one were to look at -- and again,
24 these flow measurements are in this chart,
25 describe flow in terms of cubic feet per second;

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1 correct?

2 A. Yes.

3 Q. Just for our purposes, when you
4 translate cubic feet per second to acre feet,
5 what is that calculation, generally?

6 A. One cubic foot per second is a
7 one -- flowing over 24 hours would produce about
8 1.9835 acre feet.

9 Q. So roughly speaking, one cfs over a
10 24-hour period is two acre feet per day?

11 A. Yes, roughly speaking.

12 Q. Okay. And you identified in your
13 testimony that in response to some questions
14 regarding the peak, and you identified in the
15 1996. Do you recall that testimony?

16 A. Yes.

17 Q. Okay. I think it was also your
18 testimony that in your view, the peak number was
19 not the critical number, but the duration of high
20 flows in any particular year; would that be
21 correct?

22 A. Right. In order to calculate a volume,
23 because a volume is accumulated by a flow over
24 time. In it's important to the Department to
25 know how long a particular flow occurred in order

1 to calculate a volume put to beneficial use.

2 Q. Okay. And with respect to the proof of
3 beneficial use filed in this claim for this
4 right, do you recall the total flow claimed as a
5 beneficial use?

6 A. Yes, I do. The field examiner was a
7 certified water right examiner hired by the right
8 holder to conduct the beneficial use examination.
9 And that examiner reported a flow used to
10 generate power of 5,714 cubic feet per second.

11 Q. Okay. So with respect to the
12 calculation of volume, would it be fair to say
13 that the Department looked for a year in which
14 that 5,714 was fulfilled?

15 A. I do not know that we did that. I
16 think the Department looked at a year in which
17 there were substantial flows for a period of
18 time. But I don't know whether the 5,714 was
19 actually beneficially used during 1996 or not.

20 What I do know is that we looked to
21 make sure that there were flows in excess of
22 4,000 cubic feet per second. So that the
23 additional turbine would be needed to -- and in
24 use to generate power.

25 Q. Okay. In order to maximize power

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1 generation in any particular year, the 5,714
2 figure would be an appropriate number to utilize;
3 correct, under the permit or the license as it
4 would be issued?

5 A. Yes.

6 Q. In your testimony, when you described
7 the Department's process in identifying 1996 as
8 the appropriate year, at any point during the
9 process of identifying 1996, and then undertaking
10 the calculation of volume, were there discussions
11 with the right holder?

12 A. I do not believe so.

13 Q. So you are not aware of any effort to
14 contact either Twin Falls, North Side, or anyone
15 else operating the facility there to discuss with
16 them the Department's investigation and
17 calculation of utilizing 1996 as an appropriate
18 year?

19 A. It's possible that a staff member made
20 an attempt to try to gather additional data about
21 power generation in 1996, and maybe other years.
22 But I'm not familiar with the specific details of
23 that request if it was made.

24 Q. The records you've reviewed relative to
25 this licensing issue, you haven't identified any

1 such documents or correspondence; would that be
2 fair?

3 A. Correct.

4 Q. With respect to the procedure that
5 you've identified regarding the calculation, is
6 that procedure memorialized in Department policy?
7 That is, did you follow Department policy when
8 you undertook the analysis that you've described?

9 A. I don't believe the Department has a
10 written policy on calculating an annual volume
11 limit for hydropower of water rights.

12 Q. Okay. And in your testimony here
13 today, you've provided that 1992 and '93 were
14 below normal water years; correct?

15 A. Yes.

16 Q. And so the Department didn't view those
17 as being appropriate for determining the extent
18 of beneficial use relative to the Milner project;
19 correct?

20 A. That, when coupled with the recognition
21 that the USGS data during that period might not
22 be as accurate as at other points in time.

23 Q. Okay.

24 A. Because of the shifting from one method
25 of gathering that data to the other.

1 Q. Okay. And with respect to utilizing
2 that data, and in particular utilizing the year,
3 or looking at years in which you have below
4 normal flows, would that be similar to, for
5 example, an irrigation permit? When proof comes
6 up on an irrigation permit, and proof is filed, a
7 similar issue is raised. That is, is that an
8 adequate water year in which to base proof of
9 beneficial use upon?

10 A. That's a difficult question for the
11 Department. Normally, the Department would like
12 to look and see during the authorized development
13 period, between when the permit was issued and
14 when proof of beneficial use was submitted, how
15 much water was actually diverted and put to
16 beneficial use.

17 And for an irrigation right, the
18 Department makes allowances for varying crop
19 types, and that kind of thing, to account for
20 farming practices. For other kinds of water
21 rights like municipal water rights, or
22 industrial, or commercial, the Department
23 normally wants to have records of what was
24 actually diverted and put to beneficial use
25 during the authorized development period, and

1 does not look forward in time.

2 I would say that it's fairly rare for
3 the Department to look beyond the development
4 period for calculating a volume to put on the
5 water right license, unless there is some problem
6 with the data, or that there are just problems
7 like we encountered in this situation, which
8 created a dilemma for us.

9 Q. Okay. And in this case, it's fair to
10 say, that the license wasn't issued immediately
11 after proof was filed. The license was issued a
12 number of years later; correct?

13 A. Yes, that's right.

14 Q. So that fact allowed the Department
15 some flexibility, if you will, to look forward in
16 identifying data, and even generation figures
17 that occurred after 1993 up until the time of
18 licensing in 2008; correct?

19 A. That's true.

20 Q. Do you think it would be appropriate
21 then to look at 1997 or 1998 as years in which
22 volume figures might be representative of actual
23 power generated at Milner Dam to identify the
24 capability of generating power at Milner?

25 A. The Department was looking for a year

1 as close to the development period as reasonable,
2 because we -- our normal practice is to look at
3 the authorized development period. And so the
4 Department was not not looking to go far into the
5 future, but to try to find something that was as
6 close to the development period as possible to be
7 representative of as closely as possible as what
8 may have been either put to beneficial use, or in
9 this case, probably designed for.

10 Q. Okay.

11 A. Trying not to deviate too much from
12 that practice of looking at the authorized
13 development period.

14 Q. In terms of then licensing after proof
15 has been filed, what's the Department's policy in
16 terms of then proceeding to licensing the water
17 right in terms --

18 A. I'm not sure I --

19 Q. -- of time frame?

20 A. I'm not sure I understand the question.

21 Q. If the Department has the policy that
22 once you've described that utilizing data within
23 the development period, so that they can avoid
24 this very issue that you've described, is it then
25 the Department's policy to issue the license as

1 quickly thereafter?

2 A. In the best of all possible worlds, I
3 think we would get the proof of beneficial use
4 one day, and be able to issue the license the
5 next day. That rarely occurs, because of
6 staffing levels, and competing priorities for
7 Department staff time. And so it's not uncommon
8 for a period of years to pass before the license
9 is issued.

10 Q. During that passing of time before the
11 license is issued, with respect to this permit,
12 was there any limitation placed upon the permit
13 holder in generating power at that site?

14 A. Not to my knowledge.

15 Q. Okay. So whatever flows were available
16 at the Milner Power Plant could be utilized up to
17 the capacity of the plant in generating power?

18 A. Yes, up to the diversion rate indicated
19 by the field examiner. The Department at that
20 time had not looked at, because the field
21 examiner did not report it, an annual diversion
22 volume. And so, you know, the Department just
23 simply didn't pursue that issue during that time
24 period.

25 Q. Okay. So let's -- if the

1 examiner -- strike that.

2 If the permit holder had available at
3 the Milner diversion flows in excess of 5,714 in
4 years post 1993, could that permit holder have
5 diverted those flows in excess of 5,714.

6 A. The way the Department interprets and
7 expects the beneficial use field report to be
8 submitted, that 5,714 should represent the
9 maximum number that the permit holder is capable
10 of putting to beneficial use, and has put to
11 beneficial use during the authorized development
12 period. That number should represent the maximum
13 extent of the water right in terms of
14 instantaneous diversion rate.

15 Q. Okay. And so if post 1993, the permit
16 holder is able to divert 5,714 and generate power
17 with that number, and develops then an annual
18 volume of water associated with that power
19 development, is that permit holder undertaking
20 that diversion pursuant to Idaho law consistent
21 with Idaho law?

22 A. The Department would look at that as
23 being an additional appropriation, and probably
24 need to be represented by another permit, an
25 application for a permit, and a permitting

1 process.

2 Q. If the permit holder diverted flows in
3 excess of 5,714; correct?

4 A. Yes. Yes.

5 Q. If the permit holder developed power
6 consistent with the diversion rate of 5,714, and
7 that resulted in an annual volume, is that annual
8 volume representative of the exercise of that
9 water right?

10 A. Yes, it is, except that we have the
11 responsibility as the Department of Water
12 Resources to issue a water right license with an
13 annual volume limitation representative of what
14 was actually developed, and put to beneficial use
15 during the authorized development period.

16 As I've explained before, we deviated
17 from that in this case, because of some dilemmas
18 that we had. But we have done what I believe to
19 be a reasonable job in trying to evaluate what
20 that volume was, and place one on the license.
21 That question was just not looked at in the years
22 up until 2008; when the license was issued.

23 Q. In essence, prior to the licensing
24 period in 2008, the Department hadn't looked at a
25 volume limitation associated with Milner;

1 correct?

2 A. That's right.

3 Q. Okay. And what you've just described
4 as the Department's policy with respect to
5 placing a volume limitation on a hydropower
6 right, and that's in part the subject of your
7 testimony here today; correct?

8 A. Yes.

9 Q. Okay. With respect to your testimony,
10 Exhibit 1, and Exhibit 1, did anyone within the
11 Department assist you in the development of that
12 testimony?

13 A. Yes, this was prepared by associate
14 engineer Michelle Adel.

15 Q. Okay. And she assisted with the
16 development of Exhibit 1; correct?

17 A. Yes.

18 Q. And with respect to your testimony, did
19 anyone assist you in the development of your
20 testimony?

21 A. Yes, Michelle Adel assisted me in the
22 development of my testimony, and also counsel for
23 the Department.

24 Q. And with respect to Ms. Adel's
25 assistant in your testimony, in what matters did

1 she assist you in?

2 A. She assisted in describing her efforts
3 in evaluating the data that we have been -- the
4 flow data that we have been discussing here this
5 morning to establish that annual diversion volume
6 limit that was placed on the water right license.

7 Q. With respect to your testimony that
8 you've provided, are you proposing any changes to
9 your testimony here today?

10 A. No, sir.

11 Q. Would it be correct that your pre-filed
12 testimony, your testimony here today addressed
13 the agency's policies relative to Idaho Code
14 Section 42-203 B, and the factual application of
15 those policies?

16 A. You know, I'm not sure that
17 application -- we have been discussing this
18 morning mostly the establishment of an annual
19 diversion volume limit. And I don't recall right
20 off the top of my head that Idaho Code 42-203 B
21 addresses the volume question.

22 My recollection is that 203 B, at least
23 to the extent that we looked at it in the
24 licensing process, addresses the question of
25 subordination of a hydropower water right, and

1 the establishment of a term limit for the
2 hydropower water right.

3 Q. So your testimony this morning is more
4 specific to the volume calculation; correct?

5 A. So far based on the questions I've been
6 asked.

7 Q. Right.

8 A. Yes.

9 Q. And with respect to your pre-filed
10 testimony that you've offered, and the exhibits
11 attached to your pre-filed testimony, would it be
12 correct that those are -- that testimony and
13 those are exhibits are relative to the policies
14 of the Department in responding to the provisions
15 of 42-203 B?

16 A. Yes.

17 Q. Okay. When you used the term "policy"
18 in your testimony, what do you mean?

19 A. I mean, either written guidance in the
20 application of the law in daily practice, or
21 verbal guidance from management of the Department
22 in daily practice of our duties applying the law.

23 Q. And is the meeting you've just
24 described consistent with the agency's
25 definition?

1 A. I don't know whether the agency has a
2 definition of policy someplace or not.

3 Q. Okay. But as you've defined policy as
4 you've used it in your testimony, you've been
5 advised by counsel, you've had your testimony
6 reviewed by those within the Department to ensure
7 it's consistent with the agency's perspective
8 regarding this matter; correct?

9 A. I believe so, yes.

10 Q. Okay. And with respect to those
11 policies you've described regarding hydropower,
12 and inclusion of the conditions under 42-203 B,
13 are those conditions applied to hydropower
14 rights, all hydropower rights throughout the
15 state?

16 A. Yes. At least to the extent I have
17 been involved in permitting and licensing
18 hydropower rights for the past approximately 15
19 years, it has been the practice of the Department
20 to subordinate hydropower water rights, which is
21 discussed in 42-203 B. To provide a term limit
22 on hydropower water rights, which is described
23 discussed in 42-203 B. And to put an annual
24 diversion volume limit on hydropower water rights
25 at the time of licensing

1 It's possible there are exceptions to
2 that, because of oversights, or possibly for
3 other reasons that, you know, I'm not aware of.
4 But I have strived in supervising the preparation
5 of permits and licenses to make sure that we've
6 carried out the subordination, the annual volume,
7 and the term limit obligations.

8 Q. Okay. So essentially it would be your
9 testimony that the Department strives to apply
10 those conditions uniformly throughout the
11 state --

12 A. Yes.

13 Q. -- as to hydropower permits, and then
14 to the ultimate license?

15 A. Yes.

16 Q. Are those conditions intended to act
17 prospectively in nature?

18 A. I'm not sure I understand the question.

19 Q. Well, the question being, whether they
20 are intended to apply retroactively, or as you've
21 applied them in, as conditions in permits and
22 licenses, or are they intended to act
23 prospectively into the future?

24 A. When you say those --

25 Q. Those conditions that you just

1 described --

2 A. Subordination and term limit and annual
3 volume?

4 Q. Yes. Specifically today, we're looking
5 at the term limit and the volume limitation.

6 But, yeah, I guess it would apply also to
7 subordination.

8 A. I think it would be difficult for the
9 Department to apply them retroactively. For
10 example, if the Department issued a water right
11 license in 2008 with an annual volume calculated
12 in 2008. And stated for the first time in 2008,
13 as it did in the instance we're discussing today,
14 I think it would be difficult for the Department
15 to retroactively apply that limit to years prior
16 to 2008.

17 Q. This policy, or these policies as
18 you've described, are they written anywhere in an
19 agency memo?

20 A. To my knowledge, they are not in a
21 memo. The policies arise from statute and rules.

22 Q. Okay. And with respect to rules then,
23 what rules are referenced these policies that
24 you've described in your testimony -- pre-filed
25 testimony or what you've testified to here today?

1 A. In order to cite the exact numbers, I
2 would have to look at my pre-filed testimony.

3 Q. Okay. That's fair. Take a moment to
4 do so.

5 A. Okay. Thank you. (Witness complying.)

6 MR. BAXTER: I'm sorry, John. What was
7 the question?

8 MR. SIMPSON: Well, he identified
9 that -- I asked him if these policies were
10 identified in any agency memo, and he couldn't
11 identify it. But he said that they are
12 referenced in, I believe, statute or rule. And
13 I'm just asking him what rules he's referring to.

14 MR. BAXTER: Thank you.

15 Q. (BY MR. SIMPSON) Is that fair,
16 Shelley?

17 A. Yes. Yes. Thanks, John.

18 On page 4 of my pre-filed testimony, at
19 the top, there is a reference to Beneficial Use
20 Examination Rule 35.01 A. And the Beneficial Use
21 Examination Rules are at IDAPA 37.03.02.

22 And that rule provides that all items
23 of the field report must be completed and must
24 provide sufficient information for the director
25 to determine the extent of the water right

1 developed in order for the report to be
2 acceptable to the director.

3 And also in the beneficial use
4 examination rules, Rule 35.01 J. It says, the
5 field examiner does not need to show total volume
6 of water for municipal and fire protection uses
7 on the field report, unless the project works
8 provide for storage of water.

9 Those are our two rules. And then
10 there is also a rule that may not be in my
11 pre-filed testimony, which says that the
12 Department shall impose a term limit on permits
13 for hydropower use.

14 And I don't have the cite for that in
15 front of me. But it's the rule in the Water
16 Appropriation Rules that talks about both
17 subordination and term limit being put on
18 hydropower permits.

19 MR. SIMPSON: Well, this may be -- it's
20 10:15. So we have a couple of things going on at
21 10:15.

22 THE HEARING OFFICER: Yes.

23 Q. (BY MR. SIMPSON) But an appropriate
24 spot, Shelley, I mean I'm going to hand you
25 what's going to be a copy of the Department's

1 administrative rules. And you identified just a
2 moment ago perhaps a rule that you haven't
3 identified in your pre-filed testimony. I want
4 to give you an opportunity to perhaps look.

5 And if you need something other than
6 what I've offered for you to look at today, feel
7 free to do that on break. What I would like you
8 to do is have you come back and identify for me
9 those rules, which you believe reference the
10 policies of the Department that you are relying
11 upon in offering your testimony.

12 A. Okay.

13 Q. Is that fair?

14 A. Yes.

15 MR. SIMPSON: Okay. And with that we
16 can take a break.

17 THE HEARING OFFICER: We're in recess.
18 (A recess was had.)

19 THE HEARING OFFICER: We'll resume
20 proceedings.

21 If you wish to continue your
22 examination.

23 MR. SIMPSON: Thank you.

24 Q. (BY MR. SIMPSON) Mr. Keen, before we
25 broke you were going to look through the

1 Department's rules, and identify for me, I
2 believe, any other rules beyond what you've cited
3 in your pre-filed testimony, which you would rely
4 upon, or refer to in your testimony regarding
5 implementation of the Department's policies
6 regarding Idaho Code section 42-203 B and its
7 application.

8 MR. BAXTER: Your Honor, just for
9 clarification of the record. I think it's
10 important that we keep the policies distinct
11 between the policies that apply to the volume,
12 and the policies that apply to the addition of a
13 term condition.

14 I think we're starting to blend
15 discussions of those policies back and forth. So
16 if we could just clarify, which -- what element
17 are we talking about with regards to, and then
18 talk about maybe the individual policies there.

19 MR. SIMPSON: Yes.

20 MR. BAXTER: That might be helpful, and
21 keep the record a little more clean.

22 MR. SIMPSON: Certainly, if Mr. Keen
23 has references to the Department's rules with
24 respect to this is the policy, or this is the
25 rule that I looked at in referencing the volume

1 limitation, and these are the -- this was the
2 rule or the policy referencing the application of
3 42-203 B, keeping those separate.

4 Q. (BY MR. SIMPSON) I don't have any
5 problem with that, Shelley, in your responding to
6 my questions.

7 Mine was more general as I move into
8 your specific testimony areas. But if you feel
9 the need to be specific in replying, feel free to
10 do that. Is that fair?

11 A. Yes.

12 Q. Okay. So with respect to your
13 examination of the Department's administrative
14 rules, are there any other rules that you would
15 like to cite to us that you would rely upon in
16 responding to my questions?

17 A. Yes, I did want to point out Water
18 Appropriation Rule 50.03. Rule 50 deals with
19 conditions of approval. And that Rule 50.03
20 addresses, in particular, term conditions for
21 permits for power generation.

22 The particular sentence that I believe
23 is relevant in that rule says, a permit issued
24 for hydropower purposes shall contain a term
25 condition on the hydropower use in accordance

1 with Section 42-203 B(6) Idaho Code.

2 Q. Okay. So that additional rule that you
3 just identified has application in terms of the
4 Department's review of a term limit; correct?

5 A. Yes.

6 Q. Okay. With respect to the volume
7 limitation -- or would there be any other rules
8 that you would cite us to?

9 A. In with respect to the volume
10 limitation, I read from my pre-filed testimony
11 the rules earlier, and I do not believe there are
12 any others that I would reference in regarding
13 the volume being put on a water right license.

14 Q. With respect to your reference to the
15 term policy then, is it your testimony that a
16 policy differs from a Department rule?

17 A. Yes.

18 Q. Okay. In which way -- in what way?
19 Excuse me.

20 A. Rules are promulgated, and then
21 submitted to the legislature for approval, and
22 have the force of law. And a policy, as I
23 understand it, is internal guidance on practice
24 and application of the law, but may not have a
25 force of law.

1 Q. Do you have an understanding of when
2 the Department is required to conduct rule making
3 on a policy?

4 MR. BAXTER: Your Honor, I'm going to
5 object. That calls for a legal conclusion of
6 this witness.

7 THE HEARING OFFICER: He may answer to
8 his understanding.

9 THE WITNESS: Could you repeat the
10 question, please?

11 Q. (BY MR. SIMPSON) Do you have an
12 understanding of when the Department is obligated
13 to undertake rule making to implement a policy?

14 A. I don't know about the obligation. My
15 understanding is that rule making is advantageous
16 when additional detail needs to be provided in
17 how a particular statute will be applied.

18 Q. With respect to the volumetric
19 limitation, we've discussed here today, and
20 you've testified regarding the agency's procedure
21 it utilized in identifying the particular water
22 year referencing the Milner project; correct?

23 A. Yes.

24 Q. And in identifying that particular
25 water year utilized, it then calculated an annual

1 volume associated with the exercise of that
2 license; correct?

3 A. Yes.

4 Q. Why did the Department not simply
5 utilize the capacity of the generating facility?

6 A. By "capacity," do you mean the
7 diversion rate multiplied out 24 hours a day, 365
8 days a year? I'm not sure what you mean by
9 "capacity."

10 Q. The hydraulic capacity of the
11 generating facilities, for example. What the
12 turbines were rated at their ability to generate
13 power. Would that have been one option for the
14 Department to utilize?

15 A. The Department strives to base a water
16 right on actual diversion and beneficial use of
17 water. Not design, but actual.

18 Q. You recognize do you not, at least the
19 Snake River -- the water flows in the Snake River
20 vary between years and within the year; correct?

21 A. Yes.

22 Q. Okay. So essentially, any one year may
23 not be entirely representative of the amount of
24 flow that might be available for generating power
25 at Milner?

1 A. Yes, any one year may not be
2 representative of all years.

3 Q. Okay. And that's essentially the
4 problem that you identified when the Department
5 looked at 1992 and 1993 as below normal water
6 years, that those, if utilized, might limit the
7 ability of the project to operate; correct?

8 A. Yes.

9 Q. Okay. Then would it be fair to say,
10 that in 1996, might also be if utilized operate
11 to limit the project in terms of its operation to
12 generate hydropower?

13 A. It would limit it to a volume that
14 might be less than is available during other more
15 significant water years, or years of higher, more
16 continuous water flows.

17 Q. Okay. So then wouldn't simply
18 utilizing the design capacity of the turbines
19 allow the project operator to utilize whatever
20 flows are available at the facility to generate
21 power, thus maximizing generation?

22 A. The Department has an obligation to
23 quantify the amount of water, the quantity
24 beneficially used. And normally, that's done
25 during the authorized development period, and the

1 Department looks for that period for the
2 beneficial use up to that time the proof of
3 beneficial use is submitted and not after.

4 In almost any water right, there are
5 times when more water may be available than has
6 actually historically been put to beneficial use.
7 But the Department believes that the extent of
8 the water right is the amount historically put to
9 beneficial use, typically during the authorized
10 development period, and the Department only
11 deviates from that authorized development period
12 when some dilemma or problem requires us to do
13 that.

14 Q. Such as occurred in this situation;
15 correct?

16 A. Yes.

17 Q. And in this situation, the Department
18 looked to 1996. Mr. Keen, if the Department had
19 looked at 1997 or 1998, would it have been
20 possible that more, or a greater amount of
21 beneficial use could have been made of the water
22 passing through those hydro facilities?

23 A. Yes. In looking at Exhibit No. 3 -- I
24 haven't calculated the numbers. But based on the
25 area under the graph, it appears that that's

1 correct.

2 Q. And would it be in the public interest
3 to allow for the greatest generating capacity,
4 rather than letting water bypass the plant, and
5 not be utilized for the generation of power?

6 MR. BAXTER: I'm going to object to the
7 sense that it calls for a legal conclusion of
8 this witness. In that the director has already
9 made a determination of what is in the public
10 interest by including the volume on this
11 individual water right. And so that
12 determination to have a more limited volume has
13 already been made by the director.

14 THE HEARING OFFICER: We've been
15 discussing the policy within the Department. He
16 may answer as to his understanding.

17 THE WITNESS: The Department looks at a
18 number of criteria when evaluating the public
19 interests relative to an application for a new
20 water right or a transfer of an existing water
21 right.

22 But public interest is not one of the
23 criteria that the Department has to evaluate when
24 issuing a water right license. Beneficial use is
25 the criteria that we look at when issuing a water

1 right license.

2 Q. (BY MR. SIMPSON) Okay. Would there be
3 greater beneficial use of the flows available at
4 the Milner Power Plant if the water right volume
5 was issued at flows associated with calendar
6 years 1997 or 1998?

7 A. There -- if the volume figure on the
8 license were different and were larger, it is
9 apparent that the facilities in place would
10 probably be able to take advantage of that.

11 Q. Okay. And if the volume unit on the
12 water right were associated with the generating
13 capacities at the facility, would it result in a
14 greater amount of beneficial use if the water
15 flows were available?

16 A. Yes.

17 Q. And would that, in your view, maximize
18 the use of the resource in terms of its
19 beneficial use potential?

20 A. I think there are a lot of other
21 factors that we would have to look at regarding
22 maximizing the use of the resource. But again,
23 maximizing the use of the resource is not what
24 the Department looks at when issuing a water
25 right license. The Department looks at -- does

1 its best to determine actual beneficial use.

2 Q. Just prior in your testimony, you
3 answered one of my questions with a proposed
4 calculation that was basically 5,714 times 24,
5 times 365 days a year as an alternative for
6 calculating the annual volume associated with the
7 plant at Milner. Do you recall that testimony?

8 A. Yes.

9 Q. And why didn't the Department accept
10 that calculation in terms of that was the proof
11 of beneficial use that was submitted by the
12 applicant, and then undertaking that calculation
13 of changing cfs to acre feet, and then
14 multiplying the acre feet per day, times 365
15 days, as the annual volume limitation?

16 A. Because the flow of a river varies
17 throughout the year. And as in this case, and
18 quite often, water is not available all year long
19 to satisfy the maximum authorized flow rate for
20 24 hours a day, 365 days a year.

21 Sometimes there is more water there
22 than the generating plant can use. And at other
23 times, there is less -- often less water than the
24 generating plant can use. And again, we're
25 concerned with trying to quantify actual

1 beneficial use, not potential, or hypothetical
2 beneficial use, to the best of our ability.

3 Q. So it's an effort between balancing
4 actual beneficial use, and what water might be
5 available for generation in future years; would
6 that be correct?

7 A. I don't look at it as a balancing act.
8 I look at it as the Department strives to look at
9 what was actually diverted and put to beneficial
10 use during the authorized development period,
11 unless we're forced to deviate from that, as we
12 felt like we were in this case.

13 MR. SIMPSON: Okay. I'm going to have
14 you mark this as exhibit, I believe, No. 10.

15 (Exhibit 10 marked.)

16 THE CLERK: Exhibit 10?

17 MR. SIMPSON: Yes.

18 THE CLERK: All right.

19 Q. (BY MR. SIMPSON) And in looking at
20 Exhibit 10, Mr. Keen, do you see down at the
21 bottom of the page, the website? Does it refer
22 to the USGS website that you've been talking
23 about today?

24 A. Yes, it does.

25 Q. Okay. And does it also identify the

1 gage site as well?

2 A. Just looking at the number here, and
3 comparing that to Exhibit No. 3. And, yes, there
4 is a second.

5 Q. Okay. And the layout of this exhibit
6 in terms of the information provided, and the
7 warning, and the other information provided, is
8 it similar to what you've seen produced by the
9 USGS in terms of gage data?

10 A. Yes, it is.

11 Q. Okay. And this data, does it describe
12 the flow data at the Milner gage for the year
13 1997?

14 A. Yes.

15 Q. Okay. And to the best of your
16 recollection, did you review this data in the
17 context of the volume calculation undertaken by
18 the Department?

19 A. I don't recall evaluating this data
20 specifically as presented here. I do recall
21 evaluating just in general the use of data from
22 1996 versus data from 1997, which the Department
23 knew to be generally greater in flow than the
24 data from 1996 would show.

25 MR. SIMPSON: Then if you could mark

1 this as Exhibit No. 11, please.

2 (Exhibit 11 marked.)

3 Q. (BY MR. SIMPSON) You know, Shelley,
4 before we move on to Exhibit No. 11. Let's just
5 go back to Exhibit No. 10.

6 A. Okay.

7 Q. And could you, just to the best of your
8 ability, describe the various columns on this
9 exhibit? You are familiar with the format,
10 again, as you've described for the USGS data that
11 they collect, and they provide to the Department.

12 In this format, could you just describe
13 the columns that are listed here?

14 A. Yes. The left most column is an agency
15 designation. It just means the US Geological
16 Survey. The next column of data is the
17 particular gage or measurement location. Then
18 there is a column representing the date that the
19 data was taken.

20 And then to the right of that is a
21 column representing the average daily flow in
22 cubic feet per second. Actually, I said average.
23 And actually, it's mean daily discharge in cubic
24 feet per second.

25 Q. Okay. And so if you were to compare

1 Exhibit 3, which is for 1996, you've just
2 essentially graphed the data that otherwise would
3 have been identified in a similar document; is
4 what you were just describing?

5 A. Yes.

6 Q. This is graphed data?

7 A. Yes, that's right.

8 Q. Okay. And I'm not -- just to make sure
9 the record is clear. I'm not inferring that this
10 data for in Exhibit 10 is referenced in Exhibit
11 3. It's just how the USGS compiles the data,
12 daily mean discharge data, and then how it can be
13 graphed by the USGS as well; correct?

14 A. Yes.

15 Q. Okay. Then referring to then Exhibit
16 No. 11, if you would. Could you identify Exhibit
17 No. 11 for me, please?

18 A. Yes. Exhibit No. 11 is very similar to
19 Exhibit No. 10, and also Exhibit No. 1. It
20 represents the data taken from the same US
21 Geological Survey gaging station. The difference
22 is that Exhibit No. 11 is for the calendar year
23 1998 instead of 1997, as Exhibit 10 was, and
24 1996, which Exhibit 1 was.

25 Q. Okay. From your perspective, those

1 three years, and the data that's been produced in
2 those exhibits, are very similar in terms of what
3 they identify that is flow data, mean daily
4 discharge data at the Milner gage?

5 A. Yes.

6 Q. Okay. I think with respect to Exhibit
7 3, Shelley, your earlier testimony identified
8 perhaps if one were to go back and look in the
9 early years 1982, '83, '84, in that time frame,
10 that that didn't -- that discharge data at Milner
11 might exceed the discharge data at Milner in
12 1996; is that fair?

13 A. It's -- yes, it's possible. I don't
14 know -- I'm not aware of a precise compare year
15 by year total volume of discharge comparison.
16 But in looking at Exhibit No. 3, they appear to
17 be comparable.

18 Q. If you know, why wasn't a volume
19 limitation included in the original permit issued
20 in 1977?

21 A. For as long as I've worked at the
22 Department of Water Resources, it has not been
23 the practice of the Department to impose a volume
24 limitation on permits, unless there is storage
25 involved, storage of water, or there is some

1 other need to do so.

2 Typically, the Department has
3 calculated the volume limitation, and put that on
4 the water right at licensing, because usually we
5 try to base that on actual beneficial use.

6 Q. Given that the practice of the
7 Department is not to include a volume limitation
8 on the original permit, doesn't that fact create
9 some uncertainty as to what volume of power can
10 be generated at the facility?

11 A. Perhaps. I think the way the
12 Department has applied the diversion rate on the
13 permit, is that during the authorized development
14 period, but between when the permit is issued,
15 and the proof of beneficial use is submitted, the
16 permit holder can divert and use water up to the
17 diversion rate established on the permit when
18 that diversion rate is available, and beneficial
19 use can be made of it.

20 Q. And that's been the Department's
21 practice or policy for all types of permits
22 acquired; correct?

23 A. Yes, with the limitation that sometimes
24 on irrigation permits, for example, there may be
25 a per acre volume limit. That is not a total

1 volume for the water right, but it's a per acre
2 volume limit. That's been the general practice.

3 Q. Right. So I'm going to hand you
4 Exhibit 1 --

5 A. Okay.

6 Q. -- the exhibit for Twin Falls and North
7 Side. And do you recognize that exhibit?

8 A. Yes, I do. That is the approved
9 application for permit submitted in connection
10 with the hydro generating facility at Milner Dam
11 Water Right 01-7011.

12 Q. Okay. And with respect to that
13 application, that was an approved application;
14 correct?

15 A. Yes.

16 Q. And it was approved on June 29th of
17 1977?

18 A. I am just looking at the exhibit here
19 to confirm that. Yes, that's right.

20 Q. Okay. And that approved permit did not
21 contain a volume limitation?

22 A. It did not, other than the applicant in
23 typing out the application indicated a diversion
24 rate of 12,000 cubic feet per second, and a
25 volume of 24,000 acre-feet for each day 12,000

1 cfs is available. Which essentially means, that
2 they are proposing to divert and use water
3 continuously 24 hours a day.

4 Q. Right. And you are looking at sub-part
5 5 A and B; correct?

6 A. That's correct.

7 Q. And under sub-part 5(b), there appears
8 to be a line item there for acre feet per annum.
9 And that would be a volume that the applicant is
10 imposing?

11 A. Yes.

12 Q. If a number was inserted into that
13 space; correct?

14 A. Yes.

15 Q. And the applicant did not in this case
16 propose an annual volume; correct?

17 A. That's correct.

18 Q. Okay.

19 A. Just a daily volume.

20 Q. Right. And the Department in approving
21 this permit, did not impose an annual volume on
22 that permit; correct?

23 A. That's correct.

24 Q. And so from a planning perspective,
25 would it be fair then that the applicant in this

1 case in designing for and identifying the
2 feasibility of this project, would it be fair for
3 that applicant not to rely upon an annual volume
4 as a limitation in the exercise of this permit?

5 A. I don't know. What's the term "fair"
6 that's tripping me up here.

7 Q. Reasonable for based upon the
8 applicant's review of this permit as proposed by
9 the Department. That because it did not have an
10 annual volume limitation when issued, that there
11 was no need or necessity to consider an annual
12 volume limitation?

13 A. Yeah, I believe that's correct. I
14 believe that the Department of Water Resources in
15 issuing this permit was authorizing North Side
16 Canal Company and Twin Falls Canal Company to use
17 up to 12,000 cubic feet per second of water to
18 generate power whenever it was available.

19 Q. Or to generate 24,000 acre-feet per
20 day -- generate with water amounting to 24,000
21 acre-feet per day throughout the year?

22 A. Yes.

23 Q. Okay. And from a design perspective,
24 do you have an understanding that when an
25 applicant submits an application for approval in

1 most cases, that they haven't designed the
2 project, completed construction, and so forth;
3 correct?

4 A. Yes, there needs to be at least a
5 preliminary design. But the final design may not
6 be complete. And construction, certainly in most
7 cases, would not be completed.

8 Q. Right. And that's because from an
9 applicant's perspective they need to have some
10 certainty that they have the availability of
11 water pursuant to the permit before they start to
12 undertake the design and construction of a
13 hydropower project; correct?

14 A. Yes.

15 Q. And the same would apply for an
16 irrigation project, or any other use of water;
17 correct?

18 A. Right, I agree.

19 Q. Okay. And so then after the
20 application was approved, then it would be
21 reasonable for the applicant, the permit holder
22 to then to rely upon the conditions of this
23 application, and then assessing and designing the
24 project?

25 A. Yes.

1 Q. And if the ultimate volume identified
2 that by the Department in the licensing of the
3 project would result in less water being
4 available for generation at the facility, would
5 that be a new condition that wasn't otherwise
6 contemplated in this permit?

7 A. I don't believe so. Because I believe
8 the permit is an authorization to develop a
9 beneficial use of water, and the license is
10 confirmation of what was beneficially used. And
11 so that's why the Department typically looks at
12 what was actually diverted and beneficially used
13 during the authorized development period between
14 issuance of the permit, and proof of beneficial
15 use being submitted. Unless, as in this case,
16 there is some problems with the data
17 availability, or something that causes -- gives
18 us good reason to look beyond the authorized
19 development period.

20 Q. And that's, again, in reference to the
21 fact in part that there is variation in annual
22 water supplies available to any potential user of
23 water?

24 A. Yes. Yes, in part.

25 Q. Does the volumetric figure identified

1 in the Department's licensing of the Milner
2 project 7011, create a limitation on the exercise
3 of the water right?

4 A. Yes.

5 Q. Okay. So if, for example, there is a
6 year in which Twin Falls and North Side in the
7 operation of the power plant in the exercise of
8 the water right, generates with a volume of water
9 that meets the 2.39 million acre-feet figure. At
10 that point in time, is that a limitation then on
11 the exercise of the water right?

12 A. I believe that it is. When the
13 Department puts a volume figure on water right
14 licenses, that's intended to be an annual
15 diversion volume limit.

16 Q. So then there is no right to generate
17 once that limit is met?

18 A. Yes.

19 Q. Okay.

20 A. I believe that's correct.

21 Q. Must the water then be spilled past the
22 facilities?

23 A. There is, possibly. I mean, Milner is
24 an interesting case in that there is no
25 obligation of the state to deliver water from

1 upstream of Milner to below Milner. So if there
2 are other beneficial uses that could take that
3 water at Milner, they certainly could do that.

4 But if the water reaches Milner, and
5 there is no other beneficial use, then -- and the
6 annual diversion volume on the license has been
7 exceeded by the power generator. Then, yes,
8 under that circumstance, I believe the water
9 would need to be spilled past the dam.

10 Q. Would that result in your view of the
11 maximum utilization from a beneficial use
12 perspective of the resource?

13 A. If there were another application for
14 permit filed for additional beneficial use of
15 water, under those circumstances that we just
16 described, you know, I believe that we could find
17 that there is additional water available for
18 beneficial use.

19 Q. Would the beneficial use be wasted
20 under that factual context that you've just
21 described, where the limit has been met or
22 exceeded in water spilled?

23 A. I don't typically think of water
24 flowing in its natural stream course as being
25 wasted.

1 Q. Okay. Would this limit volume
2 limitation amount to an additional subordination
3 of the Milner hydropower right?

4 A. It would be a recognition of the
5 beneficial use established in connection with the
6 right consistent with the way the Department
7 issues all other water right licenses, except as
8 indicated in the rule that we quoted earlier,
9 municipal water use, and fire protection water
10 uses. Those are the only two that the Department
11 doesn't typically put a volume limitation on.

12 Q. So on every surface diversion for
13 irrigation, there is a volume limitation?

14 A. In water right licenses, that's what we
15 do. In the Snake River Basin Adjudication,
16 things may have been done differently based on
17 how the rights were defined in the past.

18 Q. Well, in referring to on page 4 of your
19 testimony then, that you've cited to the
20 Beneficial Use Examination Rule 35.01.J, the top
21 of page 4. Do you see that?

22 A. Yes.

23 Q. Okay. And you've just referred to that
24 in that the field examiner does not need to show
25 a total volume of water for municipal and fire

1 protection uses?

2 A. Yes.

3 Q. Okay. Does that rule specifically
4 identify that for hydropower a volume limitation
5 must be included, or should be included?

6 A. It does not refer to hydropower
7 specifically, no.

8 Q. Okay. All right. So again, that's
9 your interpretation that that rule then
10 identifies that for hydropower a volume
11 limitation should be included?

12 A. Yes, it's my interpretation that is
13 consistent with how I've been asked to carry out
14 my responsibilities at the Department.

15 Q. Okay. And again, that's not identified
16 in any internal Department memo that you can cite
17 us to, or additional rule?

18 A. Not that I can think of right off the
19 top of my head.

20 Q. Okay. Mr. Keen, I had you look at
21 Exhibit 1. Could you also then look at Exhibit
22 2, which I'll hand you.

23 A. Okay. Thank you.

24 Q. And do you recognize this exhibit?

25 A. Yes. This is the cover letter and the

1 beneficial use field report prepared in
2 connection with Permit No. 01-7011.

3 Q. And this document is part of the
4 Department's files with respect to 01-07011;
5 correct?

6 A. Yes, it is.

7 Q. And as a part of your duties with the
8 Department, did you review this document in
9 association with the licensing in this matter?

10 A. Yes.

11 Q. Okay. And I'm going to hand you
12 Exhibit No. 5, if I could, Mr. Keen.

13 A. Okay.

14 Q. And do you recognize that exhibit as
15 well?

16 A. Yes, I do. That's a memorandum the
17 subject of which is analysis of request for
18 extension of time received February 26, 1987.
19 The memorandum was prepared by Glen Saxton of the
20 Department of Water Resources, for inclusion in
21 the water right file 01-7011.

22 Q. So that's part of the Department's file
23 then with respect to 01-7011?

24 A. Yes, it is.

25 Q. And you reviewed that document in the

1 past as a part of your duties?

2 A. Yes, I have.

3 Q. In your testimony, you cite to the
4 beneficial use examination rules, specifically
5 page 4, which we've been talking about.

6 Would it be fair to say that you have
7 extensive knowledge with respect to those
8 beneficial use examination rules?

9 A. I have been working with those
10 examination rules for about 15 years, and doing
11 my best to apply them each day.

12 Q. Okay. All right. With respect to
13 those rules, and I think your earlier testimony,
14 you identified that Dr. Brockway, as a part of
15 Exhibit 2, submitted a beneficial use examination
16 report; correct?

17 A. Yes.

18 Q. And I believe you identified
19 Dr. Brockway as a certified beneficial use
20 examiner; is that correct?

21 A. Yes.

22 Q. And what does that mean to be certified
23 as a beneficial use examiner?

24 A. It means that the Department of Water
25 Resources has authorized that particular

1 professional, either a registered professional
2 engineer, or a geologist, to conduct beneficial
3 use field examinations in accordance with the
4 beneficial use examination rules, and submit
5 those reports to the Department to be used in the
6 licensing process, the water right licensing
7 process.

8 Q. What does the beneficial use
9 examination prove to the Department?

10 A. The beneficial use examination is
11 intended to prove that the permit holder has
12 diverted water and put it to beneficial use in
13 accordance with the permit that the Department
14 has issued.

15 Q. If that examination is completed by a
16 certified beneficial use examiner, is that
17 examination accepted by the agency as proof of
18 beneficial use?

19 A. Assuming that it's done in accordance
20 with the beneficial use examination rules, yes.

21 Q. So in the case of Exhibit 2, was it
22 completed in accordance with the rules, to the
23 best of your knowledge?

24 A. There is in my mind an inconsistency
25 between this beneficial use field report prepared

1 by Dr. Brockway, and the beneficial use
2 examination rules, in that Dr. Brockway did not
3 provide calculations for an annual volume, or
4 provide an annual volume figure, even though we
5 have the rule that I quoted earlier that says
6 that a volume need not be provided only for
7 municipal water use and fire protection water
8 use.

9 Q. And from your examination of Exhibit 2,
10 does it identify anywhere in that document, or in
11 any other Department's document, where that issue
12 with respect to an annual volume was identified?

13 A. I do not recall seeing anything in the
14 record that indicated that that issue was raised
15 with Dr. Brockway at the time the field report
16 was submitted or since.

17 Q. So to the best of your knowledge, the
18 Department never informed the permit holder as to
19 whether or not there were any issues with regards
20 to Dr. Brockway's examination, and the filing he
21 made?

22 A. To my knowledge, that's correct. I
23 don't recall anything in the record indicating
24 such.

25 Q. All right. So then from the

1 period -- and I'll refer you to the report,
2 identifies Dr. Brockway's examination was
3 completed on October 29th, 1993. From that
4 period forward, until the time of licensing, to
5 the best of your knowledge, the permit holder was
6 never notified of any issues with respect to this
7 beneficial use examination?

8 A. That's right.

9 Q. And if the examination is a beneficial
10 use examination by a certified beneficial use
11 examiner is accepted by the Department, is it
12 then proof of the extent of beneficial use?

13 A. Yes, assuming that it's done in
14 accordance with the rules, and done accurately,
15 the Department will from time to time review the
16 field reports submitted by certified water right
17 examiners to see that proper data was used, and
18 measurements and things were done properly.

19 Q. Okay. So once proof is filed, then
20 does the permit holder have the right to continue
21 to divert in accordance with the permit and proof
22 file?

23 A. Yes.

24 Q. Okay. Are there any limitations to
25 that diversion?

1 A. I'm not sure I understand what you are
2 thinking.

3 Q. Then there are -- I'll state it another
4 way.

5 Would there be any limitations to the
6 exercise of the diversion of water, and putting
7 that water to beneficial use, if not identified
8 in either the proof submitted, or in the permit?

9 A. The Department would expect the
10 diversion and use of water to be consistent with
11 the beneficial use of water accomplished prior to
12 submitting proof of beneficial use.

13 Q. Okay. So in this case then, between
14 1993 after the date of submittal of the
15 beneficial use report and 2008, would there have
16 been any limitations identified that wouldn't
17 have been identified in the documents that either
18 in the permit or in the proof that would limit
19 the operator in the generation of power at
20 Milner?

21 A. No, I don't believe in this case there
22 was any additional communication expressing a
23 limit beyond what was permitted and communicated
24 in the beneficial use field report.

25 Q. Right. So what I'm getting to,

1 Mr. Keen, is if the operator or the facility had
2 its permit in one hand, and the proof of
3 beneficial use report in the other hand, those
4 were the two defining documents under which they
5 had a right to continue to divert and generate
6 power at Milner Dam?

7 A. Yes.

8 Q. Up until 2008?

9 A. Yes.

10 Q. So if in 1997 or in 1998, power was
11 generated at Milner in volumes in excess of 2.39
12 million acre-feet, would the operator have been
13 exercising the right to generate power illegally?

14 A. No annual volume limitation or other
15 limitation, other than the beneficial use field
16 report and permitted diversion rate had been
17 communicated to the permit holder at that point
18 in time. So I think it would have been very
19 difficult for the Department to enforce anything
20 otherwise.

21 Q. So would the answer to my question be,
22 no?

23 A. Now, we're far enough along, I've
24 forgotten how you've phrased the question. I'm
25 sorry.

1 Q. If annual generation volumes exceeded
2 2.39 million acre-feet in any one year after 1993
3 and prior to 2008, would that generation have
4 been undertaken in an illegal manner?

5 A. No, I don't believe so.

6 Q. Okay. Would it be fair to say, that
7 after 2008, the changes made by the agency in the
8 license that was issued affected how the operator
9 could exercise those rights at Milner?

10 A. I believe that the license defined how
11 the right holder had operated the project at
12 Milner and established a water right. The
13 license, I believe, is consistent with the
14 beneficial use that was established by the right
15 holder.

16 Q. Okay. Is the license consistent with
17 how the operator exercised the permit up until
18 2008?

19 A. I -- you know, I don't know about the
20 years power generation really after 1996. So
21 I -- you know, I don't know whether the operation
22 of the plant after 1996 was consistent with the
23 license or not.

24 Q. Well, let's move on to the second
25 matter. And that is the term limit is the key.

1 In your testimony, you cite to Idaho Code,
2 Section 42-203 B; correct?

3 A. Yes.

4 Q. And that is the term limit. Mr. Keen,
5 in your testimony you cite to Idaho Code, Section
6 42-203 B; correct?

7 A. Yes.

8 Q. Okay. Would you agree that 42-203 B
9 provides the director with the authority to act?

10 A. Yes.

11 Q. Okay. Would you agree that it's not a
12 directive, but it provides him simply with the
13 authority?

14 A. I don't have the exact language in
15 front of me. But my recollection is that it's
16 phrased permissively. If you are referring
17 specifically to 203 B(6), it does say the
18 director shall have the authority to subordinate
19 their rights. And also, the director shall have
20 the authority to limit a permit or a license for
21 power purposes to a specific term of years.

22 So I don't read that as a directive,
23 but as an opportunity.

24 Q. Okay. Would you also agree that 42-203
25 B(7) identifies when and if a term limit should

1 be placed on the right to use water for
2 hydropower?

3 A. Yes, I do.

4 Q. And the statute cite uses the language,
5 the term "practical"; does it not?

6 A. Something like that.

7 Q. Go ahead and take a moment, and look at
8 if it, if you you'd like?

9 A. Yes. Yes, it says, the term of years
10 shall be determined at the time of issuance of
11 the permit, or as soon thereafter as practicable
12 if adequate information is not then available.

13 Q. Okay. And therefore, if the term
14 limits, if it's not practical in terms of the
15 term limit, would it be included?

16 A. I'm not sure I understand your
17 question. I'm sorry.

18 Q. Well, it provides a time frame, or
19 generally speaks as to when that information
20 should be acquired -- or excuse me -- when that
21 when that information should be included in
22 either a permit or a license; correct?

23 MR. BAXTER: Object, Your Honor, and
24 properly designate -- and Mr. Simpson says that
25 it applies either to a license or to a permit. I

1 think the language refers only to a permit in
2 that particular paragraph.

3 MR. SIMPSON: I stand corrected.

4 Q. (BY MR. SIMPSON) Mr. Keen, if you
5 would like to look at that section that we're
6 talking about, 42-203 B(7)?

7 A. Okay.

8 MR. SIMPSON: Let's just go off the
9 record for a moment.

10 (Discussion held off the record.)

11 Q. (BY MR. SIMPSON) You understand the
12 language I'm referring you to; correct?

13 A. Yes.

14 Q. Okay. And with respect to that
15 language it identifies, does it not, a timing of
16 when a reference to a term limit should be
17 included; correct?

18 A. Yes, it does.

19 Q. Okay. Mr. Keen, if there is not
20 adequate information regarding a term limit,
21 should such a condition be included?

22 A. The Water Appropriation Rules, the rule
23 that we looked at earlier, I believe, it was
24 50.03, indicates that a permit shall carry the
25 condition. Do we have a copy of those rules?

1 THE CLERK: It's in your binder.

2 THE WITNESS: So I'm looking at Water
3 Appropriation Rule 50.03. And the last sentence
4 of that rule says, a permit issued for hydropower
5 purposes shall contain a term condition on the
6 hydropower use in accordance with Section 42-203
7 B(6) Idaho Code.

8 Q. (BY MR. SIMPSON) Okay. So that rule
9 that you cited provides greater detail to the
10 statute?

11 A. Yes.

12 Q. 42-203 B(7); correct?

13 A. Yes.

14 Q. And so the exercise of the rule would
15 have to be consistent with the statute; correct?

16 A. Yes.

17 Q. Okay. In your view, Mr. Keen, are
18 there circumstances in which inserting a term
19 limit is not practical?

20 MR. BAXTER: Your Honor, I'm going to
21 object on relevancy, because the statute -- and I
22 know you have a copy of it there in front of you.
23 The last paragraph of subsection 7, and it says,
24 the term of years shall be determined at the time
25 of issuance of the permit. And it's significant

1 that we're using that the statute uses the term
2 permit and not license.

3 The example we have here is the
4 Department including a term condition at the time
5 of licensing. So as to relevancy, I don't
6 believe this section applies to the example we're
7 talking about here. The Department's action has
8 taken place with regards to subsection 6 above.
9 Where it says subsection 6 provides the
10 Department simply the authority to limit a
11 license to a specific term at the time of
12 issuance.

13 So I think the discussion of
14 practicality or practicability, I should say,
15 isn't relevant to when a license is issued -- or
16 excuse me -- when a term condition is added to a
17 license.

18 THE HEARING OFFICER: Did you wish to
19 respond?

20 MR. SIMPSON: Yes, Your Honor. I think
21 you -- one must read 203 B(6) and the sentence
22 that Mr. Baxter refers to in conjunction with 203
23 B(7). If you read the first sentence of 203
24 B(7), it says, the director in the exercise of
25 the authority to limit a permit or license for

1 power purposes for specific term of years.

2 So those two sections have to be read
3 together not separately as Mr. Baxter is
4 asserting here. He would have you read
5 only -- he would have you believe that the
6 authority for the director to impose a term limit
7 is on -- at the time of licensing is solely
8 related to subsection 6 and not subsection 7.
9 And we would disagree.

10 THE HEARING OFFICER: Let's go ahead
11 and ask your question, so the witness knows what
12 the question is before him, and he may answer.

13 MR. BAXTER: Your Honor, could I make
14 just one additional point for the record with
15 regards to that? The Department has taken a
16 previous position in the Brownlee matter that
17 this language, the bottom paragraph really goes
18 to focusing on future permits issued by the
19 Department.

20 The legislative history is clear as
21 we've outlined in the appeal brief of Brownlee,
22 that the legislature at the time of passing 203
23 B(6), was focused on the Department's ability to
24 come in and add a turning conditioning at the
25 time of license. It was critical that we be able

1 to go back and impose that on water rights that
2 were still in the permit stage.

3 Now, I think what happened here was
4 that the legislature was also looking forward,
5 and saying, how are we going to apply term
6 permits --

7 THE HEARING OFFICER: Let me interrupt
8 at this point. It's interesting legal argument
9 at this stage. But they have not had the
10 opportunity to respond in this proceeding to the
11 brief that was submitted that will have that
12 opportunity. And these legal arguments may be
13 made. At this stage, I would like to build the
14 record as to the best we can to have all of the
15 facts, and all of the answers in, and then
16 resolve those legal arguments subsequently.

17 MR. BAXTER: Okay.

18 THE HEARING OFFICER: So let's go ahead
19 and ask a question and get an answer, and we'll
20 build the record for what future uses it may
21 have.

22 Q. (BY MR. SIMPSON) Mr. Keen, if I can
23 recall my question and rephrase it. I believe I
24 asked you a question along the lines, would you
25 agree that there are then circumstances where

1 inserting a term limit is not practical?

2 A. There are circumstances where
3 calculating exactly what that term limit is at
4 the time a permit is issued is not practical.

5 Q. Okay.

6 A. Because perhaps the FERC license hasn't
7 been issued yet, or something like that.

8 Q. Are there also circumstances in which
9 the Department in the exercise of either of its
10 policy or rule in accordance with the statutes
11 that we're talking about here today, has not
12 placed a term limit on the ultimate license
13 issued for hydropower water right?

14 A. I believe there are examples, at least
15 one comes to mind, where the Department has not
16 placed a term limit on a hydropower license. But
17 I also know that in the exercise of my duties in
18 preparing the licenses, I have always drafted
19 them with the term limit condition, unless I made
20 a mistake, and sent them forward that way. And
21 almost all of them have been licensed with a term
22 conditions on them.

23 Q. Okay. And when you say "send them
24 forward." You mean send them forward for the
25 director's review and ultimate signature?

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1 A. Yes. I'm not authorized to sign the
2 license.

3 Q. Okay. And so ultimately, it's the
4 director's decision as to what conditions are
5 placed upon the license; correct?

6 A. That's correct.

7 Q. Okay. And the one example that you are
8 referring to, would that be the Cascade
9 hydropower plant?

10 A. Yes, that's the one that comes to mind.

11 Q. Okay. And if I could, I'll hand you
12 what has been marked as Exhibit 6. And if you
13 want to look through that document. Does Exhibit
14 6 reference part of the file, the Department's
15 file with respect to the Cascade hydropower
16 plant?

17 A. Yeah. The first page ever Exhibit 6
18 are actually a printout from, I believe, the
19 Department's website. It's the data from the
20 database representing that water right. But then
21 the subsequent pages are pages from the
22 Department's water right file.

23 Q. Okay. And this is a -- if you refer to
24 Exhibit 6, if you go to the third page of
25 the -- as you described it the printout of the

1 Department's files with respect to the Water
2 Right 65-12096. At the bottom of the third page,
3 it identifies the license date, the decree date,
4 permit proof due date. Those critical dates;
5 does it not?

6 A. Yes.

7 Q. And that it identifies that the permit
8 was approved on April 8th, 1981; correct?

9 A. Yes, that's what it identifies.

10 Q. Okay. And the license then was
11 issued -- did you know the date when the license
12 was issued?

13 A. If we refer to the other pages in the
14 exhibit, the license was first issued on the 8th
15 day of November, 1999. And then that license was
16 superceded and an amended water right license was
17 issued on the 14th day of January, 2000.

18 Q. Okay. And do you understand the
19 circumstances for which the amended license was
20 issued after the original suggested license or
21 offered license was issued by the determine?

22 A. Yes, I do.

23 Q. Okay. Could you describe those for us?

24 A. There was a petition for
25 reconsideration -- backing up a step

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1 The Department issues its -- or
2 designates its water right licenses as
3 preliminary orders pursuant to the Department's
4 rules of procedure. And there was a petition for
5 reconsideration by the water right holder, Idaho
6 Power Company, contesting the license as
7 originally issued.

8 And the Department granted that
9 petition for reconsideration, re-reviewed the
10 situation, and ultimately amended its preliminary
11 order, resulting in the amended water right
12 license.

13 Q. Okay. And you took part in those
14 discussions with Idaho Power in reference to the
15 petition for reconsideration; correct?

16 A. Yes, I did. I was in attendance at a
17 meeting where that petition for reconsideration
18 was discussed. I don't have a real detailed
19 recollection of that meeting. But I have seen in
20 the record, my memo of January 10th, 2000,
21 detailing some of the discussion that occurred at
22 that meeting.

23 Q. And do these documents that are
24 identified in Exhibit 6, fairly represent the
25 arguments made by the petitioner, Idaho Power

1 Company, as a basis for the Department
2 reconsidering the inclusion of a term limit in
3 its license?

4 A. Yeah. Like I said, I don't
5 have -- it's been so long, I don't have a
6 detailed memory of that meeting. So I can only
7 rely on my memo. And I believe it was prepared
8 accurately in representing those arguments.

9 Q. Okay. And the arguments are
10 represented by the documents contained in Exhibit
11 6?

12 A. Yes.

13 Q. Okay. And one of those arguments being
14 that the time that had past since the issuance of
15 the permit, and then the development of the
16 project regarding then the inclusion of the term
17 limit in the license?

18 A. Yes, that was one of the arguments.

19 Q. Okay. And the effect of what that term
20 limit might have on the exercise of the right,
21 and the future value of the right?

22 A. Yes.

23 Q. Okay. And would it be fair to say,
24 that from your review of the record, and the
25 involvement of that proceeding, that ultimately

1 the Department accepted the arguments of the
2 petitioner in removing term limit?

3 A. I don't know. I don't know whether
4 these are arguments that were persuasive, or it
5 was something else. The license was ultimately
6 changed. I don't have any recollection of being
7 privy to the discussions that ultimately resulted
8 in the changed licensed.

9 I know I was -- I'm fairly certain that
10 I was involved in preparation of the amended
11 license document, but I don't -- I'm sure that
12 was at the direction of my superiors.

13 Q. Okay. And that would have been the
14 director that authorized you and requested that
15 you draft the amended license in a manner that
16 that did not include the term limit?

17 A. Well, it would have been Norm Young,
18 who was the division administrator at the time,
19 acting on behalf of the director. And I don't
20 know whether he discussed it with the director at
21 all.

22 Q. Okay.

23 A. I don't know.

24 Q. Okay. Ultimately, though, the
25 Department did issue the license without a term

1 limit after hearing arguments from the petitioner
2 regarding the inclusion of the term limits, and
3 the effect of those term limits?

4 A. That's correct.

5 Q. Okay. Mr. Keen, would it be fair to
6 say, that the Department's policy now is in
7 issuing permits for hydropower uses, that it
8 includes a reference to the term policy of the
9 Department?

10 A. Yes.

11 Q. Okay. So I could have you go through,
12 and I've printed out a number of permits issued
13 by the Department from the period 1997 or
14 thereabouts on to the present day. And would it
15 be fair to say, that if one were to review those
16 permits, one would likely see language in those
17 permits similar to what I'll show you in permit
18 No. 31-07654? And I've highlighted that for easy
19 reference.

20 A. Well, that condition says, the director
21 retains jurisdiction of this right in order to
22 limit the use of water for hydropower generation
23 purposes to a specific term of years as required
24 by Section 42-203 B(7) Idaho Code.

25 Yes, something -- maybe not exactly

1 that, but something similar to that. And we
2 would strive to issue every permit for power
3 generation with something like that.

4 Q. So it's essentially a placeholder,
5 where the Department hasn't identified the length
6 of time with respect to a term period, but it
7 attempts to provide the permit holder with notice
8 that a term limit will be included in the
9 ultimate licensing of the right?

10 A. Yes, that's exactly right.

11 Q. Okay. And if you know, why did the
12 agency start including those time limitations on
13 permits? Was it to provide that notice?

14 A. You mean, why did the Department start
15 using that condition on permits?

16 Q. Not necessarily the condition, but just
17 providing that notice. Was it in reference to,
18 or in an attempt to stave off a circumstance
19 similar to what arose in the Cascade licensing
20 process? Where Idaho Power in that case didn't
21 have notice that there would be a term limit
22 included, until the license was issued?

23 MR. BAXTER: Again, Your Honor, I'm
24 going to object, because I think we're confusing
25 the issue.

1 THE HEARING OFFICER: He may answer.
2 Go ahead.

3 THE WITNESS: You know, I believe that
4 the term limit policy began in about 1984 or so,
5 even prior to the passage of the statute that
6 ultimately became 42-203 B. The Water Resource
7 Board, if I recall correctly, adopted a policy of
8 wanting the Department to issue water rights for
9 hydropower generation with term limits similar to
10 what FERC does.

11 And then I believe that the Department
12 was challenged with creating conditions for both
13 permits, and then ultimately water right license,
14 as indicated in 203 B, section 7, that define
15 those limits.

16 But in the practical application of the
17 statute, once it was passed, recognized that at
18 the time a permit is issued, a water right
19 permit, it might be difficult to establish a
20 precise date, or a precise term, because the
21 power purchase contract or the FERC license that
22 that term might be based on, might not yet be
23 established.

24 So in the permit, we felt it necessary,
25 as I understand the Department's practice, to put

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1 that condition in there consistent with the
2 direction in the rule, and the opportunity in the
3 statute. But recognizing that it probably won't
4 be until some later point, typically licensing,
5 when we have enough information to actually
6 provide the specific date or number of years that
7 becomes the term limit.

8 Q. (BY MR. SIMPSON) Okay. Would it be
9 fair to say, that that's one of the arguments
10 that Idaho Power had in the Cascade case, was
11 that it didn't have notice, that it was unfair to
12 insert a term limit after the number of years it
13 had passed? And that by providing this general
14 notice, as identified in the permit that we just
15 discussed in Basin 31, it addresses that issue?

16 A. I would have to go back and look at my
17 memo here real quickly to see what was actually
18 presented by Idaho Power in the Cascade case.
19 You know, based on my understanding of my memo,
20 or notes from the meeting, I'm not sure that the
21 item that you just raised, that Idaho Power
22 didn't have notice, was really one of the
23 arguments put forward. It --

24 Q. Go ahead. If you have something you
25 would like to add.

1 A. No. I'm sorry. Nothing to add to
2 that.

3 Q. Would you agree that the imposition of
4 that term limit at the time -- well, strike that.

5 You indicated just a moment ago in your
6 testimony, that in your view, it was the
7 Department's policy as early as 1984 to include
8 term limits in licenses; correct?

9 A. In at least permits. I'm not sure that
10 the license consideration dates back to '84.

11 Q. Okay.

12 A. I don't recall that detail.

13 Q. And if you look at page 3 of the
14 Cascade printout, the third page of the printout.

15 A. Yes.

16 Q. It identifies that the permit was
17 issued in 1981, and proof was made in 1984;
18 correct?

19 A. Yes.

20 Q. Okay. So to the best of your
21 knowledge, did the Department at any point in
22 time prior to the date of issuing the license, go
23 back and amend the permit to include a term limit
24 to provide Idaho Power notice of a term limit
25 being included in the permit for the Cascade

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1 project?

2 A. Yeah, I haven't reviewed the entire
3 file lately for water right 65-12096. So I don't
4 know that for sure. But, yeah, I just don't know
5 that for sure.

6 Q. Okay. It doesn't appear from the
7 record that you have that they did?

8 A. Correct.

9 Q. Okay. Otherwise it would have
10 been -- the arguments made by the petitioner,
11 Idaho Power Company, for reconsideration wouldn't
12 have included the inclusion at the time of
13 licensing of that term condition, because it
14 would have already been in the permit; correct?

15 A. Yeah, I don't know what arguments they
16 might have made.

17 Q. Okay. Whatever the documents say, they
18 say?

19 A. Right.

20 Q. Okay. To the best of your knowledge,
21 in the Milner case that we have before, 7011, did
22 the Department ever go back in and include in any
23 of the permits issued, or the amended permits
24 issued, include a term limit?

25 A. Not to my knowledge.

1 Q. Okay. In reference to 42-203 B(6) and
2 B(7), in your view, could the Department have
3 done that?

4 MR. BAXTER: Again, Your Honor, I'll
5 just lay the foundational objection. It's
6 confusing the two issues.

7 THE HEARING OFFICER: You may answer.

8 THE WITNESS: Yes, I believe the
9 Department could have done that.

10 Q. (BY MR. SIMPSON) Okay. So your
11 testimony is that the Department in your view,
12 started a policy with respect to permits, having
13 those permits include a term limit as early as
14 the early 1980s, 1984, I think is your testimony;
15 correct?

16 A. Yes.

17 Q. Okay. And after 1984, to your
18 knowledge, did the Department ever go back into
19 the Milner permit and modify it to include a term
20 limit?

21 A. No, I don't believe that term limit was
22 placed on the water right until licensing in
23 2008.

24 MR. SIMPSON: Okay. If I could have
25 just a moment?

1 Mr. Keen, are you familiar with
2 generally the record with respect to the Milner
3 Power Plant in terms of the original permit being
4 issued in 1977, then an amended permit, an
5 extension of time in 1982, an extension of time
6 in 1987, an extension of time in 1992, and then
7 proof being filed in 1993?

8 A. Yes.

9 Q. Okay. So with respect to at least 1987
10 and 1992, when the Department issued an extension
11 of time in an amended permit for the Milner
12 project, would there have been an opportunity for
13 the Department to have placed a reference to the
14 term limit on the permit at that time?

15 A. Yeah, I believe that could happen.

16 Q. If that was the Department's policy,
17 they could have done that; correct?

18 A. Yes.

19 Q. Okay. And if the Department had placed
20 that permit condition the term limit on the right
21 on the permit at the time it issued the extension
22 of time and the amended permit in either 1987 or
23 1992. Would the applicant or the permit holder
24 in that case, would they have had the opportunity
25 to object at that time to the placement of that

1 condition on the permit?

2 A. You know, with the amended permit,
3 certainly the Department now issues those as
4 preliminary orders of the Department, and there
5 is the opportunity to petition for
6 reconsideration or appeal those.

7 And so, yes, I believe that with
8 amended permit, that would have been the case.
9 I'm not experienced with extensions of time to
10 submit proof of beneficial use enough to know
11 whether those are -- whether those can be
12 appealed. I'm not sure the Department typically
13 designates those as preliminary orders. Although
14 I suppose a person could ask the Department to
15 designate it as some kind of order, so that they
16 could proceed under the rules of procedure.

17 I'm just not -- it's just not the kind
18 of thing that comes up very often.

19 Q. Okay. Are you familiar, or do you have
20 a general understanding of when the canal
21 companies, Twin Falls and North Side, begin
22 construction of the project? Are you generally
23 familiar that they did so after receiving the
24 FERC license issued in 1998?

25 A. I don't recall that detail.

1 Q. Let's just assume that construction
2 commenced after 1987 after the extension of time
3 was issued by the Department, and the amended
4 permit was issued allowing additional time to
5 submit proof of beneficial use.

6 MR. BAXTER: John, just a quick
7 clarification. I think you said they began
8 construction in 1988. Did you mean 1989?

9 MR. SIMPSON: Yes, after. Thank you,
10 Garrick. Just after 1988.

11 MR. BAXTER: Okay.

12 Q. (BY MR. SIMPSON) After the issuance of
13 the FERC project.

14 A. Okay.

15 Q. So if the canal companies commenced
16 construction of the project after 1988, after it
17 received the FERC license, and after the canal
18 companies received the amended permit. If there
19 were terms or conditions in that amended permit
20 that they disagreed with, or in their view
21 affected the feasibility of the project, would
22 they have had the ability to appeal those prior
23 to construction?

24 A. Yeah, they would have had the
25 opportunity to appeal the provisions in the

1 amended permit when it was issued.

2 Q. Right. And so not have having the term
3 limitation in any of their permits, precluded
4 them from having that opportunity prior to
5 expending considerable resources in the
6 construction in the project?

7 MR. BAXTER: I'm going to object. I
8 think there has been no foundation laid yet that
9 they have expended considerable resources in the
10 project. I don't see that in the record yet
11 before us, but...

12 THE HEARING OFFICER: I think in the
13 earlier record, which is included in this, there
14 was evidence of that.

15 MR. BAXTER: Okay. I stand corrected
16 then, Your Honor.

17 THE HEARING OFFICER: Go ahead.

18 THE WITNESS: Yeah, I wouldn't expect
19 them to -- wouldn't expect the canal companies,
20 Twin Falls and North Side, to feel the need to
21 pursue or appeal something that wasn't included
22 in the permit, or the amended permit at the time.

23 Q. (BY MR. SIMPSON) So it would have been
24 reasonable for them to undertake consideration
25 based on the conditions that were then present in

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1 the permit that they had?

2 A. Yes.

3 Q. Okay. And so any later in time added
4 conditions, that might affect the viability of
5 the project, they would not have had any
6 knowledge of at the time that they commenced
7 construction; correct?

8 A. You know, I don't know about any
9 knowledge of, because the Statute 42-203 B, and
10 the rule that we looked at, that says the
11 Department shall provide a term limit. I believe
12 both came in to being in about 1986.

13 So, you know, even if there wasn't
14 correspondence from the Department, at least
15 there was a statutory representation. And the
16 representation in the rule that water rights for
17 hydropower production should have term limits on
18 them.

19 Q. Okay. And we discussed earlier that
20 those provisions of 42-203 B provided the
21 Department with the authority, but they were not
22 absolute; correct? Do you recall that? You
23 recall your testimony earlier?

24 A. Yes, the way to read 42-203 B is it
25 provides an opportunity.

1 Q. Yes, it provides the director the
2 discretion to determine whether or not to provide
3 those subordinations?

4 A. Yes.

5 Q. Okay. And so in your view, if those
6 subordinations weren't included at the time in
7 the 1987, or at the time that the construction
8 commenced, would it be reasonable for Twin Falls
9 and North Side to rely upon the permit as it
10 existed in 1987 as the basis for the exercise of
11 water?

12 A. Yes.

13 MR. SIMPSON: Okay. That's all the
14 questions I have. Thank you, Mr. Keen.

15 THE HEARING OFFICER: Redirect?

16 MR. BAXTER: Yes, Your Honor.

17 THE HEARING OFFICER: Do you know how
18 long it will likely take?

19 MR. BAXTER: I'm thinking about a half
20 hour or so.

21 THE HEARING OFFICER: Do you want to
22 take a lunch break?

23 MR. SIMPSON: Well, then I've got
24 probably ten minutes worth of Mr. Bowling is all.
25 So if we could, I would like to wrap it, or run

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1 on through. Unless our friend in the garage
2 needs some help?

3 THE HEARING OFFICER: No, he's good for
4 12 hours.

5 MR. SIMPSON: Okay.

6 THE HEARING OFFICER: Okay. Go ahead.

7 MR. SIMPSON: Your Honor, before we
8 start redirect. At this point, I would move for
9 the admission of Exhibits 1, 2, 5, 6, 10 and 11.
10 10 and 11 are the Milner gage readings for '97
11 and '98.

12 MR. BAXTER: Okay. No comment from me,
13 Your Honor.

14 THE HEARING OFFICER: Okay. Exhibits
15 1, 2, 5, 6, 10 and 11 are admitted.

16 (Exhibit 1, 2, 5, 6, 10 and 11 admitted
17 into evidence.)

18 MR. SIMPSON: Thank you.

19 MR. BAXTER: Could we please have this
20 marked as IDWR Exhibit 4. And Debbie will give
21 you the one that's officially marked.

22 REDIRECT EXAMINATION

23 QUESTIONS BY MR. BAXTER:

24 Q. Mr. Keen, you've just been handed
25 what's been marked as IDWR 4. Have you seen this

1 document before?

2 A. Yes, I have.

3 Q. Your earlier testimony here today was
4 to talk about policies as they relate to
5 insertion of term conditions on hydropower
6 licenses -- or excuse me -- hydropower permits
7 and licenses.

8 But could you please explain to the
9 Hearing Officer here today what this document is?

10 A. This document is a photocopy of what I
11 believe was, at the time, a Department newsletter
12 called "Currents." And it contains an article
13 for which the headline is "IDWR "Sets Time Limit
14 on Hydro Permits," and then it also includes a
15 re-print of a resolution by the Water Resource
16 Board adopting position on term permits. And the
17 date on the document is August 1984.

18 Q. Does this document talk about some of
19 the policy reasons why term limits or term
20 conditions should be put on hydropower permits?

21 A. Yes, it does.

22 Q. And what are some of those policies?

23 A. In just reading through the document.

24 Q. Let me turn your attention to --

25 A. Yeah.

1 Q. I think it's the second to last
2 paragraph in the news article. Not the
3 resolution, but the news article there. And it
4 starts with "Because."

5 A. Okay. Yes. It says, "Because hydro
6 generation permits often allow developers to
7 appropriate the entire stream flow, even during
8 spring runoff, the board felt a periodic review
9 was necessary to protect the public interest.
10 Although the time frame allowed on permits will
11 be decided on a permit by permit basis, the
12 backers of the project will be given ample time
13 to pay off loans and recoup their investments.

14 Q. And then on to the resolution itself,
15 under bullet point number 1. There under the
16 paragraph that begins, "Now, therefore, the Idaho
17 Department of Water Resource Board hereby
18 declares and resolves as follows." That bullet
19 point number 1, is there a determination as to
20 the local public interest with regards to that
21 paragraph?

22 A. It says, "the position of the Idaho
23 Water Resource Board is that the local public
24 interest requires that all permits and licenses
25 authorizing the diversion and use of waters of

1 the State of Idaho for hydropower purposes be
2 subject to review by the director of the
3 Department of Water Resources."

4 Q. Okay. And then the second sentence
5 there, could you read that one?

6 A. Yes. "Normally the review should be
7 made at the end of the operating period specified
8 by the Federal Energy Regulatory Commission
9 authorization, or as otherwise provided by the
10 director of the Department of Water Resources.
11 Pursuant to such review, the director, upon
12 appropriate findings, should renew the water
13 right with its original priority date for the
14 benefit of the project with the same or different
15 conditions, or should declare the right to be
16 terminated in whole or in part."

17 Q. And so is it your understanding that
18 this policy was to apply to permits issued -- or
19 the Department was to consider this when it
20 issues permits after the date of this resolution?

21 A. Yes.

22 Q. When did Idaho Code 42-203 B(6) become
23 enacted, to the best of your recollection?

24 A. To the best of my recollection, it
25 would have been 1986. I may be off by a year or

1 so, but I believe it was 1986, or thereabouts.

2 Q. But after the issuance of this policy
3 with regards to permits?

4 A. Yes.

5 Q. Okay. And there was the suggestion
6 that term conditions were included on water
7 rights, because the Department might have wanted
8 to prevent issues. And I think the way it was
9 framed, like issues, like the way that Cascade
10 was presented.

11 Isn't there a reason that the
12 Department actually started including term
13 conditions on water right permits, because of
14 this policy, and subsequently, the statute, and
15 then subsequently the rules changed, or the rules
16 that you've identified here today?

17 A. Yes, I believe that's correct. We
18 followed the policy, and the statute, and the
19 rule.

20 Q. Now, a case was made here today that
21 the Department in issuing the licensing in
22 Cascade, did that because of the arguments raised
23 by Idaho Power. To your recollection, do you
24 recall why exactly the Department decided not to
25 issue the term condition in the Cascade license?

1 A. I do not recall that at all.

2 Q. So is it speculation as to why the
3 director at that time removed the term condition
4 on the license?

5 A. Yeah, I don't know why the director did
6 that. I'm not sure. I could speculate.

7 Q. And, in fact, isn't that contrary to
8 the Department's own rule that you read here
9 earlier today?

10 A. Yes, it is. I believe it is.

11 Q. Now, there is some talk about defining
12 documents, and the suggestion that once a
13 beneficial use field exam is submitted to the
14 Department, you are essentially done. Isn't it
15 simply a ministerial task for the Department,
16 after the submission for the beneficial use exam,
17 isn't it ministerial after that point, can't you
18 just simply issue the license?

19 MR. SIMPSON: I'll object that that
20 wasn't part of any of the record today in this
21 case, Your Honor. There was no discussion about
22 ministerial tasks, or otherwise.

23 THE HEARING OFFICER: That issue has
24 been determined. And so let's move on to another
25 area. I don't think that was the thrust of the

1 questioning, because that issue has been
2 determined.

3 MR. BAXTER: So just for clarification
4 for me, Your Honor. There has been a
5 determination or a holding --

6 THE HEARING OFFICER: The licensing is
7 not ministerial.

8 MR. BAXTER: Perfect. Thank you, Your
9 Honor.

10 Q. (BY MR. BAXTER) I think it's important
11 that we talk about another issue that has been
12 implied here in this matter. And it's the delay
13 from when the proof of beneficial use was
14 submitted, and to when the Department licensed
15 this particular water right.

16 How would you address criticism, and
17 the delay in which the Department works, or is
18 able to process licenses in other applications?

19 MR. SIMPSON: Your Honor, I'll object.
20 This is beyond redirect. My questioning didn't
21 go to asking him to explain the criticism of the
22 Department and any delays. It just referenced
23 solely the time between 1993 and 2008. This is
24 beyond my direct examination.

25 THE HEARING OFFICER: The concern I

1 have is, where it appears to be that some of the
2 determinations are discretionary, whether in
3 determining what the term limit is apparently
4 discretionary decision by the director, and not
5 mandatory, is the extent to which delay plays a
6 part in exercising that discretion if there is an
7 abuse of discretion after allowing a process to
8 proceed for many, many years, without a
9 determination.

10 So to that extent an explanation of why
11 there may have been delay, I think is relevant.
12 I don't think criticism to the Department is
13 relevant or irrelevant. It just doesn't play a
14 part in this.

15 But the reasons for the delay is a
16 relevant -- may be a relevant factor in
17 determining if there was an abuse in discretion.

18 MR. BAXTER: Well, Your Honor, the
19 reason why I ask the question was actually in
20 anticipating future briefing on this issue. That
21 we were going to see criticism of the way the
22 Department came into license it.

23 If Counsel here today will say that
24 that issue is not going to come up with regards
25 to briefing, I'm more than happy to withdraw the

1 question.

2 THE HEARING OFFICER: Well, if you want
3 to establish a record on why the delay took
4 place, you may do so.

5 MR. BAXTER: Okay.

6 Q. (BY MR. BAXTER) Let's go ahead and
7 talk about that then, shall we?

8 A. I'm not sure I can speak specifically
9 to this particular water right. But in general,
10 I have worked since September of 1994. So a
11 considerable period of time on water right
12 licensing at the Department of Water Resources.

13 And at that time, there was significant
14 licensing backlog. And there always has been
15 ever since that time, a licensing backlog of
16 varying size. And that's really a function of
17 Department staffing levels and priorities.

18 And we've always had just a set number
19 of people who could work on water right issues.
20 And at times, licensing has been a priority. At
21 other times, it's been processing of water right
22 transfer applications or permits for new water
23 rights, or, you know, other things including
24 about a year. When those of us who normally work
25 on water appropriations, were actually working on

1 Snake River Basin Adjudication recommendations.
2 And so we do our best to do as many as
3 we possibly can. And I looked yesterday, and the
4 Department has issued over 1,800 water right
5 licenses since June of 2000, but still a backlog
6 remains.

7 I think also there is a component of
8 expertise among the staff. And historically, the
9 Department's expertise has been more in the area
10 of irrigation water rights, and those kinds of
11 things, and stock watering and domestic. And
12 hydropower presents some unique technical
13 challenges.

14 And recently we've had the good
15 fortune -- recently being the last three years or
16 so, we've had the good fortune of having in-house
17 expertise in hydropower water rights, and have
18 tried to take advantage of that in issuing water
19 right licenses for hydropower purposes.

20 Q. And have there been other efforts
21 within the Department to ramp up, or issue things
22 sooner, or quicker within the last couple years?

23 A. Yeah. In the last few years, the
24 Department has been under directive from the
25 Governor's office to actually make a water right

1 transfer as a high priority. And has put a
2 significant amount of energy and internal labor
3 and resources into water right transfers, which
4 results in less opportunity to issue water right
5 licenses.

6 Q. Thank you. Let's go to your pre-filed
7 testimony. Changing gears on you a little bit
8 here.

9 A. Okay.

10 Q. And if I may look at it here. I'm
11 looking at page 4, Beneficial Use Examination
12 Rule 3501 J, which is the second one quoted on
13 page 4 of your pre-filed testimony.

14 A. Yes.

15 Q. I think the point was made that it
16 doesn't say hydropower in that list. But does
17 that list exclude two other uses from the need to
18 report a storage -- a volume limit?

19 A. Yes, it does. It specifically excludes
20 municipal water use and fire protection use.

21 Q. Then hasn't it been the Department's
22 policy to then take that to mean, that every
23 other water use, including hydropower then must
24 have a volume condition put on it?

25 A. Yes. It's been our interpretation of

1 that rule, that since municipal and fire
2 protection are the only two specifically excluded
3 from the need to report a volume, that it must be
4 the intention that every other water use receive
5 a volume limitation.

6 Q. I'm going to go back to our discussion
7 about post 1993, and diversions, say, even post
8 1996 diversions by Idaho Power. And I think it
9 was premised to you, that the rest of you -- or
10 asked of you, if Idaho Power were to have
11 diverted a larger volume than that issued in
12 1996 -- so let me take a step back, and come into
13 that a little bit more direct.

14 If Idaho Power in 1998 or 1999
15 ultimately diverted more volume than the
16 Department put on the license ultimately, I think
17 the characterization, that you characterized that
18 the Department would not retroactively apply
19 that.

20 Do you really mean that the Department
21 would not seek a notice of violation, or would it
22 be unlike the Department to seek a notice of
23 violation, or to try to somehow penalize Idaho
24 Power for diverting that additional amount?

25 A. Yes, that's correct.

1 Q. Okay. And if so, in fact, it happens
2 that Idaho Power is able to divert an additional
3 amount, wouldn't they be able to apply for
4 another water right for the additional volume as
5 well?

6 A. Yes, they could certainly apply.

7 Q. Okay. We talked a little bit about the
8 public interest with regards to that. Isn't it
9 also important to take into consideration the
10 other junior water users that might be out there?
11 So, for example, let's say, ultimately the term,
12 or the subordination agreement condition on the
13 Milner hydropower is changed from how it was
14 recommended. And all of a sudden, recharge is
15 not subordinated to this particular water right.

16 Did I say that correctly? Or this
17 water right is able to make a call against
18 recharge, or make a call against -- you know, or
19 even without the subordination, has a right to
20 make a call against junior upstream hydropower
21 rights. They might view that public interest a
22 little bit differently, and believe that Idaho
23 Power has the ability to limit that as the right
24 to use that, in which they've put to beneficial
25 use. And that other water users should also have

1 the right to be able to come in and exercise
2 their water rights; is that correct?

3 A. Yes.

4 Q. And I just want to make sure I
5 understand, and that it's clear in the record.
6 Does the Department normally put a volume of 24
7 hours a day, seven days a week, 365 days a year
8 on not only this hydropower right, but other
9 hydropower rights, or even other irrigation water
10 rights in the licensing process?

11 A. Certainly, not on the irrigation
12 rights. I believe a volume has been calculated
13 that way in the past on some hydropower water
14 right licenses. But really, the Department
15 should be, we believe, now striving to quantify
16 the actual beneficial use of water put to
17 beneficial use during the development period.

18 And certainly don't think right now
19 that just granting a water right license for the
20 diversion rate 24/7/365 in most cases reflects
21 actual beneficial use.

22 Q. Do you know who operates the dam for
23 Twin Falls Canal Company?

24 A. I'm not sure I understand exactly how
25 that works. The Department issued the water

1 right license to the permit holders of record
2 Twin Falls Canal Company and North Side Canal
3 Company on the FERC license. I believe Idaho
4 Power is listed as a licensee. And I also recall
5 seeing Milner, I think, or something -- some
6 entity like that, which I thought might be a
7 subsidiary of Twin Falls and North Side Canal
8 Companies. But I'm not sure I completely
9 understand that.

10 Q. But it is your understanding that Idaho
11 Power appears on the FERC license for this
12 facility?

13 A. I believe that's right.

14 Q. Okay. So when discussing then the
15 barter concept of knowledge, and who would have
16 been aware of maybe the term condition, and the
17 possibility, I think it's your testimony that you
18 talked about how Twin Falls and North Side should
19 have been aware of the statute and the rules.
20 But not only there, I think the brief that we
21 provided to the Hearing Officer here lays out,
22 Idaho Power specifically has knowledge of
23 legislative history on this issue. And, in fact,
24 participated in the drafting of that statute.

25 And so also given their interest, it

1 would seem reasonable that they would also, as
2 participants, would have had knowledge of
3 this -- of the legislative history surrounded
4 this issue, and shouldn't have been surprised
5 when a term condition was put on a water right at
6 the time of licensing?

7 MR. SIMPSON: I'll object. It assumes
8 facts not in evidence.

9 THE HEARING OFFICER: Sustain the
10 objection. It's a leading question, and is
11 testimony rather than a question.

12 MR. BAXTER: Okay.

13 Q. (BY MR. BAXTER) But, Mr. Keen, is it
14 your understanding -- or strike that.

15 Given then, Mr. Keen, the Department of
16 Idaho Power's participation, you believe that
17 they would have had knowledge, given our brief,
18 of on existence of 42-203 B?

19 A. Yes.

20 MR. BAXTER: Just a second, Your Honor,
21 while I flip through the last of my notes here.

22 No further questions, Your Honor.
23 Thank you.

24 MR. SIMPSON: Just a couple quick ones,
25 Your Honor, and then we'll get on to Mr. Bowling.

1 RECROSS-EXAMINATION

2 QUESTIONS BY MR. SIMPSON:

3 Q. Mr. Keen, this is a non-consumptive use
4 right; Idaho Power generation?

5 A. Yes, it is.

6 Q. Okay. And so there is obviously
7 a -- would you agree, there is an incentive for
8 the operator of the facility to generate as much
9 power with the water available to them as they
10 possibly can; correct?

11 A. Yeah, I would think from an economic
12 standpoint that would be to their advantage.

13 Q. Yeah. And that goes in part to the
14 feasibility of the original project; correct?

15 A. Yes.

16 Q. And Mr. Baxter asked you a number of
17 questions regarding junior users on the system.
18 If there is other hydropower users upstream from
19 the Milner hydropower plant, those would also be
20 non-consumptive if they are hydropower; correct?

21 A. That's correct.

22 Q. Right. So are you aware of any
23 circumstances in which non-consumptive user makes
24 a delivery call or calls out an upstream
25 non-consumptive user under some circumstance?

1 A. You know, that's not typical for
2 run-of-the-river-type uses. But if there is an
3 off stream diversion, where the return flow is
4 not directly back to the stream, it goes to some
5 other basin, or it bypasses the diversion for the
6 downstream user, then there might be some kind of
7 delivery call that could be appropriate.

8 Q. Right. Then it wouldn't be
9 non-consumptive to the stream; correct? If it's
10 not diverted back into the stream, then it would
11 be consumptive to the stream; correct?

12 A. Correct.

13 Q. Okay. And then Mr. Baxter asked you
14 about some circumstance in which if this license
15 is issued with the original permit condition. Do
16 you recall that question he asked you? Then
17 would there be upstream recharge, or other uses
18 that might be implicated? Do you recall that
19 testimony?

20 A. Yes.

21 Q. Then are the question -- excuse me.

22 Was IDWR's effort in putting this
23 volume limitation, an effort to further
24 subordinate the Milner plant beyond what the
25 subordination under 42-203 B is?

1 A. The Department puts annual volume
2 limitations on water right licenses to quantify
3 the beneficial use actually established in
4 accordance with the permit.

5 Q. I understand. And that's your prior
6 testimony. But the question asked to you by
7 Mr. Baxter discussed upstream users, who
8 otherwise might be implicated if the original
9 permit condition was reinstated. Do you recall
10 that?

11 A. Yes.

12 Q. Okay. So my question goes to you, as
13 was there an intent on the Department, in
14 addition to what you've previously described, to
15 add a further level of subordination to this
16 hydropower permit to the benefit of upstream
17 recharge permits, or other consumptive uses out
18 of the river?

19 A. There was on the permit, you know,
20 already a condition about subordination of
21 recharge to this hydropower use. And --

22 Q. Well, excuse me for a minute. That
23 wasn't a subordination of recharge. It just
24 recognized the priority of hydropower relative to
25 future developed in time recharge rights;

1 correct?

2 A. Oh, yeah.

3 Q. Okay. So it wasn't a subordination of
4 recharge?

5 A. That's a fair way to say that.

6 Q. Okay. So my question, and it again
7 goes to the implication of Mr. Baxter's questions
8 regarding the effort of the Department to further
9 subordinate the hydropower permit through a
10 volume limitation to the benefit of junior in
11 time water rights, such as recharge rights.

12 Was that part of the consideration by
13 the Department?

14 A. No, I don't believe so. I could see
15 how there may be a practical effect of the volume
16 in administering the hydropower water right
17 against other water rights, including recharge.
18 But I don't believe that that was the purpose for
19 putting the volume on the hydropower right. The
20 purpose for putting the hydropower right was to
21 comply with Department rules in defining the
22 quantity of beneficial use. And we would do that
23 on, you know, all water rights, except municipal
24 and fire protection.

25 Q. Okay. But you understood the question

1 that Mr. Baxter was asking you, the implications
2 of that question?

3 A. I thought I did.

4 MR. SIMPSON: Okay. That's all the
5 questions I have. Thanks.

6 THE HEARING OFFICER: Anything further?

7 MR. BAXTER: No, Your Honor.

8 EXAMINATION

9 QUESTIONS BY THE HEARING OFFICER:

10 Q. So, in essence, the volume figure is to
11 comply is you interpret the statute in the rules;
12 right?

13 A. Yes.

14 Q. And it's not to create an additional
15 reduction of the otherwise water right for some
16 policy purposes?

17 A. No. No.

18 Q. I'm trying to place the significance of
19 that volume figure when it's a non-consumptive
20 use, and it gets subordinated to basically
21 everything at this point.

22 And that's one of the questions I'm
23 going to be asking Counsel to address. So I'm
24 talking out loud now just trying to get this
25 focused in my mind.

1 Because the other element of that that
2 I was concerned about in approaching this is:
3 Where you have a beneficial use field report,
4 that is at the time, events are occurring as to
5 the use of a hypothetical, a historical
6 measurement separated from that time, and perhaps
7 a bit more.

8 And I think I understand why it was
9 done, but I'm having some issues as to using a
10 hypothetical year as opposed to the information
11 available to the field examiner at the time.

12 If you want to comment on that, go
13 ahead. That's a question that I would be
14 addressing Counsel in their arguments.

15 A. To make sure I understand the question,
16 just --

17 Q. I'll summarize. Why use a hypothetical
18 year of 1996 when you have a field examiner's
19 report that says, this amount of water is being
20 applied to a beneficial use?

21 A. Well, the field examiner's report
22 provided a diversion rate. And it didn't provide
23 any kind of annual diversion volume. And for
24 whatever reason, and I don't know what reason
25 that is, the Department didn't send the

1 beneficial use field report back to the certified
2 water right examiner, and say, in accordance with
3 the rule, we think you need to add a volume
4 calculated now based on historic beneficial use.

5 And so when it came time to issue the
6 license, we didn't really think it was
7 appropriate, or effective use of time 15 years
8 later to send it back to the certified water
9 right examiner. We thought we could handle that
10 volume computation on our own.

11 We took our best shot at it. We did
12 run into the problem of the USGS apparently even
13 being unsure about some of the data during the
14 authorized development period. And the fact that
15 there were much higher flow years, years with
16 much higher flows during the authorized
17 development period maybe prior to the issuance of
18 the -- or prior to the construction of the
19 facility.

20 But at least during the period that
21 they had the permit, and would have been
22 designing for those kinds of flows. And we just
23 felt like given those couple of problems, it just
24 wouldn't be right to try to issue a license for
25 an annual period prior to submitting proof of

1 beneficial use that had bad data, and was an
2 extremely low flow, much less than what was
3 designed for.

4 Q. And this is probably an incredibly
5 naive question. Assuming that you used the
6 volumetric amount significantly higher than is
7 set in the license, with the subordination that
8 exists, and the policy that you can't waste
9 water, what harm would come from that?

10 A. I'm not sure that there would be much
11 on a kind of run-of-the-river-type project like
12 this. With the subordination in place, I'm not
13 sure as a practical matter that if the license
14 were issued that way, it would change
15 administration very much, except that, you know,
16 it could impact how much water is available for
17 recharge, and those kinds of things.

18 It's kind of dependent on, as I look at
19 it, and then try to apply it practically in my
20 mind from an administration standpoint, if
21 hydropower is subordinate to everything, but
22 hydropower, including ground water recharge, then
23 there would be water available for other
24 purposes, including ground water recharge
25 upstream.

1 If the subordination provision remains
2 such that the hydropower is superior to ground
3 water recharge, then the volume figure could be
4 significant in quantifying whether there is any
5 water available for recharge.

6 Q. Yes. And I think that's very
7 realistic. The problem I have in approaching it.
8 If I make the assumption that the subordination
9 recommendation has been made remains in effect,
10 is there doesn't seem to be any harm if there is
11 a volumetric amount, a larger volumetric amount.
12 But if there is a lower volumetric amount, and
13 that provision remains in effect, the
14 subordinating it to recharge, you are limiting
15 the use of the hydro facilities they could
16 process more, but would be limited and prohibited
17 from doing that without going back in for another
18 application, and however long that might take.

19 So that's kind of one of the issues I'm
20 struggling with right now. And it will be
21 further defined from the briefing, and hopefully,
22 as I understand this better.

23 THE HEARING OFFICER: Any questions
24 that arise from that?

25 MR. SIMPSON: No.

1 MR. BAXTER: I think you are struggling
2 with the issue, the right issue.
3 THE HEARING OFFICER: I appreciate it.
4 (Witness excused.)
5 THE HEARING OFFICER: And you had
6 evidence you wish to offer?
7 MR. SIMPSON: Yes, Your Honor.
8 THE HEARING OFFICER: You are welcome
9 to remain, of course.
10 THE WITNESS: I think I might take a
11 rest room break, and then come back.
12 THE HEARING OFFICER: You are welcome
13 to return.
14 (Discussion held off the record.)
15 THE HEARING OFFICER: Go ahead and make
16 the motion.
17 MR. BAXTER: Your Honor, at this point
18 I would move to have IDWR Exhibit No. 4 admitted
19 into evidence.
20 THE HEARING OFFICER: Any objection?
21 MR. SIMPSON: No objection.
22 THE HEARING OFFICER: No. 4 is
23 admitted.
24 (Exhibit 4 admitted into evidence.)
25 THE HEARING OFFICER: Okay. Go ahead.

1 MR. SIMPSON: Twin Falls and North Side
2 Canal Company would call John Bowling.
3 THE HEARING OFFICER: Please raise your
4 right hand.
5 JONATHAN BOWLING,
6 first duly sworn to tell the truth relating to
7 said cause, testified as follows:
8 DIRECT EXAMINATION
9 QUESTIONS BY MR. SIMPSON:
10 Q. Good afternoon, Mr. Bowling.
11 Will you please state your full name
12 for the record, and spell your last name.
13 A. Jonathan C. Bowling, B-o-w-l-i-n-g.
14 Q. And, Mr. Bowling, who are you employed
15 by?
16 A. Idaho Power Company.
17 Q. Have you had the opportunity to review
18 the pre-filed testimony of Shelley Keen?
19 A. I did.
20 Q. Okay. And with respect to that
21 evidence, and in particular Exhibit No. 1, IDWR
22 No. 1, did you have an opportunity to review that
23 exhibit?
24 A. I did.
25 Q. Okay. And, Mr. Bowling, did you then

1 have an opportunity to review additional Milner
2 gage readings for years other than 1996?
3 A. I did.
4 Q. What years did you look at?
5 A. I looked at 1997 and 1998.
6 Q. Okay. And with respect to your review
7 of those years, and the data associated with the
8 Milner gage, did you perform any calculations in
9 analyzing Mr. Keen's testimony?
10 A. I did.
11 Q. Can you explain what you did, please?
12 A. Well, I did a comparison of 1996, 1997,
13 and 1998 for total flow past Milner at each one
14 of those years. And I specifically looked at the
15 amount of water that generated electricity in
16 1997 and 1998.
17 Q. Okay. And based upon your analysis,
18 were the flows that were utilized in 1997 and
19 1998 greater in volume than the flows depicted in
20 1996 as referenced in Mr. Keen's testimony?
21 A. They were.
22 Q. Can you describe those numbers, please?
23 A. In 1997, units 1 and 2, which are the
24 bigger units on the Idaho Power plant, generated
25 439,732 megawatt hours. And I performed a

1 conversion of that generation number with a K
2 factor for the plant and that resulted in a
3 volume to generate that much electricity of 3.5
4 million acre-feet.
5 And the small unit on the dam generated
6 2,158 megawatt hours, which equated to 45,000
7 acre-feet. So the total amount generated at
8 Milner to generate electricity in 1997 based on
9 those calculations was 3.6 million acre-feet.
10 In 1998, units 1 and 2 generated
11 351,636 megawatt hours. Which when converted to
12 the volume of water to generate that electricity
13 came out to 2.76 million acre-feet. And unit 3,
14 which is the small unit on the dam, generated
15 3,475 megawatt hours, which converts to 72.4
16 thousand acre-feet. So the total water diverted
17 in 1998 to generate electricity at Milner Dam was
18 2.8 million acre-feet.
19 Q. Both of those figures you identified
20 for 1997 and 1998, are those amounts greater than
21 the amount referenced in the license proposed
22 license for Milner?
23 A. My understanding is is that the amount
24 referenced in the license proposed license are
25 2.3 million acre-feet. So, yes, both of those

1 numbers would be bigger than that.

2 MR. SIMPSON: If you can mark that as
3 exhibit, I think, it's 12. Yes, Exhibit 12.
4 (Exhibit 12 marked.)

5 Q. (BY MR. SIMPSON) Mr. Bowling, you've
6 been handed what's been marked as Exhibit 12. Is
7 this a document you produced?

8 A. It is.

9 Q. And is that a document you produced
10 relative to your review of Mr. Keen's testimony,
11 and reviewing the Milner gage data for years
12 1996, '97 and '98?

13 A. It is.

14 Q. Okay. Can you briefly describe the
15 contents of the document, please?

16 A. This is just a general presentation of
17 data for 1996, '97, and '98 for combined flows at
18 Milner. This includes flows through the lower
19 power plant and flows at the dam. These are
20 monthly average flows for the 12 month periods,
21 January through December for 1996, 1997, 1998.
22 And the information is also provided on a graph.
23 And the information on the graph are actually
24 daily average flows for that same time period.

25 Q. So would it be fair to say, you

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1 utilized the data described in Exhibit 12 in your
2 calculation, that is you described in your
3 testimony?

4 A. That's fair.

5 MR. SIMPSON: We would offer Exhibit 12
6 in the testimony, Your Honor.

7 MR. BAXTER: Just a clarification. On
8 the side, is that cfs or what's --

9 THE WITNESS: That is cfs.

10 MR. BAXTER: Okay.

11 MR. SIMPSON: And the bottom are
12 months.

13 MR. BAXTER: Months.

14 THE WITNESS: Are months.

15 MR. BAXTER: No objections, Your Honor.

16 THE HEARING OFFICER: No. 12 is
17 admitted.

18 (Exhibit 12 admitted into evidence.)

19 Q. (BY MR. SIMPSON) Mr. Bowling, if a
20 volume limitation were imposed upon the license
21 at Milner, and that volume limitation was based
22 upon the beneficial use examination by
23 Dr. Brockway, which identified, I believe, 5,714
24 cfs as a diversion rate, and it was applied
25 throughout the year to create an annual volume,

1 would that annual volume that was calculated from
2 that, from those figures include, or be partially
3 representative of the flows that were present in
4 1997 and 1998?

5 A. Can you restate that?

6 Q. Right. Well, if that calculation was
7 made that I just described to you, would it allow
8 the generation of power with the flows that were
9 present in 1997 and 1998?

10 A. Do you mean if there were a limitation?

11 Q. If a limitation were -- a volume
12 limitation were imposed upon the Milner Power
13 Plant that was based upon the beneficial use
14 examination, that is the discharge or diversion
15 rate of 5,714 applied throughout the year. Would
16 it allow for water that was present as described
17 in Exhibit No. 12, to be utilized beneficially in
18 the generation of power?

19 A. If a volume limitation were calculated
20 based on a maximum hydraulic capacity diversion
21 rate of 5,714, 24 hours a day, it would not place
22 a limit on that, unless the average plant flow on
23 an annual basis were above the maximum hydraulic
24 capacity. And at that point, some water would be
25 spilled.

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1 MR. SIMPSON: No further questions.

2 THE HEARING OFFICER: Questions?

3 MR. BAXTER: Your Honor, may I have
4 just a few minutes to talk with Mr. Keen. This
5 is the first time we've been presented with the K
6 conversion calculation. And I just want to have
7 some opportunity to talk with him, and understand
8 how that's made.

9 THE HEARING OFFICER: We'll take a
10 recess at this time.

11 (A recess was had.)

12 THE HEARING OFFICER: We'll resume
13 proceedings.

14 Questions.

15 MR. BAXTER: No questions, Your Honor.
16 Thank you.

17 THE HEARING OFFICER: Any other
18 evidence to be submitted?

19 MR. SIMPSON: No, Your Honor.

20 THE HEARING OFFICER: Okay. Briefing?

21 MR. SIMPSON: Well, I would ask that, I
22 think as I mentioned off the record before we got
23 started, that anticipate that the canal companies
24 would like to file a post hearing brief, if I
25 could describe it that way, on these matters.

1 And so with that, I believe the 30th is
2 a Wednesday, June 30th. And that's what I would
3 propose.

4 THE HEARING OFFICER: Simultaneous
5 briefing?

6 MR. SIMPSON: Well, I think we talked
7 earlier about the Department's submitted their
8 brief to you in that exhibit. And so I didn't
9 anticipate that there would be briefing in
10 addition in the other administration proceedings,
11 the Department has never issued briefing.

12 Your Honor, we're kind of in a little
13 bit of new territory where we're kind of solo in
14 respect to this issue, where there is not another
15 party participating, per se.

16 So it would seem appropriate in this
17 matter to have the petitioner file briefing, but
18 no other briefing be filed. I just don't see the
19 basis. And especially in light of the fact that
20 any review by you, the Hearing Officer, then goes
21 to the Department. So the Department offering
22 briefing in a matter before the Department seems
23 without precedent, if you will.

24 THE HEARING OFFICER: What's your
25 position?

1 MR. BAXTER: Your Honor, I think the
2 rules provide that the Hearing Officer can ask
3 the Department for a memorandum on particular
4 issues. I don't think this is totally
5 un-precedential in terms of water law in the
6 sense that the Department is not a party in the
7 SRBA.

8 But quite frequently, the special
9 masters will simply ask us, well, what's the
10 basis for the Department's decision in this
11 matter, and we will provide a written explanation
12 to them, saying this is both either the factual
13 basis, or our legal understanding of the issue.

14 Now, a special master like you can
15 disagree with the Department's legal analysis.
16 But at least it provides you an insight as to
17 what the Department was thinking as to that
18 particular issue.

19 THE HEARING OFFICER: I think the best
20 process at this point, where there is a brief in
21 place, that's in the Idaho Supreme Court now.
22 And when is the --

23 MR. SIMPSON: Our brief is -- our
24 responsive brief is due July 22nd or 23rd, Your
25 Honor, I believe.

1 THE HEARING OFFICER: Some distance
2 away.

3 MR. SIMPSON: Right.

4 THE HEARING OFFICER: Let's take the
5 brief from the canal companies. And after I've
6 reviewed it, if I think the commentary is
7 necessary, or would be helpful, I probably would
8 schedule a conference. And have you layout any
9 authorities that you had, and you could respond.

10 But I think I'll take that brief that
11 was submitted in the Supreme Court, and utilize
12 it. And whatever you respond, and however you
13 respond. And then we'll go ahead, and I'll
14 notify you if I think I need more.

15 MR. BAXTER: Thank you, Your Honor.

16 THE HEARING OFFICER: Thanks.
17 (Proceedings concluded.)
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1 REPORTER'S CERTIFICATE

2 I, COLLEEN P. KLINE, CSR No. 345, Certified
3 Shorthand Reporter, certify:

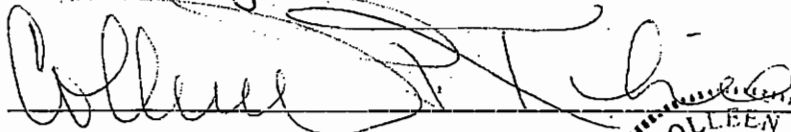
4 That the foregoing proceedings were taken
5 before me at the time and place therein set
6 forth, at which time the witness was put under
7 oath by me;

8 That the testimony and all objections made
9 were recorded stenographically by me and
10 transcribed by me or under my direction;

11 That the foregoing is a true and correct
12 record of all testimony given, to the best of my
13 ability;

14 I further certify that I am not a relative
15 or employee of any attorney or party, nor am I
16 financially interested in the action.

17 IN WITNESS WHEREOF, I set my hand and seal
18 this 9th day of June, 2010

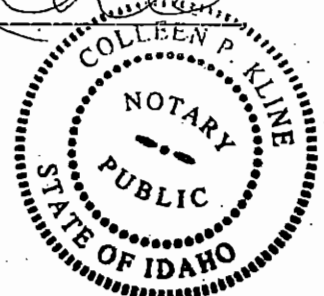
19 
20

21 COLLEEN P. KLINE, CSR

22 Notary Public

23 P.O. Box 2636

24 Boise, Idaho 83701-2636



25 My commission expires September 17, 2011

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EXHIBIT 2

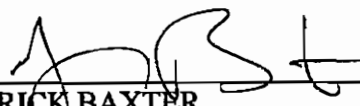
**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF LICENSED)
WATER RIGHT NO. 03-7018 IN THE) **STATEMENT OF POSITION**
NAME OF IDAHO POWER COMPANY)
_____)

PROCEDURAL HISTORY

On November 23, 2007, the Idaho Department of Water Resources ("Department") issued a Preliminary Order approving the issuance of Water Right License No. 03-7018. On December 3, 2007, Idaho Power Co. ("Idaho Power") filed an appeal of the Preliminary Order. Specifically, Idaho Power challenged the Department's inclusion of approval condition no. 3 in the license. On July 25, 2008, Idaho Power served upon the Department a document titled Idaho Power Company's First Set of Discovery Requests. The Rules of Procedure before the Department do not provide for the service of interrogatories and requests for production upon the Department. However, to help expedite resolution of this matter, the Department agreed to provide Idaho Power with a Statement of Position explaining the history behind approval condition no 3. Attached hereto is the Statement of Position of the Department prepared by Shelley Keen, Water Rights Section Manager for the Department.

Dated this 1 day of OCTOBER, 2008.

By: 
GARRICK BAXTER
Deputy Attorney General
Attorney for IDWR

SCANNED
DEC 12 2008

CERTIFICATE OF MAILING

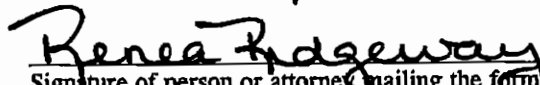
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**STATEMENT OF POSITION
OF THE
IDAHO DEPARTMENT OF WATER RESOURCES**

Approval condition no. 3 on Water Right License 03-7018 states:

The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of the Federal Energy Regulatory Commission license for Brownlee Dam. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

This condition is an example of the "term review" conditions used by the Department on water right permits and licenses authorizing the diversion and use of water for power generation. Effective July 1, 1985, Idaho Code §§ 42-203B (6) and (7) authorize the Department to limit a permit or license for power purposes to a specific term. Consistent with Idaho Code §§ 42-203B (6) and (7), it is the Department's standard practice to put term review conditions on all permits and licenses for the use of water to generate power.

The term review condition on Water Right License 03-7018 is used on water right licenses for power generation if the project requires Federal Energy Regulatory Commission (FERC) approval. This particular term review condition, modified to refer to the specific FERC authorized project or FERC license, also appears on at least 6 water right licenses issued by the Department. (See Attachment 1.) The Department has employed a similar term review condition on 32 water right permits requiring FERC approval. (See Attachment 2.)

The Department also employs term review conditions on water right permits and licenses for power generation projects not requiring FERC approval. Term review conditions appear on approximately 60 active permits and 35 licensed or decreed water rights for projects not requiring FERC approval. (See Attachments 3 and 4 respectively.)

The use of term review conditions dates back at least to a memorandum issued by Norm Young of the Department on March 22, 1984. A copy of the memorandum is attached to this statement as Attachment 5. The memorandum includes a directive to include the following term review condition on permits for power purposes:

The diversion and use of water under this permit and any license subsequently issued is subject to review by the Director thirty (30) years from the date of issuance of this permit or the date of FERC approval expiration (if applicable). Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

On July 25, 1984, the Water Resource Board adopted a resolution supporting the use of term limits on water right permits and licenses for hydropower purposes. A copy of an IDWR publication announcing the resolution is attached hereto as Attachment 6. The resolution declares:

The position of the Idaho Water Resource Board is that the local public interest requires that all permits and licenses authorizing the diversion and use of waters of the state of Idaho for hydropower purposes be subject to review by the Director of the Department of Water Resources

The directive to use term review conditions was reinforced by the June 19, 1986, issuance of Amended Application Processing Memorandum No. 24 regarding the approval of permits for power purposes. A copy of Application Processing Memorandum No. 24 is attached to this statement as Attachment 7. Page 5 of Application Processing

Memorandum No. 24 references Attachment B to the memorandum. Attachment B includes the relevant hydropower term review conditions.

To this date, the Department has not acted upon its authority to review a water right for power generation at the end of the established term. Because term review conditions were implemented only about 24 years ago, there may not be many permits, licensed rights, or decreed rights for which the term has expired. To my knowledge, the Department has not implemented a routine effort or an ad hoc effort to determine when terms expire on water rights for power generation purposes.

By: Shelley W. Keen Oct. 1, 2008
Shelley W. Keen
Water Rights Section Manager
Idaho Department of Water Resources

9/30/2008

ATTACHMENT 1

Water Right Licenses Where the Project Requires FERC Approval
and IDWR Used a Term Review Condition

SCANNED
DEC 12 2008

Basin	Sequence	Suffix	Basis	Priority Date	Rate(cfs)	Volume(af)	Source	Water Use(s)
3	7018		License	12/24/1975	5000.00	93400	SNAKE RIVER	POWER
29	7578		License	3/31/1981	175.00	100100	PORTNEUF RIVER	POWER
29	7772		License	8/1/1984	75.00	42900	PORTNEUF RIVER	POWER
32	7128		License	9/8/1982	45.00	32600	BIRCH CREEK	POWER
32	7136		License	1/3/1984	30.00	18500	BIRCH CREEK	POWER
47	7768		License	11/10/1981	110.00	61100	CEDAR DRAW	POWER

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9/30/2008

ATTACHMENT 2

Water Right Permits Where the Project Requires FERC Approval
and IDWR Used a Term Review Condition

DEC 12 2008
CANNED

Basin	Sequence	Suffix	Basis	Priority Date	Rate(cfs)	Volume(af)	Source	Water Use(s)
1	7010	B	Permit	3/30/1977	3000.00		SNAKE RIVER	POWER
1	7010	C	Permit	3/30/1977	3000.00		SNAKE RIVER	POWER
1	7010	D	Permit	3/30/1977	3000.00		SNAKE RIVER	POWER
1	7058		Permit	9/15/1980	1180.00		SNAKE RIVER	POWER
1	7124		Permit	9/1/1993	1300.00		SNAKE RIVER	POWER
2	7375		Permit	4/9/1982	5000.00		SNAKE RIVER	POWER
2	7379		Permit	3/31/1982	6550.00		SNAKE RIVER	POWER
21	7212		Permit	9/18/1980	960.00		HENRY'S FORK	POWER
21	7375		Permit	2/9/1988	500.00		FALL RIVER	POWER
29	7699		Permit	5/9/1983	210.00		PORTNEUF RIVER	POWER
32	7128		Permit	9/8/1982	45.00		BIRCH CREEK	POWER
32	7136		Permit	1/3/1984	30.00		BIRCH CREEK	POWER
32	7170		Permit	2/19/1991	8.40		WARM SPRING CREEK	POWER
37	7848		Permit	8/14/1980	800.00		BIG WOOD RIVER	POWER
37	8113		Permit	6/2/1983	180.00		LITTLE WOOD RIVER	POWER
37	8178		Permit	7/2/1984	250.00		BIG WOOD RIVER	POWER
37	8262		Permit	3/4/1986	120.00		LITTLE WOOD RIVER	POWER
37	8389		Permit	11/12/1988	300.00		BIG WOOD RIVER	POWER
37	21297		Permit	4/22/2004	500.00		LITTLE WOOD RIVER	POWER
47	7768		Permit	11/10/1981	110.00		CEDAR DRAW	POWER
47	7961		Permit	9/21/1983	25.00		UNNAMED STREAM	POWER, WATER QUALITY IMPROVEMENT
47	7991		Permit	12/27/1984	40.00		CEDAR DRAW	POWER
47	8005		Permit	6/14/1985	50.00		CEDAR DRAW	POWER
63	9019		Permit	8/31/1977	5700.00		BOISE RIVER	POWER
63	10240		Permit	6/11/1984	5470.00		BOISE RIVER	POWER
63	11069		Permit	11/15/1989	2500.00		BOISE RIVER	POWER
77	7295		Permit	5/11/1989	2.00		MYERS CREEK	POWER
77	7322		Permit	9/16/1992	0.14		GASPER CREEK	DOMESTIC, FIRE PROTECTION, POWER
83	7102		Permit	8/17/1989	25.00		CLEARWATER RIVER NO	POWER
83	7103		Permit	8/17/1989	65.00		CLEARWATER RIVER NO	POWER
83	7133		Permit	12/11/1998	25.00		CLEARWATER RIVER NO	POWER
84	7171		Permit	6/30/1983	100.00		JIM FORD CREEK	POWER

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ATTACHMENT 3

Water Right Permits Where the Project Does Not Require FERC Approval
and IDWR Used a Term Review Condition

Basin	Sequence	Suffix	Basis	Priority Date	Rate(cfs)	Volume(af)	Source	Water Use(s)
1	10401		Permit	6/6/2002		157000	SNAKE RIVER	POWER FROM STORAGE, POWER STORAGE
11	7449		Permit	9/16/1999	0.50		SKINNER CREEK	POWER
15	7168		Permit	5/19/1998	0.01		SPRING	DOMESTIC, POWER, WILDLIFE
21	7363		Permit	7/22/1985	433.00		HENRY'S FORK	POWER, POWER FROM STORAGE, POWER
21	7382		Permit	7/26/1988	0.67		BUNKHOUSE SPRING	POWER
21	7566		Permit	9/2/1997	6.00		UNNAMED STREAM	POWER
29	8238		Permit	4/18/2000	0.50		REESE CREEK SOUTH FORK	POWER
29	13155		Permit	5/10/2001	1.00		SPRING	POWER
29	13720		Permit	8/16/2005	0.10		LOWER ROCK CREEK	POWER
31	7654		Permit	2/16/1999	3.80		CHING CREEK	POWER
32	7260		Permit	12/7/1999	6.70		BLUE CREEK SPRING, S	POWER
36	7967		Permit	2/24/1981	25.00		UNNAMED STREAM	POWER
36	8310		Permit	5/7/1986	85.00		CEDAR DRAW CREEK	FISH PROPAGATION, POWER
36	15959		Permit	10/18/2001	240.30		WARM CREEK	POWER
37	7719		Permit	6/16/1978	3.29		WADDINGTON SPRINGS	POWER
37	8194		Permit	12/8/1984	2.00		GROUND WATER	FISH PROPAGATION, IRRIGATION, POWER
37	8889		Permit	6/22/1999	0.50		CROESUS CREEK	POWER
47	8271		Permit	5/5/1991	20.00		UNNAMED STREAM, WAS	POWER, STOCKWATER
47	17094		Permit	4/25/2003	3.10		LATERAL NO 58	POWER
47	17279		Permit	2/6/2006	5.00		UNNAMED STREAM	POWER
63	10385		Permit	9/29/1986	2.00		SPRINGS, UNNAMED ST	DOMESTIC, FIRE PROTECTION, FISH PRO
63	31981		Permit	2/9/2004	1.00		ROBIE CREEK	FIRE PROTECTION, POWER
63	32648		Permit	4/20/2007	1.00		THORN CREEK MIDDLE F	POWER
65	12709		Permit	3/30/1984	2.45		PORTER CREEK	POWER
65	13621		Permit	6/2/1995	0.50		EDDY CREEK	DOMESTIC, POWER
65	22723		Permit	11/5/2001	4.86		DEADWOOD RIVER	POWER
67	14689		Permit	10/6/2005	0.78		SPRING	IRRIGATION, POWER
75	7455		Permit	3/24/1988	0.19		BRIDGE CREEK	POWER
75	7668		Permit	6/1/1999	0.18		SPRING	POWER
75	14061		Permit	2/13/2002	0.38		INDIAN CREEK	POWER

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ATTACHMENT 3 **Water Right Permits Where the Project Does Not Require FERC Approval** **and IDWR Used a Term Review Condition**

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75	14272	Permit	4/14/2006	0.75	BEAVER CREEK	POWER
75	14473	Permit	8/8/2007	2.20	OWL CREEK	POWER
77	7161	Permit	1/8/1982	2.00	LEMHI CREEK	DOMESTIC, FIRE PROTECTION, POWER
77	7189	Permit	7/3/1983	10.00	SILVER CREEK	POWER
77	7192	Permit	5/20/1983	12.00	DEER CREEK, LOON CREEK	POWER
77	7334	Permit	2/23/1994	0.75	UNNAMED STREAM	POWER
77	14145	Permit	8/8/2002	0.27	PIONEER CREEK	POWER
78	7198	Permit	1/14/1982	0.80	HAT CREEK	POWER
78	7384	Permit	2/2/2006	0.12	UNNAMED STREAM	IRRIGATION, POWER
79	7237	Permit	8/7/1995	2.20	RACE CREEK WEST FORK	POWER
85	15383	Permit	1/28/2003	0.20	MISSION CREEK	DOMESTIC, POWER
85	15653	Permit	1/13/2006	0.20	FARRENS CREEK	POWER
86	11909	Permit	11/15/2003		11 SPRINGS	IRRIGATION FROM STORAGE, IRRIGATION
95	9006	Permit	1/28/1999	1.30	UNNAMED STREAM	AESTHETIC, AESTHETIC STORAGE, COOL
95	9192	Permit	6/20/2003	0.15	LOST CREEK	IRRIGATION, IRRIGATION FROM STORAGE
95	9232	Permit	9/2/2003	0.30	11.4 UNNAMED STREAM	DOMESTIC, DOMESTIC FROM STORAGE, D
96	9057	Permit	9/12/2000	0.20	0.1 UNNAMED STREAM	POWER, POWER FROM STORAGE, POWER
96	9077	Permit	5/24/2001	0.20	UNNAMED STREAM	DOMESTIC, DOMESTIC FROM STORAGE, D
96	9192	Permit	7/30/2004	0.13	UNNAMED STREAM	IRRIGATION, POWER
96	9215	Permit	12/10/2004	1.60	COCOLALLA CREEK	DOMESTIC, POWER
96	9234	Permit	5/23/2005	0.20	SPRING, UNNAMED STR	DOMESTIC, IRRIGATION, POWER, STOCKV
96	9243	Permit	7/13/2005	0.18	DELYLE CREEK	DOMESTIC, POWER
96	9264	Permit	10/27/2005	0.04	MOORE CREEK	POWER
96	9266	Permit	11/18/2005	0.20	DELYLE CREEK	DOMESTIC, POWER
96	9302	Permit	9/13/2006	0.15	UNNAMED STREAM	IRRIGATION, POWER
97	7432	Permit	4/29/2004	0.18	SOUTH OLE CREEK	POWER
97	7436	Permit	7/8/2004	0.30	UNNAMED STREAM	POWER
98	7726	Permit	2/24/1994	0.20	HALL CREEK	POWER, POWER FROM STORAGE, POWER
98	7836	Permit	8/31/2004	0.20	FALL CREEK, UNNAMED	DOMESTIC, POWER
98	7850	Permit	3/16/2006	0.15	SPRINGS	DOMESTIC, POWER
98	7861	Permit	5/22/2007	0.65	MISSION CREEK	DOMESTIC, FIRE PROTECTION, IRRIGATION

9/30/2008

ATTACHMENT 4

Water Right Licenses Where the Project Does Not Require FERC Approval
and IDWR Used a Term Review Condition

Basin	Sequence	Suffix	Basis	Priority Date	Rate(cfs)	Volume(af)	Source	Water Use(s)
13	7452		License	5/3/1988	1.50	1090	SUGAR CREEK	POWER
23	7068		Decreed	5/14/1981	3.98	238	UNNAMED STREAM	POWER
32	7170		License	2/19/1991	2.95	1649	WARM SPRINGS CREEK	POWER
33	7087		Decreed	1/8/1981	7.00	5070	BELL MOUNTAIN CREEK	POWER
33	7093		License	4/10/1981	5.00	3620	DEEP CREEK	POWER
33	7159		License	11/8/1983	0.80	578	BLACK CREEK	POWER
33	7177		License	4/29/1991	5.50	3980	DEEP CREEK	POWER
33	7178		License	4/29/1991	2.70	1950	BLACK CREEK	POWER
37	7749		Decreed	11/29/1978	5.21		UNNAMED STREAM	POWER
37	7854		License	7/23/1980	3.38	2450	INDIAN CREEK SPRING	POWER
37	7863		Decreed	10/31/1980	60.00	43400	LITTLE WOOD RIVER	POWER
37	7911		Decreed	5/7/1981	60.00	43400	LITTLE WOOD RIVER	POWER
37	7943		License	9/23/1981	490.00	319000	LITTLE WOOD RIVER	POWER
37	8096		Decreed	5/4/1983	300.00	217000	LITTLE WOOD RIVER	POWER
37	8251		Decreed	10/28/1985	157.00	114000	LITTLE WOOD RIVER	POWER
47	7679		License	6/23/1982	30.00	17200	SPRINGS, WASTE WATER	POWER
47	7682		License	6/23/1982	14.00	3240	SPRINGS	POWER
47	7739		License	8/7/1981	0.66	298	LATERAL NO 58	POWER
47	7812		License	4/25/1982	100.00	34800	UNNAMED STREAM	POWER
47	7813		License	4/22/1982	6.25	4510	GROUND WATER	POWER
65	12563		License	9/14/1982	3500.00	1960000	PAYETTE RIVER	POWER
75	7352		License	4/20/1983	0.60		WALLACE CREEK	POWER
77	7133		Decreed	4/8/1981	0.60		LICK CREEK	POWER
77	7322		License	9/16/1992	0.14	23.2	GASPER CREEK	DOMESTIC, FIRE PROTECTION, POWER
78	7150 B		Decreed	6/23/1980	7.72	4272.2	ELK CREEK	POWER
78	7154		Decreed	7/28/1980	10.00	5534	ELK CREEK	POWER
78	7188		Decreed	10/29/1981	8.00	4427.2	ELK CREEK	POWER
78	7313		License	3/28/1990	0.20	167	SPRING	DOMESTIC, IRRIGATION, POWER, STOCKWATER
79	7089		License	8/10/1981	16.90	3510	JOHN DAY CREEK	POWER
81	7152		License	10/25/1991	0.12	87.4	SPRING	DIVERSION TO STORAGE, POWER, RECREATION, RE
96	8759		License	5/17/1993	0.04	30.2	UNNAMED STREAM	DOMESTIC, POWER
97	7385		License	6/11/1998	0.06	22.6	UNNAMED STREAM	IRRIGATION, POWER, STOCKWATER
94	7238		License	3/31/1983	0.08	37.7	UNNAMED STREAM	DOMESTIC, FIRE PROTECTION, IRRIGATION, POWER
95	9241		License	8/26/2004	0.10	44.7	UNNAMED STREAM	DOMESTIC, DOMESTIC STORAGE, POWER, POWER
96	7796		License	6/19/1979	0.90	600.2	GROUSE CREEK SOUTH	FIRE PROTECTION, IRRIGATION, POWER

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

JOHN V. EVANS
Governor

A. KENNETH DUNN
Director

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

MEMORANDUM

March 22, 1984

TO: Glen Saxton
Bob Fleenor

FROM: Norm Young *NY*

RE: APPROVAL OF HYDROPOWER RIGHTS
(Supersedes memo dated February 23, 1984)

Applications proposing power generation may be approved assuming the following usual factors have been considered:

- a) the guidelines of the existing administrative memo dated 12-1-1980 and 3-3-1980 are met
- b) appropriate conditions of approval including subordination are shown.

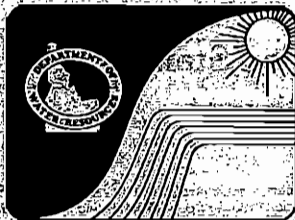
In addition, all permits issued for power purposes or including power as a use (excluding the exceptions in my 3-3-1980 administrative memo) should have the following conditions of approval:

"The diversion and use of water under this permit and any license subsequently issued is subject to review by the Director thirty (30) years from the date of issuance of this permit or the date of FERC approval expiration (if applicable). Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised."

"Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control."

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Attachment
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Currents

A publication of energy and water information published by the Idaho Department of Water Resources, A. Kenneth Dunn, Director, John V. Evans, Governor, and the Idaho Department of Water Resources.

Back Page
U.S. Passage
#P/110
Permit No.
Boise Idaho

Vol. 2, No. 8

Statehouse, Boise, Idaho

August, 1984

IDWR sets time limit on hydro permits

The Idaho Water Resource Board, meeting in Idaho Falls on July 25, adopted a resolution establishing that the public interest would be served by limiting new hydroelectric power generation water rights to a specific time period. The policy would guide A. Kenneth Dunn, Idaho Department of Water Resources, director, in conditioning the hydroelectric permits issued by the agency by including a renewal date. The permits would be for a term similar to licenses from the Federal Energy Regulatory Commission (FERC).

Most FERC hydro power generation

licenses are issued for 50 years. Dunn said. At the end of that time, the FERC licenses are reviewed. The state of Idaho, however, has in the past issued hydro power generation water rights in perpetuity. As a result, the state and the public have had no opportunity to review them in light of changing technology or times. With the new policy adopted by the Idaho Water Resource Board, the IDWR director will issue hydro power water rights with a renewal date. At the time of renewal, the permits will be subject to review by the agency, much as FERC reviews the power

licenses. After the review, the state hydro generation water rights could be renewed with a new renewal date, either with the identical or different conditions attached. The director would also be able to terminate the permits either partially or completely, thus making some water available for other uses.

Because hydro generation permits often allow developers to appropriate the entire streamflow, even during spring runoff, the board felt a periodic review was necessary to protect the public interest. Although the time frame allowed on permits will be decided on a permit-by-permit basis, the backers of the projects will be given ample time to pay off loans and recoup their investments.

The complete text of the resolution passed by the Idaho Water Resource Board can be found on this page.



A. Kenneth Dunn
IDWR Director

BEFORE THE WATER RESOURCE BOARD OF THE STATE OF IDAHO

Conditions of Approval for Permits and Licenses to Appropriate Water for Hydropower Purposes

RESOLUTION ADOPTING POSITION ON TERM PERMITS

WHEREAS, Article 15, Section 7, Idaho Constitution, 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 Water Resource Board adopted on December 29, 1976 and revised on January 19, 1982, a state water plan which allocates the unappropriated waters of the state to various uses in the public interest; and

WHEREAS, the Director of the Department of Water Resources is authorized by Section 42-203, Idaho Code, to issue permits to appropriate the unappropriated public waters of the state of Idaho if such permits are determined to comply with the criteria therein set forth, including a criterion requiring conformance with the local public interest; and

WHEREAS, Section 42-203, Idaho Code, authorizes the Director of the Department of Water Resources to condition water right permits to, among other considerations, insure that the local public interest is protected; and

WHEREAS, permits to appropriate water for hydro power purposes usually appropriate most of the flow of a water source, even during periods of peak runoff, and thereby have the potential for preventing upstream appropriations of water and thus precluding the opportunity to achieve the purposes of the allocations in the adopted state water plan; and

WHEREAS, the continuing evolution of local public interest requires that major commitments of the state's vital water resources remain subject to further review;

NOW, THEREFORE, THE IDAHO WATER RESOURCE BOARD HEREBY DECLARES AND RESOLVES AS FOLLOWS:

1. The position of the Idaho Water Resource Board is that the local public interest requires that all permits and licenses authorizing the diversion and use of waters of the state of Idaho for hydro power purposes be subject to review by the Director of the Department of Water Resources. Normally, the review should be made at the end of the operating period specified by the Federal Energy Regulatory Commission authorization or as otherwise provided by the Director of the Department of Water Resources. Pursuant to such review, the Director, upon appropriate findings, should renew the water right with its original priority date for the benefit of the project with the same or different conditions, or should declare the right to be terminated in whole or in part.
2. This declaration with respect to fixed term permits is not intended to imply any restriction on the authority of the Director of the Department of Water Resources to impose in the local public interest a fixed term on permits and licenses for uses of water other than hydro power.
3. The Idaho Water Resource Board expresses its intent to review the above position concerning term permits at the next regularly scheduled review of the State Water Plan.

DATED THIS 25th day of July, 1984.

ATTEST: /s/ Franklin Jones
Secretary

/s/ Donald R. Kramer
Chairman

Energy education program earns EME national acclaim

A program used to promote greater understanding of energy issues in Idaho classrooms has won national recognition from the National Energy Resources Organization (NERO). The Washington, D.C.-based group has named EME (Energy and Man's Environment), a 12-year-old nonprofit organization, its 1984 Public Education Award recipient.



EME's programs are used in Idaho classes to educate students from kindergarten through twelfth grade about energy issues and concerns. The materials maintain neutral position on energy issues, according to Dr. Edward Dalton, EME President. "Our purpose is not to advocate a particular energy policy, only to help teachers and students learn more about the nation's energy dilemma," Dr. Dalton said. "All of EME's instructional materials have been tested in the classroom and are regularly evaluated and refined. They may be used alone as an energy curriculum or used to supplement existing lessons. They focus on six basic

energy concepts: 1) sources of energy, 2) uses of energy, 3) conversion of energy from one form to another, 4) environmental and economic impacts of energy development and use, 5) limited nature of the earth's natural resources, and 6) energy conservation and management. EME operates under the assumption that knowledge is the catalyst of change. The organization's objective, said Dr. Wilma Jones, Idaho coordinator, is to help students achieve energy literacy—to help them use energy wisely and efficiently (EME's premise (Continued on page 8)).

Inside Currents

- 1. MCS implementation
- 2. Bright ideas
- 3. Waste heat recovery
- 4. Geothermal greenhouses
- 5. Library acquisitions
- 6. Energy Events

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Attachment
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State of Idaho

DEPARTMENT OF WATER RESOURCES

STATE OFFICE, 450 W. State Street, Boise, Idaho

JOHN V. EVANS
Governor

A. KENNETH DUNN
Director

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

ADMINISTRATOR'S MEMORANDUM

App. Processing No. 24 (Amended)

TO: Regional Offices and Water Allocation Section

FROM: Norman C. Young *NCY*

DATE: June 19, 1986 (Replaces version dated December 1, 1980)

RE: Approval of Permits for Power Purposes

Changes in Federal Energy Regulatory Commission (FERC) processing requirements have precipitated a modification in Department policy regarding applications for permit for hydropower*. This memorandum provides updated information regarding three unique aspects of hydropower applications: (1) current requirements of the Idaho Public Utilities Commission (PUC) and FERC; (2) Department processing guidelines for Applications for Permit; and (3) a method for calculating a reasonable rate of flow.

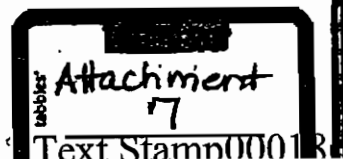
(1) CURRENT REQUIREMENTS OF THE PUC AND FERC

PUC

The determination of which power producers are subject to PUC regulation and which are not remains a complex issue. In general, the PUC regulates and requires applications from investor-owned utilities that market power, such as Idaho Power Company, or independent small power producers. Systems that are not regulated include those owned

* This memorandum is written specifically for hydropower use, and the terms power and hydropower are considered to be interchangeable herein. The use of water for purposes associated with thermal and nuclear power plants should be classified as cooling use, and an Application for Permit for this use is not subject to the provisions specified herein.

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by public entities (co-ops, municipalities, irrigation districts, etc.), private systems for personal use, and entities meeting the requirements of a qualifying facility (QF*) under PURPA**. If there is a question about jurisdiction in a specific instance, PUC will provide a letter stating their position.

Processing a PUC application requires a public hearing in most cases. Processing time by PUC is usually 3 months to 1 year, and final approval by PUC, in the form of the issuance of a Certificate of Public Convenience and Necessity (CPCN), can be completed prior to approval of the water right application by the Department.

*A QF is defined as a facility that:

- A. Is owned by an individual or a corporation (including municipalities), but not more than 50% of the equity interest in a facility may be owned by an electric utility.
- B. Produces electric energy primarily by use of a renewable resource (water power is considered to be a renewable resource at both new and existing dams).
- C. Has a power production capacity of no more than 80 megawatts.

**Public Utility Regulatory Policies Act of 1978

FERC

Water power development comes within FERC jurisdiction when the project:

- A. Is located on federal land, or
- B. Is located in or uses water from a navigable stream, or
- C. Uses water impounded by a federal dam, or
- D. Provides power to a FERC regulated (interstate) power grid.

Where FERC is found to have jurisdiction, frequently the first step toward project development is to obtain a preliminary permit from FERC. A preliminary permit requires minimal information and establishes filing priority for subsequent license or exemption applications. It is not an approval to begin construction, and is not required by FERC.

Project development approval can be obtained by securing either a license or an exemption. An exemption relieves the project of some FERC requirements. Exemptions are generally available for projects that do not use dams or that utilize an existing conduit originally built primarily for non-power purposes.

Three types of license applications are available -- a short form for all projects 5 MW or less, a slightly longer form for projects greater than 5 MW at existing dams, and a long form for major unconstructed or major modified projects greater than 5 MW. Processing times vary depending on the complexity and environmental impact of the projects and can range from several months to several years. A graphical representation of FERC filing categories is depicted in Attachment A.

A change in FERC processing is that in the past FERC required the project applicant to obtain an approved water right permit prior to issuing a FERC license, whereas now FERC will issue a license before a state water right is approved, contingent on the licensee obtaining state water right approval.

DEPARTMENT PROCEDURE WITH RESPECT TO FERC & PUC

The Department does not require FERC &/or PUC approvals to be prerequisites for issuance of a water right permit. However, many of the issues regarding local public interest that are evaluated by the Department are also evaluated by FERC &/or PUC. Thus, the Department normally does not take final action on an application for permit until the application for license or exemption or application for CPCN together with supporting documents have been filed with FERC &/or the PUC. An applicant, however, can request Department action on an application for permit prior to the application submittal to FERC &/or PUC if the applicant provides to the Department all of the information needed for the Department to evaluate the proposed project. Henceforth in this memorandum, in the situations where FERC &/or PUC have jurisdiction, the alternatives of providing either (1) an application for a CPCN from PUC &/or an application for license or exemption from FERC, or (2) information for the evaluation of the proposed project, will be identified as "PUC &/or FERC approvals or alternatives."

(2) DEPARTMENT PROCESSING GUIDELINES FOR APPLICATIONS FOR PERMIT

Rule 4 of the Department's Water Appropriation Rules and Regulations provide general considerations to be met by a hydropower applicant. In addition, special processing guidelines have been developed for power applications for permit based on (1) the potential for speculation, (2) Sections 42-205 thru 42-210, Idaho Code, (3) Idaho case law, and (4) interagency coordination. The guidelines are divided into regional office processing and state office processing as follows:

Regional Office Processing

- A. Upon receipt of an application for permit for hydropower use, the applicant should be advised, via either a documented conversation or correspondence, of the unique requirements for processing a hydropower water right. Requirements are as follows:

1. Requirements for All Power Applications

- a. An affidavit establishing residency and ownership of facilities (Form 205/206).

b. Information that shows whether or not the project will be regulated by FERC &/or PUC.

c. If the project will be regulated by FERC &/or PUC, FERC &/or PUC approvals or alternatives.

2. In the past, the Department basically considered power projects in either a small or large category based on certain criteria. The adopted water appropriation rules and regulations when considered with existing statutes suggest additional categories with different related requirements.

An application for permit (application) for 5 cfs or less and for an installed capacity of 0.37MW or less usually will require no additional information.

An application with a diversion rate greater than 5 cfs will require the submittal of all information described in Rule 4,5,3., Water Appropriation Rules and Regulations.

An application for 5 cfs or less but for an installed capacity of more than 0.37MW will require a financial statement.

An application for more than 25 cfs, or for an installed capacity of more than 5MW will require all of the information described in Rule 4,5,3., Water Appropriation Rules and Regulations in addition to an engineering design.

- B. In situations where FERC &/or PUC have jurisdiction, the conference/hearing for a protested application should be delayed until FERC &/or PUC approvals or alternatives are provided.
- C. Unprotested applications should be forwarded to the state office when all requirements have been met except FERC &/or PUC approvals or alternatives.

State Office Processing

- A. The state office should insure that documentation describing the completion of all requirements is in the file, with the exception of FERC &/or PUC approvals or alternatives.
- B. Applicants should be required by the state office to update the file on an annual basis regarding the status of obtaining FERC &/or PUC approval. An exception is that if the applicant receives approval of a preliminary permit, an update is not needed until the permit expires. The applicant must maintain applications with PUC &/or FERC in a valid status to be entitled to the Department processing delays described herein.

- C. Applications for permit that would be denied by the Director for reasons other than failure to receive approval from PUC &/or FERC will be denied at the earliest possible time and will not be held pending comments submitted by those agencies.

Attachment B shows standard conditions of approval which are associated with approvals for Applications for Permit for power purposes.

One unique aspect of power applications regards possessory interest. For most water right applications, the applicant must show some "vested interest", or "color of title" to the place of use before the application is deemed valid (see Lemmon v Hardy, 95 Idaho 778, 1974). However, an application for power may be an exception to this requirement since the place of use for power purposes can in some cases be obtained by the applicant through eminent domain after the water right has been obtained. Therefore, a power application may be approved even though possessory interest has not been demonstrated, if all other requirements are satisfied.

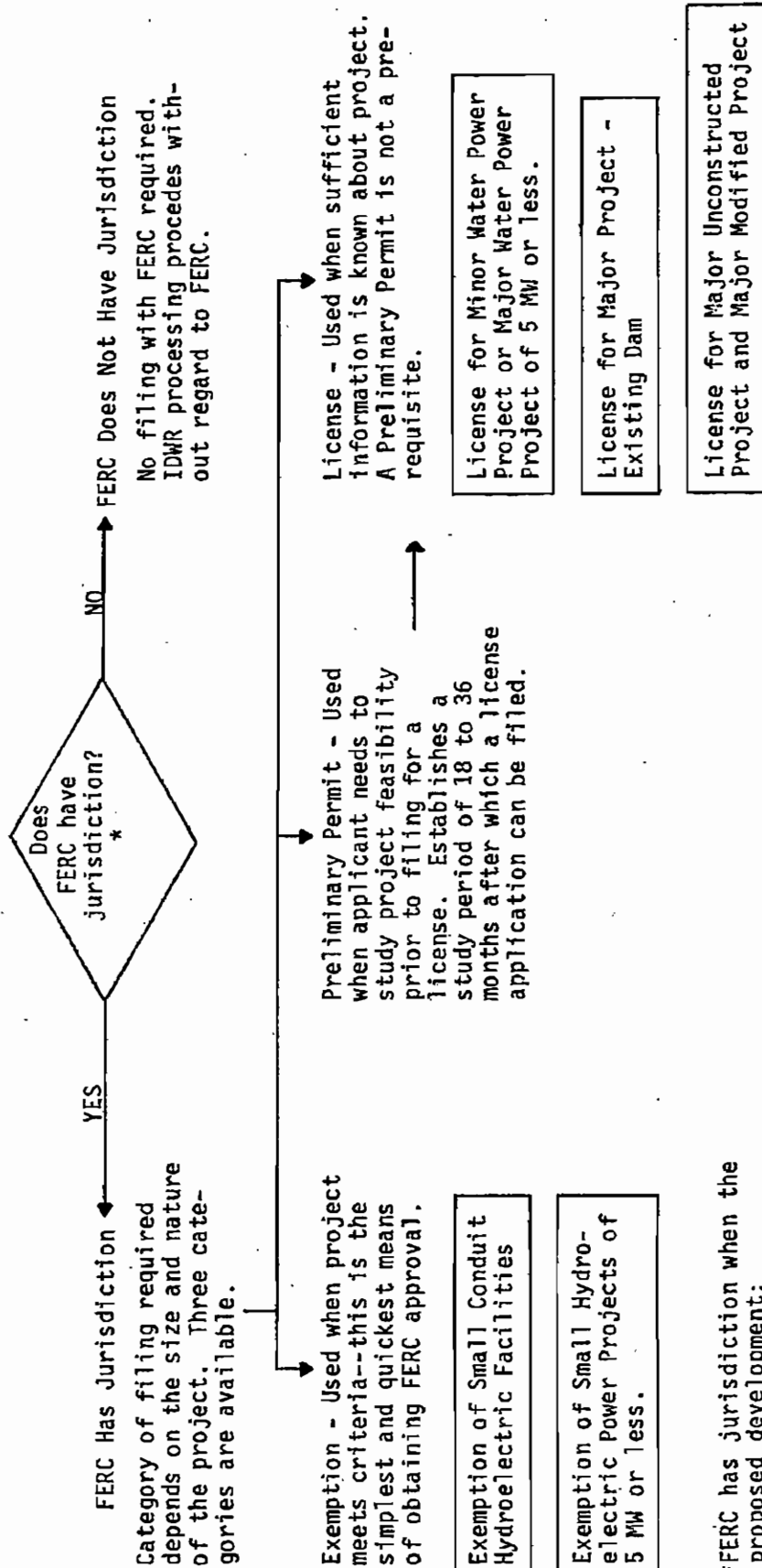
(3) FLOW CALCULATION

Attachment C entitled "Individual Hydropower Production" has been prepared to assist in the determination of a reasonable rate of flow based on (1) the power requirements of the applicant, (2) the type of hydroelectric system to be installed, and (3) available head. The instructions provide a basic method to assess the adequacy of flow requested, but this brief method should not be used to calculate final design flows. If the calculated flows are either much lower or much higher than those shown on the application, the applicant should be required to justify the rate of diversion shown.

FERC Filing Categories

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Each power project can be categorized at a unique location on this chart. Boxes represent categories for which FERC approval is normally required before IDWR issues a permit.



*FERC has jurisdiction when the proposed development:

- (A) Is located on federal land, or
- (B) Is located on or uses water from a navigable stream, or
- (C) Uses water impounded by a federal dam, or
- (D) Provides power to a FERC regulated (interstate) power grid.

Source: Federal Energy Guidelines, FERC Statutes and Regulations, Vol. 1, Subchapter B - Regulations Under the Federal Power Act, Part 4, par 2,000 et seq.

ATTACHMENT B

* { A measuring device and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained as part of the diverting works.

The permit holder shall either install a measuring device or a flow measurement port or provide a certified measurement or computation of flow based upon system design to be prepared by a professional engineer.

The issuance of this permit in no way grants any right-of-way or easement across the land of another.

Use of water under this permit is subject to control by the watermaster of State Water District No. <number and name>.

* This permit is subject to the provisions of Sections 42-205 through 42-210, Idaho Code, restricting the sale, transfer, assignment, or mortgage of this permit. Failure to comply with these provisions is cause for immediate cancellation of this permit.

* Water used under this permit if discharged into a natural channel or subsurface system shall meet Idaho Water Quality Standards.

* { The diversion and use of water under this permit and any license subsequently issued is subject to review by the Director thirty-five (35) years from the date of issuance of this permit. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

* { The diversion and use of water under this permit and any license subsequently issued is subject to review by the Director on the date(s) of expiration of any license issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

* The water right acquired under this permit for hydropower purposes 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 this permit and 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 this permit.

* This permit does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.

* Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.

* Use of water under this permit shall be non-consumptive.

A separate stream alteration permit from the IDWR is required for any activity in the stream channel other than construction and/or maintenance of the diversion structure. If your proposed construction or operation involves construction of an outfall or any other work in the stream channel other than a water diversion, you must contact the Department and obtain a Stream Channel Alteration permit prior to the start of construction.

Power apps from a groundwater source:

Water shall not be diverted solely for power production purposes, however, power may be produced utilizing water diverted for other uses.

*Conditions with an asterisk are used for every hydropower application approved by IDWR. Brackets signify alternative choices based on ancillary parameters.

ATTACHMENT C

INDIVIDUAL HYDROPOWER PRODUCTION

The following is an acceptable means of evaluating water requirements for planning a small scale hydropower facility. This method is general and intended to provide approximate results for use in filing a water right permit application for development of such a facility. Sizing and selection of equipment for installation is much more complicated and should not be attempted without proper technical guidance. Any one of the following four variables can be determined by mathematical or graphical methods providing the other three are known or assumed: (See Figure 1).

- 1) Power (kilowatts)
- 2) Gross Head (feet)
- 3) Design Flow (cubic feet per second)
- 4) Efficiency

Definition and Explanation of Terms

For turbines, pelton wheels and overshot water wheels, the above variables are defined as follows:

A) Power (P)

System power production capability or system capacity is the amount of electrical power that can be generated by the hydropower system. Power demand is the amount of electrical power that is required by the user to supply electrical appliances. In order to have an operational system, power production capability must be greater than or equal to power demand. Power is commonly measured in kilowatts.

Maximum power demand can be estimated by summing the demand of all electrical appliances that may reasonably be in use at one time. The demand requirements of individual electrical appliances can usually be obtained from power suppliers or are listed on the appliances. An estimate of normal household demand can also be obtained from the following table:

Table 1: Maximum Household Power Demand

<u>Electrical Power Use</u>	<u>Demand (Watts/ft²)</u>
Lighting and refrigeration only	2
Lighting, refrigeration, water heating, cooking and clothes drying	4-7
Total electric home	10-15

Maximum power demand in watts can be computed by multiplying demand in watts per square foot by the home size in square feet. Divide by 1000 to convert watts to kilowatts.

B) Gross Head (H)

1) Pelton Wheel or Hydraulic Turbine

Gross head for a pelton wheel or hydraulic turbine is the total vertical elevation difference in feet between the upper end of the penstock and the lower end of the penstock.

2) Overshot Water Wheel

Gross head for an overshot water wheel is the total vertical elevation difference in feet between the bottom of the discharge flume and the water surface of the tail-water.

C) Design Flow (Q)

The flow in cubic feet per second (cfs) at which the system is designed to operate.

D) Efficiency (e)

The fraction of total hydraulic energy available that can be converted to electrical energy and delivered to the consumer. For estimating purposes, use .50 for pelton wheels and turbines and .40 for overshot water wheels.

EXAMPLE PROBLEM

Problem Statement

A person with a 2000 ft² total electric home has a stream near his house which flows a minimum of 15 cfs and has a vertical drop of 400 ft. in the mile upstream from his house. The person desires to supply all of the electrical requirements of his home with a hydro-power generating system. How much water does he need?

Solution

This will be a graphical solution using Figure 1 and assuming the use of a pelton wheel or hydraulic turbine system.

1) Determine home electrical power demand.

Using Table 1

$$\begin{aligned}\text{Maximum Demand} &= 2000 \text{ ft}^2 (15 \text{ watts/ft}^2) \\ &= 30,000 \text{ watts} = 30 \text{ kw}\end{aligned}$$

2) Assume System Efficiency

Since power is assumed to be generated by a pelton wheel or hydraulic turbine, a reasonable system efficiency might be 50%. Assume $e = .5$.

3) Determine $H \times Q$ Requirement to Produce the Desired Power

Enter the graph (Figure 1) at 30 kw. Cross to the 50% efficiency line and proceed down to the lower axis and find $H \times Q = 708$.

4) Select a Head and Solve for the Flow

$H \times Q = 708$; therefore

$$Q = \frac{708}{H}$$

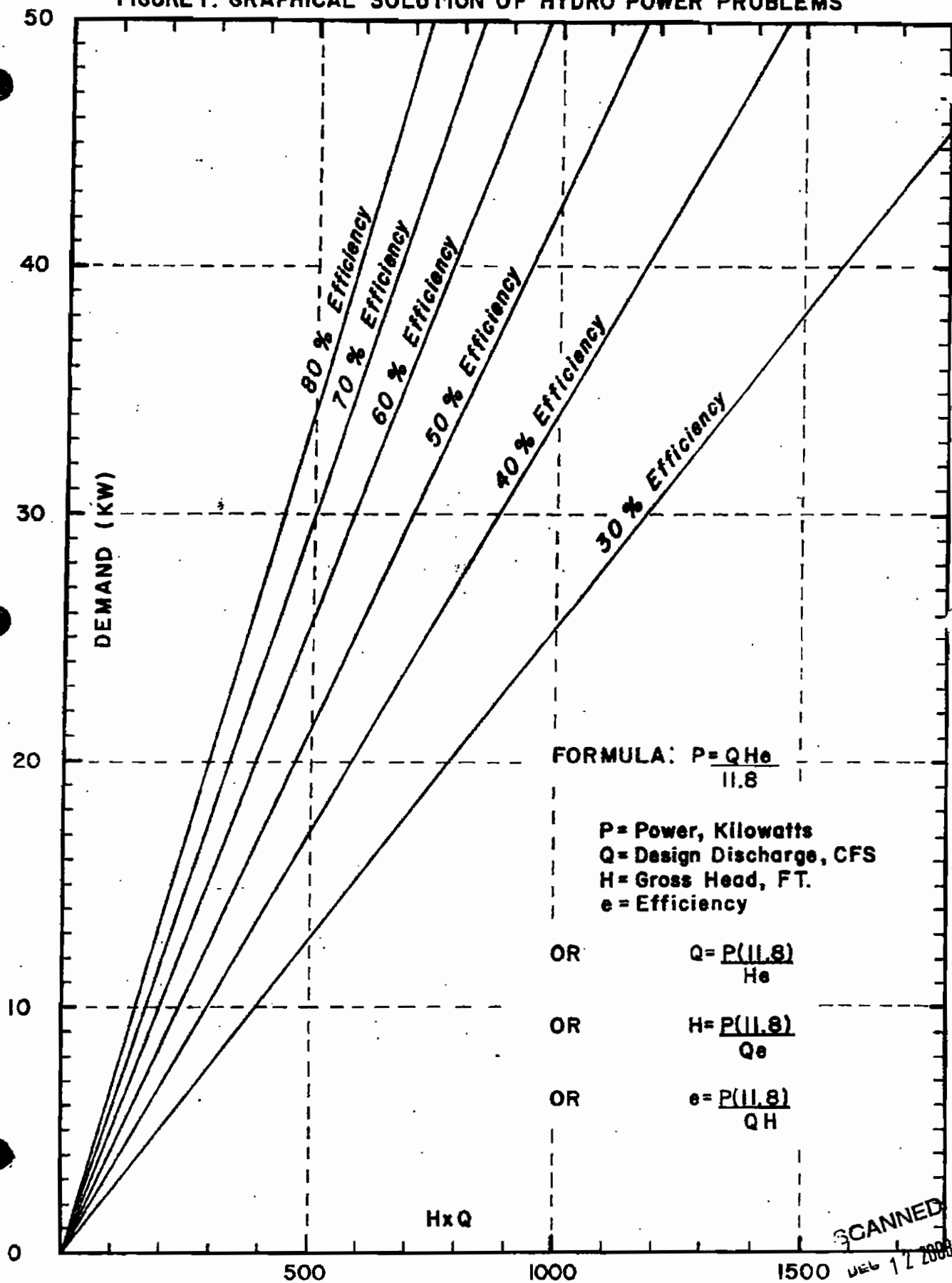
If $H = 400$ ft.; $Q = \frac{708}{400} = 1.8$ cfs

If $H = 200$ ft.; $Q = 3.5$ cfs

If $H = 50$ ft.; $Q = 14.2$ cfs

(It should be noted that there are an infinite number of possible solutions for $H \times Q = 708$ that provide 30 kw of power.)

FIGURE 1: GRAPHICAL SOLUTION OF HYDRO POWER PROBLEMS



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EXHIBIT 3

State of Idaho
Department of Water Resources
APPLICATION FOR AMENDMENT

(For Licensing Purposes)
WATER RIGHT NO. 29-07578

Date of Priority: March 31, 1981

Maximum Diversion Rate: 175.00 CFS
Maximum Diversion Volume: ~~81,900.0 AF~~
100,100.0 AF

Comes now MARSH VALLEY DEVELOPMENT INC
5203 S 11TH E

IDAHO FALLS ID 83404 and represents to the Director of the Idaho Department of Water Resources that he is the owner and holder of Permit to appropriate the Public Waters of the State of Idaho No. 29-07578, and requests that the permit be changed as follows:

Source: PORTNEUF RIVER

Tributary: SNAKE RIVER

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
POWER	01/01 to 12/31	175.00 CFS	~~81,900.0 AF~~ 100,100.0 AF

LOCATION OF POINT(S) OF DIVERSION:

PORTNEUF RIVER L3 SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 22, Twp 08S, Rge 37E, B.M., BANNOCK County

PLACE OF USE: POWER

Twp Rge Sec	NE			NW			SW			SE			Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
08S 37E 20			X										
			L6										

Permit holder asserts that no one will be injured by such change and that such change will be made at permit holder's own risk. Signed this 4 day of June, 2001.


(Signature)

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Department of Water Resources

State of Idaho
Department of Water Resources
APPLICATION FOR AMENDMENT
(For Licensing Purposes)
WATER RIGHT NO. 29-07578

FOR DEPARTMENT USE ONLY

Preliminary check by _____ Fee = 50. Received by jm # C053434 Date 4/30/01

ACTION OF THE DEPARTMENT OF WATER RESOURCES

I, Karl J. Dreher, of the Department of Water Resources hereby approve the
above Application for Amendment for Permit No. 29-07578 with the following:

CONDITIONS OF APPROVAL

1. The use of water under this right shall not give rise to any claim against the holder of a senior water right based upon the theories of forfeiture, abandonment, adverse possession, waiver, equitable estoppel, estoppel by laches or customary preference.
2. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
3. Use of water under this right shall be non-consumptive.
4. Use of water under this water right will be regulated by the watermaster of State Water District No. 29.
5. The rights for the use of water confirmed in this license shall be junior and subordinate to all 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 right 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 right.
6. Use of water under this approval shall comply with applicable water quality standards of the Department of Environmental Quality.
7. Right 29-07772 is also diverted through the point of diversion described above.
8. The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of license 10466-000 issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.
9. Prior to diverting water pursuant to this right, measuring devices and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained as part of the diverting works. Additional measuring devices may also be required for the accurate measurement of water diverted, water returned and water available to satisfy this and other water rights.

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Department of Water Resources

10. The adequacy of the project design to protect public and employee safety during all phases of construction and operation of the project shall be reviewed and certified by a professional engineer licensed to practice in the state of Idaho.
11. A minimum flow of ten (10) cfs or the entire available stream, if less than ten cfs, must be maintained within the bypass reach at all times, except as specified in the FERC license.
12. A shutdown bypass shall be constructed at the power plant site. The operation of the power system shall not alter normal flow characteristics of the Portneuf River.
13. The right holder shall be responsible for the cost of installing or retrofitting any diversion works, located between the project point of diversion and the downstream point of discharge, which is detrimentally affected by the hydropower diversion.
14. For purposes of interim distribution pending judicial determination, any senior unadjudicated water right, including those perfected through the beneficial use method, for which a claim is made in the pending Snake River Basin Adjudication (SRBA) shall be delivered prior to this right, provided the water is being beneficially used and provided the use is consistent with the right as recommended in the Directors Report when filed with the district court in the SRBA pursuant to Section 42-1411, Idaho Code.

Witness my hand this 25th day of JUNE, 2001.

Acting for


KARL J. DREHER
Director

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Department of Water Resources

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State of Idaho
Department of Water Resources
Permit To Appropriate Water

NO. 29-07578

Proposed Priority: February 2, 1981 Maximum Diversion Rate: 175.00 CFS
This is to certify, that MARSH VALLEY HYDRO ELECTRIC CO.
MC CANNON, ID 83250
has applied for a permit to appropriate water from:

FORTNEUF RIVER tributary of SNAKE RIVER

and a permit is APPROVED for development of water as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>
POWER	01/01 to 12/31	175.00 CFS

LOCATION OF POINT(S) OF DIVERSION: SENE Sec. 21, Township 09S, Range 37E
BANNOCK County

PLACE OF USE: POWER

TWN RGE SEC

09S 37E 21 NENE

CONDITIONS/REMARKS:

1. Proof of construction of works and application of water to beneficial use shall be submitted on or before October 1, 1994.
2. Subject to all prior water rights.
3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.
4. The right to the use of water acquired under this permit shall not give rise to any right or claim against the holder of a senior right based upon the theories of forfeiture, abandonment, adverse possession, waiver, equitable estoppel, estoppel by laches or customary preference.
5. The issuance of this permit in no way grants any right-of-way or easement across the land of another.
6. This permit is subject to the provisions of Sections 42-205 through 42-210, Idaho Code, restricting the sale, transfer, assignment, or mortgage of this permit. Failure to comply with these provisions is cause for immediate cancellation of this permit.
7. Water used under this permit if discharged into a natural channel or subsurface system shall meet Idaho Water Quality Standards.

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State of Idaho
Department of Water Resources**Permit To Appropriate Water**

NO. 29-07578

CONDITIONS/REMARKS:

8. The water right acquired under this permit for hydropower purposes 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 this permit and 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 this permit.
9. This permit does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
10. Use of water under this permit shall be non-consumptive.
11. Prior to diverting water pursuant to this permit, measuring devices and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained as part of the diverting works. Additional measuring devices may also be required for the accurate measurement of water diverted, water returned and water available to satisfy this and other water rights.
12. The Director retains jurisdiction of the permit and any license subsequently issued, to require streamflow augmentation or other action needed to protect prior surface water and groundwater rights.
13. The diversion and use of water under this permit and any license subsequently issued is subject to review by the Director on the date of expiration of any license issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.
14. Use of water under this permit is under the control of the watermaster of State Water District No. 29, Portneuf River.
15. A minimum flow of ten (10) cfs or the entire available stream if less than ten cfs must be maintained within the bypass reach at all times, except as specified in the FERC license.
16. A shutdown bypass shall be constructed at the power plant site. The operation of the power system shall not alter normal flow characteristics of the Portneuf River.
17. The permit holder shall be responsible for the cost of installing or retrofitting any diversion works, located between the project point of diversion and the downstream point of discharge, which is detrimentally affected by the hydropower diversion.

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JAN 22 1993

Permit To Appropriate Water

NO. 29-07578

CONDITIONS/REMARKS:

18. The adequacy of the project design to protect public and employee safety during all phases of construction and operation of the project shall be reviewed and certified by a professional engineer licensed to practice in the state of Idaho.
19. Prior to operation of the hydropower facility, the permit holder shall provide an operation plan to the Department for review and approval. The operation plan shall provide for the protection of public safety and ensure adequate bypass and maintenance of the Portneuf River regime.
20. For purposes of interim distribution pending judicial determination, any senior unadjudicated water right, including those perfected through the beneficial use method, for which claim is made in the pending Snake River Basin Adjudication ("SRBA" - Twin Falls County Case No. 39576) shall be delivered prior to the right under this permit, provided the water is being beneficially used and provided the use is consistent with the right as recommended in the Director's Report when filed with the district court in the SRBA pursuant to Section 42-1411, Idaho Code.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code. Witness the seal and signature of the Director, affixed at Boise, this

24th day of September, 1990.

for *R. Keith Higginson*
R. Keith Higginson, Director

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State of Idaho
Department of Water Resources
Water Right License

WATER RIGHT NO. 29-07578

Priority: March 31, 1981

Maximum Diversion Rate: 175.00 CFS
Maximum Diversion Volume: 100,100.0 AF

It is hereby certified that MARSH VALLEY DEVELOPMENT INC
5203 S 11TH E
IDAHO FALLS ID 83404 has complied with the terms and
conditions of the permit, issued pursuant to Application for Permit dated February 02, 1981; and has
submitted Proof of Beneficial Use on December 07, 1994. An examination indicates that the works have
a diversion capacity of 250.4 cfs of water from:

SOURCE

PORTNEUF RIVER

Tributary: SNAKE RIVER

and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL DIVERSION VOLUME</u>
POWER	01/01 to 12/31	175.00 CFS	100,100.0 AF

LOCATION OF POINT(S) OF DIVERSION:

PORTNEUF RIVER L3 SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 22, Twp 09S, Rge 37E, B.M., BANNOCK County

PLACE OF USE: POWER

Twp Rge Sec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
09S 37E 20			X														
			L 6														

CONDITIONS OF APPROVAL

1. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
2. Use of water under this right shall be non-consumptive.
3. Use of water under this water right will be regulated by the watermaster of State Water District No. 29.
4. The rights for the use of water confirmed in this license shall be junior and subordinate to all 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 right 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 right.
5. Use of water under this approval shall comply with applicable water quality standards of the Department of Environmental Quality.
6. Right 29-07772 is also diverted through the point of diversion described above.

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State of Idaho
Department of Water Resources
Water Right License

WATER RIGHT NO. 29-07578

7. The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of license 10488-000 issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.
8. Prior to diverting water pursuant to this right, measuring devices and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained as part of the diverting works. Additional measuring devices may also be required for the accurate measurement of water diverted, water returned and water available to satisfy this and other water rights.
9. The adequacy of the project design to protect public and employee safety during all phases of construction and operation of the project shall be reviewed and certified by a professional engineer licensed to practice in the state of Idaho.
10. A minimum flow of ten (10) cfs of the entire available stream, if less than ten cfs, must be maintained within the bypass reach at all times, except as specified in the FERC license.
11. A shutdown bypass shall be constructed at the power plant site. The operation of the power system shall not alter normal flow characteristics of the Portneuf River.
12. The right holder shall be responsible for the cost of installing or retrofitting any diversion works, located between the project point of diversion and the downstream point of discharge, which is detrimentally affected by the hydropower diversion.
13. For purposes of interim distribution pending judicial determination, any senior unadjudicated water right, including those perfected through the beneficial use method, for which a claim is made in the pending Snake River Basin Adjudication (SRBA) shall be delivered prior to this right, provided the water is being beneficially used and provided the use is consistent with the right as recommended in the Directors Report when filed with the district court in the SRBA pursuant to Section 42-1411, Idaho Code.
14. The use of water under this right shall not give rise to any claim against the holder of a senior water right based upon the theories of forfeiture, abandonment, adverse possession, waiver, equitable estoppel, estoppel by laches or customary preference.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be used in accordance with Idaho law and applicable rules of the Department of Water Resources.

Signed and sealed this 25th day of June, 2001.

Acting for


KARL J. DREHER
Director

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EXHIBIT 4

State of Idaho
Department of Water Resources

Permit To Appropriate Water

NO. 29-07772

Proposed Priority: June 5, 1984 Maximum Diversion Rate: 75.00 CFS
This is to certify, that MARSH VALLEY HYDRO ELECTRIC CO.
MC CANNON, ID 83250
has applied for a permit to appropriate water from:

PORTRINEUF RIVER tributary of SNAKE RIVER

and a permit is APPROVED for development of water as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>
POWER	01/01 to 12/31	75.00 CFS

LOCATION OF POINT(S) OF DIVERSION: SEW Sec. 22, Township 09S, Range 37E
BANNOCK County

PLACE OF USE: POWER

TWN RGE SEC

09S 37E 21 NWNW

CONDITIONS/REMARKS:

1. Proof of construction of works and application of water to beneficial use shall be submitted on or before October 1, 1994.
2. Subject to all prior water rights.
3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.
4. The right to the use of water acquired under this permit shall not give rise to any right or claim against the holder of a senior right based upon the theories of forfeiture, abandonment, adverse possession, waiver, equitable estoppel, estoppel by laches or customary preference.
5. The issuance of this permit in no way grants any right-of-way or easement across the land of another.
6. This permit is subject to the provisions of Sections 42-205 through 42-210, Idaho Code, restricting the sale, transfer, assignment, or mortgage of this permit. Failure to comply with these provisions is cause for immediate cancellation of this permit.
7. Water used under this permit if discharged into a natural channel or subsurface system shall meet Idaho Water Quality Standards.

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State of Idaho
Department of Water Resources**Permit To Appropriate Water**

NO. 29-07772

CONDITIONS/REMARKS:

8. The water right acquired under this permit for hydropower purposes 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 this permit and 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 this permit.
9. This permit does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
10. Use of water under this permit shall be non-consumptive.
11. Prior to diverting water pursuant to this permit, measuring devices and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained as part of the diverting works. Additional measuring devices may also be required for the accurate measurement of water diverted, water returned and water available to satisfy this and other water rights.
12. The Director retains jurisdiction of the permit and any license subsequently issued, to require streamflow augmentation or other action needed to protect prior surface water and groundwater rights.
13. The diversion and use of water under this permit and any license subsequently issued is subject to review by the Director on the date of expiration of any license issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.
14. Use of water under this permit is under the control of the watermaster of State Water District No. 29, Portneuf River.
15. A minimum flow of ten (10) cfs or the entire available stream if less than ten cfs must be maintained within the bypass reach at all times, except as specified in the FERC license.
16. A shutdown bypass shall be constructed at the power plant site. The operation of the power system shall not alter normal flow characteristics of the Portneuf River.
17. The permit holder shall be responsible for the cost of installing or retrofitting any diversion works, located between the project point of diversion and the downstream point of discharge, which is detrimentally affected by the hydropower diversion.

JAN 22 1993

State of Idaho
Department of Water Resources**Permit To Appropriate Water**

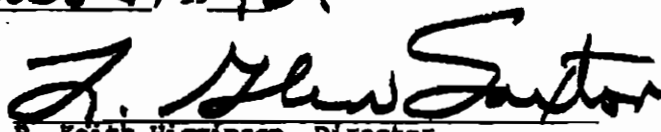
NO. 29-07772

CONDITIONS/REMARKS:

18. The adequacy of the project design to protect public and employee safety during all phases of construction and operation of the project shall be reviewed and certified by a professional engineer licensed to practice in the state of Idaho.
19. Prior to operation of the hydropower facility, the permit holder shall provide an operation plan to the Department for review and approval. The operation plan shall provide for the protection of public safety and ensure adequate bypass and maintenance of the Portneuf River regime.
20. For purposes of interim distribution pending judicial determination, any senior unadjudicated water right, including those perfected through the beneficial use method, for which claim is made in the pending Snake River Basin Adjudication ("SRBA" - Twin Falls County Case No. 39576) shall be delivered prior to the right under this permit, provided the water is being beneficially used and provided the use is consistent with the right as recommended in the Director's Report when filed with the district court in the SRBA pursuant to Section 42-1411 Idaho Code.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code.
Witness the seal and signature of the Director, affixed at Boise, this

24th day of September, 1990.

for 
R. Keith Higginson, Director

JAN 22 1993

State of Idaho
Department of Water Resources
Water Right License

WATER RIGHT NO. 29-07772

Priority: August 01, 1984

Maximum Diversion Rate: 75.00 CFS
Maximum Diversion Volume: 42,900.0 AF

It is hereby certified that MARSH VALLEY DEVELOPMENT INC
5203 S 11TH E
IDAHO FALLS ID 83404 has complied with the terms and
conditions of the permit, issued pursuant to Application for Permit dated June 05, 1984; and has
submitted Proof of Beneficial Use on December 07, 1994. An examination indicates that the works have
a diversion capacity of 250.4 cfs of water from:

SOURCE

PORTNEUF RIVER

Tributary: SNAKE RIVER

and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL DIVERSION VOLUME</u>
POWER	01/01 to 12/31	75.00 CFS	42,900.0 AF

LOCATION OF POINT(S) OF DIVERSION:

PORTNEUF RIVER L3 SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 22, Twp 09S, Rge 37E, B.M., BANNOCK County

PLACE OF USE: POWER

Twp Rge Sec	NE				NW				SW				SE				
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
09S 37E 20			X														
			L6														

CONDITIONS OF APPROVAL

1. The use of water under this right shall not give rise to any claim against the holder of a senior water right based upon the theories of forfeiture, abandonment, adverse possession, waiver, equitable estoppel, estoppel by laches or customary preference.
2. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
3. Use of water under this right shall be non-consumptive.
4. Use of water under this water right will be regulated by the watermaster of State Water District No. 29.
5. The rights for the use of water confirmed in this license shall be junior and subordinate to all 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 right 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 right.
6. Use of water under this approval shall comply with applicable water quality standards of the Department of Environmental Quality.

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State of Idaho
Department of Water Resources
Water Right License

WATER RIGHT NO. 29-07772

7. The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of license 10468-000 issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.
8. Prior to diverting water pursuant to this right, measuring devices and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained as part of the diverting works. Additional measuring devices may also be required for the accurate measurement of water diverted, water returned and water available to satisfy this and other water rights.
9. The adequacy of the project design to protect public and employee safety during all phases of construction and operation of the project shall be reviewed and certified by a professional engineer licensed to practice in the state of Idaho.
10. A minimum flow of ten (10) cfs or the entire available stream, if less than ten cfs, must be maintained within the bypass reach at all times, except as specified in the FERC license.
11. A shutdown bypass shall be constructed at the power plant site. The operation of the power system shall not alter normal flow characteristics of the Portneuf River.
12. The right holder shall be responsible for the cost of installing or retrofitting any diversion works, located between the project point of diversion and the downstream point of discharge, which is detrimentally affected by the hydropower diversion.
13. For purposes of interim distribution pending judicial determination, any senior unadjudicated water right, including those perfected through the beneficial use method, for which a claim is made in the pending Snake River Basin Adjudication (SRBA) shall be delivered prior to this right, provided the water is being beneficially used and provided the use is consistent with the right as recommended in the Directors Report when filed with the district court in the SRBA pursuant to Section 42-1411, Idaho Code.
14. Right 29-07578 is also diverted through the point of diversion described above.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be used in accordance with Idaho law and applicable rules of the Department of Water Resources.

Signed and sealed this 25TH day of June, 2001.

MICROFILMED

AUG 08 2001

Acting for

KARL J. DREHER
Director

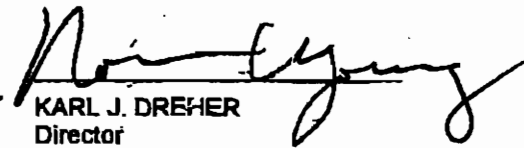


EXHIBIT 5

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR PERMIT

To appropriate the public waters of the State of Idaho

APPROVED

1. Name of applicant BIRCH POWER COMPANY Phone (208) 529-2469
Post office address 550 Linden Drive, Idaho Falls, Idaho 83401
2. Source of water supply Birch Creek which is a tributary of Birch Cr. sinks to ground-water aquifer.
3. Location of point of diversion is NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 3 Township 8N
Range 30 E B.M. Clark County, additional points of diversion if any: _____

*kw 5/18/84

4. Water will be used for the following purposes:

Amount 45 cfs for power production purposes from Jan. 1 to Dec. 31 (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)

5. Total quantity to be appropriated:

- a. 45 cubic feet per second ~~and/or~~ less minimum 5 cfs for fish propagation

6. Proposed diverting works:

- a. Description of ditches, flumes, pumps, headgates, etc. headgate with five miles of feeder ditch, penstock and power house
b. Height of storage dam none feet, active reservoir capacity none acre-feet; total reservoir capacity None acre-feet, materials used in storage dam: N/A
Period of year when water will be diverted to storage None to None inclusive.
(Month/Day) (Month/Day)
c. Proposed well diameter is N/A inches; proposed depth of well is N/A 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:

- a. If water is not for irrigation: Power Generation
(1) Give the place of use of water: NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 17 Township 8N*
Range 31E* B.M. 31E
(2) Amount of power to be generated: 900 horsepower under 278 feet of head.
(3) List number of each kind of livestock to be watered N/A
(4) Name of municipality to be served N/A, or number of families to be supplied with domestic water _____
(5) If water is to be used for other purposes describe: Power Generation

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. _____

N/A

9. a. Who owns the property at the point of diversion US Dept. of Interior, Bureau of Land Mgmt.

b. Who owns the land ^{at} ~~to be irrigated~~ or place of use US Dept. of Interior, Bureau of Land Mgmt.

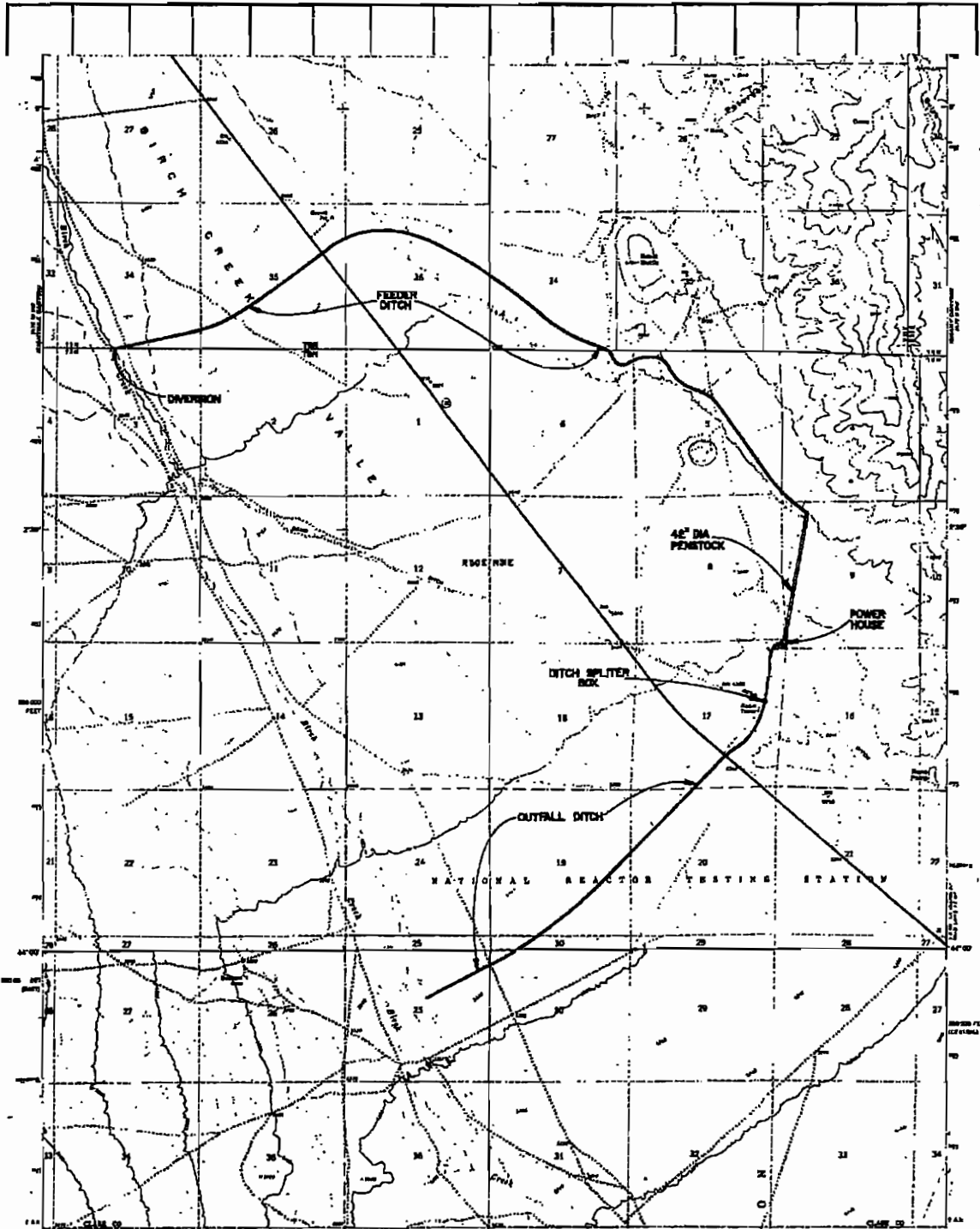
c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing right-of-way application on file with U.S. Dept. of Interior, Bureau of Land Management.

10. Remarks The water use is nonconsumptive. All water will be available for present irrigational uses and/or returned to Birch Creek

The power plant feeder ditch will reduce existing bed losses by approximately 5 cfs. This additional flow will be available to meet irrigational and/or fish propagation needs.

The outfall ditch will be filled with a concrete diversion box at the intersection with Reno Ditch to afford irrigational diversion as desired.

11. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.



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.

[Signature]
(Applicant)

Priority: 09/08/82

Received by BP Date 9/8/82 Time 9:45am
Preliminary check by Emc Fee \$ 675.00
Receipted by BP Date 9/10/82 # 22496
Publication prepared by BP Date 9/15/82
Published in Standard Journal
Publication dates 9/16 - 9/23/82
Publication approved CW Date 10-14-82
Protests filed by: Water District 32-D, BLM, Fish & Game

Copies of protests forwarded by CW
Hearing held by _____ Date _____
Recommended for approval denial by Emc

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. 32-7128, and said application is hereby APPROVED.

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

- a. SUBJECT TO ALL PRIOR WATER RIGHTS.
- b. Proof of construction of works and application of water to beneficial use shall be submitted on or before March 1, 19 90.
- c. The rate of diversion, if water is to be used for irrigation under this permit, when combined with all other water rights for the same land shall not exceed 0.02 cubic feet per second for each acre of land.
- d. Other: Pursuant to Order Adopting Modified Memorandum Decision and Order and Modified Memorandum Decision and Order.

Dated this 27th day of March, 1985.

J. Glen Saxton
Chief, Operations Bureau

RECEIVED
MARCH 27 1985

IN THE MATTER OF APPLICATIONS FOR PERMIT
NOS. 32-7128 AND 32-7136 IN THE NAME OF
BIRCH POWER COMPANY

On September 8, 1982, Birch Power Company filed with the Department of Water Resources Application for Permit No. 32-7128 to appropriate 45 cubic feet per second less a minimum of 5 cubic feet per second for fish propagation from Birch Creek in Clark County. The water would be diverted in the NE1/4NW1/4, Sec. 3, Twp. 8N, Rge. 30E and used to generate 900 horsepower in the NE1/4NE1/4, Sec. 17, Twp. 8N, Rge. 31E.

Notice of the application was published in the Rexburg Journal on September 23 and 30, 1982 and was subsequently protested on September 23, 1982 by the Idaho Department of Fish and Game. On October 12, 1982, additional protests were received from the Bureau of Land Management and from William T. Simmons, C. A. Wagoner, and Ben R. Wilding.

On January 3, 1984, Birch Power Company filed with the Department of Water Resources Application for Permit No. 32-7136 to appropriate an additional 30 cubic feet per second from Birch Creek to be used in combination with Application No. 32-7128.

Notice of this application was published in the Rexburg Journal on January 19 and 26, 1984 and subsequently protested on February 1, 1984 by the Bureau of Land Management. Additional protests were received from the Idaho Department of Fish and Game, and Ben Wilding, Watermaster of Water District 32-D, on February 2 and 3, 1984, respectively. A petition for D & D Enterprises

CHILDRENLIFE

to intervene in the matter of Application for Permit No. 32-7128 was received on September 16, 1983. The applicant had previously advised the Department he would not object to such a petition so on February 23, 1984, the Department issued an order allowing D & D Enterprises to intervene in the matter.

The protests and petition to intervene cited several reasons for objecting to the proposed project which are summarized as follows:

1) Diversion of 75 cubic feet per second at the proposed diversion point would have an adverse impact on the fishery and riparian habitat along the 3,000 feet of Birch Creek between the proposed point of diversion and the Reno Ditch diversion.

2) The construction of the proposed diversion would be incompatible with the interests of the water users of Birch Creek.

3) The applicant's plans are inadequate to allow an assessment of possible detrimental effects.

4) The application contains no proof of a firm commitment to finance the project and the applicant has not demonstrated financial ability to complete it.

5) Information provided on the application is not sufficient to evaluate feasibility of the project.

6) The application appears to be made for speculative purposes.

On April 5, 1984, a combined hearing was held in Idaho Falls, Idaho to consider the objections against Applications for Permit No. 32-7128 and 32-7136. Present at the hearing and representing the applicant were Ted Sorenson, owner of Birch Power Company and Ray Rigby, Attorney at Law. The protestants present at the hearing were William Dillon, Deputy Attorney General and Virgil Moore, Regional Fisheries Manager representing the Idaho Department of Fish and Game; Ben Wilding, Watermaster representing Water District 32-D, Birch Creek; Jim

Esget, District Hydrologist and Robert McCurdy, Wildlife Biologist representing U.S. Bureau of Land Management; and George Peterson, Attorney at Law representing D & D Enterprises. The following evidence was obtained during the hearing and considered in reaching this decision.

Review of Evidence

- 1) Applications for Permit Nos. 32-7128 and 32-7136
- 2) Hearing tapes numbered 1 through 9.
- 3) Applicant's Exhibit No. 1, Birch Power Company Preliminary Design and Report.
- 4) Applicant's Exhibit No. 2, letter from Don McGahey, General Manager of Midstate Distributing, Inc. dated April 4, 1984.
- 5) Applicant's Exhibit No. 3, letter from Brian D. Holt, Director Consumer Service, Planning and Research for Utah Power and Light Company, dated February 14, 1984.
- 6) Applicant's Exhibit No. 4, letter from Lyle J. Larson, Assistant Vice-president, Continental Bank & Trust Company, dated January 6, 1984.
- 7) Applicant's Exhibit No. 5, letter from Lyle J. Larson, Assistant Vice-president, Continental Bank & Trust Company, dated October 24, 1983.
- 8) Applicant's Exhibit No. 6, a report by J. S. Griffeth, PhD, entitled "Feasibility of Developing a Trout Population in the Proposed Birch Creek Hydroelectric Project Feeder Ditch" dated April 5, 1984.
- 9) Applicant's Exhibit No. 7, photos of Birch Creek in vicinity of proposed diversion.
- 10) Applicant's Exhibit No. 8, photos of riparian habitat along Reno Ditch.
- 11) Applicant's Exhibit No. 9, photos of general area where feeder ditch will be constructed.

12) Applicant's Exhibit No. 10, order from Federal Energy Regulatory Commission issuing preliminary permit to Birch Power Company, Project No. 7194-000 issued September 7, 1983.

13) Protestant's Exhibit Fish and Game No. 1, letter from Tom Rein-ecker, Region VI Supervisor, Idaho Department of Fish and Game, dated March 26, 1984.

14) Policy Statement of Idaho Water Resource Board on Birch Creek.

15) Court decree entitled Agnes B. Reno, et al vs J. R. Richards, et al dated September 6, 1922 adjudicating water rights on Birch Creek and tributaries.

Birch Creek flows in a southeasterly direction from Gilmore Summit down through Birch Creek Valley and adjacent to State Highway 28 for several miles. Birch Creek is used heavily by campers and fishermen partially because of the ease of access to the creek and because picnic and camping areas have been developed along it. About 3 miles above the proposed point of diversion Birch Creek turns more south and diverges from Highway 28 until at the proposed point of diversion it is about 1 1/2 miles west of the highway. The creek continues in a southerly direction about 3000 feet to the diversion structure for the Reno Ditch where during most of the time the entire flow is diverted leaving the channel of Birch Creek below the diversion without water.

The Reno Ditch takes the water from the east side of the creek and runs in a east-southeasterly direction about 5 miles before it is used. The slope of the ditch is steep enough so that the velocity of water is between 5 and 8 feet per second.

The applicant plans to divert the water from Birch Creek about 3000 feet upstream from the Reno Ditch diversion into a feeder ditch with a flatter slope with the velocity of the water reduced to 1.8 to 2.25 feet per second.

The water would be conveyed for about 5 1/2 miles in the feeder ditch then enter a steel penstock leading downhill to the generation facility located adjacent to the Reno Ditch. The water leaving the generation facility would return directly to the Reno Ditch for use by the irrigators.

The applicant claims that the water lost to seepage in the new feeder ditch will be at least 5 cubic feet per second less than in the 3000 feet of Birch Creek and in the approximately 5 miles of the Reno Ditch to the point where the water is returned to the Reno Ditch. This possible decrease in water loss raises the question of whether the water previously lost to seepage should be used to fill the decreed rights of the irrigators on the Reno Ditch or should it be used to provide a minimum flow in the Birch Creek channel downstream from the proposed point of diversion.

The hearing officer has considered the evidence and reviewed the testimony, and based upon his understanding of the law, proposes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1) Birch Power Company, the applicant, is a corporation qualified to do business in the State of Idaho, under the laws of the State of Idaho.

2) The applicant has applied to the Department of Water Resources for 45.0 cubic feet per second under Application for Permit No. 32-7128 and 30.0 cubic per second under Application for Permit No. 32-7136.

3) The applicant, through Ted Sorenson sole owner verbally deleted at the hearing all reference to the intent of the applicant to leave 5.0 cubic feet per second maintenance flow in Birch Creek between the proposed point of diversion and the Reno Ditch diversion.

4) The applicant has filed an application to divert water from Birch Creek in the NE1/4NW1/4, Sec. 3, Twp. 8N, Rge. 30E, convey this water through

5 miles of feeder ditch and 1 mile of penstock to a point in the NE1/4NE1/4, Sec. 17, Twp. 8N, Rge. 31E, where it will be used to generate 1,600 horsepower under 278 feet of head. This plan is option A in Applicant's Exhibit 1. Option B shown in Exhibit 1, but not shown on the application, would use the same feeder ditch but would use about 3 miles of penstock to a generating station in the NE1/2SE1/2, Sec. 15, T8N, Rge. 31E. The effect on Birch Creek and the downstream users would be the essentially the same for both options.

5) Based upon the records of the USGS gaging station at Eight Mile Canyon Road, flows at the proposed point of diversion are expected to range consistantly from 41.0 cubic feet per second to 75.0 cubic feet per second with flows in excess of 75.0 cubic feet per second occurring primarily in the period from October to May.

6) Water normally conveyed through the Reno Ditch for irrigation purposes will be the same water used for power generation during the irrigation season.

7) The proposed point of diversion is approximately 3,000 feet upstream from the head of the Reno Ditch.

8) Diversion of water from Birch Creek during the summer months is subject to regulation by the watermaster of Water District No. 32-D, Birch Creek.

9) Losses in the Birch Creek channel between the proposed point of diversion and the Reno Ditch are estimated at 1.0 cubic foot per second.

10) Loss measurements in the Reno Ditch indicate 9.0 cubic feet per second or approximately 22% of the water diverted is lost in the existing system between the proposed point of diversion and the point where the water will be returned to the Reno Ditch from the generation facility.

11) The use of sealants by the applicant in the feeder ditch is

expected to reduce the loss by about 50% between the proposed point of diversion and the point where the water is returned to the Reno Ditch.

12) The water lost to seepage does not reach the downstream water user as either surface or subsurface flow and has never been used for irrigation by those water users on the Reno Ditch.

13) Utah Power and Light to whom the power will be sold, and General Electric, the major supplier of the electrical equipment, have reviewed the project and found it financially feasible.

14) The Continental Bank & Trust Company has a verbal contract with Birch Power Company to secure or provide the best available financing. The bank would finance the project itself or arrange financing with several other alternate sources which are available pending the issuance of a water right permit.

15) Existing riparian habitat will be lost along that portion of the Reno Ditch and Birch Creek where dewatering is expected to occur. The existing riparian habitat is mainly willows and other brushy plants along Birch Creek and grasses and few woody plants along the Reno Ditch.

16) The fishery existing in Birch Creek below the proposed point of diversion will be eliminated. A maintenance flow of 5 cubic feet per second bypassing the proposed point of diversion is not sufficient to maintain a fishery, but would be sufficient to provide stockwater and maintain a riparian zone along the 3000 feet of Birch Creek being dewatered.

17) The first 1 1/2 miles of the feeder ditch is being designed to support a riparian zone and create a fishery habitat where the population density of trout should equal the fishery existing in Birch Creek below the proposed diversion. A continuous flow of water must be maintained in that section of the feeder ditch to assure a fishery.

18) A grazing allotment administered by the BLM has used for many

years, the Reno Ditch and Birch Creek below the proposed point of diversion for the watering of 4,000 sheep from April 1 to June 30. The proposed feeder ditch is also located within this grazing allotment.

19) Under a trailing allotment administered by the BLM, 450 head of cattle have watered along the 1 1/2 miles of Birch Creek below the proposed point of diversion between November 1 and February 1.

20) Section 42-113, Idaho Code charges the Department with recognizing and protecting water rights for instream livestock use and other purposes based on priority.

21) On September 7, 1983, the applicant received from the Federal Energy Regulatory Commission a preliminary permit to conduct investigations and secure data necessary to determine the feasibility of the project.

22) None of the protestants are participating in the cost on the construction of the project.

CONCLUSIONS OF LAW

1) The water that will be saved by sealing the feeder ditch is new water that has never been available for use by the Reno Ditch irrigators, therefore, the existing irrigation rights will not be injured if the water being saved is used to provide water for livestock and to protect the public interest by preserving the riparian habitat along the natural stream channel of Birch Creek. The person who saves the water is entitled to the benefit of the water with his right to the saved water being prior to the right of the other parties. Reno v. Richards, 32 Idaho 1, 6, 13 (1918) and Basinger v. Taylor, 36 Idaho 591, 596-597, 599 (1922).

2) Streamflows at the proposed point of diversion have been shown to be adequate for the project as designed for the use of .75 cubic feet per second.

3) The adverse impacts to riparian habitat caused by the appropriation

and diversion of water from the 3,000 feet of stream will be sufficiently mitigated by the establishment of 1 1/2 miles of riparian zone plus the riparian vegetation that will naturally occur in the remaining length of the feeder ditch and the riparian vegetation that will be maintained by the flow left in the natural channel.

4) Establishing 1 1/2 miles of fishery habitat in the feeder ditch as shown in Applicant's Exhibit 6, will mitigate the loss of 3,000 feet of fishery below the proposed point of diversion as long as feeder ditch is not dewatered.

5) Stockwatering use from Birch Creek predates diversion and use of water under the two Birch Power Company applications.

6) Water rights established for instream livestock use on the 3,000 feet of Birch Creek above the Reno Ditch diversion must be satisfied.

7) The applicant has sufficient financial resources to complete the project.

8) The diversion of water under these permits when conditioned to protect the existing irrigation and stockwater rights and to mitigate the riparian, fish and wildlife values, is in the public interest.

9) The applicant is entitled to have both permits approved for a combined diversion of 75 cubic feet per second.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that Applications for Permit Nos. 32-7128 and 32-7136 be APPROVED subject to the following limitations and conditions:

1) Subject to all prior water rights.

2) A measuring device and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained as part of the diverting works. A second measuring device shall be installed near the end

of the feeder ditch so that the amount of water lost in the feeder ditch can be determined.

3) Use of water under these permits is subject to control by the watermaster of State Water District No. 32-D, Birch Creek.

4) Eleven percent of the flow of Birch Creek at the diversion to the feeder ditch, the amount of water saved by the new ditch, or 5 cubic feet per second whichever is the least, shall be allowed to flow past the feeder canal diversion in the natural channel of Birch Creek. The amount of water saved shall be computed by subtracting the amount of water being lost in the new feeder ditch which can be measured, from the amount that would have been lost in the 3,000 feet of stream channel and the Reno Ditch, which is 22% (0.22) of the water flowing in the stream at the new point of diversion.

5) The feeder canal shall be constructed and maintained in a manner that will reduce the amount of seepage loss by at least 11% of the flow at the proposed point of diversion.

6) The first 1 1/2 miles of ditch must be designed, constructed, maintained and operated in a manner that supports a fishery as shown in Applicant's Exhibit No. 6.

7) Provisions shall be made to return the water to Birch Creek at the end of the first 1 1/2 mile of feeder ditch to assure that the section of feeder ditch will not be dewatered if the generator malfunctions or icing occurs or any other event necessitates that the water not be conveyed to the generator.

8) These permits are subject to the provisions of Sections 42-205 through 42-210, Idaho Code restricting sale, transfer, assignment, or mortgage of these permits. Failure to comply with these provisions is cause for immediate cancellation of the permits.

9) This project shall be operated in a manner that will not conflict

or interfere with future diversion of water for irrigation or other beneficial consumption.

10) Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.

11) The diversion and use of water under this permit and any license subsequently issued is subject to review by the Director on the date of expiration of any license issued by FERC or if no license from FERC is issued, then thirty (30) years from the date the permit is issued. Upon appropriate findings relative to the interest of the public, the Director may cancel all or part of the use authorized herein and may revise, delete or add conditions under which the rights may be exercised.

12) These permits do not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.

13) Proof of construction of works and application of water to beneficial use shall be submitted on or before March 1, 1990.

Dated this 27 day of March, 1985.


BOBBY D. FLEENOR
Hearing Officer

State of Idaho
Department of Water Resources

APPLICATION FOR AMENDMENT
(For Licensing Purposes)
WATER RIGHT NO. 32-07136

FOR DEPARTMENT USE ONLY

Preliminary check by _____ Fee = \$20.00 Received by _____ Date _____

ACTION OF THE DEPARTMENT OF WATER RESOURCES

I, R. Keith Higginson, of the Department of Water Resources hereby approve the above Application for Amendment for Permit No. 32-07136 with the following;

CONDITIONS/REMARKS:

1. The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount which can actually be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.
2. This water right is appurtenant to the described place of use.
3. This right is subject to all prior water rights and may be forfeited by five years of non-use.
4. Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho Code, or the applicable Idaho law.
5. A measuring device and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained as part of the diverting works.
- X 6. Use of water under this water right is subject to control by the watermaster of State Water District No. 32D.
7. The water right confirmed in this license for hydropower purposes 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 this license and shall not give rise to any right or claim against any future rights to the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this license.
8. Eleven percent of the flow of Birch Creek at the diversion to the feeder ditch, or 5.0 cfs, whichever is least, shall be allowed to flow past the feeder canal diversion in the natural channel of Birch Creek.
9. The feeder canal shall be maintained in a manner that will reduce the amount of seepage loss by at least 11% of the flow at the point of diversion.
10. The first 1 1/2 miles of ditch must be maintained and operated

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JAN 08 2001

State of Idaho
Department of Water Resources

APPLICATION FOR AMENDMENT
(For Licensing Purposes)
WATER RIGHT NO. 32-07136

CONDITIONS/REMARKS:

in a manner that supports a fishery as shown in Applicant's Exhibit No. 6.

11. This project shall be operated in a manner that will not conflict or interfere with future diversion of water for irrigation or other beneficial consumption.
12. The diversion and use of water under this license is subject to review by the Director on the date(s) of expiration of any license issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

Witness my hand this _____ day of _____, 19____.

R. Keith Higginson, Director

MICROFILMED
JAN 08 2005

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMIT
NOS. 32-7128 AND 32-7136 IN THE NAME OF
BIRCH POWER COMPANY

ORDER ADOPTING
MODIFIED MEMORANDUM
DECISION AND ORDER

A Proposed Memorandum Decision and Order was issued on November 21, 1984 by Bobby D. Fleenor, Hearing Officer and served on the parties on November 27. Those parties wishing to file exceptions to the proposed decision or request oral argument were allowed fifteen days to do so.

Exceptions to the proposed decision were received on December 12, 1984 from the Idaho Department of Fish and Game and from the Birch Creek Water Users and on December 14, 1984 from the Bureau of Land Management. No requests for oral argument before the Director were received.

The Birch Creek Water Users took exception to the conclusion that the saved water belongs to the applicant and also to the requirement that water must be left in the natural channel of Birch Creek to provide water for livestock and to maintain the vegetation along the stream. In answer, I find that the court has consistently awarded water saved to the person saving it. I also find that the preservation of the riparian habitat along the stream is in the public interest, is consistent with the policy of the Water Resource Board and will not deprive the water users of any water they normally would receive.

The Department of Fish and Game objected to the portion of paragraph 4 of the order that would require "amount of water saved by the new ditch" as one of the alternatives for the amount of water released past the new point of diversion and to the wording of paragraph 2 of the order on the timing of a

WIC 207 123

review of the license by the Director. In answer, I find that the release of the amount of water saved must be included as an alternative in the amount of water allowed to flow past the proposed point of diversion in order to prevent injury to existing prior irrigation rights. There must, however, be water saved so condition 5 of the order has been modified to require an 11% savings of water in the new system. Also, I find that no change is necessary in paragraph 2 since it is clear that the license conditions can only be modified at the FERC license renewal or in 30 years.

The Bureau of Land Management's exception suggested Finding of Fact No. 15 be changed to read "few woody plants ..." and No. 16 be changed to "maintain a riparian zone ...". Both changes have been made. An exception also is made to paragraph 3 of the Order which places the diversion of water under the control of the watermaster. This exception is rejected since the statutory method of delivery is by the state appointed watermaster. The last exception is to paragraph 4 of the Order which is similar to the exception of the Idaho Department of Fish and Game and, therefore, would receive the same response concerning the water saved.

On January 14, 1985, D & D Enterprises, Inc. responded to the exceptions of the Birch Creek Water Users, the Idaho Department of Fish and Game and the Bureau of Land Management. The primary objection of D & D Enterprises, Inc. concern the disposition of the saved water. While I would agree that if the holder of a decreed water right saves the water normally lost in his conveyance works to seepage he would be entitled to the water under his decree. That, however, is not the case here. The water in this instance is being saved by a party other than the owners of the decreed rights. Therefore, the arguments of D & D Enterprises, Inc. do not convince me to reach a different decision.

The Proposed Memorandum Decision and Order has been modified for clarification at the following places: Findings of Fact 10, 11, 12, 15, 16 and 22; Conclusion of Law 1 and 3; and Order 4.

The modifications of the Proposed Decision do not substantially change the decision and, therefore, the Proposed Decision as modified is hereby adopted as the Final Decision.

Dated this 26th day of March, 1985.


A. KENNETH DUNN, Director



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

August 23, 2001

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

TED S SORENSON
5203 S 11 E
IDAHO FALLS ID 83404

RE: Permit Nos. 32-07128 and 32-07136

Dear Mr. Sorenson:

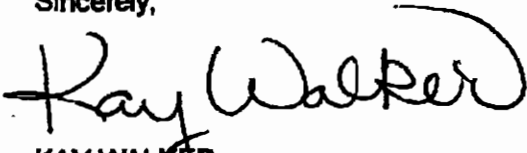
We are in receipt of your letter dated August 7, 2001, regarding the proposed licenses and the amendment filing fees in the amount of \$100.00. Enclosed is Departmental Receipt No. C055546. We did not receive the signed amendment forms that needed to accompany the filing fees. I have enclosed revised amendment forms for your signature and submittal.

The amendment forms have been revised to recommend the maximum allowable diversion volume for the rates of diversion under these permits. Please be advised that I have revised my recommendations, however, they are subject to change upon administrative review of the proposed licenses. For Permit 32-07128, I have proposed an amount of 32,600.0 acre feet per year and for Permit 32-07136, proposed 21,700.0 acre feet per year. These revised recommended volumes are based on the permitted diversion rates, multiplied by 1.9835 for 365 days a year. We cannot recommend any more volume, than these amounts, for these rights.

→ In regard to the subordination condition (No. 5) on the amendment forms, please be advised that your permits did contain a subordination condition when approved. The condition was listed under number 9 on the Modified Memorandum Decision and Order dated March 27, 1985. That condition has been revised over time to reflect the current policy of the State of Idaho.

Please sign the revised licensing amendment forms and return them to this office, within 30 days of the date of this letter. If you have any questions in regard to this matter, please do not hesitate to contact me at (208)327-7944.

Sincerely,


KAY WALKER
Sr. Water Resource Agent

Enclosures

MICROFILMED
DEC 12 2001

EXHIBIT 6

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR PERMIT

APPROVED

AMENDED
RECEIVED

To appropriate the public waters of the State of Idaho

DEC 20 1984

1. Name of applicant Crystal Springs Hydroelectric Co. Phone 734-9800
Post office address P. O. Box 1892 Twin Falls, Idaho 83301

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

3. Location of point of diversion is SW % of NE % of Section 23 Township 9S

Range 15E B.M. Twin Falls County, additional points of diversion if any: _____

4. Water will be used for the following purposes:

Amount 110 for Power purposes from 1/1 to 12/31 (both dates inclusive)
(cfs or acre-feet per annum)

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

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

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

5. Total quantity to be appropriated:

a. 110 cubic feet per second and/or b. _____ acre-feet per annum.

6. Proposed diverting works:

a. Description of ditches, flumes, pumps, headgates, etc. Diversion canal and penstock

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 _____ to _____ inclusive.
(Month/Day) (Month/Day)

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:

a. If water is not for irrigation:

(1) Give the place of use of water: SW % of NE % of Section 14 Township 9S

Range 15E B.M. can produce 1991 kilowatts at 80% efficiency - kw
~~See Remark (1) **~~ 10/23/85

(2) Amount of power to be generated: * horsepower under 267 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: _____

RECEIVED

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. _____

47-7767--**

9. a. Who owns the property at the point of diversion Derek Cantrell

b. Who owns the land to be irrigated or place of use Crystal Springs Ranch

c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing Land at diversion point is leased.

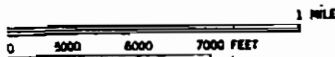
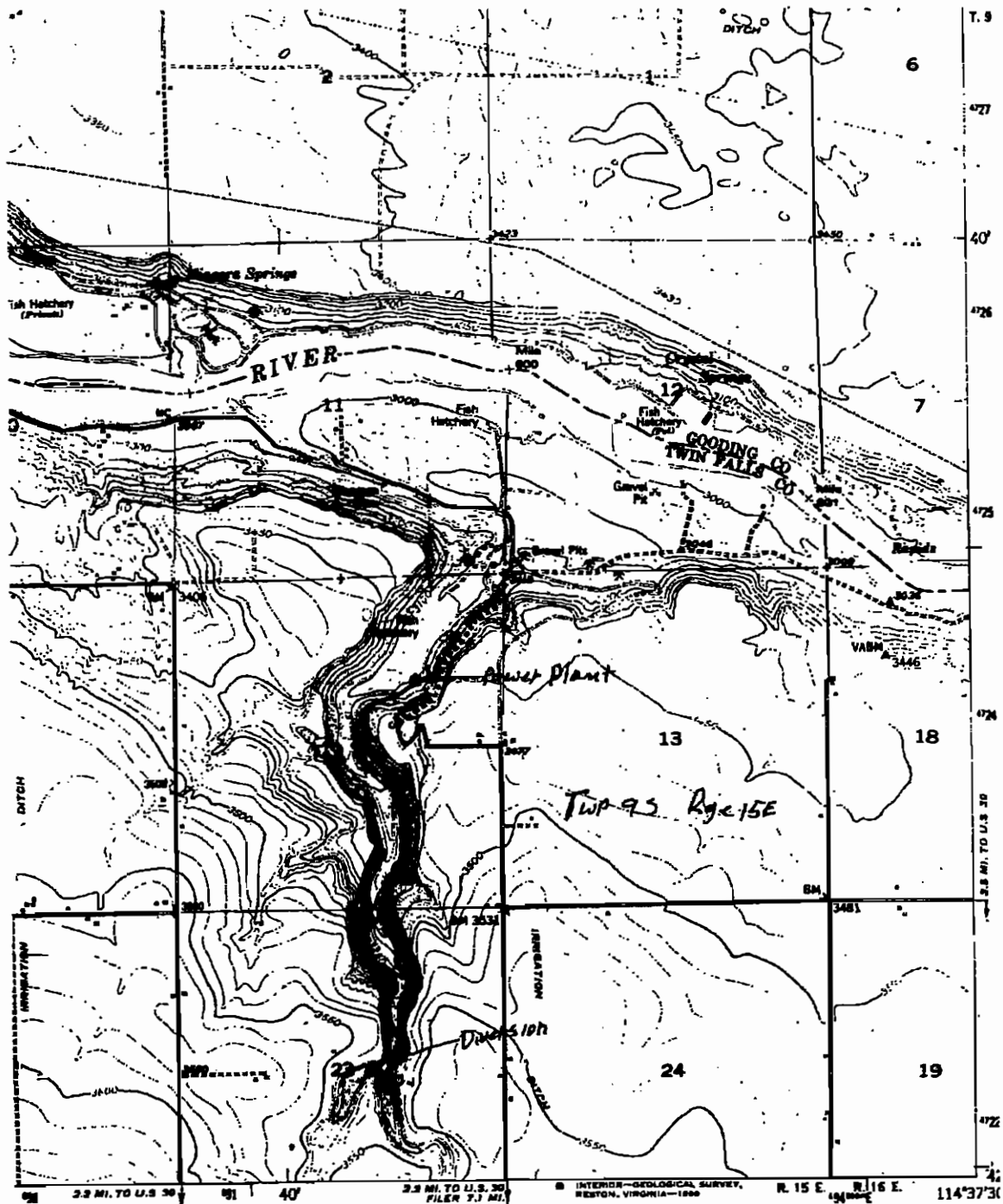
10. Remarks

(1) This application is being combined with 47-7767 to
generate 4500 theoretical horsepower under 267 feet
of head with 150 cfs. of water in a single power plant

** Application 47-7767 was relinquished on 10/24/1986 - kw 10/28/86

RECEIVED
FEB 10 1987
WATER DIVISION

11. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.



ROAD CLASSIFICATION
 Primary highway, hard surface Light-duty road, hard or improved surface

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.

CHRYSTAL SPRINGS HYDROELECTRIC CO.
Shirley A. Proctor
 (Applicant)

RECEIVED

Proposed Priority 11/10/81

original app. rec'd. 11/10/1981 - \$1275. - Receipt No. 20645
Received by merge Date 11/10/81 Time 12:00 p

Preliminary check by ADW Fee \$ 20.00 Amended Applic Fee

Received by merge Date 11/15 # 25251

Publication prepared by merge Date 11/15

Published in Times News Statesman Lewiston Morning Tribune, The Idaho Statesman, and the Post Register

Publication dates 1/10 & 1/17/85 11/07 & 11/14/1985

Publication approved merge Date 11/19/85

Protests filed by: Idaho Dept. of Fish & Game & Wilderness
7/22/85

Copies of protests forwarded by _____

Hearing held by _____ Date _____

Recommended for approval denial by LD KW

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. 47-7768, and said application is hereby APPROVED.

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

- a. SUBJECT TO ALL PRIOR WATER RIGHTS.
- b. Proof of construction of works and application of water to beneficial use shall be submitted on or before November 1, 19 91.
- c. The rate of diversion, if water is to be used for irrigation under this permit, when combined with all other water rights for the same land shall not exceed 0.02 cubic feet per second for each acre of land.
- d. Other: SEE ATTACHED SHEET FOR CONDITIONS d thru m.

Witness my hand this 31st day of October, 1986.

Lyle G. Saxton
Chief, Operations Bureau

RECORDED

ATTACHMENT TO CONDITIONS OF APPROVAL

For Permit No. 47-7768

- d. The issuance of this permit in no way grants any right-of-way or easement across the land of another.
- e. The permit holder shall either install a measuring device or a flow measurement port or provide a certified measurement or computation of flow based upon system design to be prepared by a professional engineer.
- f. This permit is subject to the provisions of Sections 42-205 through 42-210, Idaho Code, restricting the sale, transfer, assignment, or mortgage of this permit. Failure to comply with these provisions is cause for immediate cancellation of this permit.
- g. Water used under this permit if discharged into a natural channel shall meet Idaho Water Quality Standards.
- h. The diversion and use of water under this permit and any license subsequently issued is subject to review by the Director on the date(s) of expiration of any license issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.
- i. The water right acquired under this permit for hydropower purposes 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 this permit and 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 this permit.
- j. This permit does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
- k. Use of water under this permit shall be non-consumptive.
- l. A separate stream alteration permit from the IDWR is required for any activity in the stream channel other than construction and/or maintenance of the diversion structure. If your proposed construction or operation involves construction of an outfall or any other work in the stream channel other than a water diversion, you must contact the Department and obtain a Stream Channel Alteration permit prior to the start of construction.
- m. This permit is subject to the agreement regarding instream flow requirements, between the applicant, Idaho Department of Fish & Game, and the Federal Energy Regulatory Commission, to the extent such agreement covers matters within the jurisdiction of the Department of Water Resources.

Witness my hand this 31st day of October, 1986.

Lytle G. Saxton
Chief, Operations Bureau

RECEIVED
OCT 31 1986
IDWR

State of Idaho
Department of Water Resources
Water Right License

WATER RIGHT NO. 47-07768

Priority: November 10, 1981

Maximum Diversion Rate: 110.00 CFS
Maximum Diversion Volume: 61,100.0 AF

It is hereby certified that CRYSTAL SPRINGS HYDROELECTRIC LP
ATTN: DELL E KEEHN
7829 CENTER BLVD SE #100
SNOQUALMIE WA 98065 has complied with the terms and
conditions of the permit, issued pursuant to Application for Permit dated November 10, 1981; and has
submitted Proof of Beneficial Use on February 03, 1987. An examination indicates that the works have
a diversion capacity of 110 cfs of water from:

SOURCE

CEDAR DRAW

Tributary: SNAKE RIVER

and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL DIVERSION VOLUME</u>
POWER	01/01 to 12/31	110.00 CFS	61,100.0 AF

LOCATION OF POINT(S) OF DIVERSION:

CEDAR DRAW SW1/4NE1/4 Sec. 23, Twp 09S, Rge 15E, B.M.

TWIN FALLS County

PLACE OF USE: POWER

Twp Rge Sec	NE			NW			SW			SE			Totals	
	NE	NW	SW	NE	NW	SW	NE	NW	SW	NE	NW	SW		SE
09S 15E 14														
		X												

CONDITIONS OF APPROVAL

1. The issuance of this right does not grant any right-of-way or easement across the land of another.
2. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
3. Use of water under this right shall be non-consumptive.
4. The rights for the use of water confirmed in this license shall be junior and subordinate to all 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 right 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 right.

State of Idaho
Department of Water Resources
Water Right License

WATER RIGHT NO. 47-07768

5. The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of license 8278 (4/30/2035) issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.
6. This right is subject to the minimum instream flow requirement of the Federal Energy Regulatory Commission license for this project.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be used in accordance with Idaho law and applicable rules of the Department of Water Resources.

Signed and sealed this 6th day of March, 2008.


for DAVID R. TUTHILL, JR.
Director

EXHIBIT 7

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PERMIT NO. 81-7818)
IN THE NAME OF NORTH SIDE CANAL)
COMPANY, LTD.)

NSCCL
By-Pass
Wilson Lake
ORDER

WHEREAS, Permit No. 81-7818 in the name of North Side Canal Co., Ltd. was issued on June 29, 1977; and,

WHEREAS, the permit proposed the diversion of 3800 cubic feet per second (cfs) of water from the Snake River tributary to the Columbia River for power purposes; and,

WHEREAS, the permit was approved without the traditional conditions of approval placed on hydropower permits; and,

WHEREAS, by letter dated November 30, 1984, the permit holder, through legal counsel, agreed that the permit 81-7818 may be subordinated by the Idaho Department of Water Resources with language that has traditionally been placed on hydropower permits; and,

WHEREAS, Article 15, Section 7, Idaho Constitution, 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 Water Resource Board adopted on December 29, 1976 and revised on January 19, 1982 a state water plan which allocates the unappropriated waters of the state to various uses in the public interest; and,

WHEREAS, the Director of the Department of Water Resources is authorized by Section 42-203, Idaho Code, to issue permits to appropriate the unappropriated public waters of the state of Idaho if such permits are determined to comply with the criteria therein set forth, including a criterion requiring conformance with the local public interest; and,

WHEREAS, Section 42-203, Idaho Code, authorizes the Director of the Department of Water Resources to condition water

right permits to, among other considerations, insure that the local public interest is protected; and,

WHEREAS, permits to appropriate water for hydropower purposes usually appropriate most of the flow of a water source, even during periods of peak runoff, and thereby have the potential for preventing upstream appropriations of water and thus precluding the opportunity to achieve the purposes of the allocations in the adopted state water plan; and,

WHEREAS, the continuing evolution of local public interest requires that major commitments of the state's vital water resources remain subject to further review; and,

WHEREAS, on July 25, 1984 the Idaho Water Resource Board adopted a resolution that states:

. . . the local public interest requires that all permits and licenses for hydropower purposes be subject to review by the Director of the Department of Water Resources . . . the review [to] be made at the end of the operating period specified by the Federal Energy Regulatory Commission authorization or as otherwise provided by the Director . . . ;

and;

WHEREAS, on October 17, 1983 the permit holder submitted an application for amendment to the Department; and,

WHEREAS, Permit No. 81-7818 was issued prior to the date of the Idaho Water Resource Board's resolution of July 25, 1984 and is not conditioned with language making the permit or subsequent license which may be issued subject to periodic local public interest review by the Director and to other conditions of approval traditionally placed on hydropower permits;

NOW, THEREFORE, IT IS HEREBY ORDERED that the application for amendment is APPROVED with the following additional conditions of approval applicable to Permit No. 81-7818:

1. Water used under this permit if discharged into a natural channel shall meet Idaho Water Quality Standards.
2. This permit is subject to the provisions of Sections 42-205 through 42-210, Idaho Code, restricting the sale, transfer, assignment, or mortgage of this permit. Failure to comply with these provisions is cause for immediate cancellation of this permit.

3. The water right acquired under this permit for hydropower purposes 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 this permit and 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 this permit.
4. The diversion and use of water under this permit and any license subsequently issued is subject to review by the Director on the date(s) of expiration of any license issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.
5. Use of water under this permit shall be non-consumptive.

Dated this 29th day of January, 1984.

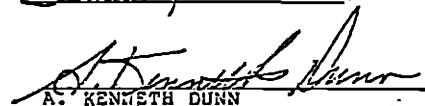

A. KENNETH DUNN
Director

EXHIBIT 8

[Close](#)**IDAHO DEPARTMENT OF WATER RESOURCES**
Water Right Report

9/8/2009

WATER RIGHT NO. 65-12096

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	IDAHO POWER CO PO BOX 70 BOISE, ID 83707 (208)388-2905
Attorney	BARKER ROSHOLT & SIMPSON LLP 1010 W JEFFERSON STE 102 PO BOX 2139 BOISE, ID 83701-2139 (208)336-0700
Attorney	IDAHO POWER CO PO BOX 70 BOISE, ID 83707 (208)388-2905

Priority Date: 02/21/1978**Basis: Decreed****Status: Active**

<u>Source</u>	<u>Tributary</u>
----------------------	-------------------------

NORTH FORK PAYETTE RIVER | PAYETTE RIVER

Beneficial Use	From	To	Diversion Rate	Volume
POWER	1/01	12/31	2000 CFS	642000 AFA
Total Diversion			2000 CFS	

Location of Point(s) of Diversion:

PAYETTE RIVER	NENE Lt 5	Sec. 26	Township 14N	Range 03E	VALLEY County
------------------	--------------	------------	-----------------	--------------	------------------

POWER Use:

Hydropower Kilowatts: 12420

Place(s) of use:

Place of Use Legal Description: POWER VALLEY County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
14N	03E	26	5	NENE							

Conditions of Approval:

1.	RIGHTS 65-02232, 65-02338A, 65-02338X AND 65-12096 WHEN COMBINED SHALL NOT EXCEED A TOTAL DAILY MAXIMUM DIVERSION VOLUME OF 4356 ACRE FEET
----	--

2.	THE RIGHTS FOR THE USE OF WATER CONFIRMED BY THIS RIGHT SHALL BE JUNIOR AND SUBORDINATE TO ALL 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 RIGHT 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 RIGHT.
3.	THIS RIGHT DOES NOT CONSTITUTE IDAHO PUBLIC UTILITIES COMMISSION OR FEDERAL ENERGY REGULATORY COMMISSION APPROVAL THAT MAY BE REQUIRED.
4.	THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE 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. SECTION 42-1412(6), IDAHO CODE.
5.	RIGHTS NO. 65-02232, 65-02338A AND 65-02338X ARE ALSO DIVERTED THROUGH THE POINT OF DIVERSION DESCRIBED ABOVE. THE HYDROPOWER FACILITY IS KNOWN AS CASCADE HYDROELECTRIC PROJECT.

Dates:

Licensed Date:

Decreed Date: 08/29/2002

Permit Proof Due Date: 5/1/1988

Permit Proof Made Date: 10/19/1984

Permit Approved Date: 4/8/1981

Permit Moratorium Expiration Date:

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Water Supply Bank Enrollment Date Accepted:

Water Supply Bank Enrollment Date Removed:
Application Received Date: 02/21/1978
Protest Deadline Date:
Number of Protests: 0

Other Information:

State or Federal: S
Owner Name Connector: OR
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Civil Case Number:
Old Case Number:
Decree Plaintiff:
Decree Defendant:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Close

State of Idaho
Department of Water Resources

Water Right License

AMENDED

AMENDED

WATER RIGHT NO. 65-12096

Priority: February 21, 1978

Maximum Diversion Rate:

2000.00 CFS

Maximum Diversion Volume:

642000.0 AF

This is to certify, that IDAHO POWER CO
PO BOX 70

BOISE ID 83707

has complied with the terms and conditions
of the permit, issued pursuant to Application for Permit dated February 21, 1978; and
has submitted Proof of Beneficial Use on October 19, 1984. An examination indicates
that the works have a diversion capacity of 2350.000 cfs of water from:

PAYETTE RIVER, NORTH FORK

tributary to PAYETTE RIVER

source, and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
POWER	01/01 to 12/31	2000.00 CFS	642000.0 AF

LOCATION OF POINT(S) OF DIVERSION: Lot 5(NENE), Sec. 26, Township 14N, Range 03E
VALLEY County

PLACE OF USE: POWER

TWN RGE SEC

14N 03E 26 Lot 5(NENE)

CONDITIONS OF APPROVAL AND REMARKS

1. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
2. Use of water under this right shall be non-consumptive.
3. The rights for the use of water confirmed in this license shall be junior and subordinate to all 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 right 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 right.
4. Use of water under this water right will be regulated by the watermaster of State Water District No. 65.
5. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.
6. The issuance of this right does not grant any right-of-way or easement across the land of another.

MICROFILMED
JAN 28 2000

State of Idaho
Department of Water Resources

Water Right License

AMENDED

AMENDED

WATER RIGHT NO. 65-12096

CONDITIONS OF APPROVAL AND REMARKS

7. Rights 65-02232, 65-02338A and 65-02338X are also diverted through the point of diversion described above.
8. The hydropower facility is known as Cascade Hydroelectric Project.
9. Rights 65-02232, 65-02338A, 65-02338X and 65-12096 when combined shall not exceed a total daily maximum diversion volume of 4356 acre feet.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Signed and sealed this 14th day of JANUARY, 2000.

Acting for


KARL J. DREHER, Director

MICROFILMED
JAN 28 2000

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF WATER RIGHT
LICENSE NO. 65-12096 IN THE NAME
OF IDAHO POWER CO.

) ORDER GRANTING PETITION
) FOR RECONSIDERATION
)

This matter having come before the Department of Water Resources (Department) as a petition to reconsider the issuance of a water right license, the Department makes the following Findings of Fact, Conclusions of Law, and Order

FINDINGS OF FACT

1. On November 8, 1999, the Department issued Water Right License No. 65-12096 (license) to Idaho Power Company (right holder) for the diversion and use of 2000 cfs of water from the North Fork of the Payette River in Valley County for power production purposes.
2. The license was issued as a preliminary order (order) of the Department pursuant to §67-5243, *Idaho Code*, and Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01.730).
3. On November 9, 1999, the Department mailed a true and correct copy of the order to the right holder.
4. Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a.) provides in pertinent part as follows:

Any party may file a petition for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.

5. Rule 300 of the Department's Rules of Procedure (IDAPA 37.01.01.300.) provides for the filing of documents by facsimile transmission (fax), but it also requires the original document to be mailed by the next working day.

6. The Department received a facsimile transmission of a petition for reconsideration of the order (petition) from James C. Tucker, the attorney for the right holder. The certificate of service printed on the petition indicates that it was sent by fax and by regular mail on November 23, 1999, *fourteen* days after service date of the order. The Department stamped the petition as received on Wednesday, November 24, 1999, *fifteen* days after the service date of the order.
7. The Department has not received the original petition.
8. As indicated in the petition, the right holder seeks reconsideration of approval condition no. 7 listed on the license.

CONCLUSIONS OF LAW

1. The petition may or may not have been filed timely in accordance with Rule 730.02.a. of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a.).
2. In the absence of further evidence demonstrating that the petition was not filed timely, it is reasonable for the Department to regard the petition as timely.
3. The Department should grant the petition to provide an opportunity for evaluating the changes requested by the right holder.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the preliminary order issuing Water Right License No 65-12096 is **GRANTED** pursuant to §67-5243, *Idaho Code*, to provide the Department an opportunity to evaluate the changes requested by the right holder.

IT IS FURTHER HEREBY ORDERED that the Department retains jurisdiction to re-evaluate the timeliness of the petition if additional relevant evidence is presented.

Dated this 30th day of NOVEMBER, 1999.


NORMAN C. YOUNG
Administrator, Water Management Division

State of Idaho
Department of Water Resources

Water Right License

WATER RIGHT NO. 65-12096

Priority: February 21, 1978

Maximum Diversion Rate:

2000.00 CFS

Maximum Diversion Volume:

642000.0 AF

This is to certify, that IDAHO POWER CO
PO BOX 70

BOISE ID 83707

has complied with the terms and conditions
of the permit, issued pursuant to Application for Permit dated February 21, 1978; and
has submitted Proof of Beneficial Use on October 19, 1984. An examination indicates
that the works have a diversion capacity of 2350.000 cfs of water from:

PAYETTE RIVER, NORTH FORK

tributary to PAYETTE RIVER

source, and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
POWER	01/01 to 12/31	2000.00 CFS	642000.0 AF

LOCATION OF POINT(S) OF DIVERSION: Lot 5(NENE), Sec. 26, Township 14N, Range 03E
VALLEY County

PLACE OF USE: POWER

TWN RGE SEC

14N 03E 26 Lot 5(NENE)

CONDITIONS OF APPROVAL AND REMARKS

1. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
2. Use of water under this right shall be non-consumptive.
3. The rights for the use of water confirmed in this license shall be junior and subordinate to all 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 right 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 right.
4. Use of water under this water right will be regulated by the watermaster of State Water District No. 65.
5. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.
6. The issuance of this right does not grant any right-of-way or easement across the land of another.

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State of Idaho
Department of Water Resources**Water Right License**

WATER RIGHT NO. 65-12096

CONDITIONS OF APPROVAL AND REMARKS

7. The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of license 2848 issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.
8. Rights 65-02232, 65-02338A and 65-02338X are also diverted through the point of diversion described above.
9. The hydropower facility is known as Cascade Hydroelectric Project.
10. Rights 65-02232, 65-02338A, 65-02338X and 65-12096 when combined shall not exceed a total daily maximum diversion volume of 4356 acre feet.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Signed and sealed this 8th day of NOVEMBER, 1997.

SUPERSEDED

Acting for KARL J. DREHER, Director

MICROFILMED

JAN 2 8 2000

JOHN A. ROSHOLT
J EVAN ROBERTSON
JAMES C. TUCKER
GARY D SLETTE
JERRY V JENSEN
JOHN K. SIMPSON
TIMOTHY J STOVER
NORMAN M. SEMANKO

RECEIVED

JAN 13 2000

Department of Water Resources

ROSHOLT, ROBERTSON & TUCKER

Chartered
ATTORNEYS AT LAW

Boise Office
1221 W IDAHO, SUITE 600
P.O. BOX 2139
BOISE, IDAHO 83701-2139
TELEPHONE (208) 336-0700
FAX (208) 344-6034
Email rosholt@mucron.net

Twin Falls Office
142 3rd AVENUE NORTH
P O. BOX 1906
TWIN FALLS, IDAHO 83303-1906
TELEPHONE (208) 734-0700
FAX (208) 736-0041
jct@mucron.net

January 12, 2000

Norman C. Young
Administrator, Water Management Division
Idaho Department of Water Resources
1301 North Orchard Street
P.O. Box 83720
Boise, Idaho 83720-0098

Re: Water Right License # 65-12096 - Idaho Power Company

Dear Mr. Young:

I appreciate having the opportunity to meet with you and Phil Rassier to discuss the pending *Petition for Reconsideration* filed on behalf of the Idaho Power Company with regard to the above referenced water right license. As I explained during our meeting, the principal issue of concern to Idaho Power is *condition # 7* of the license that renders the license subject to review by the Director upon the expiration of the FERC license for the Cascade Project (Project #2848) and allows for either the cancellation of the water license or the deletion or addition of conditions under which the right may be exercised.

I understand that the basis for that condition is I.C. § 42-203B(7), which provides that the director may "limit a permit or license for power purposes to a specific term". While Idaho Power questions the constitutionality of that provision in light of Art. XV, Sec. 3 of the Idaho Constitution, it seems unnecessary to tackle that issue in light of the administrative history of this water right. As you know, § 42-203B was added to the Idaho Code in 1986. Our records indicate that the administrative process involving this license proceeded as follows:

Water right application filed -	February 21, 1978
IPC Petition for Immediate Issuance of Permit filed -	December 8, 1980
Application approved (POBU due 5/31/83) -	April 8, 1981
Request for extension of time to file POBU -	March 23, 1983

JAN 28 2000

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Norman C. Young
January 12, 2000
Page 2

POBU filed -	October 19, 1984
Field exam completed -	July 30, 1986
File transferred to IDWR State office -	July 30, 1986
License issued -	November 8, 1999

It is clear from the above that a permit for the water right was issued in 1981 and Idaho Power complied with all administrative requirements for the issuance of the license by the end of October 1984, nearly two years prior to the enactment of § 42-203B(7) and fifteen years prior to the issuance of the license. Under these specific circumstances we consider the application of the term limitation in the license under § 42-203B to be inappropriate and would again request that *condition # 7* be removed.

Again, thank you for your consideration of this matter and we await your response. If we can offer anything further or answer any questions, please contact me.

Very truly yours,



James C. Tucker

cc: B. Stahman
N. Gardiner

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JAN 28 2008

MEMORANDUM

DATE: January 10, 2000

TO: Water Right File 65-12096

FROM: Shelley W. Keen *SWK*

RE: Meeting to discuss the petition for reconsideration

On Friday, December 17, 1999, IDWR staff met with James C. Tucker to discuss his petition for reconsideration of Water Right License 65-12096. Representing IDWR were Norm Young, Phil Rassier, and Shelley Keen. Mr. Tucker said that Idaho Power Company is uncomfortable with the temporal provisions of the license. As a permanent property right it adds some value to the company's ledger sheet because it could be sold or transferred. For example, if Idaho Power Company does not retain the FERC license to operate at Cascade, it could still potentially retain and sell the water right license. However, if the water right license can be revoked its value is significantly diminished. As Mr. Rassier summarized, "If the FERC license is revoked, is there anything to prevent the state from re-allocating the water used under this license?"

Mr. Tucker also raised the following issues.

- Did the 1928 amendment to the Idaho Constitution really intend for Idaho Power Co. to have less ability to acquire property rights than other water appropriators? Mr. Tucker raised the question but indicated that he does not intend for this question to be pursued in this forum or at this time.
- Permit 65-12096 was issued five years before Section 42-203B(7), *Idaho Code*, was passed by the legislature. Can't Permit 65-12096 be excluded because of some "grandfather" consideration? The language of the statute seems pretty clear that there is no grandfather provision.
- Condition No. 7 on the license is rather broad. Can it be rewritten to describe in more detail the process through which the license might be canceled or changed? Mr. Young suggested wording similar to the statement placed in minimum stream flow licenses.

The meeting ended with Mr. Tucker promising to review an example of the minimum stream flow language and to make some suggestions to IDWR.

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JAN 28 2000



CONSTITUTION OF THE STATE OF IDAHO

ARTICLE XV WATER RIGHTS

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

The Idaho Code is made available on the Internet by the Idaho Legislature as a public service. This Internet version of the Idaho Code may not be used for commercial purposes, nor may this database be published or repackaged for commercial sale without express written permission.

Available Reference: [Search Instructions](#)

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State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

November 30, 1999

**IDAHO POWER COMPANY
C/O JAMES C TUCKER
ROSHOLT, ROBERTSON & TUCKER
PO BOX 2139
BOISE ID 83701-2139**

RE: Petition for Reconsideration of Order issuing Water Right License 65-12096

Dear Mr. Tucker:

I have enclosed a copy of an order granting your petition for reconsideration of the preliminary order issuing Water Right License No. 65-12096. I think it would be useful to meet to discuss the concerns raised in your petition. I will direct my staff to contact you in a few days to schedule the meeting as soon as possible.

If you have any questions regarding this matter, please call me at 327-7900.

Sincerely,

Norman C Young
Administrator, Water Management Division

NCY:swk

Enclosure

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JAN 28 2000

IDAHO POWER COMPANY
Attorneys' Names and Addresses:

JAMES C. TUCKER
Rosholt, Robertson & Tucker
P. O. Box 2139
1221 West Idaho St., Suite 600
Boise, Idaho 83701-2139
(208) 336-0700
(208) 344-6034 - Fax
ISB# 2038

RECEIVED

NOV 24 1999

Department of Water Resources

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

In Re:

Water Right No. 65-121096

PETITION FOR RECONSIDERATION

TO: THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES

The Idaho Power Company, hereinafter the Petitioner, petitions the Director to reconsider that certain *preliminary order* issued in the form of a *Water Right License* for Water Right No. 65-12096. Specifically, the Petitioner seeks reconsideration of the following condition placed on such water right license:

7. The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of license 2848 issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

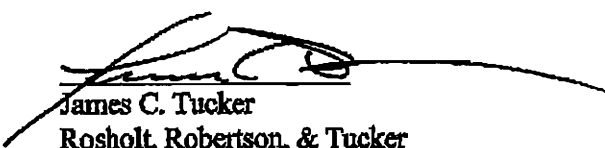
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JAN 28 2000

The grounds for this petition are as follows:

1. The condition constitutes an unreasonable and unauthorized limitation on a water right appropriation as authorized by Article 15, § 3 of the Idaho Constitution.
2. And for such additional and further reasons as may be set forth by the Petitioner in this proceeding.

Dated this 23rd day of November, 1999


James C. Tucker
Rosholt, Robertson, & Tucker
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 1999, I served a true and correct copy of the PETITION FOR RECONSIDERATION on the
DIRECTOR of the Idaho Department of Water Resources, via FAX and regular mail at:
1301 N. Orchard Str., P. O. Box 83720, Boise, Idaho 83720-0098.


Legal Assistant
Rosholt, Robertson & Tucker

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JAN 28 2000

tive 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 [July 1, 1985] of this act.

(7) The director in the exercise of the authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term of the license shall extend and for purposes of determining such date shall consider among other factors:

(a) The term of any power purchase contract which is, or reasonably may become, applicable to, such permit or license;

(b) The policy of the Idaho public utilities commission (IPUC) regarding the term of power purchase contracts as administered by the IPUC under and pursuant to the authority of the public utility regulatory 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. [I.C., § 42-203E, as added by 1985, ch. 17, § 2, p. 23 and ch. 224, § 1, p. 537; am. 1986, ch. 117, § 1, p. 308.]

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JAN 28 2000



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

November 9, 1999

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

IDAHO POWER CO
PO BOX 70
BOISE ID 83707

RE: WATER RIGHT NO. 65-12096

Dear Water Right Holder(s):

The Department of Water Resources (the Department) has issued the enclosed license confirming that a water right has been established in accordance with the permit referenced above. The license is a preliminary order issued by the Department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and/or brief as described in the enclosed information sheet.

Also, please note that water right owners are required to report any change of water right ownership and/or change of mailing address to the department within 120 days of the change. Failure to report these changes could result in a \$100 late filing fee. Contact any office of the department or visit the department's homepage on the Internet to obtain the proper reporting form.

If you have any questions, please call me at 208-327-7946.

Sincerely,

Shelley M. Keen
Water Rights Supervisor

SK:klt

Enclosure

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JAN 28 2000

EXHIBIT 9

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

DEC 29 1999

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

) Subcase Nos. 36-02708, 36-07201, 36-07218, 36-02048,
) 36-02703, 36-04013A, 36-04013B, 36-04013C, 36-07040,
) 36-07148, 36-07568, 36-07071, 36-02356, 36-07210, 36-
) 07427, 36-07720, 36-02659, 36-07004, 36-07080 and 36-
) 07731

) **ORDER ON CHALLENGE (Consolidated Issues) OF**
) **"FACILITY VOLUME" ISSUE AND "ADDITIONAL**
) **EVIDENCE" ISSUE**

**I.
APPEARANCES**

Professor D. Craig Lewis, Esq., Moscow, Idaho, and Ms. Dana Hofstetter, Esq.,
Beeman & Hofstetter, Boise, Idaho, for North Snake Ground Water District, May
Farms Ltd., and Faulkner Land & Livestock Company

Mr. Daniel Steenson, Esq., Ringert Clark, Boise, Idaho, for Clear Lakes Trout
Company

Mr. Norman Semanko, Esq., Rosholt Robertson & Tucker, Twin Falls, Idaho, for
Clear Springs Foods Inc. and Blue Lakes Trout Farm Inc.

Mr. Patrick Brown, Esq., Jerome, Idaho, for John W. Jones Jr.

**II.
ORAL ARGUMENT AND
MATTER DEEMD FULLY SUBMITTED FOR DECISION**

Oral argument on this Consolidated Challenge was held in open court on November 1,
1999. At the conclusion of argument, no party sought to present additional briefing or authorities

and, the Court having requested none, this matter is deemed fully submitted for decision on the next business day, or November 2, 1999.

III. ISSUES PRESENTED

This Challenge on Consolidated Issues was filed by the North Snake Ground Water District ("NSGWD") on behalf of its members, including Faulkner Land & Livestock Company and May Farms Ltd. The 20 subcases listed in the caption above involve water rights for fish propagation facilities in the Hagerman area of Idaho.

NSGWD raises two consolidated issues in these fish propagation subcases.

1. Did the [respective]¹ Special Master err in ruling that facility volume is not "necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director"? Idaho Code § 42-1411(2)(j) (Supp. 1998)? ("facility volume" issue).
2. Which standard is applicable to the submission of evidence in conjunction with motions to alter or amend special masters' reports in the SRBA, Rule 59(e), I.R.C.P. which applies post-judgment, or Rule 53(e)(2), I.R.C.P. which applies to special master's reports? ("additional evidence" issue).

IV. "FACILITY VOLUME" ISSUE

THE ISSUE

As noted above, the issue is stated by NSGWD to be:

Did the [respective] Special Master err in ruling that facility volume is not "necessary for definition of the right, for clarification of any element of a right, or for

¹ The Court uses the phrase "respective Special Master" because each of the three Special Masters then in the SRBA were assigned to one or more of the various subcases and issued reports and recommendations in these subcases. Because these two issues are common between the subcases and because each of the Special Masters ultimately ruled against including a facility volume remark, or allowing additional evidence at the motion to alter or amend stage, the subcases were consolidated on appeal for these two consolidated issues. Special Master Haemmerle heard Clear Springs Foods Inc. subcases 36-04013A, 36-07148, 36-07040, 36-07201, 36-07568, 36-02703, 36-04013B, 36-02708, 36-07218, 36-02048, and 36-04013C; Special Master Bilyeu heard John W. Jones Jr. subcase 36-07071; and Special Master Dolan heard Blue Lakes Trout Farm Inc. subcases 36-07720, 36-07427, 36-07210, and 36-02356 and Clear Lakes Trout Co. subcases 36-02659, 36-07004, 36-07080, and 36-07731. For reasons unknown to this Court, the then Presiding Judge did not reference all of these subcases to one Special Master.

administration of the right by the director"? Idaho Code § 42-1411(2)(j) (Supp. 1998).

ELEMENTS OF A WATER RIGHT – I.C. § 42-1411(2)(a)-(j)

Also as noted above, these consolidated subcases deal with fish propagation facilities in the Hagerman valley.

When the respective water right claims were reported out by the Director (IDWR), each included a facility volume remark.

"Facility volume" is not defined by statute or appellate case law and is not a specifically enumerated element of a water right under I.C. § 42-1411(2)(a)-(j). That statute provides:

(2) The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law:

- (a) the name and address of the claimant;
- (b) the source of water;
- (c) the quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right;
- (d) the date of priority;
- (e) the legal description of the point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;
- (f) the purpose of use;
- (g) the period of the year when water is used for such purposes;
- (h) a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code;
- (i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and
- (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

IDWR concluded that a facility volume limitation was necessary for each of these rights to define one or more of the elements -- quantity, nature or purpose of use, or place of use. In the alternative, IDWR included facility volume as necessary to further define or administer each of these rights.

THE NATURE OF FACILITY VOLUME REMARK

It is unnecessary for the Court to enumerate each of the twenty (20) claimed rights and the specific language actually appearing in each right, because it is the general concept which is being decided here, and not the proposed individual language on each right.² The following examples are provided for illustrative purposes:

Example 1: 36-02356

By Blue Lakes Trout Farm Inc.'s ("Blue Lakes") second amended notice of claim under 36-02356, it claimed a total of 100 cfs from Alpheus Creek for fish propagation, domestic and commercial uses with a priority date of May 29, 1958, based on a license. In his *Amended Director's Report Regarding Claim to Water Right No. 36-02356*, dated July 7, 1997, the Director recommended the claim as filed. However, under the quantity element, the Director included the language -- facility volume 10.66 af. The Director also described the non-irrigation uses: "commercial/fish facility; domestic/2 homes; fish/49 ponds, hatch." The single contested issue was whether facility volume should be decreed by the SRBA Court for fish propagation water rights.

Example 2: 36-07210

Blue Lakes filed its claim under 36-07210 claiming 45 cfs from Alpheus Creek for fish propagation with a priority date of November 17, 1971, based on a license. The Director recommended the claim as filed, but under remarks, the Director included the same language as before -- facility volume 10.66 af. The Director described the non-irrigation uses: "fish/49 ponds, 38 hatchery tanks."

Example 3: 36-07427

² It should be noted here that some of the licensed rights contained a facility volume remark in the actual license which was issued by IDWR and the license holder did not object to its inclusion. For others, the licenses were issued with no such remark.

Under 36-07427, Blue Lakes claimed 52.23 cfs from Alpheus Creek for fish propagation with a priority date of December 28, 1973, based on a license. Again, the Director recommended the claim as filed, but with the remark -- facility volume 3.67 af. The Director described the non-irrigation uses: "fish/commercial fish facility, 10 ponds @ 20' X 200' X 4'." The Director also included under remarks: "A measuring device of a type approved by IDWR shall be maintained as part of the diverting works."

Example 4: 36-07720

Under 36-07720, Blue Lakes claimed 37.1 cfs from waste water for fish propagation with a priority date of June 8, 1977, based on a license. Unlike before, in the remarks section of the *claim*, Blue Lakes stated: "facility volume = 1.5 af, water used under this license if discharged into a natural channel shall meet Idaho water quality standards." The Director recommended the claim as filed, but with facility volume 1.16 af. The Director described the non-irrigation uses: "fish propagation/10 ponds @ 14' x 120' x 3'." Under remarks, the Director also stated: "Return flow if discharged to a surface water system shall meet Idaho water quality standards."

THE STANDARD OF REVIEW

A. Statutory Construction

As noted earlier, IDWR included a facility volume limitation on these rights based upon the assertion that it was necessary to define elements of the rights or as necessary to define or administer the right pursuant to I.C. § 42-1411(2) and, as such, the interpretation of I.C. § 42-1411 is a question of law. Statutory interpretation begins with the words of the statute, giving the language of the statute plain, obvious, and rational meaning. If statutory language is clear and unambiguous, a court applies the statute without engaging in any statutory construction. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997). Further, I.C. § 73-113 provides that "[w]ords and phrases are construed according to the context and the approved usage of the language." If it is necessary for the court to construe a statute, then it will attempt to ascertain legislative intent. 130 Idaho at 733. "In construing a statute, the court may

examine the language used, the reasonableness of the proposed interpretations, and the policy behind the statute." *Id.*

A basic rule of statutory construction is that the application of a statute is an aid to construction, especially where the public relies on that application over a long period of time. *Id.* at 733. Where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time, it will be regarded as important in arriving at the proper construction of a statute. *Id.* at 734.

The Idaho Supreme Court has recently emphasized that it will accord deference to agency construction of a statute when certain conditions are met. An agency's construction of a statute will be given great weight if:

- 1) the agency has been entrusted with responsibility to administer the statute at issue;
 - 2) the agency's construction of the statute is reasonable;
 - 3) the statutory language at issue does not expressly treat the precise question at issue;
- and,
- 4) any of the rationales underlying the rule of deference are present.

Id. at 734.

B. Asserted Elements of a Water Right

Again, as noted above, IDWR concluded that a facility volume limitation was necessary for these rights to define one or more of the elements -- quantity, nature or purpose of use, or place of use; or, in the alternative, necessary to further define or administer these rights (in water parlance, what is commonly referred to as a "remark," as opposed to a more specific and traditional element of a water right such as source or quantity).

With respect to the "remark" section, or I.C. § 42-1411(2)(j), there are three (3) possible statutory components which need to be examined. They are:

- 1) whether the remark is necessary for definition of the right, or
- 2) whether the remark is necessary for clarification of any element of a right, or
- 3) whether the remark is necessary for the administration of the right by the Director.

BASIC CONCEPTS OF FACILITY VOLUME IN FISH PROPAGATION

The records in these subcases, as the Court understands them, appear to establish the following basic concepts of facility volume as that term is used in these water right claims for fish propagation.

Facility volume appears to be an expression of the size (dimensions) of a given fish facility by stating the maximum existing capacity or water volume of particular fish facility ponds, raceways, settlement basins, and the like, including in some instances also an inventory of the number of ponds, tanks or raceways serviced by a particular water right, **at the point in time** when the Director issued his report for that water right claim.

Exhibit 14 in the Blue Lakes subcases is an Administrator's Memorandum from IDWR dated August 9, 1979. It states in part:

It is difficult to calculate water needs for fish farming since production is usually based on the amount of water available rather than the amount of land or the size of the facilities.

As such, IDWR has historically admitted that fish production (pounds of fish raised) is, in reality, not dependant on the size of a given facility, rather production is mostly dependant on the flow rate of available water.

Additionally, the record is clear and it is uncontradicted that the particular water users at issue use all available water from its source, not in excess of the limits of their respective licenses or beneficial use claims. The record is equally clear and uncontradicted that the available water from the respective sources fluctuates from time to time, either as a result of naturally occurring climatic conditions or by diversions by other users, or both.

IDWR has as a "rule of thumb" that it will not specify a storage component in a water right if a facility will fill in a day (not greater than 24 hours) given the direct flow rate or if a facility does not hold the same water more than a day. *See Reporter's Transcript, Re: Trial on the Merits in Subcase Nos. 36-2356, 36-7210, 7427 & 7720* (September 4, 1997) at page 105-108. Obviously a bright-line rule is necessary for determining when a storage component is needed to describe a water right because there is potentially some "storage" involved in all water rights, whether describing a reservoir, a fish propagation pond, or the charging of an irrigation system. In all of these facilities at issue, the water is turned over many times each day from the

direct flow right, usually at least twelve (12) times per day. As such, in accordance with the policy of IDWR, none are considered storage rights; i.e., they do not have a storage component.

Lastly, it is universally agreed that these water uses for fish propagation are both beneficial and non-consumptive. There is obviously some water consumed and/or lost by evaporation, but it is so negligible that it cannot be accurately measured, and that is the basis for IDWR considering these uses as non-consumptive.

THE QUANTITY ELEMENT – I.C. § 42-1411(2)(C)

The quantity element, as claimed by the respective claimants in these subcases, was reported out by the Director as claimed. No objections were filed to the quantity element of these Director's Reports. As such, the claimants involved in this Challenge argue that quantity was never at issue and was not tried before the respective Special Masters.

Diversion rate is an instantaneous measurement called cubic feet per second (cfs) and is the legal standard for the measurement of water in this state. I.C. § 42-102. Diversion volume is calculated by the diversion rate (cfs) over a one-year period of time, and it is measured in acre feet per year (afy). When the licenses at issue here were issued, they were licensed for diversion rates with diversion volumes consistent with a full year's use.

IDWR's inclusion of a facility volume remark was, in part, stated by Mr. Tuthill of IDWR, to further define the quantity element, i.e., to add a "third parameter" (cfs, afy and facility volume). I.C. § 42-1411(2)(c) defines the manner in which quantity shall be described as:

[T]he quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right.

Where statutory language is clear and unambiguous, the court applies the statute without engaging in statutory construction, giving the language its plain, obvious, and rational meaning. 130 Idaho at 733. The statute requires quantity to be measured by rate of diversion or flow in cfs or afy. I.C. § 42-1411(2)(c) does not include facility volume as a prescribed method of measuring quantity. This Court holds that the plain meaning of the statute does not provide for describing or

limiting quantity by facility volume.³ Nor has it been rationally established that a facility volume remark would assist in further defining the fish propagation right as to quantity because, by definition, it is a non-consumptive use and the water used is not stored; it simply flows through the facility and is discharged at the end of the facility. As such, the quantity element of the right (so long as it is applied to its intended beneficial use and is not wasted) could not be abused so long as the diversion rate did not exceed the allowable cfs, regardless of the number or size of the ponds, raceways, etc. It is also extremely curious to the Court that it is IDWR's position that if additional ponds were added to a facility for the purpose of pollution control, this would not be considered an increase in facility volume, but if the additional ponds or raceways were to actually grow fish in, it would be an increase in facility volume. To this Court, this is at least a tacit admission by IDWR that its proposed facility volume remark has nothing to do with the quantity element, but is intended to directly deal with regulating production so that in the event of a future delivery call, and mitigation is sought, junior water users may be required to pay less. This position is contrary to at least two fundamental principles of water law: the prior appropriation doctrine and the goal of obtaining the maximum beneficial use of water. Additionally, this illustrates that trying to regulate fish propagators with facility volume is analogous to IDWR trying to regulate an irrigator to the type or quantity of a crop that can be grown, i.e., regulation of production, not quantity of water.

Finally, it bears repeating that production of fish is primarily related to the rate of flow, not the size of the facility.

THE NATURE OR PURPOSE OF USE ELEMENT – I.C. § 42-1411(2)(f)

IDWR asserted that the nature of use element has been used in the past as a reason and part of its rationale to include a facility volume remark. The rationale is that IDWR would consider an increase in facility volume as being a change in nature of use requiring a transfer under I.C. § 42-222. A change in facility volume is clearly not the type of change contemplated under I.C. § 42-222. A change in nature or purpose of use occurs when, for example, a user changes from an irrigation use to a domestic or manufacturing use, etc. Going from a fish

³ As discussed below, a facility volume limitation is not really a limitation of quantity, rather it is a limitation on

propagation use to an increased or different fish propagation use is not a change in nature of use contemplated under I.C. § 42-222 and does not support the rationale.

It is inconceivable that a farmer changing a crop from pasture to alfalfa on a licensed place of use would constitute a change in the nature of use. Likewise inconceivable would be the notion that changing seed varieties of the same crop in an effort to increase production would be a change in the nature or purpose of use.

Finally, as Special Master Bilyeu noted, "the plain meaning of 'purpose of use' in I.C. § 42-1411(2)(f) requires water rights be described by broad category of use such as mining, domestic, or irrigation, and does not require minute details of operation such as number of ditches, sprinklers, or facility volume limitations." *Special Master Report*, 36-07071, page 5, May 19, 1998.

THE PLACE OF USE ELEMENT – I.C. § 42-1411(2)(h)

IDWR also asserted that it included a facility volume remark to further define the place of use. I.C. § 42-1411(2)(h) establishes that place of use shall be described by:

[A] legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code.

I.C. § 42-1411(2)(h) does not include facility volume as a prescribed method of describing the place of use. This Court holds that the plain meaning of the statute requires a standard legal description for the place of use, not a facility volume limitation. Furthermore, an examination of the respective Director's Reports reveals that IDWR describes the place of use by legal description and not by a description of the fish facility.

Again, the non-consumptive use of water by fish propagators in the water claims before the Court needs to be kept in mind. Fish propagation rights are unlike water rights for irrigation which are limited by acres, which is because irrigation rights are clearly a consumptive use. If an irrigator irrigates more/additional acres, then by definition more water will be consumed because more acres are irrigated, and less will be available in the overall water system.

the utility of the water given the quantity element of the right.

A domestic user, whose use is considered to be *de minimis*, and hence essentially non-consumptive, who constructs an addition to his house, is not considered to have changed the place of use. Likewise, a fish propagator using five connected raceways instead of four could not rationally be considered to have changed the place of use.

"REMARKS" -- OTHER MATTERS NECESSARY TO DEFINE OR ADMINISTER -- I.C. § 42-1411(2)(j)

I.C. § 42-1411(2)(j) provides for the inclusion of "such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director." IDWR also asserted that it included facility volume as a "matter necessary to define or administer." As stated under the Standard of Review above, the query is whether a facility volume limitation is necessary to define a water right, to clarify an element, or to administer this right. Keeping in mind, as discussed above, facility volume does not define or clarify quantity, nature or purpose of use, or place of use, therefore, the first two factors, define or clarify, have been answered. Therefore, the necessity of the facility volume remark for administration is addressed.

A. Water Quality

IDWR asserts that a facility volume remark is necessary for administration of water quality.

There are at least three significant reasons why IDWR's position on quality is wrong.

First, there is no showing that facility volume is rationally related to water quality; i.e., there is no nexus between the two. From the record, it clearly appears that water quality is primarily a function of the fish husbandry practices employed, not the physical size of the facility. Therefore, to be legally necessary there would have to be this nexus.

Second, IDWR's duty with respect to water quality was outlined by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985). In that case, the Supreme Court held that the primary function of "policing water quality" rests with the Department of Health and Welfare [now DEQ and EPA], not with IDWR. *Id.* at 341. The Supreme Court held that "Water Resources should condition the issuance of a permit on a showing by the applicant that a

proposed facility will meet the mandatory water quality standards." *Id.* However, once the facility is complete, "later compliance with those laws after construction of a facility generally will be a proper concern of the Department of Health and Welfare." *Id.* In these subcases before the Court, the water rights are not in the permit stage. All the water rights have ripened into licenses, or were beneficial use claims. Since the water rights have vested and the structures are complete, it is not the current function of IDWR to police water quality. Water quality is policed by DEQ and EPA. As such, if there were to be a legitimate remark in either a permit or a license relative to water quality, it would not be directed to the existing size of the facility, but rather would be directed that the facility, regardless of its size, would be managed to meet required water quality standards.

The third reason is that water quality is a question of fact. In *Randall v. Northfork Placers*, 60 Idaho 305, 91 P.2d 368 (1939), the Idaho Supreme Court considered an action for damages to a downstream user's lands and irrigation ditches alleged to have been caused by mud and silt being deposited into the Northfork River by an upstream mining operation, which deposits then washed downstream into the irrigation ditches.

The Supreme Court stated:

Numerous authorities announce the doctrine that while a proper use of the water of a stream for mining purposes necessarily contaminates it to some extent, such contamination or deterioration of the quality of the water cannot be carried to such a degree as to inflict substantial injury upon another user of the water of said stream. (citations omitted). We believe the rule stated in *Arizona Copper Co. v. Gillespie*, 12 Ariz. 190, 100 Pac. 465; *Id.*; 230 U.S. 46, 33 Sup. Ct. 1004, 57 L. ed. 1384, is controlling in this case, namely:

"We do not mean to say that the agriculturist may captiously complain of a reasonable use of water by the miner higher up the stream, although it pollutes and makes the water slightly less desirable, nor that a court of equity should interfere with mining industries because they cause slight inconveniences or occasional annoyances, or even some degree of interference, so long as such do no substantial damage." (emphasis theirs).

"What deterioration in quality would injuriously affect the water for irrigation, and whether or not the deterioration to which the defendant company subjected the waters in question injured the land of the plaintiff, were matters of fact;" (citation omitted).

The author of *Hill v. Standard Mining Co.*, *supra*, closes his dissertation with reference to the sufficiency of the complaint therein referring to Lindly on Mines and Cooley on Torts, as follows:

"The right to the use of a stream for depositing debris from mines is discussed in section 840, volume 2, of Lindly on Mines. Many cases from the various states of the Union are cited and discussed by the author. He closes his text as follows: **'No positive rule of law can be laid down to define and regulate such use with entire precision. As to this, all courts agree. It is a question of fact to be determined by the jury.'** This conclusion certainly seems reasonable and logical.

Id. at 311, 312 and 313 (bold emphasis added).

The same reasoning applies to the fish propagator's use of water which is returned to the stream. Questions of excessive pollution in a water source are questions of fact to be made on a case-by-case basis, at least for the use of water for fish propagation. As such, a "one size fits all" rule in the form of a facility volume remark is wholly inapplicable. All of the evidence is to the effect that the size of the facility has no demonstrable effect on water quality. How an individual facility is managed or mismanaged clearly does impact water quality and a facility volume remark adds nothing.

B. Local Public Interest

In *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 911 P.2d 748 (1995), the Idaho Supreme Court held that the public trust is not an element of a water right used to determine the priority of that right in relation to the competing claims of other water right claimants. Thus, the SRBA lacks jurisdiction to consider the public trust in the adjudication of these claims.

Pursuant to *Matter of Hidden Springs Trout Ranch, Inc.*, 102 Idaho 623, 636 P.2d 745 (1981), specifically dealing with statutory local public interest, the Supreme Court held that the public interest could not be considered with respect to rights which had vested. All of the claims here have vested into licenses and/or are beneficial use claims. They are not applications to appropriate water or a permit, and this is not a transfer proceeding under I.C. § 42-222. As such, facility volume remarks cannot be considered under the local public interest.

C. Mitigation

It is essentially undisputed that until 1997, IDWR's stated purpose for including a facility volume remark was to regulate water quality. However, since 1997 IDWR has asserted that a

facility volume remark helps to "define the extent of beneficial use" for purposes of mitigation⁴ in time of water shortage. In other words, if a senior fish propagator made a water delivery call on junior water users, the junior users could offer mitigation in the form of money instead of ceasing their use of the called water. However, while mitigation may be voluntarily exercised between private parties, IDWR freely admits it cannot compel a senior user to accept mitigation in the event of a water delivery call. The right of senior water right holders to have water delivered "first in time, first in right" is constitutionally protected. Idaho Constitution, Art. VX. § 3. Therefore, since IDWR has no authority to compel mitigation, this cannot serve as a legal basis for the inclusion of a facility volume remark.

Licenses Issued With and Licenses Issued Without the Facility Volume Remark

As stated earlier in this Decision, some of the water rights licenses were issued with a facility volume remark which was not challenged by the license holder at the time. Other licenses were issued without the facility volume remark and the remark appeared for the very first time in the Director's Report for the respective claimed right.

In his July 31, 1998, *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)*, then Special Master Haemmerle ruled as follows:

F. THE LICENSES

As indicated, some of the water rights based on licenses had facility volume inserted when the licenses were issued. Most of the water rights based on licenses, however, had facility volume inserted in the Director's Report long after the licenses were issued. The inquiry is what relevance or finality previously issued licenses have between Claimants and IDWR in the context of the SRBA. Stated differently, the inquiry is whether the purpose of the SRBA is to inventory licenses or to recondition and reallocate licenses.

The Director has the authority to insert such remarks as are necessary to define, clarify, or administer a particular water right. I.C. § 42-1411(2)(k). On the other hand, a license once issued by IDWR "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." I.C. § 42-220 [footnote 2 cited]. As applied, IDWR is part of the "state" as the word is used in I.C. § 42-220 [footnote 3 cited]. As between the two statutes, there is a conflict only when a remark redefines the use

⁴ See generally, *Rules For Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11, *et seq.*

of a licensed water right. Under these circumstances, the question is which statute controls.

The inquiry involves principles of statutory construction. "It is a basic tenet of statutory construction that a more general statute should not be interpreted to encompass an area already covered by a special statute." *In Re SRBA Case No. 39576* (24 Hagerman Subcases), 130 Idaho 736, 947 P.2d 409, 416 (1997). "[T]o the extent that two statutes conflict, the more specific governs over the more general." *Id.* Here, the more specific and, therefore, controlling statute is I.C. § 42-220 which expressly states that licenses are binding on the state [footnote 4 cited].

[footnote 2] *In Re SRBA Case No. 39576* (24 Hagerman Subcases), 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court held that "[n]owhere in Title 42 is the Director 'obligated to accept a prior decree' issued in a private adjudication 'as being conclusive proof of the nature of a water right.'" *Id.* at 414. Unlike prior decrees, Title 42 does require the state to accept license as conclusive proof of a user's right to use water as stated in the license. I.C. § 42-220.

[footnote 3] For purposes of the adjudication of water right under Title 42, Chapter 14, Idaho Code, IDWR has been separated from other state agencies. I.C. § 42-1401B. Under the adjudication statutes, however, the Director's role is to report "claims to water rights acquired under state law." I.C. § 42-1401B. Here, the licenses were acquired and perfected under state law. These licenses are binding on the state and constitute *prima facie* evidence of the water right and should be reported accordingly. I.C. § 42-220.

[footnote 4] There are exceptions to the finality of a license in that the use of a license may change subjecting the license to claims of abandonment, forfeiture, adverse possession, estoppel, or waste. Also, a license is subject to review in a transfer proceeding. I.C. § 42-222.

Although a remark cannot be inserted to redefine the use of a previously issued license, a remark may be inserted to administer or clarify a right so long as the remark does not alter or restrict the use of the license. A similar issue was addressed by the Idaho Supreme Court in *In Re SRBA Case No. 39576* (Basin-Wide Issue 5B), ___ Idaho ___, 951 P.2d 943 (1998). In that case, the issue was whether the court was required to decree certain general provisions contained in a prior decree. Addressing the legitimate and potential need for general provisions, the Court stated: "Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property." *Id.* at 4 (citations omitted). Remarks are much like general provisions. Both may be used to further define a water right. I.C. §§ 42-1411(2)(k) and 42-1411(3). Like a prior decree, any attempt to redefine a license would be "tantamount" to altering a real property right. In this case, IDWR issued licenses for water rights 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148. None of these licenses contained remarks addressing facility volume. To the extent that IDWR considers facility volume as a further restriction on these licenses, an attempt to insert facility volume in the context of the SRBA would violate the binding affect of licenses as set forth under I.C. § 42-220. The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued. *See e.g., Matter of Hidden Springs Trout Ranch, Inc., v. Alfred.*

Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1997). If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. [footnote 5 cited]. See e.g., *Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984). In this case, Claimant did not appeal the remarks addressing facility volume for water rights 36-07201, 36-07218, and 36-07568. Therefore, Claimant is bound by the licenses for these rights.

In evaluating the licenses where facility volume was included when the licenses were issued, the court notes that there is no express provision in the licenses indicating the relevance of the remarks. As previously indicated, the court cannot find any rational reason why the remarks exist. When confronted with an ambiguous element contained in a prior decree or license, the court may clarify the ambiguous element or provision. I.C. § 42-1427(b). Therefore, to clarify this ambiguity, the

[footnote 5] The court expresses no opinion as to whether parties in the SRBA, not parties to a license, can challenge a license in the SRBA. That issue is not before the court.

court will recommend that facility volume be included for water right numbers 36-07201, 36-07218, and 36-07568 with the following additional language: "The remark addressing facility volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume."

For these reasons, the licenses at issue are final and binding on both the Claimant and IDWR.

As to those licenses which contained a facility volume remark when issued, Special Master Haemmerle held that the remark must remain in the license, but it is ambiguous, and because it was ambiguous the Court could clarify the remark. I.C. § 42-1427(1)(b). The clarifying remark was to be:

The remark addressing facility volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume.

This Court agrees with the Special Master that the remark must remain in the license but can be clarified for the following reasons. First, by adopting this recommended language it confirms that the "claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right" I.C. § 42-1427(1)(b). The supporting reasons again need to be restated here.

1. The use of water for fish propagation is a non-consumptive use.
2. There is no storage component; regardless of the size of the facility, the water just continuously flows through and is "turned over" at least twelve (12) different times each day.
3. The user continuously uses all available water up to the limit of his right; water flows primarily affect production, not the size of the facility.

In other words, it would be like having a water right for 100 cfs flowing out of a spring in the Snake River Canyon wall which then flows into a large pipe, flows the length of the pipe, and then discharges off the user's property. Does it make a difference if the user increases the length of the pipe from 200 feet to 400 feet? Or if a hydropower plant with one generator were able to place two generators in the stream instead of one?

The court cannot limit "the extent of beneficial use of the water right" in the sense of limiting how much (of a crop) can be produced from the use of that right, so long as there is not an enlargement of use of the water right. In fact, the stronger argument is presented in *Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 208; 252 P.865 (1926):

It is a cardinal principle established by law and the adjudications of this court that the highest and greatest duty of water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it. What constitutes a reasonable use of water is a question of fact, and depends upon the circumstances of each case. No person is entitled to use more water than good husbandry requires.

In other words, because the use is a non-consumptive, continuous flow use, the highest and greatest duty of the water would seem to encourage the grower to use his or her best efforts to maximize the crop obtained from using the water. And if this means the grower under these circumstances can economically produce 200 pounds of fish versus 100, there is no legitimate policy in water law for not allowing this to occur.

CONCLUSION AS TO FACILITY VOLUME

Each of the respective Special Masters determined that the Claimants have met their burden in establishing that facility volume is not necessary as a traditional element of a water right, I.C. § 42-1411(2)(a)(b), or as a remark for the definition of the right, for clarification of any element of a right, or for administration of the right by the Director, I.C. § 42-1411(a)(j). Each of the Special Masters has cited to various portions of the evidence produced in their respective trials/hearings. Each has used their own factual and legal basis for their respective conclusions that facility volume remarks should not be included.

This Court adopts each of the respective Special Master's Reports and Recommendations including the underlying findings of fact and conclusions of law upon which they are based. There is no basis to find that their respective findings of fact are clearly erroneous or that their respective conclusions of law are not correct.

V.

"ADDITIONAL EVIDENCE" ISSUE

THE ISSUE

NSGWD sought to have the respective Special Masters consider additional evidence in the form of testimony and affidavits in support of its *motion to alter or amend* filed in the various subcases. Each of the respective Special Masters refused to consider additional evidence. Two of the Special Masters ruled that I.R.C.P. 59(e) governed motions to alter or amend Special Master's Reports. Another Special Master reviewed the motion under I.R.C.P. 53(e)(2) and also applied the "good cause" standard contained in I.R.C.P. 55(c). As noted above, the consolidated issue is stated in the Challenge to be:

Which standard is applicable to the submission of evidence in conjunction with motions to alter or amend special masters' reports in the SRBA, Rule 59(e), I.R.C.P. which applies post-judgment, or Rule 53(e)(2), I.R.C.P. which applies to special master's reports?

STANDARDS OF REVIEW

Regarding I.R.C.P. 53(e)(2), Administrative Order 1 (AO1) § 13(f) provides:

The court shall accept the Special Master's findings of fact unless clearly erroneous. The court may, in whole or in part, adopt, modify, reject, receive further evidence, or remand it with instructions. I.R.C.P. 53(e)(2).

I.R.C.P. 53(e)(2) provides:

In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within fourteen (14) days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon the objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or reject it in whole or in part or may receive further evidence or may recommit it with instructions.

In *Seccombe v. Weeks*, 115 Idaho 433, 767 P.2d 276 (Ct. App. 1989), the Court of Appeals stated:

The appointment of a master does not displace the district court's role as the ultimate trier of fact. Under I.R.C.P. 53(e)(2), the district court is mandated to accept the master's findings of fact unless clearly erroneous; consequently, the trial court must independently review the evidence to determine whether the findings were supported by substantial evidence. The master's conclusions of law, however, carry no weight with the trial court. Therefore, Rule 53(e)(2) permits the court to adopt the master's report, modify it, supplement it with further evidence, recommit it to the master with instructions, or reject it in whole or in part.

Id. at 435, 767 P.2d 278.

Regarding I.R.C.P. 59(e):

A Rule 59(e) motion to amend a judgment is addressed to the discretion of the court. An order denying a motion made under Rule 59(e) to alter or amend a judgment is appealable, but only on the question of whether there has been a manifest abuse of discretion. Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that has occurred in its proceedings; it therefore provides a mechanism for corrective action short of an appeal. Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.

Coeur d'Alene Min. Co. v. First Nat'l. Bank of N. Idaho, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)(quoting *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (1982)).

ANALYSIS—MOTION TO ALTER OR AMEND

The issue regarding the appropriate standard for allowing the introduction of additional evidence in conjunction with a motion to alter or amend the findings of fact and conclusions of law of a special master is not one of first impression for this Court. This issue was previously analyzed in detail in *In Re SRBA Subcases 36-00061, 36-00062, and 36-00063, Memorandum Decision and Order on Challenge* (September 27, 1999) ("*Memorandum Order*"). NSGWD was also a party to those subcases. In the *Memorandum Order*, this Court discussed the procedural rules and accompanying standards which arguably could apply in the context of a motion to alter or amend a special master's recommendation brought pursuant to AO1 § 13(a). *Memorandum Order* at 20-29. The Court's entire discussion will not be reiterated here. In sum, this Court ruled that the standards of I.R.C.P. 59(e) were instructive in the context of a motion to alter or amend a special masters findings of fact and conclusions of law, but that the Rule did not literally apply because a prior judgment is not entered at the special master stage of the proceeding. *Memorandum Order* at 26-27. This Court also noted that I.R.C.P. 59(e) does not provide a procedure for the introduction of additional evidence. *Id.* Rather, that in accordance with existing precedent, I.R.C.P. 59(e) motions apply to the findings of fact and conclusions of law based on the status of the existing record. *See e.g., Idaho First Nat'l. Bank v. David Steed & Assoc.*, 121 Idaho 356, 361, 825 P.2d 79, 84 (1992) (citing *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990)(trial court lacks jurisdiction to consider new facts in conjunction with a motion to alter or amend pursuant to I.R.C.P. 59(e)). This Court held that I.R.C.P. 52(b) more appropriately applied to the circumstances surrounding AO1 § 13(a), in particular because a motion to alter or amend can be brought pursuant to I.R.C.P. 52(b) prior to the entry of judgment. *Memorandum Order* at 27-28. However, the applicable standard for amending the findings of fact, whether prior to, or post-judgment, is effectively the same. Rule 52(b) allows a court to correct or augment its findings so that an appellate court may have a clear understanding of how the trial court arrived at its decision. The Rule is not intended to allow parties to advance new legal theories or relitigate the merits of a case. *See Memorandum Order* at 27 (citing 9 *Moore's Federal Practice* 52.60 (party may move to amend findings of fact, even if modified or additional findings would effectively reverse the judgment)). A motion to alter or amend findings provides a mechanism for the trial court to correct both errors of fact and law

short of an appeal. *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982)(citing *First Security Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977)).

This Court, in the *Memorandum Order*, also discussed the four grounds for properly granting a motion to amend findings pursuant to I.R.C.P. 52(b): (1) correction of manifest error; (2) newly discovered evidence; (3) change in law; and (4) supplement or amplify findings. *Id.* at 27 (citing 9 *Moore's Federal Practice* 52.60[4][a]-[d]). The two grounds which would arguably apply in the context of the instant subcases are the correction of a manifest error and newly discovered evidence. In regards to considering whether to amend the findings on the basis of a manifest error, the trial court considers only the evidence contained in the record. 9 *Moore's Federal Practice* 52.60[4][a]. In regards to a motion to amend based on newly discovered evidence, the movant may not introduce evidence that was available at trial but not proffered. Further, it is improper for a party to move to amend in order to advance new theories based on evidence that was proffered at trial or to reassert arguments already rejected by the court. *Id.* at 52.60[4][b].

Lastly, and of significance, is that the determination of whether to grant or deny a motion to amend findings of fact or a judgment is left to the discretion of the trial court (special master) and is therefore reviewed under a "manifest abuse of discretion standard." *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982). As such, to the extent a special master disallows new evidence in conjunction with a motion to alter or amend brought pursuant to AO1 § 13(a) on the grounds that the proponent is seeking to advance a new legal theory or introduce evidence that was otherwise available at trial, there can be no manifest abuse of discretion. Simply stated, the Rule does not provide a mechanism for advancing new legal theories and/or evidence that was discoverable during the pendency of the action, or to allow a brand new party to the subcase to step forward for the first time and have a new trial.

The proper application and standards of I.R.C.P. 53(e)(2) were also set forth in detail in the Court's *Memorandum Order*. However, since I.R.C.P. 53(e)(2) is specifically directed at the district court (as opposed to a special master), the rule has no application towards establishing a standard or mechanism for the submission of additional evidence at the special master's level of the proceeding absent a directive from the district court. Further, as this Court previously pointed out in its *Memorandum Order*, the district court does not have unfettered discretion to modify the

findings of a special master. *Memorandum Order* at 22-23. Rather, the District Court must accept a special master's findings of fact unless clearly erroneous. *Id.*; AO1 § 13(f); I.R.C.P. 53(e)(2); *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989).

ANALYSIS -- MOTION FOR RECONSIDERATION

Unlike a motion to alter or amend findings, a motion for reconsideration brought pursuant I.R.C.P. 11(a)(2)(B) provides a mechanism for the trial court to consider new or additional facts in support of the motion that bear on the correctness of the interlocutory order. *See Coeur d'Alene Min. Co. v. First Nat'l. Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)(distinguishing applicable standards between I.R.C.P. 59(e) motion to alter or amend and I.R.C.P. 11(a)(2)(B) motion for reconsideration). The burden is on the moving party to bring to the trial court's attention to the new facts. *Id.* In *Coeur d'Alene Min. Co.*, the Idaho Supreme Court in distinguishing a motion to alter or amend from a motion for reconsideration, stated:

A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.

Id. (citing *J.I. Case Company v. McDonald*, 76 Idaho 223, 229, 280 P.2d 1070, 1073 (1955)). Although I.R.C.P. 11(a)(2)(B) permits the introduction of additional evidence, that particular procedural rule is not available to a party seeking to participate in a subcase pursuant to AO1 § 13. AO1 § 13(a) provides:

Any party to the adjudication not already a party to the subcase may file a *Motion to Alter or Amend* within 21 days from the date the *Special Master's Recommendation* appears on the Docket Sheet. Any party to the adjudication not already a party to the subcase may respond to a *Motion to Alter or Amend* by filing a *Notice of Participation* which shall set forth the party's name; the water right number; the name, address and telephone number of the attorney; and a short statement of the party's position on the issues presented in the *Motion to Alter or Amend*.

SUMMARY OF THE RESPECTIVE MOTIONS

Although a motion to reconsider is more akin to what NSGWD is seeking from the Court, in accordance with AO1 § 13(a), a party not already a party to a subcase participates in

subsequent proceedings in the subcase by filing, or responding to, a motion to alter or amend. The rule does not provide for initiating participation through a different procedural rule, including a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B). Since a motion to alter or amend is limited to the record before the court (special master) and does not provide for the introduction of new or additional evidence, a party is limited in that regard. As a related matter, a party cannot subsequently file a motion for reconsideration of a court's ruling on motions brought pursuant to I.R.C.P. 59(e) or 52(b). See I.R.C.P. 11(a)(2)(B)(rule does not permit reconsideration of an order entered pursuant to Rules 59(e) and 52(b)). Furthermore, from a practical standpoint, in the context of the SRBA, a procedure allowing new parties to enter a subcase following the recommendation being issued by a special master which permits the new parties to advance new legal theories and evidence in support of those theories would (to put it kindly) result in an inefficient use of judicial resources as well as prejudice to the parties to the subcase by requiring the parties to relitigate their claims or go back to court to defend against issues that were never initially raised.

DUE PROCESS IMPLICATIONS

At oral argument on the Challenge, NSGWD additionally argued that the failure of the respective Special Masters to consider additional or new evidence in conjunction with a motion to alter or amend also raised due process implications. Specifically, NSGWD argued that it would be precluded from getting evidence before the Court of a claimant's actual use of water over a given period of time. The implication being that a claimant has been historically using a lesser quantity of water than the quantity reflected in the claimant's license or prior decree. NSGWD argues that if a special master declines to consider the additional evidence, a special master (and the district court on Challenge) does not have all the relevant evidence necessary to ascertain the truth, but also the net effect is that NSGWD is essentially barred from asserting its legal claim or cause of action based on the proffered evidence (i.e. partial forfeiture or as styled by NSGWD "extent of beneficial use"). Specifically, NSGWD argues it would be forever precluded from raising its legal claim because if the evidence is not admitted by either a special master or at the subsequent direction of the district court, once the partial decree is entered, the claim is barred by principles of *res judicata*. Hence the contention of due process violations.

This due process argument fails for several reasons. First, nothing prevented NSGWD from filing a response to an objection (or an objection) to the Director's Report and becoming involved in the subcase at its inception. This is true even if NSGWD was in agreement with the Director's Report as it had the opportunity to file a response to an objection. Consequently, under any stretch of the imagination NSGWD cannot claim due process violations for any evidence (or cause of action) that was available as of the date of expiration for filing responses to objections to the Director's Report. Further, NSGWD would also have available the option to file a motion to file a late objection based on the discovery of new evidence even after the expiration of the filing date for objections and responses. Simply put, NSGWD could have become timely involved in these subcases and properly raised any related issues before the matter went to trial before the respective Special Masters. NSGWD readily admits, however, that its practice has been to not get involved in the subcase until the special master has issued his or her recommendation; which by orders of reference in these subcases, the evidentiary trial has been held, findings of fact and conclusions of law have been made, and the respective Special Master's Reports and Recommendations have been prepared and filed. In the event NSGWD disagrees with the recommendation, NSGWD then becomes engaged in the subcase via a motion to alter or amend pursuant to AO1 § 13 and then seeks to introduce new or additional evidence and/or raise new legal theories. In one of the consolidated subcases, NSGWD made its strategy readily apparent. NSGWD responded to the Special Master's inquiry as follows (with emphasis):

The [Special Master]: So your strategy is to sit back – although the statute defines time periods to get in the case, you [NSGWD] sit back, wait and see what happens; the case is tried; and then if you get a result you don't like, you ask that it be tried again.

Ms. Hofstetter: I would say that that's absolutely correct. I have no – because it's humanly impossible for private parties to get anticipatorily involved in every single subcase that may affect their interests ultimately.

See Reporter's Transcript, Re: Challenge to Recommendations Made by Special Master Fritz Haemmerle in Subcase Nos. 36-02048, 36-02703, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07148, and 36-07568, by North Snake Ground Water District (November 17, 1997) at page 77.

Additionally:

The [Special Master]: So every single right that's recommended is subject to a second trial any time before a final decree in the SRBA is entered?

Ms. Hofstetter: Potentially, if warranted if the first trial was not adequate and that's demonstrated, yes. That's a possibility.

Id. at pp. 88-89.

Thus it is clear from the record NSGWD made a conscious determination not to become involved in the various subcases. Consequently, NSGWD's due process arguments relating to any available evidence or cause of action that existed prior to expiration of the date for filing objections are without merit. Further, no due process violations are implicated during the pendency of the special master's proceedings for available evidence or causes of action if NSGWD failed to become involved in the proceeding via a motion to file a late objection or a motion to participate, pursuant to AO1. *See e.g.*, AO1 §10(k)(Motion to Participate).

The crux of NSGWD's argument, however, pertains to the introduction of evidence which did not become relevant, or the raising of new causes of action which did not allegedly become ripe, until after the expiration of the time for filing responses to objections to the Director's Report. This situation arises in the context of a cause of action for partial forfeiture pursuant to I.C. § 42-222(2) and related case law. *See State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997). To place the matter in proper perspective, NSGWD contends that the evidence sought to be introduced in the consolidated cases was probative of the claimant's "extent of beneficial use." However, as noted in the preceding sections of this opinion "extent of beneficial use" is not an element of a water right. Furthermore, the respective Special Masters already conducted hearings on the quantity element. In this Court's view, although being couched in the phrase "extent of beneficial use," NSGWD is really attempting to raise a cause of action for partial forfeiture or abandonment, or in the alternative, to relitigate the quantity issue. By way of explanation, any evidence that a claimant is using less water than the quantity for which the claimant was previously licensed or decreed, by definition must be in support of an action for partial forfeiture (or abandonment). Partial forfeiture, abandonment or adverse possession are the only cognizable legal theories by which a diminishment could be obtained. In *State v. Hagerman Water Users, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court specifically

held that the quantity element of a water right cannot be reduced merely for non-application to a beneficial use regardless of the length of time the non-application continues. *Id.* at 743, 947 P.2d at 416. Rather, that I.C. § 42-222(2) provides for the loss of water rights for failure to apply the water to a beneficial use for the five (5) year prescriptive period. *Id.* The Supreme Court set forth its reasoning as follows:

To interpret references to “beneficial use” throughout Title 42 as providing the means by which a water right may be statutorily lost or reduced regardless of the length of time the non-application continues would render the five-year period set forth in I.C. § 42-222(2) meaningless and neglect clear direction from the legislature.

Id. (citing *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539, 797 P.2d 1385, 1387 (1990)). Therefore, unless NSGWD is asserting either partial forfeiture or abandonment of a previously licensed right, evidence of “extent of beneficial use,” is irrelevant. Secondly, whether labeling the diminished use as “partial forfeiture” or “extent of beneficial use,” unless the five year statutory period has elapsed, there is no cause of action and any related evidence would again be irrelevant. Simply put, there is no legal cause of action for an “anticipatory” partial forfeiture. Lastly, NSGWD also argued (again without referring specifically to “partial forfeiture”) that due process concerns are also implicated because NSGWD cannot assert “partial forfeiture” as an objection, or later in the course of the proceedings, until the statutory period has actually elapsed. NSGWD argues that this situation would arise in the event that the five year statutory period does not entirely run until after the objection period has elapsed. In this situation, NSGWD argues that it could never assert a cause of action for “partial forfeiture” (a.k.a. “extent of beneficial use”) because an objection can not be filed prior to the statutory period having elapsed because no cause of action has yet matured. Thus, if a special master does not allow the admission of evidence pertaining to the partial forfeiture after the statutory period has elapsed, then NSGWD is essentially forever barred from asserting a “partial forfeiture” or “extent of beneficial use” issue which did not actually ripen until after the expiration of the objection period.

This argument fails because it overlooks the effect that the filing of a claim in the SRBA has on the running of the forfeiture statute. A claim to a water right made in the SRBA is essentially akin to a quiet title action. *See e.g., Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 6 P.2d 486 (1931) (pre-adjudication quiet title action for water

right); *Sutton v. Brown*, 91 Idaho 396, 422 P.2d 63 (1966) (quiet title action can necessarily include claim for water right). A notice of claim is a pleading within the SRBA. *Fort Hall Water Users Ass'n v. United States*, 129 Idaho 39, 41, 921 P.2d 739, 741 (1995) *reh'g denied* (1996); AO1 § 2(r). The filing of a notice of claim initiates the procedure for making claim to a water right in the SRBA. I.C. § 42-1409. A partial decree with a rule 54(b) certificate is akin to a final judgment for purposes of appealing as a matter of right. I.C. § 42-1412(6); I.R.C.P. 54(b); AO1 §§ 14,15. As a result, a water right claimant's action is pending from the time a claim is filed until a partial decree is entered.

It is a settled legal principle that the filing of a quiet title action tolls the running of the statute of limitations for establishing title by adverse possession or prescription to the property that is the subject of the action. In *Smith v. Long*, 76 Idaho 265, 281 P.2d 483 (1955), the Idaho Supreme Court held that: "Defendant's title by adverse possession not having matured at the time this action commenced, plaintiffs are entitled to a decree quieting their title as against the claims of the defendants." *Id.* at 494-95, 76 P.2d at 276-77. In *Yorba v. Anaheim Union Water Co.*, 259 P.2d 2 (1953) the California Supreme Court stated: "[O]rdinarily the filing of an action, either by the person asserting a prescriptive right, or by the person against whom the statute of limitations is running, will interrupt the running of the prescriptive period and the statute will be tolled while the action is actively pending." *Id.* at 5. See also 25 Am. Jur. 2d Easements and Licenses § 69 (suit brought by claimant interrupts prescriptive period); 3 Am. Jur. 2d Adverse Possession § 127 (effect of suit relates back to date of its commencement, and claimant can acquire no additional advantages by remaining in possession during its pendency). Thus, any period supporting a claim for title by adverse possession or prescription must have accrued prior to the claim being filed. This rule applies to the extent the action is being prosecuted or defended by the legal title holder, and in the event the action is abandoned, the statute is not tolled. 3 Am. Jur. 2d Adverse Possession § 130.

Since forfeiture is a species of adverse possession and prescription, it follows that once a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of I.C. § 42-222(2) are also tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to partial decree. In *Smith v. Hawkins*, 42 P. 453 (1895), the California Supreme Court, in construing California's then existing water right forfeiture statute, applied by

analogy the same standards for establishing prescriptive title to real property. *Id.* at 454. In *Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 6 P.2d 486 (1931), the Idaho Supreme Court, in resolving a water right transfer claim, concurred with the reasoning of the California Supreme Court in *Smith* which applied the standards of prescription and adverse possession to forfeiture. *Id.* at 488 (citing *Smith v. Hawkins*, 42 P. 453 (1895)). Therefore, pursuant to this reasoning, unless a claimant ultimately abandons their claim within the SRBA (which could result in the failure of the entire water right), any alleged time period of non-use subsequent to the filing of the notice of claim cannot be used to establish forfeiture. That being the case, NSGWD cannot be denied due process protections for attempting to present itself in a case with a hearing on the merits to assert a cause of action (i.e. partial forfeiture) which has not yet matured. Further, and on the contrary, if the cause of action for forfeiture has ripened before the claim is filed, it is incumbent on the person seeking to prosecute the forfeiture to get timely involved, (i.e. file an objection/response to the quantity element).

Finally, even if the forfeiture statute were not tolled during the pendency of the proceeding, the decision whether or not to admit new or additional evidence is discretionary with the trial court or in these subcases, the respective Special Masters. Although a motion pursuant to I.R.C.P. 60(b)(2) (i.e. motion to set aside a judgment based on the newly discovered evidence) does not technically apply in this situation, the standard for granting a Rule 60(b) motion is instructive in explaining the deficiency in the due process argument advanced by NSGWD. For example, the due process argument raised by NSGWD could arise in the context of any garden variety legal proceeding where new evidence giving rise to a new legal cause of action or defense which was not previously asserted is discovered after entry of judgment. Similarly, in that particular situation, if the court denies the Rule 60(b) motion, the movant may also be forever precluded from subsequently raising the new legal claim or defense based on the newly discovered evidence. Despite this consequence, the determination whether to grant a Rule 60(b)(2) motion is still discretionary with the court as opposed to a non-discretionary entitlement. *See Roberts v. Bonneville County*, 125 Idaho 588, 592, 873 P.2d 842 (1994)(trial court did not abuse discretion in denying motion based on newly discovered evidence); *Knight Insurance Inc. v. Knight*, 109 Idaho 56, 58-59, 704 P.2d 960, 962-63 (Ct.App. 1985)(distinguishing between discretionary relief and non-discretionary entitlement to relief pursuant to I.R.C.P. 60(b)); 12 Moore's Federal

Practice 3d§ 60.22[1] (except for motion under 60(b)(4), decision as to whether relief should be granted is discretionary)). Consequently, the denial of a Rule 60(b)(2) motion based on the discovery of new evidence does not automatically entitle the movant to have the judgment set aside and a new hearing to present the new evidence. However, if the denial of the motion was considered a denial of due process it would seem that the judgment should be set aside as a matter of course. This is not the case. Rather, the court reviews the evidence in the context of the factors set forth in Rule 60(b)(2) to determine whether or not the evidence should be considered. In sum, since this determination is left to the discretion of the court, the denial of the motion cannot result in a denial of due process.

Next in determining whether the respective Special Masters did in fact abuse discretion in failing to admit and consider the new or additional evidence, the following factors were present. Hearings had already been conducted on the merits, including on the quantity element. NSGWD was not entirely clear as to the legal theory it was advancing in support of a diminishment in quantity. As previously explained, as a matter of law, "extent of beneficial use" by itself is not a viable theory for diminishing a water right. Furthermore, if NSGWD were in fact asserting an "extent of beneficial use" argument then evidence of a prescriptive period is irrelevant, and any evidence offered in support of the "extent of beneficial use" could not be considered "newly discovered" because evidence of the various fish propagating practices was available prior to the commencement of the proceedings. On the other hand, if NSGWD was in fact asserting a claim for partial forfeiture in which a prescriptive period is relevant, the evidence before the respective Special Masters was that the various claimants during the relevant time periods were using all available water such that any reduction in use was based solely on availability in which case partial forfeiture does not result. *See Hodge v. Trail Creek Irrigation Co.*, 78 Idaho 10, 16, 297 P.2d 524, 530 (1956)(holding no forfeiture where non-user is prevented from exercising his right to the water by circumstances over which he has no control). Since partial forfeiture must be proved by clear and convincing evidence, NSGWD's alleged newly discovered evidence would have had no impact on the outcome of the recommendations made by the respective Special Masters. *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982)(clear and convincing proof is required to support a forfeiture). Based on the foregoing, this court cannot find that NSGWD's due process rights were violated.

CONCLUSION AS TO THE "ADDITIONAL EVIDENCE" ISSUE

In conclusion, AO1 § 13(a) provides a mechanism for new parties to enter a subcase following a hearing on the merits and the issuance of the Special Master's Recommendation. A motion to alter or amend under either I.R.C.P. 59(e) or 52(b) does not contemplate the admission of new or additional evidence to advance new legal theories or relitigate the merits of a case. Rather, the tribunal is limited to the existing record. AO1 § 13(a) does not provide for a new party to enter a subcase on a motion for reconsideration (as opposed to a motion to alter or amend). The standards between a motion to alter or amend and a motion for reconsideration are clearly distinguishable. I.R.C.P. 53(e)(2) does not provide a mechanism for a special master to admit new evidence absent a directive from the district court. As such, the respective Special Masters did not err in refusing to admit evidence supporting the advancement of a new legal theory.

Lastly, due process concerns were not implicated because NSGWD could have entered the subcase prior to the hearing on the merits or the cause of action had not ripened by the time the claim was filed. Further any evidence pertaining to an alleged diminishment in quantity following the filing of a claim is irrelevant for establishing a partial forfeiture. Accordingly, the respective Special Masters did not err in refusing to admit NSGWD's evidence pertaining to "extent of beneficial use" subsequent to the hearing on the merits.

IT IS SO ORDERED.

Dated: December 29, 1999.

BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication