



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

December 11, 2001

TED S SORENSON
5203 S 11 E
IDAHO FALLS ID 83404

RE: License Nos. 32-7136 and 32-7128

Dear Mr. Sorenson:

The Department of Water Resources has issued the enclosed Water Right License confirming that a water right has been established in accordance permit 32-7136. Please be sure to thoroughly review the conditions of approval and remarks listed on your license.

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 by the Department unless a party petitions for reconsideration or files an exception and/or brief within fourteen (14) days of the service date as described in the enclosed information sheet about preliminary orders.

A copy of your approved amendment of permit for right 32-7136 is also enclosed.

The Department has also issued the enclosed amended Water Right License for water right 32-7128. The amendment was necessary to add condition no. 8 to the license. The condition was added to the permit 32-7128 by order on December 5, 2000, but it was inadvertently omitted from the license. The amended license is an "**amended final order**" pursuant to Sections 67-5246 or 67-5247, *Idaho Code*, and Rule 760 of the Department's Rules of Procedure. An informational sheet that explains how to respond to final orders is enclosed.

In preparing your licenses, the Department considered your request to retain the old subordination condition from your permits rather than imposing the new subordination condition used by the Department since the adoption of Section 42-203B(6), *Idaho Code*. It is the Department's position, however, that the new condition embodies the intent of the legislation, and that the Department has the authority to subordinate licenses issued for hydropower purposes, even if the permit was issued prior to July 1, 1985. Therefore, to comply with the intent of the legislation, the Department issued your licenses with the new subordination condition. If an application is filed to appropriate water upstream from your diversion for a use other than hydropower, you

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STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
ALAN G. LANCE

September 10, 1998

RE: In the matter of Application for Amendment of Water Right Permit Nos. 32-07128 and 32-07136 in the name of Ted Sorenson dba Sorenson Engineering

Dear Interested Party:

The accompanying order is a "**recommended order**" issued by the department pursuant to Section 67-5243, Idaho Code. The provisions of this order will not become effective until the Director issues a final order in this matter.

Each party to these proceedings who appeared at the hearing may file a petition for reconsideration, briefs and exceptions to the recommended order and may request oral argument before the Director of the department as further described below:

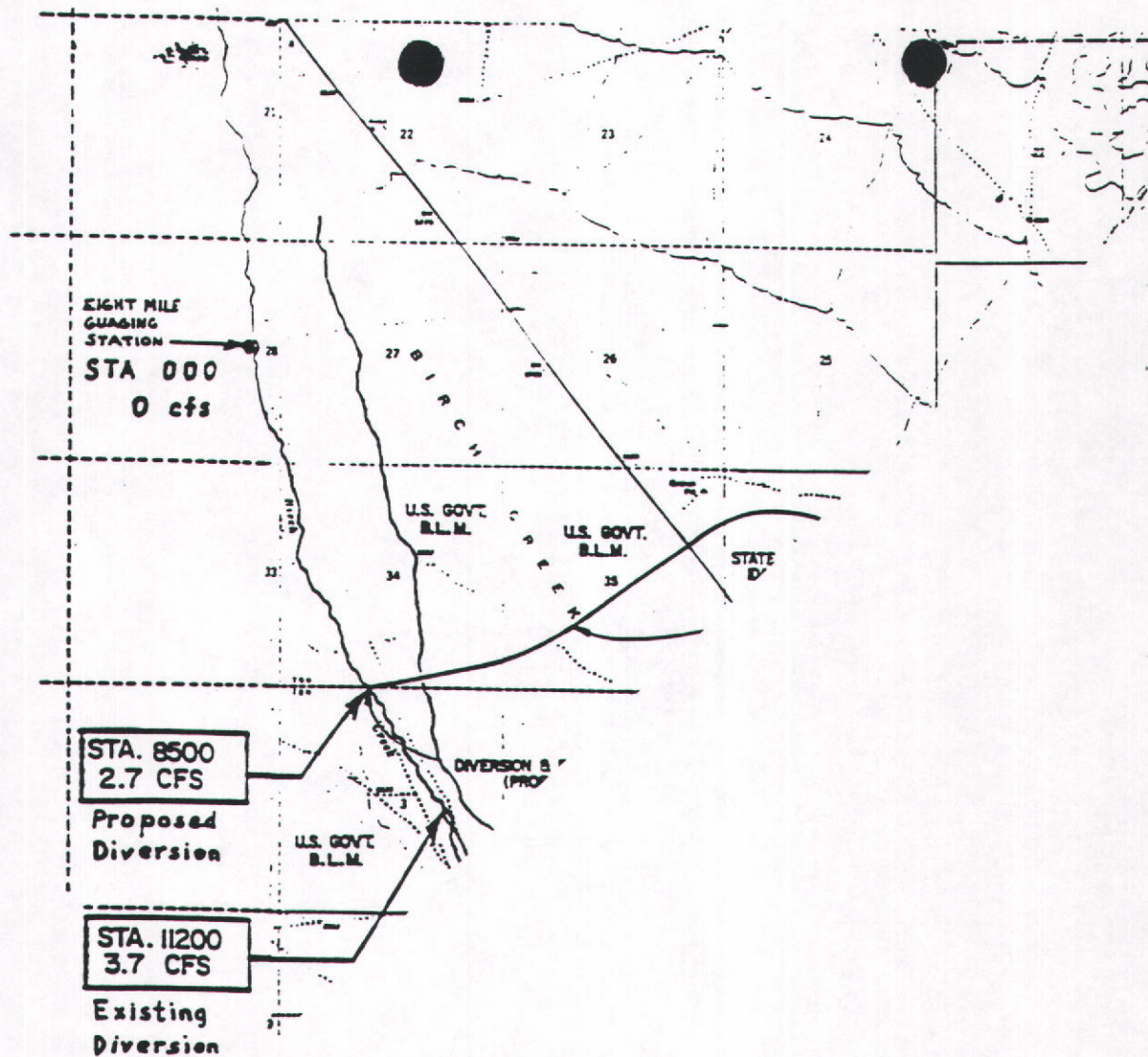
PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of the order. The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

EXCEPTIONS AND BRIEFS

Within twenty-one (21) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of a recommended order and may file briefs in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

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30 DAY
change P/D

cert. exam

WATER RIGHT NO. 32-07136

Priority: January 3, 1984 Amount: 30.00 CFS

21,719.32 AFA

This is to certify, that DBA SORENSON ENGINEERING
TED S. SORENSON

2988 TIPPERARY LN. 550 Linden Dr.

IDAHO FALLS, ID 83401-0000

has complied with the terms and conditions
of the permit issued pursuant to Application for Permit dated January 3, 1984, and
has submitted proof to the Department of Water Resources on January, that 9/22/89
water has been applied to a beneficial use; an examination by the Department indicates
that the works have a diversion capacity of 79.0 cfs of water from:

BIRCH CREEK tributary to SINKS

source and that a water right has been established as follow:

BENEFICIAL USE	PERIOD OF USE	RATE OF DIVERSION	VOLUME
POWER	01/01 to 12/31	30.00 CFS	21,719.32 AFA

LOCATION OF POINT OF DIVERSION(S): NENE, Sec. 34, Township 08N, Range 30E
JESW CLARK County

PLACE OF USE: POWER

TWN RGE SEC

08N 31E 14 NENE

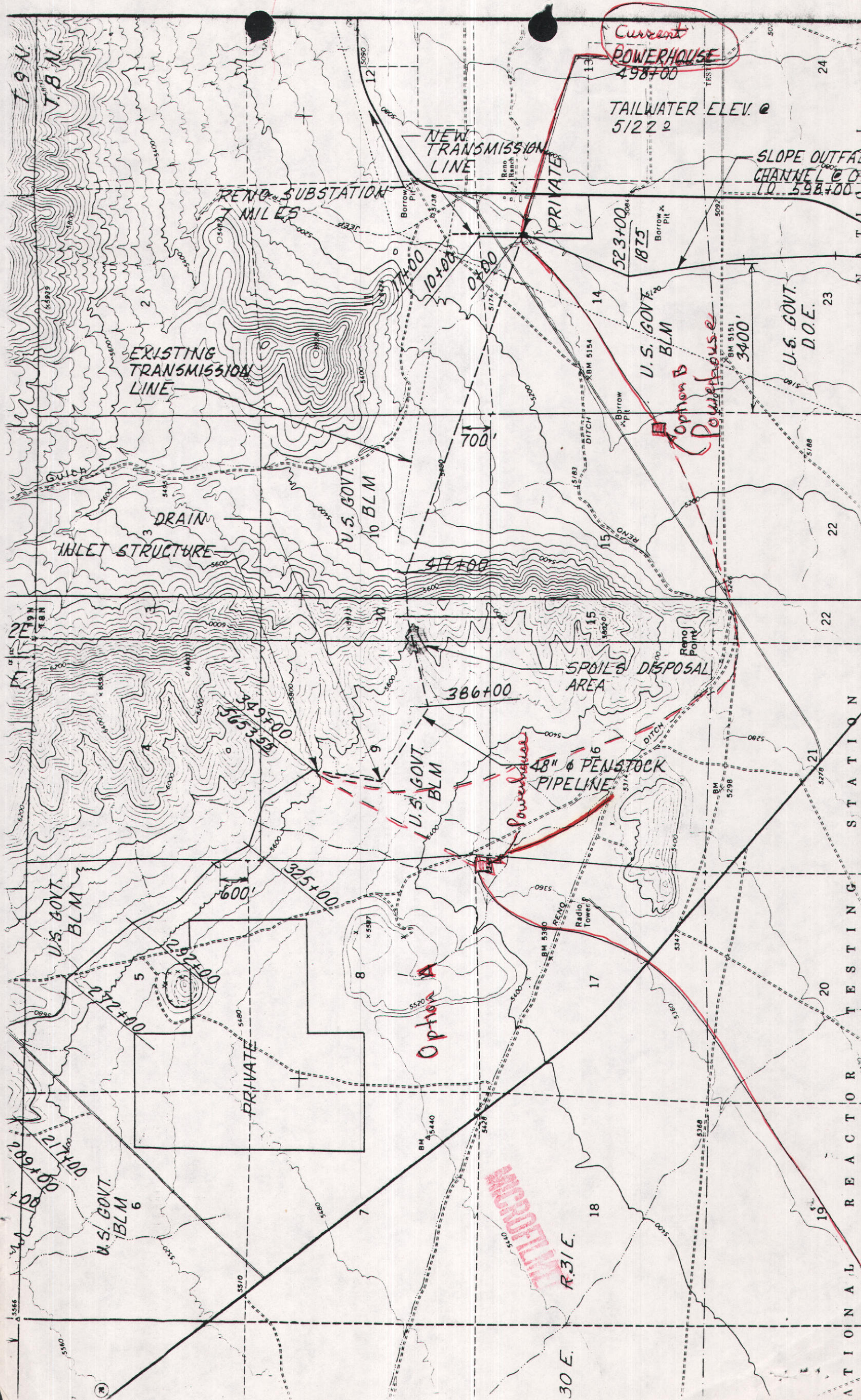
CONDITIONS/REMARKS:

1. The right to the use of water hereby confirmed is limited to the amount which can actually be beneficially used and is restricted and appurtenant to the lands or place of use and to the purpose herein described, as provided by the laws of Idaho.
2. This right is subject to all prior water rights and may be forfeited by five years of non-use.
3. Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho Code, or the applicable Idaho law.
4. 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.

delete-

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Current
POWERHOUSE
498+00

TAILWATER ELEV. @
5122.2

NEW
TRANSMISSION
LINE

RENO SUBSTATION
7 MILES

PRIVATE

SLOPE OUTFALL
CHANNEL @ D
10 598+00

EXISTING
TRANSMISSION
LINE

523+00
1875

U.S. GOVT.
BLM

Option B
Powerhouse

U.S. GOVT.
D.O.E.

DRAIN

INLET STRUCTURE

U.S. GOVT.
10 BLM

700'

517+00

SPOILS DISPOSAL
AREA

386+00

U.S. GOVT.
BLM

48" Ø PENSTOCK
PIPELINE

Option A
Powerhouse

325+00

U.S. GOVT.
BLM

PRIVATE

Option A

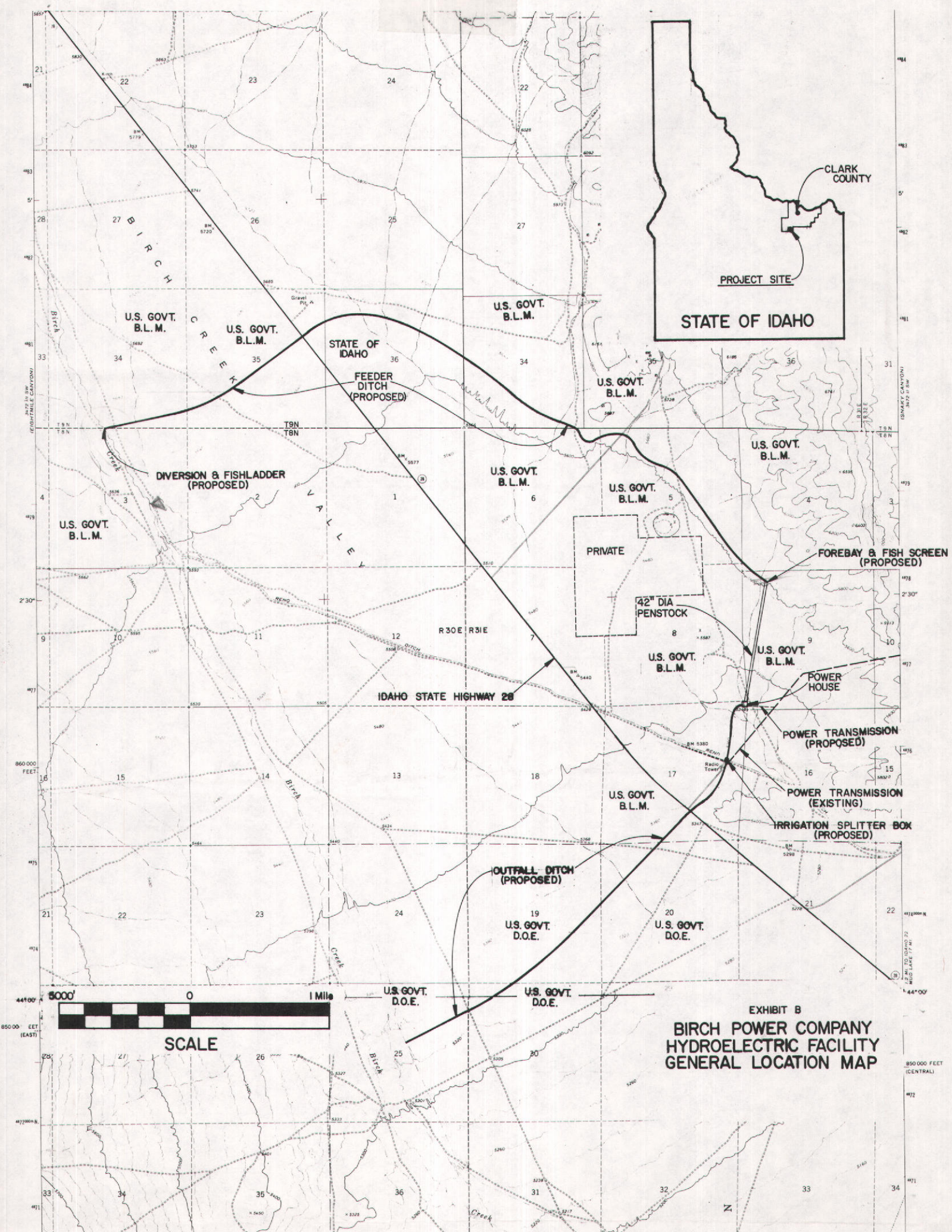
17

U.S. GOVT.
BLM

R 31 E.

30 E.

STATION
TESTING
REACTOR
AT



The REXBURG STANDARD and
The REXBURG JOURNAL
REXBURG, IDAHO

RECEIVED

FEB 9 1984

Department of Water Resources
Eastern District Office

Affidavit of Publication

STATE OF IDAHO }
County of Madison } ss.

I, Bruce Porter
being first duly sworn, depose and say,
that I am the printer of THE REXBURG

Journal, a newspaper printed and
published weekly at Rexburg, Madison
County, Idaho; and I do solemnly swear
that the

Notice Of Application

a copy of which notice appears attached
hereto, was published in the regular and
entire issue of said newspaper, and not in

any supplement issue thereof for Two
consecutive issues, the first publication hav-

ing been made on Jan. 19, 1984
and the last publication having been made

on Jan. 26, 1984

Further, that said newspaper is one of
general circulation in said county; that it
is a legal newspaper, conforming to legal
specifications under the Idaho Statutes; that
it has at least two hundred bona fide sub-
scribers living within the county of publica-
tion; and that it has been continuously and
uninterruptedly published in said county dur-
a period of seventy-eight consecutive weeks
prior to the first publication of the said not-
ice.

Subscribed to and sworn to before me

this Jan. 27, 1984

Geri Garner

Notary Public.

(SEAL)

My commission expires

Life.

NOTICE OF APPLICATION
FOR WATER RIGHT

The following application(s) have been filed
to appropriate the public waters of the State
of Idaho:

32-7136

BIRCH POWER CO.
550 LINDEN, IDAHO FALLS, ID 83401
Source: BIRCH CREEK trib. to SINKS
Date Filed: 01/03/1984
Diversion Pt: NENW Sec 03 T 08N R 30E
Use: POWER (30.00 CFS)
In: NENE Sec 17 T 08N R 31E

The permit(s) will be subject to all prior
water rights. Protests must be filed with the
Director, Dept. of Water Resources, 150
Shoup Ave., Suite 15, Idaho Falls, Idaho
83402 on or before FEBRUARY 6, 1984.

KENN DUNN
Director

Publ. Jan. 19 and 26, 1984J

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Cecil A. Thomas

Consulting Hydrologist, Civil Engineer, Land Surveyor

Idaho License No. 645

Box 868

Homedale, Idaho 83628



Six foot weir on ditch to the west below the power plant



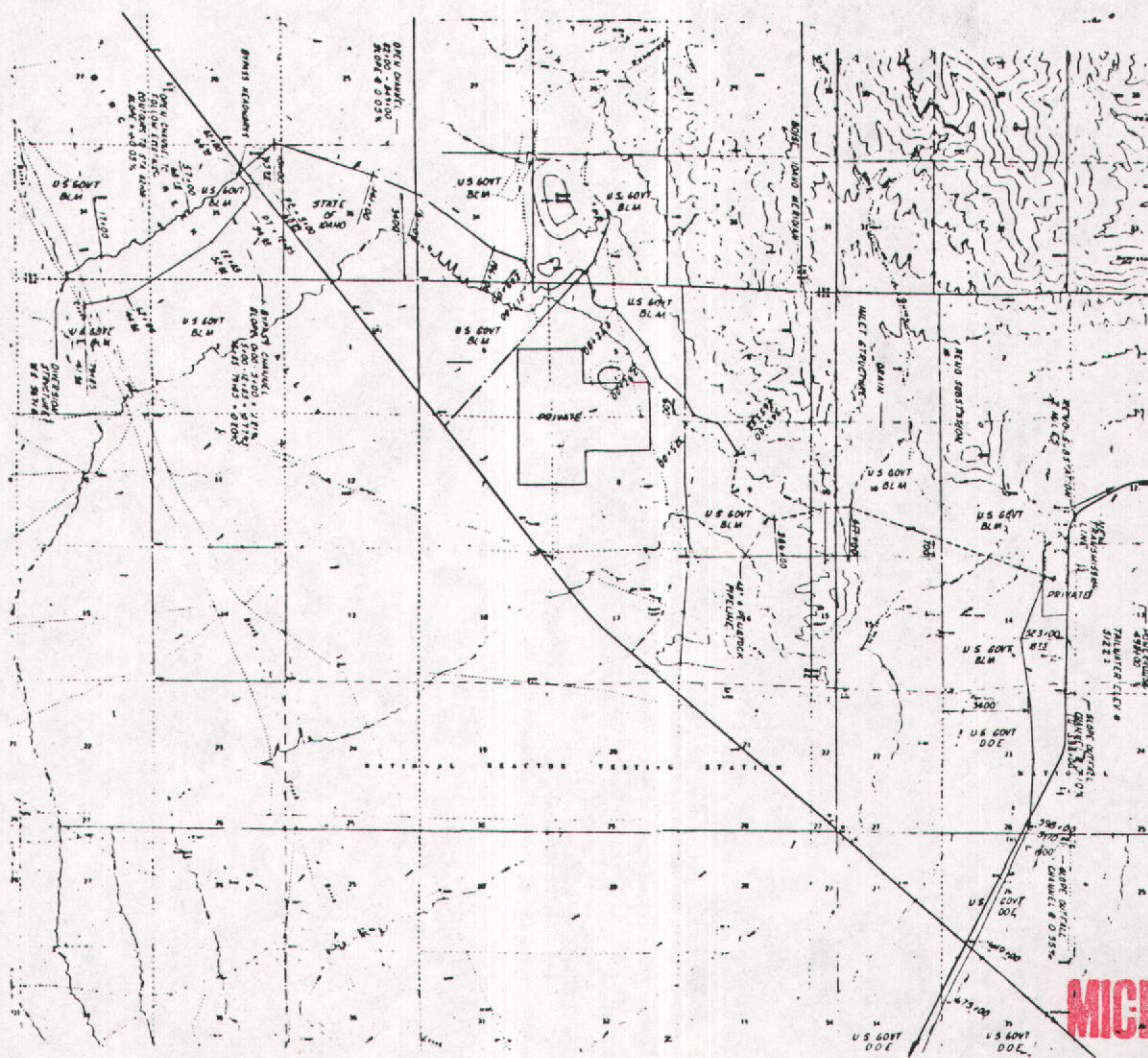
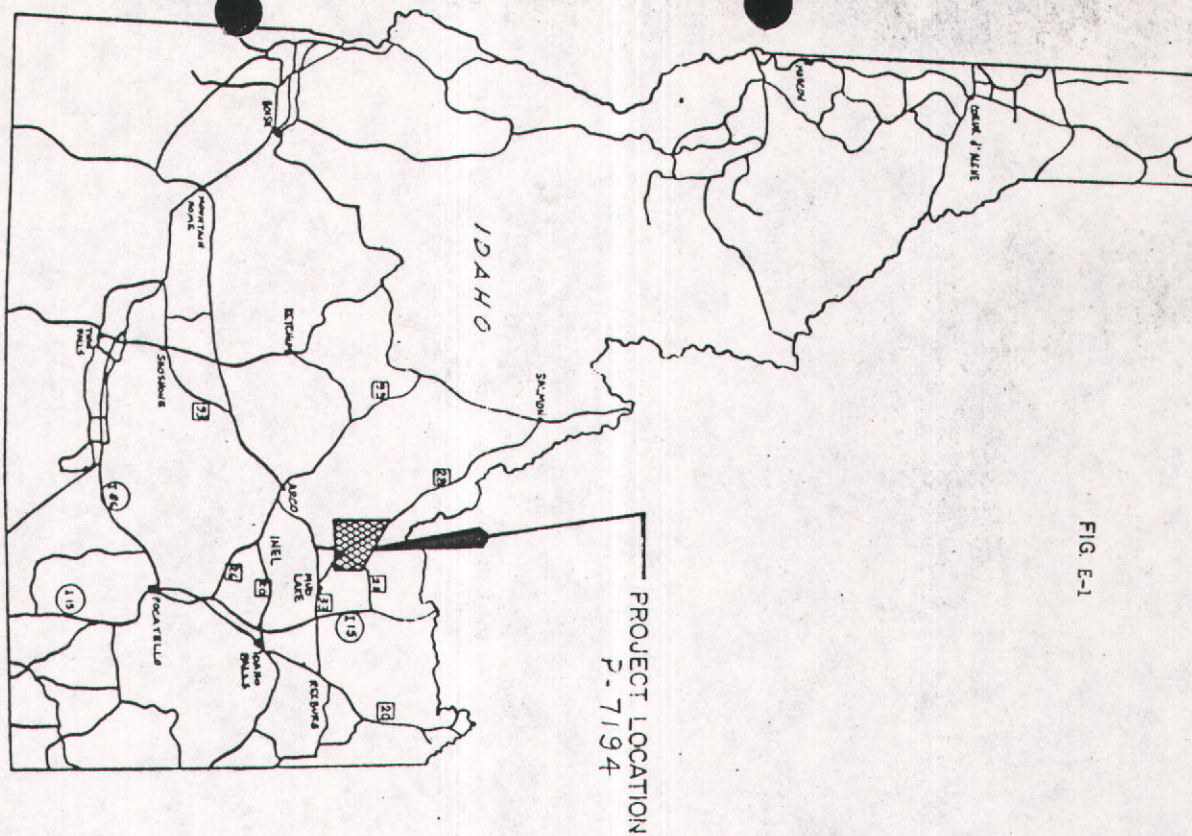
Six foot weir on ditch to the east below the power plant



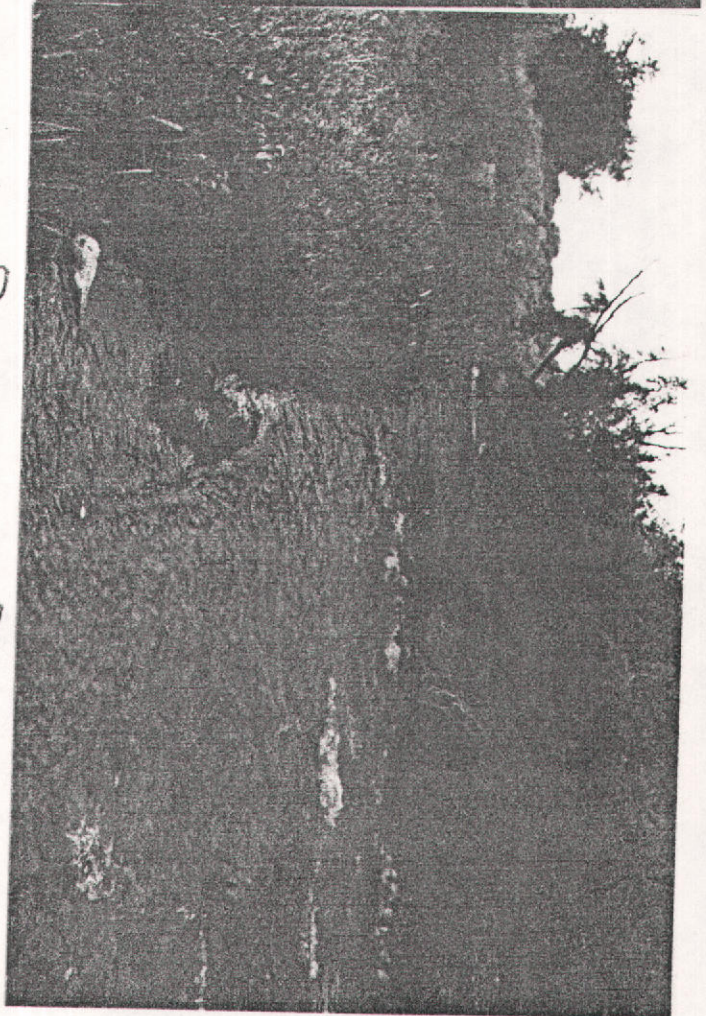
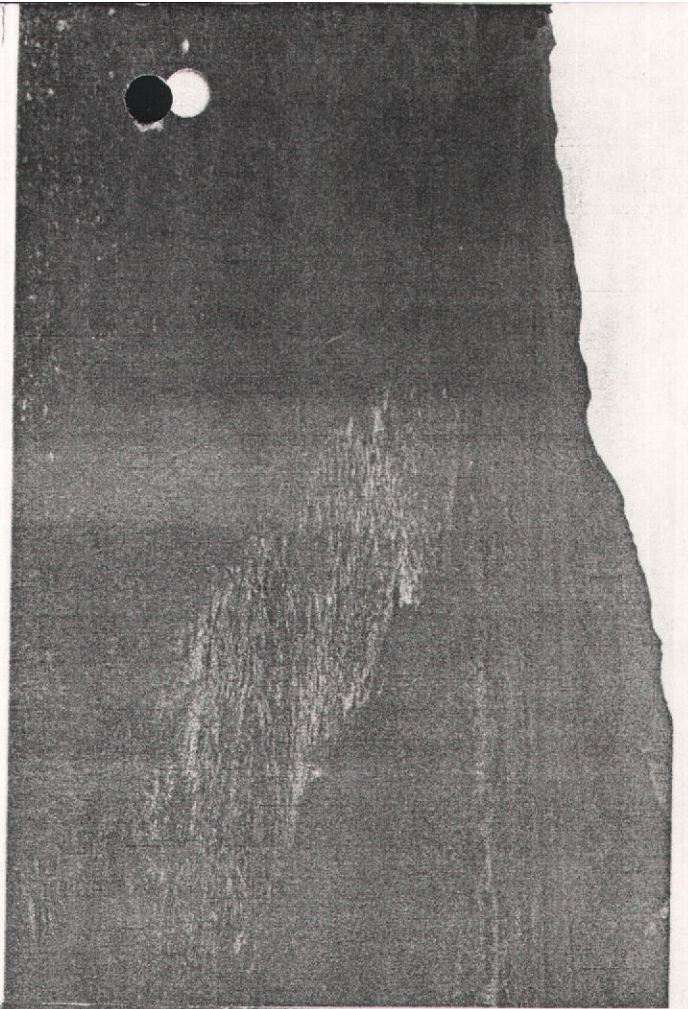
Downstream side of gate structure releasing flow to Birch Creek below the power plant diversion

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Photos of weirs on ditches below Birch Creek power plant and the diversion structure below the diversion pond.



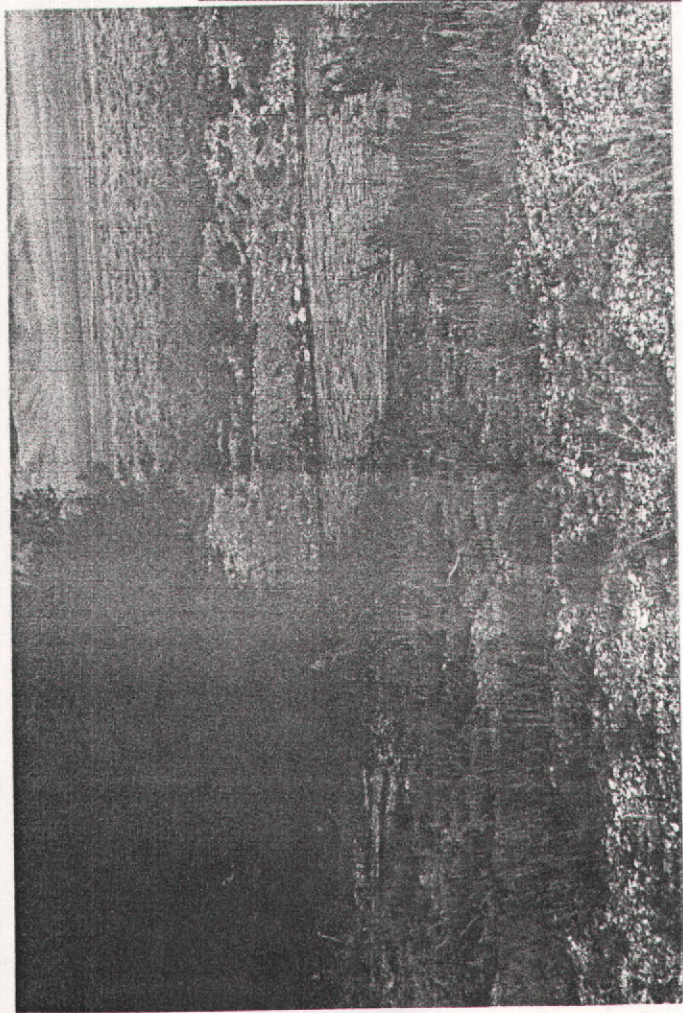
Bird Creek in Vicinity of Proposed Diversion



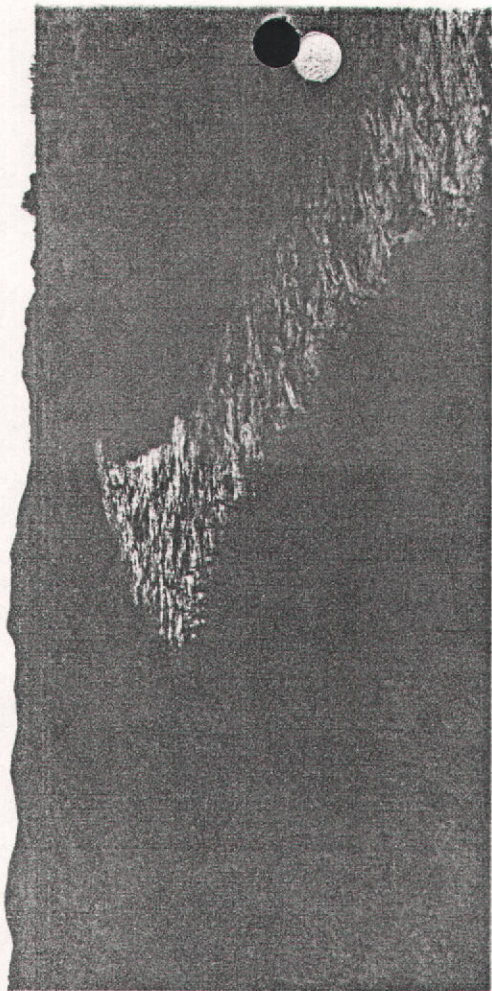
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Department of Water Administration
APPLICANT'S
Exhibit # 7
Date Admitted 4-05-84 EMC



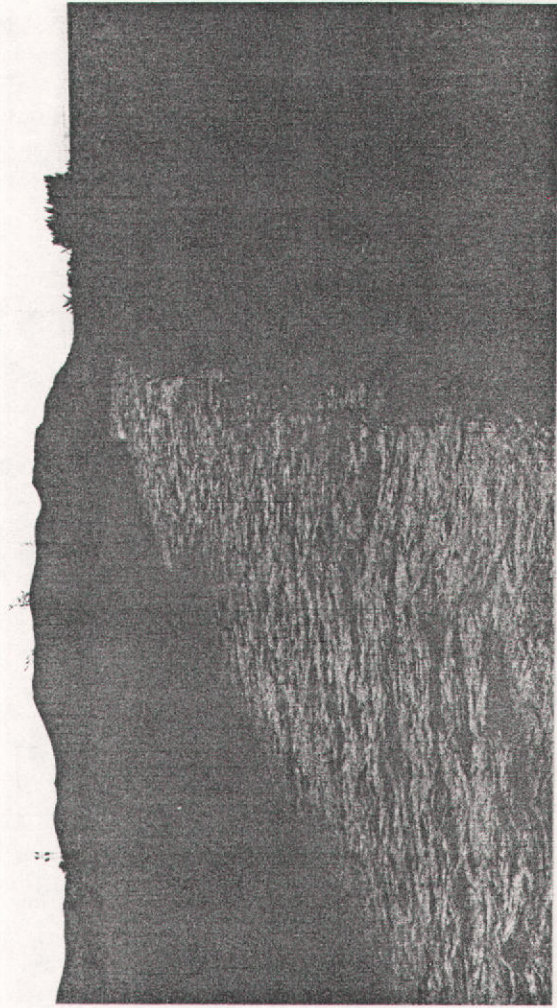
Existing Diversion



Reno Ditch

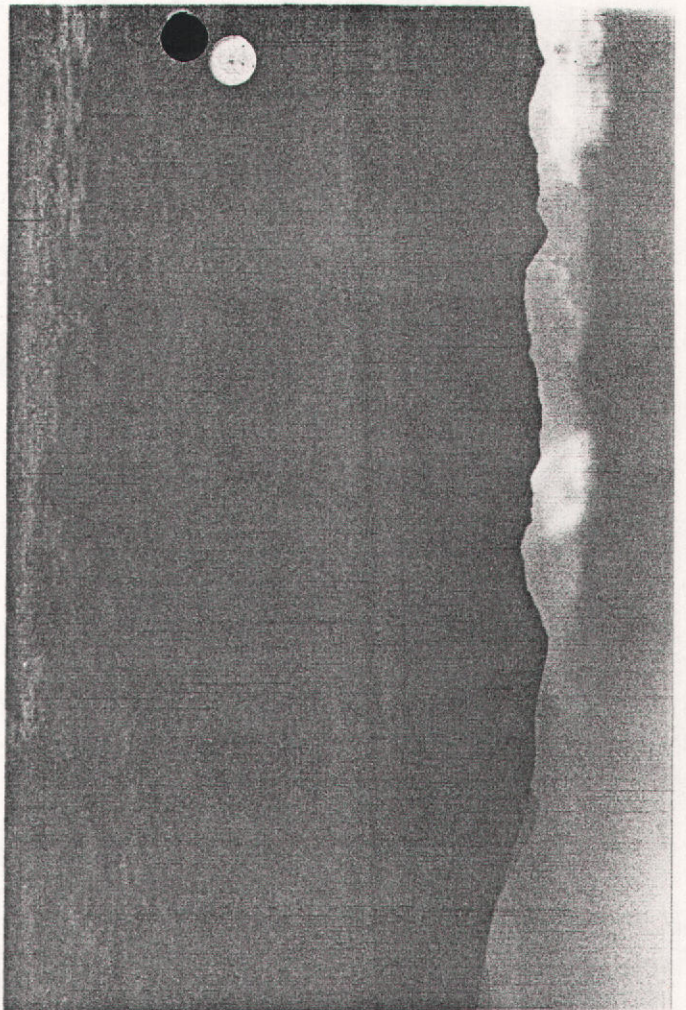
Department of Water Administration	
APPLICANT'S	
Exhibit #8	
Date Admitted	4-05-84 ENC

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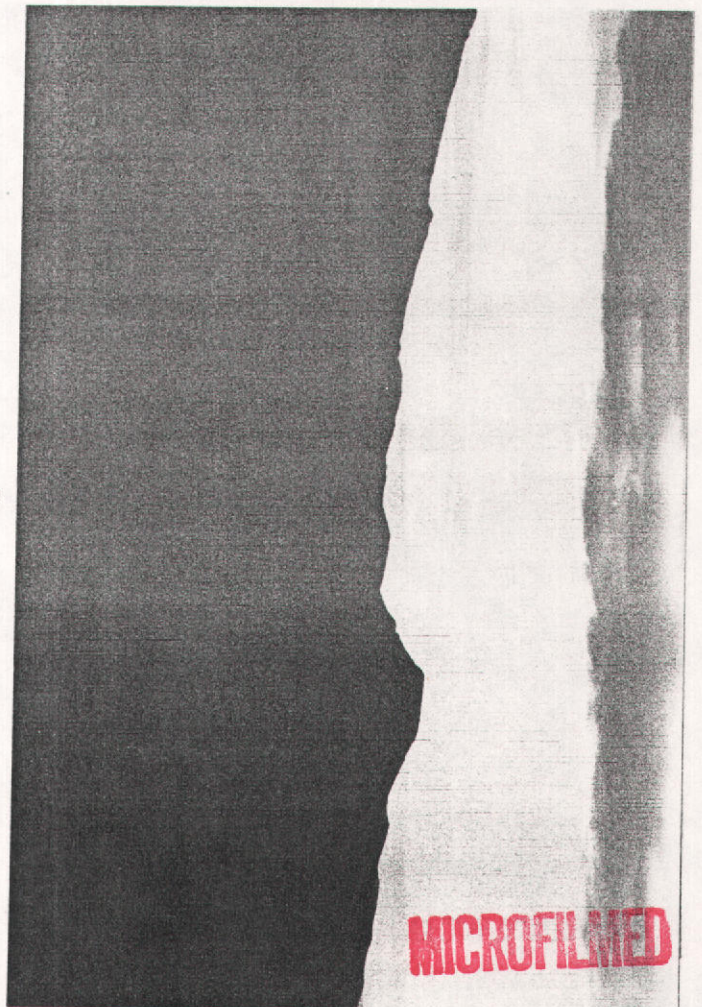


Reno Ditch

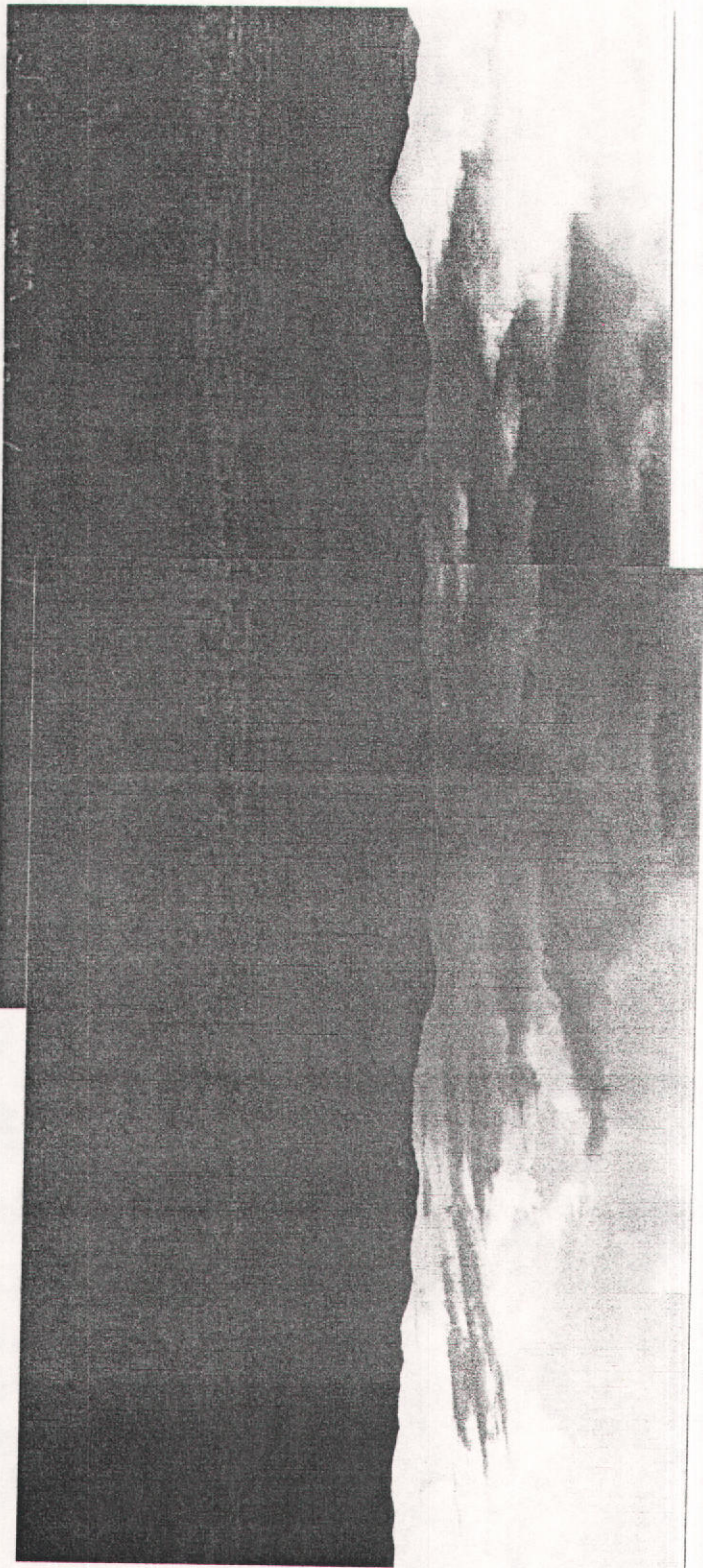
Proposed Diversion



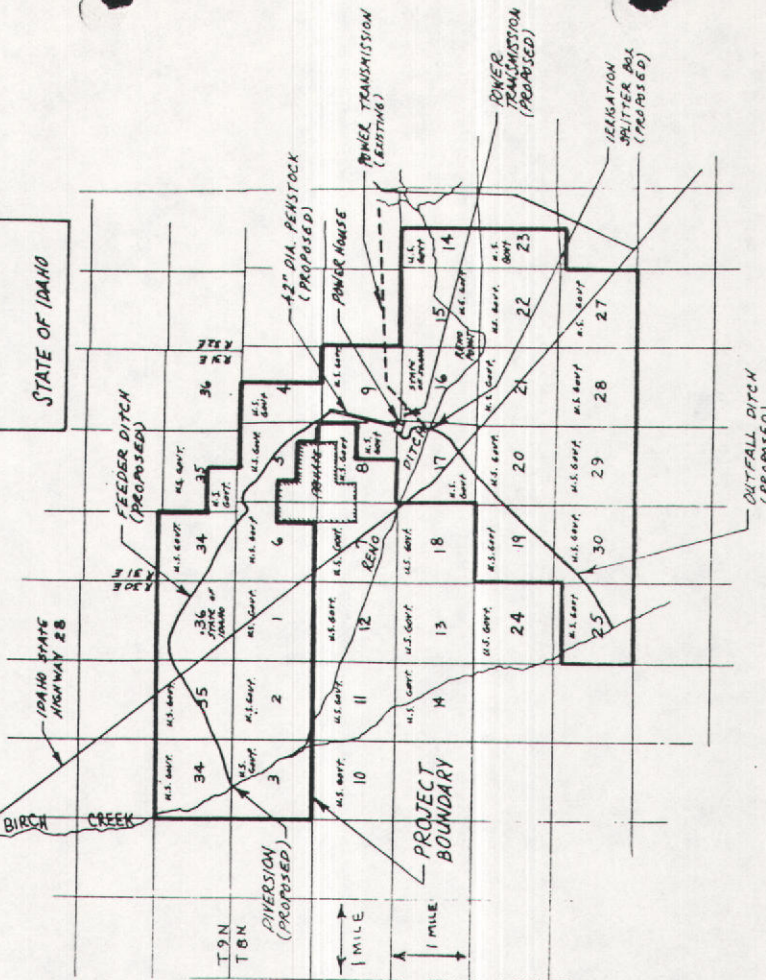
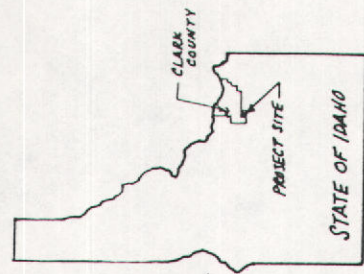
Canal Route



Canal Route



Department of Water Administration	
APPLICANT'S	
Exhibit	#9
Date Admitted	4-05-84 EMC



BIRCH POWER COMPANY
HYDROELECTRIC FACILITY

P-7194

EXHIBIT 4
SHEET 2

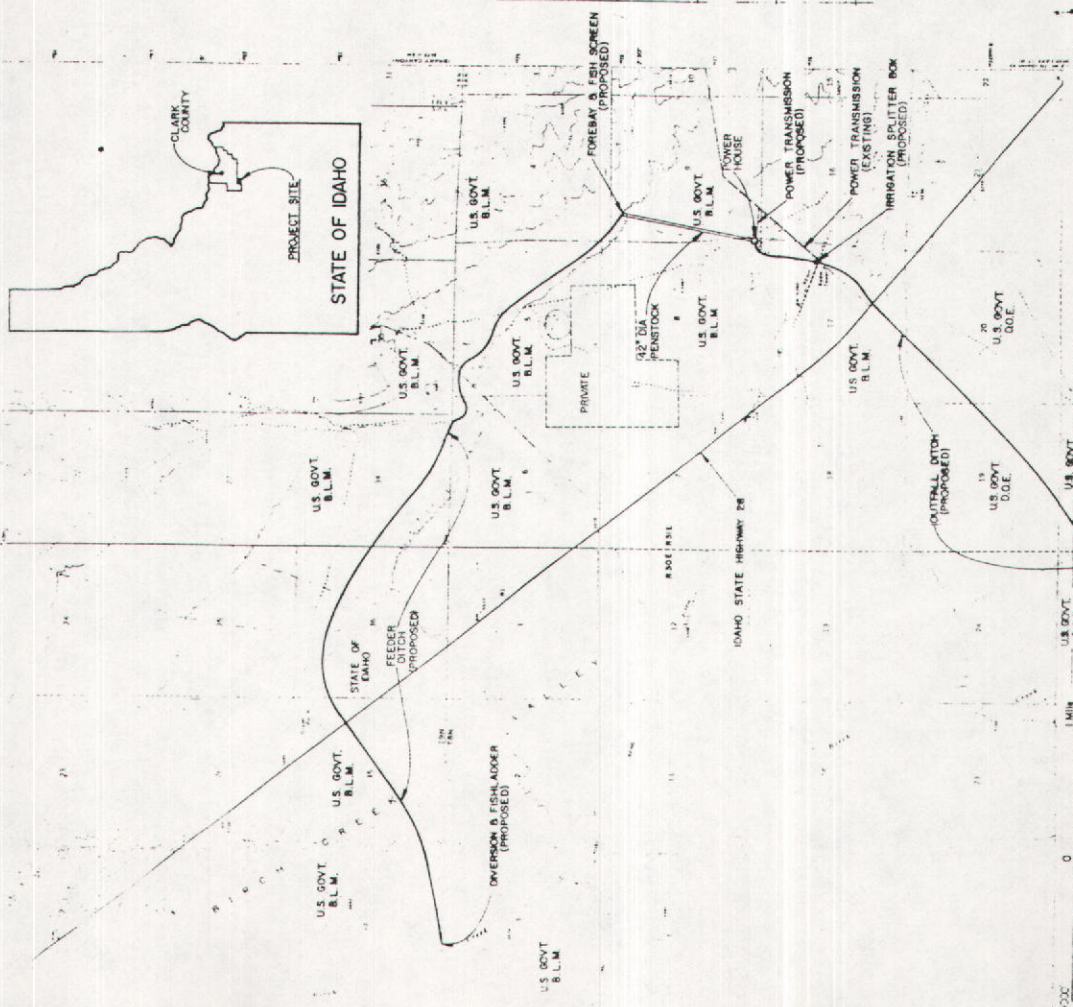


EXHIBIT 4 SHEET 1
BIRCH POWER COMPANY
HYDROELECTRIC FACILITY
GENERAL LOCATION MAP

P-7194



SCALE

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State of Idaho
Department of Water Resources
Water Right License

WATER RIGHT NO. 32-07136

Priority: January 3, 1984

Maximum Diversion Rate: 30.00 CFS
Maximum Diversion Volume: 18,500.0 AF

It is hereby certified that TED S SORENSON And/Or SORENSON ENGINEERING
5203 S 11 E
IDAHO FALLS ID 83404 have complied with the terms and
conditions of the permit, issued pursuant to Application for Permit dated January 3, 1984; and have
submitted Proof of Beneficial Use on September 22, 1989. An examination indicates that the works
have a diversion capacity of 79 cfs of water from:

SOURCE

BIRCH CREEK

Tributary: SINKS

and a water right has been established as follows:

BENEFICIAL USE

POWER

PERIOD OF USE

01/01 to 12/31

DIVERSION RATE

30.00 CFS

**ANNUAL
DIVERSION VOLUME**

18,500.0 AF

LOCATION OF POINT(S) OF DIVERSION:

BIRCH CREEK L5 SE1/4SW1/4 Sec. 34, Twp 09N, Rge 31E, B.M. CLARK 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	
08N	31E	14													
					X										

CONDITIONS OF APPROVAL

1. Use of water under this right shall be non-consumptive.
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 water right will be regulated by the watermaster of State Water District No. 32D.
4. 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 maintained near the end of the feeder ditch so that the amount of water lost in the feeder ditch can be determined.
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.

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State of Idaho
Department of Water Resources
Water Right License

WATER RIGHT NO. 32-07136

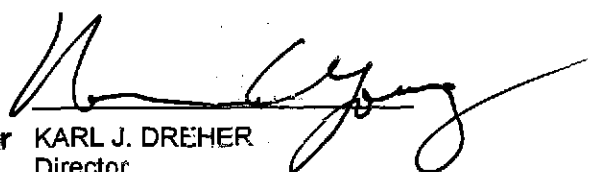
6. The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of license 7194-001 issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.
7. The right holder shall maintain the pond and irrigation system that utilizes 0.11 cfs of water, described in the BLMs Finding of No Significant Impact and Decision/Rationale, EA Number ID-030-9-46 (January 11, 1990) including but not limited to 6 to 8 ponds below the hydropower diversion that create 2.46 acres of riparian habitat.
8. If the right holder does not comply with Condition No. 7 listed above, the right holder shall build and maintain a gate in the hydropower diversion located in the NENW, S3, T8N, R30E, B.M. and shall allow 11% of the flow of Birch Creek or 5.0 cfs, whichever is smaller, to flow past the feeder canal diversion on Birch Creek, said water to remain in the natural channel of Birch Creek.
9. 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.
10. The first 1 1/2 miles of ditch must be maintained and operated in a manner that supports a fishery as described in the report entitled Feasibility of Developing a Trout Population in the Proposed Birch Creek Hydroelectric Project Feeder Ditch written by J.S. Griffith, Ph.D, and found in the official record of application for this water right.
11. Right holder shall maintain a gate in the hydropower diversion located in the NENW, S3, T8N, R30E, B.M. and shall allow 11% of the flow of Birch Creek or 5.0 cfs, whichever is smaller, to flow past the feeder canal diversion on Birch Creek, said water to remain in the natural channel of Birch Creek.
12. 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.
13. Right 32-07128 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 10th day of DECEMBER, 2001.

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Acting for 
KARL J. DREHER
Director

State of Idaho
Department of Water Resources
APPLICATION FOR AMENDMENT

(For Licensing Purposes)
WATER RIGHT NO. 32-07136

Date of Priority: January 03, 1984

Maximum Diversion Rate: 30.00 CFS

Maximum Diversion Volume: 18,500.0 AF

Comes now **TED S SORENSON** And/Or **SOORENSON ENGINEERING**
5203 S 11 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. 32-07136, and requests that the permit be changed as follows:

Source: BIRCH CREEK

Tributary: SINKS

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
POWER	01/01 to 12/31	30.00 CFS	18,500.0 AF

LOCATION OF POINT OF DIVERSION:

BIRCH CREEK L5 SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 34, Twp 09N, Rge 31E, B.M., CLARK 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	
08N 31E 14			X														

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 12 day of December, 2001.


(Signature)

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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 SWK Fee = 50⁰⁰ Received by jm # C055546 Date 8/14/2001

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. 32-07136 with the following:

CONDITIONS OF APPROVAL

1. Use of water under this right shall be non-consumptive.
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 water right will be regulated by the watermaster of State Water District No. 32D.
4. 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 maintained near the end of the feeder ditch so that the amount of water lost in the feeder ditch can be determined.
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. 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 7194-001 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.
7. The right holder shall maintain the pond and irrigation system that utilizes 0.11 cfs of public water, described in the BLMs Finding of No Significant Impact and Decision/Rationale, EA Number ID-030-9-46 (January 11, 1990) including but not limited to 6 to 8 ponds below the hydropower diversion that create 2.46 acres of riparian habitat.
8. If the right holder does not comply with Condition No. 7 listed above, the right holder shall build and maintain a gate in the hydropower diversion located in the NENW, S3, T8N, R30E, B.M. and shall allow 11% of the flow of Birch Creek or 5.0 cfs, whichever is smaller, to flow past the feeder canal diversion on Birch Creek, said water to remain in the natural channel of Birch Creek.

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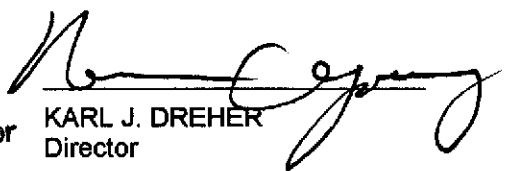
State of Idaho
Department of Water Resources
APPLICATION FOR AMENDMENT
(For Licensing Purposes)
WATER RIGHT NO. 32-07136

CONDITIONS OF APPROVAL

9. 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.
10. The first 1 1/2 miles of ditch must be maintained and operated in a manner that supports a fishery as described in the report entitled Feasibility of Developing a Trout Population in the Proposed Birch Creek Hydroelectric Project Feeder Ditch written by J.S. Griffith, Ph.D, and found in the official record of application for this water right.
11. The right holder shall maintain a gate in the hydropower diversion sufficient both to control and measure the flows through the hydropower diversion and to allow the entire flow of Birch Creek to flow through the hydropower diversion in the natural channel of Birch Creek.
12. 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.
13. Right 32-07128 is also diverted through the point of diversion described above.

Witness my hand this 10TH day of DECEMBER, 2001.

Acting for


KARL J. DREHER
Director

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DEC 12 2001

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

IN THE MATTER OF APPLICATION)
FOR AMENDMENT OF PERMIT NOS.)
32-07128 AND 32-07136 IN THE NAME)
OF TED SORENSON DBA SORENSON)
ENGINEERING)
_____)

**AMENDED
PRELIMINARY ORDER
DENYING EXCEPTIONS AND
APPROVING AMENDMENT**

FINDINGS OF FACT

1. On March 27, 1985, the Department of Water Resources ("Department") issued Permit No. 32-07128 ("permit") in the name of Birch Power Company as follows:

Source:	Birch Creek
Priority:	September 8, 1982
Rate of diversion:	45 cubic feet per second ("cfs")
Point of diversion:	NE1/4NW1/4 Section 3, T8N, R30E, B.M., Clark County
Use:	Power production
Season of use:	year-round
Place of use:	NE1/4NE1/4 Section 17, T8N, R31E, B.M.,
Conditions of approval:	Several including the requirement to leave 11% of the flow of Birch Creek or 5 cfs, whichever is smaller to flow past the feeder canal diversion and to remain in the natural channel of Birch Creek

2. On March 27, 1985, the Department also issued Permit No. 32-07136 ("permit") in the name of Birch Power Company as follows:

Source:	Birch Creek
Priority:	January 3, 1984
Rate of diversion:	30 cubic feet per second ("cfs")
Point of diversion:	NE1/4NW1/4 Section 3, T8N, R30E, B.M., Clark County
Use:	Power production
Season of use:	year-round
Place of use:	NE1/4NE1/4 Section 17, T8N, R31E, B.M.
Conditions of approval:	Several including the requirement to leave 11% of the flow of Birch Creek or 5 cfs, whichever is smaller to flow past the feeder canal diversion and to remain in the natural channel of Birch Creek.

3. On August 21, 1986, Birch Power Company assigned the permits to Ted S. Sorenson, DBA Sorenson Engineering ("permit holder").

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4. On February 15, 1989, the permit holder submitted proof of beneficial use of water to the Department together with a completed beneficial use field report for each permit.

5. On May 1, 1990, the permit holder submitted an application for amendment ("application") of each permit. The amendment proposed to remove the requirement to bypass 5 cfs or 11% of the flow of Birch Creek down the old Birch Creek channel. The application was protested by D&D Enterprises c/o George C. Peterson, Mac and Betty Wagoner c/o Breck Barton, and Elda H. Wilding c/o Jerry Rigby ("protestants"). LaVar and Louise Newman (intervenor) c/o Blair Grover were allowed to intervene in the matter. The protest of Elda H. Wilding was subsequently dismissed.

6. On May 18, 1998, a hearing officer for the Department conducted a hearing in the contested matter and on September 10, 1998 issued a Recommended Decision and Order approving the application with certain conditions.

7. On September 28, 1998, protestants LaVar Newman and D&D Enterprises filed petitions for reconsideration with the hearing officer, which petitions were denied on October 19, 1998 by the hearing officer.

8. On October 26, 1998, protestant LaVar Newman filed exceptions to the Recommended Decision and Order and on October 28, 1998, protestant D&D Enterprises also filed exceptions to the Recommended Decision and Order.

9. On January 19, 1999, the applicant, protestants and intervenor entered into a Settlement Agreement prior to the issuance of a Final Order by the Director. In the Settlement Agreement, protestants withdrew their protests based on certain stipulated actions of the various parties.

CONCLUSIONS OF LAW

1. Section 42-211, Idaho Code, authorizes the Director of the Department to approve amendments of existing permits.

2. The application will not result in the diversion of more water than originally permitted.

3. The application will not adversely affect the rights of others, if the approval is adequately conditioned.

4. The Department should approve the application with certain conditions.

ORDER

IT IS THEREFORE HEREBY ORDERED as follows:

1. Protestant LaVar Newman's Exceptions filed on October 26, 1998 to the Recommended Decision and Order are **DENIED**.
2. D&D Enterprise, Inc's Exceptions filed on October 28, 1998 to the Recommended Decision and Order are **DENIED**.

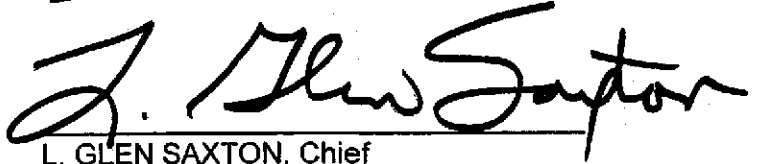
IT IF FURTHER HEREBY ORDERED that Application for Amendment of Permit Nos. 32-07128 and 32-07136 in the name of Ted S. Sorenson, DBA Sorenson Engineering is **APPROVED** subject to the following conditions:

1. Condition of Approval 4 on the original permits is rescinded.
2. A new Condition of Approval 4 shall apply to the permits as follows:
 4. The permit holder shall develop and maintain the pond and irrigation system that utilizes 0.11 cfs of water, described in the Bureau of Land Management's "Findings of No Significant Impact and Decision/Rationale," EA Number ID-030-9-46 (January 11, 1990) including but not limited to:
 - 6 to 8 ponds below the hydropower diversion that create 2.46 acres of riparian habitat.

Or, in the alternative,

3. A new Condition of Approval 14 shall apply to the permits as follows:
 14. If the permit holder does not comply with Condition of Approval 4 in this Preliminary Order, the permit holder shall forthwith build and maintain a gate in the hydropower diversion located in NE1/4NW1/4 Section 3, T8N, R30E, B.M. and shall allow 11% of the flow of Birch Creek or 5 cfs, whichever is smaller to flow past the feeder canal diversion on Birch Creek, said water to remain in the natural channel of Birch Creek.

Dated this 5th day of December, 2000.


L. GLEN SAXTON, Chief
Water Allocation Bureau

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 2000, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

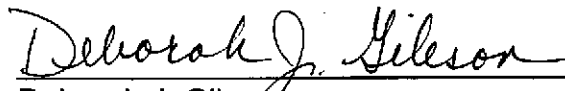
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Eastern Regional Manager
Idaho Department of Water
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900 N. Skyline Dr., Ste A
Idaho Falls, ID 83402 -1718



Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

MICROFILMED
JAN 8 2001

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

IN THE MATTER OF APPLICATION)
FOR AMENDMENT OF PERMIT NOS.)
32-07128 AND 32-07136 IN THE NAME)
OF TED SORENSON DBA SORENSON)
ENGINEERING)
_____)

**PRELIMINARY ORDER
DENYING EXCEPTIONS AND
APPROVING AMENDMENT**

FINDINGS OF FACT

1. On March 27, 1985, the Department of Water Resources ("Department") issued Permit No. 32-07128 ("permit") in the name of Birch Power Company as follows:

Source: Birch Creek
Priority: September 8, 1982
Rate of diversion: 45 cubic feet per second ("cfs")
Point of diversion: NE1/4NW1/4 Section 3, T8N, R30E, B.M., Clark County
Use: Power production
Season of use: year-round
Place of use: NE1/4NE1/4 Section 17, T8N, R31E, B.M.,
Conditions of approval: Several including the requirement to leave 11% of the flow of Birch Creek or 5 cfs, whichever is smaller to flow past the feeder canal diversion and to remain in the natural channel of Birch Creek

2. On March 27, 1985, the Department also issued Permit No. 32-07136 ("permit") in the name of Birch Power Company as follows:

Source: Birch Creek
Priority: January 3, 1984
Rate of diversion: 30 cubic feet per second ("cfs")
Point of diversion: NE1/4NW1/4 Section 3, T8N, R30E, B.M., Clark County
Use: Power production
Season of use: year-round
Place of use: NE1/4NE1/4 Section 17, T8N, R31E, B.M.
Conditions of approval: Several including the requirement to leave 11% of the flow of Birch Creek or 5 cfs, whichever is smaller to flow past the feeder canal diversion and to remain in the natural channel of Birch Creek.

3. On August 21, 1986, Birch Power Company assigned the permits to Ted S. Sorenson, DBA Sorenson Engineering ("permit holder").

4. On February 15, 1989, the permit holder submitted proof of beneficial use of water to the Department together with a completed beneficial use field report for each permit.

5. On May 1, 1990, the permit holder submitted an application for amendment ("application") of each permit. The amendment proposed to remove the requirement to bypass 5 cfs or 11% of the flow of Birch Creek down the old Birch Creek channel. The application was protested by D&D Enterprises c/o George C. Peterson, Mac and Betty Wagoner c/o Breck Barton, and Elda H. Wilding c/o Jerry Rigby ("protestants"). LaVar and Louise Newman (intervenor) c/o Blair Grover were allowed to intervene in the matter. The protest of Elda H. Wilding was subsequently dismissed.

6. On May 18, 1998, a hearing officer for the Department conducted a hearing in the contested matter and on September 10, 1998 issued a Recommended Decision and Order approving the application with certain conditions.

7. On September 28, 1998, protestants LaVar Newman and D&D Enterprises filed petitions for reconsideration with the hearing officer, which petitions were denied on October 19, 1998 by the hearing officer.

8. On October 26, 1998, protestant LaVar Newman filed exceptions to the Recommended Decision and Order and on October 28, 1998, protestant D&D Enterprises also filed exceptions to the Recommended Decision and Order.

9. On January 19, 1999, the applicant, protestants and intervenor entered into a Settlement Agreement prior to the issuance of a Final Order by the Director. In the Settlement Agreement, protestants withdrew their protests based on certain stipulated actions of the various parties.

CONCLUSIONS OF LAW

1. Section 42-211, Idaho Code, authorizes the Director of the Department to approve amendments of existing permits.

2. The application will not result in the diversion of more water than originally permitted.

3. The application will not adversely affect the rights of others, if the approval is adequately conditioned.

4. The Department should approve the application with certain conditions.

ORDER

IT IS THEREFORE HEREBY ORDERED as follows:

1. Protestant LaVar Newman's Exceptions filed on October 28, 1998 to the Recommended Decision and Order are **DENIED**.
2. D&D Enterprise, Inc's Exceptions filed on October 28, 1998 to the Recommended Decision and Order are **DENIED**.

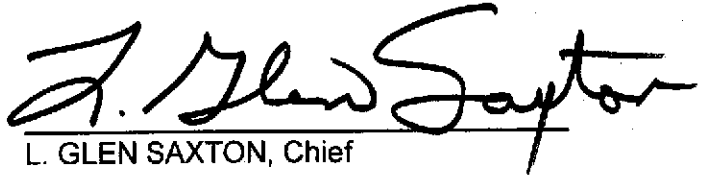
IT IF FURTHER HEREBY ORDERED that Application for Amendment of Permit Nos. 32-07128 and 32-07136 in the name of Ted S. Sorenson, DBA Sorenson Engineering is **APPROVED** subject to the following conditions:

1. Condition of Approval 4 on the original permits is rescinded.
2. A new Condition of Approval 4 shall apply to the permits as follows:
 4. The permit holder shall develop and maintain the pond and irrigation system that utilizes 0.11 cfs of water, described in the Bureau of Land Management's "Findings of No significant Impact and Decision/Rationale," EA Number ID-030-9-46 (January 11, 1990) including but not limited to:
 - 6 to 8 ponds below the hydropower diversion that create 2 acres of riparian habitat, and
 - A 1000 foot drip irrigation system that supports 0.46 acres of riparian habitat.

Or, in the alternative,

3. A new Condition of Approval 14 shall apply to the permits as follows:
 14. If the permit holder does not comply with Condition of Approval 4 in this Preliminary Order, the permit holder shall forthwith build and maintain a gate in the hydropower diversion located in NE1/4NW1/4 Section 3, T8N, R30E, B.M. and shall allow 11% of the flow of Birch Creek or 5 cfs, whichever is smaller to flow past the feeder canal diversion on Birch Creek, said water to remain in the natural channel of Birch Creek.

Dated this 3rd day of November, 2000.


L. GLEN SAXTON, Chief
Water Allocation Bureau

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of November, 2000, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

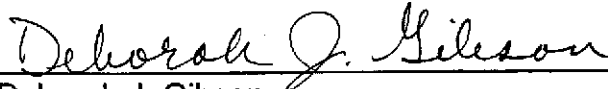
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Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

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DEC 12 2001
JAN 08 2001

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

IN THE MATTER OF THE APPLICATION FOR)
AMENDMENT OF WATER RIGHT PERMITS)
NOS. 32-07128 AND 32-07136 IN THE NAME)
OF TED SORENSON d/b/a SORENSON)
ENGINEERING)
_____)

**ORDER ON PETITIONS
FOR RECONSIDERATION**

INTRODUCTION

Protestants Lavar Newman and D&D Enterprises, Inc. on September 28, 1998, filed with the Idaho Department of Water Resources ("IDWR") *Petitions for Reconsideration* of IDWR's *Recommended Decision and Order* dated September 10, 1998. Both parties argue substantially the same position—that the decision in this matter should be withdrawn pending IDWR's decision regarding Application for Permit No. 32-07252.

DISCUSSION

This matter comes before the IDWR on an Application for Amendment of a Permit filed by Ted S. Sorenson d/b/a Sorenson Engineering concerning Permits to Appropriate the Public Waters of the State of Idaho Nos. 32-7128 and 32-7136 (the "Applications"). The Applications were considered by IDWR pursuant to the standards in I.C. § 42-211.

IDWR consolidated its proceedings on the Applications with its determination of Application for Permit No. 32-07252 because they both "related to appropriation of water allegedly saved by the development of the Applicant's hydropower facility." *Prehearing Order* dated February 10, 1998. Application for Permit No. 32-07252, however, will be

ORDER ON PETITIONS FOR RECONSIDERATION

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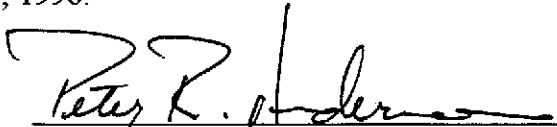
determined by IDWR pursuant to the standards in I. C. § 42-203A(5), which are distinct from the standards set forth in I.C. § 42-211 and which do not completely overlap.

Because of these distinct statutory standards, these matters must be determined by IDWR separately, even if the factual record upon which each is determined is consolidated. The parties have provided a factual record that demonstrates that uncontested facts exist in this matter upon which IDWR may properly issue the *Recommended Decision and Order*. The parties should determine whether they wish to challenge the *Recommended Decision and Order* based upon the applicable statutory standard and the factual record, and not based upon their reaction to a separate decision that will be issued in the future on a different statutory standard.

ORDER

Based upon the foregoing discussion, the Petitions for Reconsideration are DENIED.

DATED this 19th day of October, 1998.



PETER R. ANDERSON
Deputy Attorney General
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of October, 1998, I mailed a true and correct copy of the foregoing **ORDER ON PETITIONS FOR RECONSIDERATION** on the following persons listed below by U.S. mail, postage prepaid and addressed as follows:

Norman C. Young
Idaho Dept. of Water Resources
1301 N. Orchard Street
Boise, ID 83706

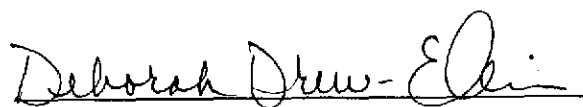
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Deborah Drew-Ellis
Legal Secretary

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

IN THE MATTER OF THE APPLICATION FOR)
AMENDMENT OF WATER RIGHT PERMITS)
NOS. 32-07128 AND 32-07136 IN THE NAME)
OF TED SORENSON d/b/a SORENSON)
ENGINEERING)
_____)

**RECOMMENDED DECISION
AND ORDER**

STANDARD FOR DECISION

This matter comes before the Idaho Department of Water Resources ("IDWR") on an *Application for Amendment of a Permit* filed by Ted S. Sorenson d/b/a Sorenson Engineering concerning *Permits to Appropriate the Public Waters of the State of Idaho* Nos. 32-7128 and 32-7136 (the "Application"). The Application is filed pursuant to I.C. § 42-211, which provides, in part, that:

Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, he shall file an application for amendment upon forms to be furnished by the department of water resources together with the statutory fee for filing and recording same, and upon receipt thereof it shall be the duty of the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application and return an approved copy to the permit holder. The director of the department of water resources shall give such notice to other affected water users as he deems appropriate and may grant the amendment, in whole or in part or upon conditions, or may deny same. Notice of partial approval or conditions or denial of an amendment shall be forwarded to the applicant by certified mail and shall be subject to judicial review as hereafter provided. The priority of the right

established pursuant to a permit which has been amended under these provisions shall date from the date of the original application for permit, provided the permit holder has complied with other provisions of this act.

(Emphasis added).

IDWR may resolve this case based upon written evidence pursuant to Idaho Code § 67-5241, which provides, in part, that:

- (1) *Unless prohibited by other provisions of law:*
 - (b) *any part of the evidence in a contested case may be received in written form if doing so will expedite the case without substantially prejudicing the interests of any party;*

All parties to this action have submitted motions for summary judgment requesting that this case may be decided upon undisputed evidence shown by the written record.

The Idaho Department of Water Resources (IDWR), having examined the Application and the written record, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Evidence Considered.

1. IDWR considered the following evidence in making the substantive findings of facts:

- Water Right Permit No. 32-07128.
- Water Right Permit No. 32-07136.
- The Application, with attachments.

- The hearing transcript from the April 5, 1984, hearing on Applications for Permit Nos. 32-07128 and 32-07136.
- The exhibits introduced at the April 5, 1984, hearing on Applications for Permit Nos. 32-07128 and 32-07136.
- The record and decision in D & D Enterprises, Inc. v. Dunn, 7th Judicial District, Bonneville County Case No. 33072, the appeal regarding Applications for Permit Nos. 32-07128 and 32-07136.
- *Finding of No Significant Impact and Decision/Rationale*, EA Number ID-030-9-46 (January 11, 1990). The first page of this document was attached to the Affidavits of Ted S. Sorenson, described below. The entire document is contained in the files of Permit Nos. 32-07128 and 32-07136 with IDWR and IDWR takes official notice of it.
- The tapes of the telephonic hearing held on May 4, 1998, and the hearing on May 18, 1998.
- Affidavit of Blair Grover dated April 14, 1998.
- Affidavit of Ted S. Sorenson in Support of Motion for Summary Judgment and in Opposition to Protestants' Motions dated April 27, 1998.
- Affidavit of C.E. Brockway in Support of Motion for Summary Judgment and in Opposition to Protestants' Motion dated April 27, 1998.

- Amended Affidavit of Ted S. Sorenson in Support of Motion for Summary Judgment and in Opposition to Protestants' Motions dated May 8, 1998.
- Amended Affidavit of C.E. Brockway in Support of Motion for Summary Judgment and in Opposition to Protestants' Motion dated May 11, 1998.
- Affidavit of James DeMourdaunt dated May 15, 1998.
- Affidavit of Lavar Newman in Opposition to Applicant's Motion for Summary Judgment dated May 15, 1998.

II. Physical Setting.

2. Birch Creek is a small, shallow, fast-moving stream that flows in a southeasterly direction from Gilmore Summit through Birch Creek Valley, between the Lemhi Mountains to the West and the continental divide to the East. The stream flows adjacent to State Highway 28 for several miles between low foothill bluffs. At the south end of the valley the Creek at one time flowed out onto the northern Snake River Plain into what is called the Sinks. There the Creek disappeared into the ground and the water entered the Snake River Plain aquifer.
3. The Birch Creek Valley has been used for farming and ranching for more than a century. The water of Birch Creek being used to irrigate lands that lie in close proximity to the Creek. Cattle drink from the Creek from the northern end of the valley south to the area of the sinks. Birch Creek is also 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. Historically, during most

of the year all of the water of Birch Creek has been diverted for irrigation and stock water purposes into a ditch know as the "old Reno Ditch" before it flowed into the Sinks.

4. The riparian ecosystem along lower Birch Creek consists of riparian shrub habitat, including willows, birch, woods rose, and current, with shrubs, grasses and forbs; low sagebrush habitat, including low sagebrush and Wyoming big sagebrush, with grasses and upland species; and herbaceous riparian habitat, including grasses, sedges, rushes, and bluegrass. Species that utilize the Birch Creek riparian habitat include: mallards, black-crowned night herons, belted kingfishers, pronghorn antelope, sage grouse, and mourning dove.

III. The Hydropower Permits

5. Water Right Permit No. 32-7128 issued to Birch Power Company on March 27, 1985, for 45 cfs of water from Birch Creek for power production. The priority date of permit no. 32-7128 is September 8, 1982. This permit was subsequently assigned to Ted S. Sorenson d/b/a Sorenson Engineering.
6. Water Right Permit No. 32-7136 issued to Birch Power Company on March 27, 1985, for 30 cfs of water from Birch Creek for power production. The priority date of permit no. 32-7136 is January 3, 1984. This permit was subsequently assigned to Ted S. Sorenson d/b/a Sorenson Engineering.
7. Water Right Permits No. 32-7128 and 32-7136 (the "Permits") were issued for a hydropower project that would divert virtually all of Birch Creek into a power

canal, or "feeder ditch," approximately one mile north of the diversion point of the old Reno Ditch that historically diverted all of Birch Creek.

8. The hydropower project runs water through the canal approximately six miles, until it passes through the turbines at the Applicant's hydropower plant. Below the plant the water can be directed to the water users who previously used the old Reno Ditch or directed back into the Birch Creek Sinks. The stretch of Birch Creek between the new power diversion downstream to the old Reno Ditch has been de-watered by the project, subject to the conditions that are the subject of this Decision.
9. The power canal trends to the east/southeast from the hydropower diversion on Birch Creek. Approximately the first mile of the canal has the appearance of a natural stream. It is lined with willows, shrubs and grass. Rather than flowing in a straight line the ditch is constructed with meanders and other structures to create fish habitat.
10. Protests were filed to the original application for Permit No. 32-7128 by the United States, Department of the Interior, Bureau of Land Management; Idaho Department of Fish and Game; C. A. Wagoner; William Simmons; and Ben Wilding. D&D Enterprises, Inc. ("D&D") intervened and filed a protest.
11. Protests were filed to the original application for Permit No. 32-7136 by the United States, Department of the Interior, Bureau of Land Management; Idaho Department of Fish and Game; and the watermaster of Water District 32-D, Ben Wilding.

12. The protests to the permit applications were heard at a combined hearing on April 5, 1984. IDWR issued its decision on March 26, 1985. *In the Matter of Applications for Permit Nos. 32-7128 and 32-7136 In the Name of Birch Power Company*, Modified Memorandum Decision and Order (March 27, 1985)(the "Permit Decision").

13. IDWR made the following findings of fact in the Permit Decision:

15) *Existing 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.*

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Permit Decision at 7-8.

14. IDWR reached the following conclusions of law in the Permit Decision:

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).*

* * *

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.*

* * *

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.*

* * *

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.*

Permit Decision at 8-9.

15. Based upon these findings and conclusions both permit no 32-7128 and 32-7136 were conditioned by IDWR as follows:

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.*

Permit Decision at 10.

16. Of the protestants to the original permit applications, only D&D Enterprises, Inc. ("D&D") appealed the Permit Decision to district court. *D&D Enterprises, Inc. v. Dunn*, Bonneville County Case No. 33072. D&D appealed condition 4, which required the Applicant to bypass a portion of the water saved by the hydropower project past the Applicant's diversion structure (the "bypass flow"). D&D argued that "any water which is saved from loss by seepage through the use of a new channel should be made available to fill the decreed water rights of the irrigators of Birch Creek." Appellant's Brief at 7. The district court rejected D&D's argument and upheld IDWR's decision. *Memorandum Decision* and *Memorandum Decision Addendum, D&D Enterprises, Inc. v. Dunn*, Bonneville County Case No. 33072 (June 26, 1986 and October 8, 1986). The district court stated:

Thus Birch Power saves the water - - by permit the Director allows the water to be used for power purposes - - this appropriation to power use is an appropriation in trust - - the public is the beneficiary of the trust. Birch Power becomes the vehicle through whom the appropriated water traverses from the D&D to the public.

Memorandum Decision Addendum, at 5 (emphasis added).

17. The purpose of the bypass flow requirement was to protect the riparian habitat along Birch Creek below the hydropower diversion and to protect livestock watering rights out of Birch Creek below the hydropower diversion. This bypassed flow was to remain in the natural channel of Birch Creek.
18. The interaction of Conditions 4 and 5 in the Permits provided that the bypass flow would be the lesser of 11% of the flow in Birch Creek or 5 cfs. The Permits allowed the Applicant to divert a maximum of 75 cfs at the hydropower diversion after the necessary flows were bypassed. The Applicant was given no permit to divert more than 75 cfs, whether or not the Applicant complied with the bypass flow conditions.
19. The Applicant bypassed up to 5 cfs after receiving the Permits as required by the bypass flow conditions, but has not consistently complied with these conditions and is not currently in compliance with the bypass flow conditions. When 5 cfs has been bypassed through the hydropower diversion the water flowed in the stream channel for approximately 1400-2600 feet before it percolated into the substrate fan. This bypass flow would maintain only about 1.64 acres of riparian habitat.

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IV. The Pond Proposal.

20. As an alternative to the bypass flow the Applicant proposed and developed a pond, trough and irrigation system that utilizes 0.11 cfs of water, described in the Bureau of Land Management's *Finding of No Significant Impact and Decision/Rationale*, EA Number ID-030-9-46 (January 11, 1990) (the "pond proposal"), including but not limited to:

- 6 to 8 ponds below the hydropower diversion that create 2 acres of riparian habitat developed with 6,000 feet of buried water pipeline.
- A 1,000 foot drip irrigation system that supports 0.46 acres of riparian habitat.
- 1.25 miles of livestock fencing.
- One livestock watering facility.

21. The pond proposal has been accepted as an acceptable replacement for the riparian habitat lost along Birch Creek resulting from the development of the hydropower diversion by the Federal Energy Regulatory Commission: *Order Modifying Minimum Flow Required by Article 404, Approving Riparian Habitat Mitigation Plan and Deleting Article 405*, Project No. 7194-009 (June 15, 1990); the United States Department of the Interior, Bureau of Land Management: *Finding of No Significant Impact and Decision/Rationale*, EA Number ID-030-9-46 (January 11, 1990); and the State of Idaho Department of Fish and Game: *Letter from Tracey*

JAN 08 2001

Trent, Chief, Bureau of Program Coordination, Idaho Fish & Game (March 12, 1990).

22. The pond proposal supports 2.46 acres of riparian habitat, compared with the 1.64 acres of riparian habitat supported by the bypass flow conditions in the Permits.

V. The Application for the Pond Proposal.

23. On May 1, 1990 IDWR received the *Application for Amendment of a Permit* filed by Ted S. Sorenson d/b/a Sorenson Engineering concerning *Permits to Appropriate the Public Waters of the State of Idaho Nos. 32-7128 and 32-7136* (the "Application"). The Application requested a change in water right permit nos. 32-7128 and 32-7136 as follows:

Permittee requests removal of the condition of approval of Permits Nos. 32-7128 and 32-7136 requiring a bypass of 5 cfs or 11% of the stream flow. The enclosed letter from Idaho Department of Fish and Game and the letter with attached environmental assessment and decision from the United States Bureau of Land Management explain the agreement which has been reached between Mr. Sorenson and such agencies and describe the proposed alternative minimum stream flow mitigation plan as well.

24. The Application was published in the Idaho Falls Post Register for two consecutive weeks, from August 16 to August 23, 1990. The Application was published in the Twin Falls Times-News for two consecutive weeks, from August 2 to August 9, 1990. Four protests were filed with IDWR, but several of them were subsequently withdrawn.

25. D & D Enterprises, Inc filed a protest to the Application with IDWR on August 31, 1990, listing 10 specific arguments, generally alleging that:
- a. The Application would be detrimental to other water users of Birch Creek;
 - b. The Applicant has not demonstrated the feasibility or the wherewithal to construct and maintain the pond development that was proposed to replace the bypass flow condition;
 - c. The permit should be conditioned on the application of the previously bypassed water to fill decreed, but unsatisfied, water rights;
 - d. The Application does not provide adequate guidance or measuring devices to administer the proposed pond development; and
 - e. The Application does not compare present maintenance flows with the amount required under the proposed pond development.
26. Elda H. Wilding filed a protest to the Application with IDWR on August 31, 1990, which was consistent with the protest filed by D & D Enterprises. On April 29, 1997, attorney Jerry R. Rigby informed IDWR that the interests of the Wildings had been conveyed to LaVar and Louise Newman. The protest of Elda H. Wilding was dismissed on May 23, 1997.
27. On May 16, 1997, Lavar and Louise Newman filed the *Motion of Lavar Newman and Louise Newman, His Wife, to Intervene*. This Motion was granted in the *Order Granting Intervention to Lavar and Louise Newman* issued on June 19,

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1997. The Newmans participated pursuant to the *Protest of Elda H. Wilding* filed on August 31, 1990. The Newmans are successors-in-interest to Ben and Elda Wilding.
28. Woodie Land and Livestock filed a protest to the Application with IDWR on August 31, 1990, stating "Consideration of stock water." Woodie Land and Livestock subsequently withdrew its protest on July 7, 1991.
29. Mac and Betty Wagoner filed a protest to the Application with IDWR on September 4, 1990, alleging "that the amendment of said water rights to provide 5 cfs or 11 percent of the flow of Birch Creek may constitute an enlargement of use of said water right and may result in harm to Mac and Betty Wagoner." The Wagoners did not participate in this matter or pursue their protest pursuant to a Memorandum of Agreement entered into by them with the Applicant in *Sorenson et. al. v. Wagoner*, Seventh Judicial District Court, Clark County Case No. 2-462.
30. A motion for summary judgment dated August 12, 1997, under the caption of the Application, was filed by the Newmans with IDWR. A review of that Motion reveals that the caption was a mistake, and the Motion relates to a related transfer application filed by the Applicant. The Motion does not relate to this Application.
31. A pre-hearing conference on Application was conducted on September 10, 1997. As a result of the pre-hearing conference this matter was stayed on November 10, 1997, to provide for mediation between the parties. Subsequently, the mediator reported to IDWR that the mediation was not successful. A *Pre-Hearing Order*

was issued on February 10, 1998, and an *Amended Pre-Hearing Order* was issued April 15th, 1998. Pursuant to that Order, timely Motions for Summary Judgment were filed by the Newmans and D&D Enterprises, with supporting affidavits. Protestant Newman's Motion for Summary Judgment dealt with the ownership of saved water. It did not raise the specific issues related to approval or disapproval of the Applications. Likewise, the Motion By Protestant D&D Enterprises, Inc. for Summary Judgment related to the "rights" in any saved water or the priority date to be assigned such rights, if any, in a consolidated matter. A telephonic hearing on these motions was held on May 4, 1998, with all parties appearing through counsel.

32. The Applicant filed a Cross-Motion for Summary Judgment dated April 28, 1998. Rather than striking the Cross-Motion, IDWR issued a *Second Amended Prehearing Order* allowing the Protestants an opportunity to file responses to the Applicant's Cross-Motion. Based upon the *Memorandum in Support of Applicant's Motion for Summary Judgment and in Opposition to Protestants' Motions for Summary Judgment*, the Applicant is apparently arguing that reduction in the bypass requirement in the Permits should be granted to the Applicant to use for irrigation. A hearing was held on May 18, 1998, on the Cross-Motion, with all parties appearing through counsel. No party raised any disputed facts, other than questions regarding ownership of the bypass flows.

33. Any Conclusion of Law which is deemed to be a Finding of Fact is adopted as a Finding of Fact. From these Findings of Fact, IDWR comes to these

CONCLUSIONS OF LAW

1. Findings of fact 1 – 33 are undisputed.
2. The Application will not result in the diversion and use of more water than originally permitted. The original bypass flow conditions established a base line that determined when water was available to the Applicant for the hydropower use, based upon the local public interest. At all times under the Permits the Applicant had the ability to divert and use up to a maximum of 75 cfs, if available. The limit of 75 cfs is not changed by the proposed Amendment.
3. The rights of others will not be adversely affected by the Application. The water that was bypassed pursuant to original Condition 4 was public water that was left in the stream channel to maintain riparian habitat. The bypassed water did not “belong” to any appropriator. Downstream livestock watering rights, if any exist, will not be affected by the Application. If those water rights are senior to the Permits, they can assert their senior priority against the Permits. Junior water rights simply are not protected under the prior appropriation system. The hydropower diversion must be constructed in such a way as to allow for the release of water through the hydropower diversion for senior, downstream stock watering purposes.

4. A demonstration of the feasibility or the wherewithal to construct and maintain the pond development is not a requirement of I.C. § 42-211. In any event, the Application is not speculative. The pond proposal has been constructed and maintained by the Applicant.
5. The Application will not conflict with the local public interest so long as the Applicant constructs and maintains the Pond proposal, or upon failing to do so, bypasses 5 cfs of water past the hydropower diversion. The primary purpose of the bypass condition in the original Permits was to protect the riparian habitat along the Birch Creek channel below the hydropower diversion. The original bypass flows were only sufficient to maintain 1.64 acres of such habitat. The pond proposal will maintain 2.46 acres of riparian habitat, but will require long term maintenance and operation. In the event that such maintenance does not occur, bypassing 5 cfs past the hydropower diversion will maintain at least a portion of the riparian habitat provided by the pond system. Further, at all times when the flow of Birch Creek is in excess of both the 0.11 cfs of public water used in the pond system and the 75 cfs that may be diverted by the Applicant, all such excess flows must be allowed to flow down the Birch Creek channel through the hydropower diversion, unless diverted for other authorized water uses. The hydropower diversion must be constructed to allow for the release of such flows. Because the size of such excess flows cannot be predicted, the release structure or gate in the point of diversion should be constructed both to allow the entire flow of

Birch Creek to flow in the natural channel. In order to enforce the conditions placed on the Permits the gate needs to allow the watermaster to control and measure the flow through the hydropower diversion.

6. Any Finding of Fact that is deemed to be a Conclusion of Law is adopted as a Conclusion of Law. Based upon these Conclusions of Law, IDWR issues the following

ORDER

THE STATE OF IDAHO, DEPARTMENT OF WATER RESOURCES ORDERS that the Application for Amendment of Permit Nos. 32-7128 and 32-7136 be APPROVED subject to the following conditions:

1. Condition of Approval 4 on the original Permits is withdrawn.
2. A new Condition of Approval 4 shall apply to the Permits as follows:

4. The water user shall develop and maintain the pond and irrigation system that utilizes 0.11 cubic feet per second of public water, described in the Bureau of Land Management's "Finding of No Significant Impact and Decision/Rationale," EA Number ID-030-9-46 (January 11, 1990), including but not limited to:

•6 to 8 ponds below the hydropower diversion that create 2 acres of riparian habitat, and

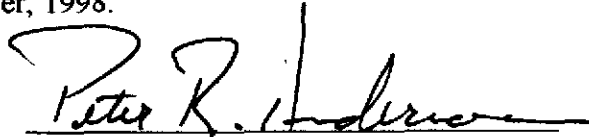
•A 1,000 foot drip irrigation system that supports 0.46 acres of riparian habitat.

Or, in the alternative, 5 cubic feet per second shall be allowed to flow past the feeder canal diversion in the natural channel of Birch Creek.

3. A new Condition of Approval 14 shall apply to the Permits as follows:

14. Applicant shall build and maintain a gate in the hydropower diversion sufficient both to control and measure the flows through the hydropower diversion and to allow the entire flow of Birch Creek to flow through the hydropower diversion in the natural channel of Birch Creek.

DATED this 10th day of September, 1998.



PETER R. ANDERSON
Deputy Attorney General
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of September, 1998, I mailed a true and correct copy of the foregoing **RECOMMENDED DECISION AND ORDER** on the following persons listed below by U.S. mail, postage prepaid and addressed as follows:

Norman C. Young
Idaho Dept. of Water Resources
1301 N. Orchard Street
Boise, ID 83706

Kent W. Foster, Esq.
HOLDEN KIDWELL HAHN & CRAPO PLLC
P.O. Box 50130
Idaho Falls, ID 83405

George C. Petersen, Jr., Esq.
PETERSEN MOSS OLSEN
MEACHAM & CARR
485 "E" Street
Idaho Falls, ID 83402

Ronald D. Carlson
Eastern Regional Manager
Idaho Dept. of Water
Resources
900 N. Skyline Dr.
Idaho Falls, ID 83402

Blair J. Grover, Esq.
GROVER & ARCHIBALD
P.O. Box 36
Rigby, ID 83442

Breck H. Barton, Esq.
BRECK BARTON &
ASSOC., PA
P.O. Box 100
Rexburg, ID 83440


Deborah Drew-Ellis
Legal Secretary



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

December 11, 2001

TED S SORENSON
5203 S 11 E
IDAHO FALLS ID 83404

RE: License Nos. ~~32-7126~~ and 32-7128

Dear Mr. Sorenson:

The Department of Water Resources has issued the enclosed Water Right License confirming that a water right has been established in accordance permit 32-7136. Please be sure to thoroughly review the conditions of approval and remarks listed on your license.

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 by the Department unless a party petitions for reconsideration or files an exception and/or brief within fourteen (14) days of the service date as described in the enclosed information sheet about preliminary orders.

A copy of your approved amendment of permit for right 32-7136 is also enclosed.

The Department has also issued the enclosed amended Water Right License for water right 32-7128. The amendment was necessary to add condition no. 8 to the license. The condition was added to the permit 32-7128 by order on December 5, 2000, but it was inadvertently omitted from the license. The amended license is an **"amended final order"** pursuant to Sections 67-5246 or 67-5247, *Idaho Code*, and Rule 760 of the Department's Rules of Procedure. An informational sheet that explains how to respond to final orders is enclosed.

In preparing your licenses, the Department considered your request to retain the old subordination condition from your permits rather than imposing the new subordination condition used by the Department since the adoption of Section 42-203B(6), *Idaho Code*. It is the Department's position, however, that the new condition embodies the intent of the legislation, and that the Department has the authority to subordinate licenses issued for hydropower purposes, even if the permit was issued prior to July 1, 1985. Therefore, to comply with the intent of the legislation, the Department issued your licenses with the new subordination condition. If an application is filed to appropriate water upstream from your diversion for a use other than hydropower, you

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DEC 12 2001

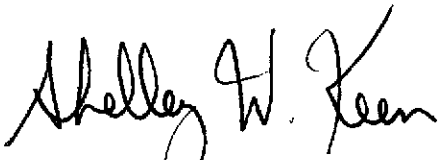
Ted Sorenson
December 11, 2001
Page 2

still have the opportunity to protest the application under the criteria set forth in 42-203A(5), *Idaho Code*, including the local public interest criteria.

Please note that water right owners are required to report any change of water right ownership and/or 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 forms and instructions.

If you have any questions, please contact me at 208-327-7946.

Sincerely,

A handwritten signature in cursive script that reads "Shelley W. Keen". The signature is written in dark ink and is positioned above the printed name and title.

Shelley W. Keen
Water Rights Supervisor

Enclosures

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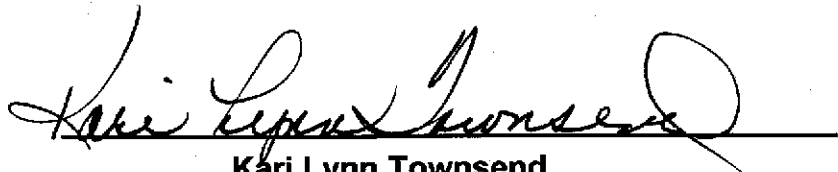
DEC 12 2001

CERTIFICATE OF MAILING

I hereby certify that on December 11, 2001 I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER(Approved License 32-7136) and the foregoing AMENDED FINAL ORDER (Amended License 32-7128) to the person(s) listed below:

RE: WATER RIGHT NOS. 32-7136 and 32-7128

**TED S SORENSON
5203 S 11 E
IDAHO FALLS ID 83404**



Kari Lynn Townsend
Secretary

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DEC 12 2001

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DEC - 7 2001

SORENSEN ENGINEERING

5203 South 11th East
Idaho Falls, Idaho 83404

Department of Water Resources

Phone: 208-522-8069
Fax: 208-522-8223
E-Mail: ted@tsorensen.net

December 5, 2001

Shelly W. Keen
Kay Walker
IDWR
P.O. Box 83720
Boise, ID 83720-0098

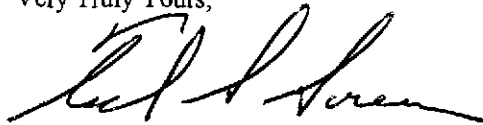
SUBJECT: License #32-7128

Dear Shelly and Kay:

Pursuant to my telecom with Kay Walker today and Shelly Keen several weeks ago here is the signed Amendment.

I continue to have a problem with condition #5, subordination. In Mr. Keen's letter of October 26, 2001 he suggested I review the specific authority for the clause enacted in 1985 (Section 42-203B). I have reviewed the statute. The statute is for "permit issued after July 1, 1985". My permit was issued March 27, 1985. Therefore, it should not be subject to the legislation. My main objection runs to the "no claim for future use". The original permit stated I was entitled to saved water which has evolved to condition 8. Part of my BLM agreement is that if the ponds are not maintained, then I have to release 5 cts. Therefore, I continue to feel that condition 9 of the original permit should be used.

Very Truly Yours,



Ted S. Sorenson, P.,E.

Enc.
TSS/ptj

Word\2001\ts\KeenWalker.ltr

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DEC 12 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

November 19, 2001

TED S SORENSON
SORENSON ENGINEERING
5203 S 11 E
IDAHO FALLS ID 83404

RE: Water Right Permit 32-07136

Dear Permit Holder(s):

I previously forwarded to you an Application for Amendment so that you could amend your permit to depict your water right as it has been actually developed. I have not yet received the amendment. If I do not receive it within 14 days, I will assume you no longer have any interest in the permit and cancellation proceedings will begin.

Enclosed for your convenience is another amendment form. Please note that the \$50.00 filing fee for this amendment has been paid. If you have any questions regarding this matter, please call me at 208-327-7944.

Sincerely,

KAY WALKER
Sr. Water Resource Agent

KW:klt

Enclosure

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DEC 12 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

October 29, 2001

TED S SORENSON
&/OR SORENSON ENGINEERING
5203 S 11 E
IDAHO FALLS ID 83404

RE: Permit No. 32-07136

Dear Mr. Sorenson:

Upon administrative review of your proposed license for the above referenced permit, it was determined that we could only allow 18,500.0 acre feet per annum under this permit. I have revised the licensing amendment to show this reduction in the volume to be licensed.

This reduction is based upon the information you submitted to our office on August 14, 2001 in which you stated "The maximum year experienced to date was 51,050 Acre Feet." We have issued the license for your senior right 32-07128 in the amount of 32,600.0 acre feet. Based on the information you submitted we can only allow 18,500.0 acre feet under this right since that is the maximum volume you have beneficially used under these rights when combined.

Please sign the revised licensing amendment and return it to this office within the next 14 days so we can proceed with licensing of this permit. 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

Enclosure

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DEC 12 2001

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OCT 12 2001

State of Idaho
Department of Water Resources
APPLICATION FOR AMENDMENT

Department of Water Resources

(For Licensing Purposes)
WATER RIGHT NO. 32-07136

Date of Priority: January 03, 1984

Maximum Diversion Rate: 30.00 CFS

Maximum Diversion Volume: 21,700.0 AF

Comes now TED S SORENSON And/Or SORENSON ENGINEERING
5203 S 11 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. 32-07136, and requests that the permit be changed as follows:

Source: BIRCH CREEK

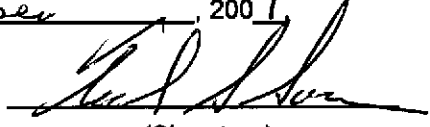
Tributary: SINKS

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
POWER	01/01 to 12/31	30.00 CFS	21,700.0 AF

LOCATION OF POINT(S) OF DIVERSION:BIRCH CREEK L5 SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 34, Twp 09N, Rge 31E, B.M., CLARK CountyPLACE 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	
08N 31E 14			X														

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 08 day of October, 2001


(Signature)

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DEC 12 2001

per Sorenson

Max. Div. Vol

51,050

32-07/28-32,600.

18,450.

¹¹
32600

18500

51100.

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OCT 12 2001

may

BIRCH POWER COMPANY

5203 SOUTH 11TH EAST

IDAHO FALLS, IDAHO 83404

208-522-8069 FAX 208-522-8223

E-mail: ted@tsorenson.net

Department of Water Resources

MEMORANDUM

TO:

Kay Walker
Idaho Dept of Water Resources
P.O. Box 83720
Boise Idaho ~~83706~~ 83720-0098

DATE:

10/8/2001

FROM:

Ted S. Sorenson P.E.

SUBJECT:

Water Rights 32-07128 + 32-07136

REMARKS:

I apologise for delay in responding.

Here are the signed amendments,

I continue to object to language

of subordination condition #5.

It is much more restrictive than
the original subordination condition
(#5 on Modified Memorandum Decision
Order dated March 27, 1985). This
amounts to new 'conditions
"after the fact" and without
due process. Why not use the original
language?

SIGNED:

Ted S. Sorenson

cc:

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DEC 12 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

October 2, 2001

TED S SORENSON
5203 S 11 E
IDAHO FALLS ID 83404

RE: Water Right Permits 32-07136

Dear Permit Holder(s):

I previously forwarded to you an Application for Amendment so that you could amend your permit to depict your water right as it has been actually developed. I have not yet received the amendment. If I do not receive it within 14 days, I will assume you no longer have any interest in the permit and cancellation proceedings will begin.

Enclosed for your convenience is another amendment form. Please note that the \$50.00 filing fee for this amendment has been paid. If you have any questions regarding this matter, please call me at 208-327-7944.

Sincerely,

KAY WALKER
Sr. Water Resource Agent

KW:klt

Enclosure

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DEC 12 2001



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:

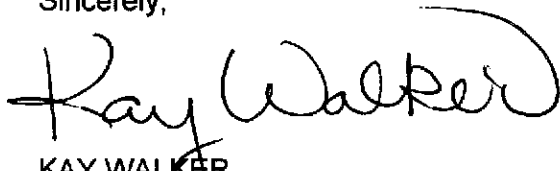
We are in receipt of your letter dated August 7, 2001, regarding the proposed licenses and the amendment filing fees in the amount of \$100.00. Enclosed is Departmental Receipt No. C055546. We did not receive the signed amendment forms that needed to accompany the filing fees. I have enclosed revised 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

Sorenson Engineering, P.A.

5203 South 11th East
Idaho Falls, Idaho 83404

Phone: (208) 522-8069
Fax: (208) 522-8223
e-mail: ted@tsorenson.net

RECEIVED

AUG 14 2001

Department of Water Resources

August 7, 2001

Kay Walker
IDWR
P.O. Box 83770
Boise, ID 83720-0098

RE: Water Right Permit #32-07128
Water Right Permit #32-07136

Per your letters of July 18, 200, here is the \$100.00 filing fee. The proposed permit has two areas I request modification in.

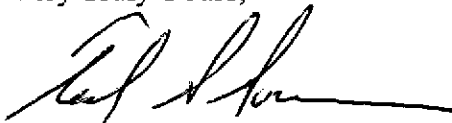
1. Annual Volume should be:
32-7128 32,580 A.F.
32-7136 25,340 A.F.
57,920 A.F. Total

The maximum year experienced to date was 51,050 Acre Feet. The plant economics were based upon 1982-83 at 53,120 Acre Feet. I request a total of 57,920 A.F.

2. Condition 5 was not included in the original permit or the recent amendment. Therefore, it should not be included now.

Please advise.

Very Truly Yours,



Ted S. Sorenson, P.E.

TSS/ptj

C:\My Documents\Word Perfect\Sorenson Eng\Walker.ltr.wpd

MICROFILMED

DEC 12 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

July 18, 2001

TED S SORENSON &/or SORENSON ENGINEERING
5203 S 11 E
IDAHO FALLS ID 83404

RE: Water Right Permit No. 32-07136

Dear Permit Holder(s):

The Department of Water Resources is reviewing the permit referenced above prior to issuing a water right license. By issuing a license, the Department confirms the extent of development that has been established in compliance with the terms of the permit. The examiner who verified your water use reported that certain elements of the permit have been developed differently than described on your permit. Changes that do not increase the authorized use of water under the permit can be requested and approved in accordance with Section 42-211, Idaho Code. Before a license can be issued, your permit must be amended to depict your water use as it was actually developed.

Based on the examiner's report, the following elements were developed differently than described on your permit:

☒ Point(s) of Diversion
☒ Place(s) of Use

The enclosed Application for Amendment form depicts the elements of the water right as they will appear on the license when it is issued. Please review the amendment form carefully. If you concur with the information presented, please sign the form and return it with the \$50.00 filing fee within 14 days.

If you have any questions, please call me at 208-327-7944.

Sincerely,


KAY WALKER
Sr. Water Resource Agent

Enclosure

MICROFILMED

DEC 12 2001

Birch Power Co.

5203 South 11th East
Idaho Falls, Idaho 83404
Tel 208-522-8069
fax 208-522-8223
e-mail: ted@tsorenson.net

June 15, 2001

Kay Walker, Senior Water Resource Agent
State of Idaho Department of Water Resources
1301 North Orchard Street
P. O. Box 83720
Boise, ID 83720

RECEIVED

JUN 20 2001

Department of Water Resources

Re: Permit Nos. 32-07128 and 32-07136

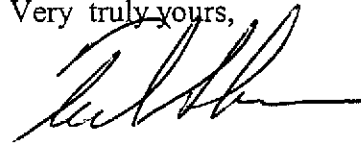
Dear Ms. Walker:

This letter is written pursuant to your letter of June 12, 2001. I apologize for not answering your April 24, 2001 letter sooner.

1. Here is evidence of compliance with the conditions of condition no. 2, page 18 of the Recommended Decision and Order. This has to do with "The User shall develop and maintain the pond" Attached is a letter dated November, 2000, from the Bureau of Land Management documenting compliance with this condition.
2. Condition number 3, page 19. "Applicant shall build and maintain a gate in the hydropower division..." Attached please find a copy of the "as built" drawings showing the location of this gate and the location of the weir. Please note that some confusion has arisen because this control gate is downstream in the channel approximately 1.5 miles. The gate is located in this position at the request of the Idaho Department of Fish and Game. This ensures that the first mile and a half of the channel, which was developed successfully for fisheries, is not dewatered. The headgate is able to shut off the water and return the entire flow to Birch Creek. The return is in the bypass channel. A ten foot sharp crested weir is located just downstream of this structure as shown on the attached drawings.

Trusting this to be of value.

Very truly yours,



Ted S. Sorenson, P.E.

- See attachment MICROFILMED in file 32-07128. fw
DEC 12 2001 7/17/01



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

June 12, 2001

TED S SORENSON
5203 S 11 E
IDAHO FALLS ID 83404

RE: Permit Nos. 32-07128 and 32-07136

Dear Mr. Sorenson:

I sent you a letter on April 24, 2001, requesting documentation that you have complied with the conditions of approval described in the Recommended Decision and Order approving applications for amendment dated September 10, 1998. As of this date, I have not received a response to my letter. Enclosed, for your convenience, is a copy of my April 24th letter.

Please submit any documentation you may have in regard to the compliance with the conditions within the next 30 (thirty) days so we can complete our review of these permits. The documentation could be in the form of pictures or a statement from the watermaster that you have complied with the conditions. If we don't receive a response from you, within the 30-day period, we will assume you are no longer interested in pursuing the permits and will recommend they be voided.

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

Enclosure

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DEC 12 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

April 24, 2001

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 the final stages of reviewing the above referenced permits for licensing purposes and find we need more information in regard to the compliance with the conditions of approval. Pursuant to our telephone conversation last week, enclosed you will find copies of the permits and the Recommended Decision and Order issued pursuant to the Amendment approved September 10, 1998.

We cannot tell, from our files, if you have complied with the conditions applied to your permits in the Recommended Decision and Order approving the application for amendment. You can see these conditions on pages 18 and 19 of the Order, which I have flagged, for your convenience. Please submit any documentation that you may have to show that you have complied with these conditions at your earliest convenience. We will withhold any further processing towards licensing these permits until we have received your documentation.

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

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DEC 12 2001

LICENSE REVIEW CHECKLIST

Permit No. 32-07136 Date: 4-18-2001 Reviewer: Kay Walker

topo V86

Change/OK

Name/Address

change per corres. in file

Source

ok

Does change clarify original intended source? If no, void permit.

Point of Diversion:

change

Change (P39/P49) Add (P45/P44) Feds (P40)

W32 (multiple in 1/4/1/4)

W36 (overlap)

W59 (subdivision description)

Place of Use

change

Change (P41/P49) Add (P41/P44) Feds (P43)

W60 (subdivision description)

W27 (ppu acre limit)

Overlaps: Right(s): 32-7128 at pld & p/u

File reviewed _____ Profile reports printed _____

P/D & P/U amend (P37) Feds (P48)

Rate of Diversion:

Permitted rate 30. cfs

Fee Limit _____ cfs

Measured 79. cfs

Theoretical _____ cfs

Recommended Total Diversion Rate 30.

Water Uses

ok Change (P46)

Season of Use per new Standards

Irrigation _____ cfs _____ af

Stockwater _____ cfs _____ af

Domestic _____ cfs _____ af

Power 30 cfs 1280 af 21,700.

_____ cfs _____ af

Total 30 cfs 1280 af

Irrigation - overlap (R58-R61, R62-R65, R66-R69)

supp. Gw (WB7/065/104)

overlap spec combined rts (W35)

<1 acre (W31)

Domestic (W01/W05/070/071/075)

Power (W42 or W43/025/027/R22 or R23)

Fish (042)

Fire (077)

Water Quality (081/R07)

Payette - (W22/047/27A)

Stockwater for US (R37)

see power contract file 32-07128 folder 3 file #4

Volume Determination

30 cfs x 1.9835 x 365 days = 21,719.3 af (vs) 21,700. af _____ acres x _____ (FHR) = _____ af

Remarks:

W36 (32-07128)

Additional Conditions

☒ Watermaster Control 32D
☒ GW Measurement/Measuring Device
☐ Other
Trust R55 - remove 051)
Non-trust (048/049)

GW Dist? _____
Water Msmt. Dist? _____
Crit. GWMA? _____
GWMA? _____
Government Lots? yes at pld per

Advance Priority? yes

no

If yes, explain why below.

McVey

SRBA Claim?

NO

Adjust memo

Amend Letters

P37 P87, S06

Second Amendment Notice

S06



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

January 23, 2001

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

Ted S. Sorensen
Sorensen Engineering
5203 South 11th East
Idaho Falls, ID 83404

RE: Licensing of Permits 32-07128 and 32-07136

Dear Mr. Sorensen:

This morning I received your request for licensing of water appropriation permits 32-07128 and 32-07136. Now that the deadline for seeking district court review of the order approving your amendment has passed without word of an appeal, we will begin reviewing the files to determine if water right licenses can be issued. Due to the volume of documentation associated with these permits, it may take several days, possibly up to a few weeks, to thoroughly review the files.

If you have any questions, please contact me at 208-327-7946.

Sincerely,

Shelley Walter Keen
Water Rights Supervisor

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DEC 12 2001

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JAN 22 2001

Department of Water Resources

Sorenson Engineering

5203 South 11th East
Idaho Falls, Idaho 83404

Phone: (208) 522-8069
Fax: (208) 522-8223
e-mail: sorenson@ida.net

January 18, 2001

Glen Saxton, P.E. Chief
Water Allocation Bureau
State of Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

RE: Application for Permit 32-07128 and 32-07136

Dear Mr. Saxton:

On December 15, 2000 you issued the final order for the amendment for these permits. The Proof of Beneficial Use was filed in 1989. The final issuance of the license has never occurred. It is my opinion that it was held pending resolution of this amendment. In that the amendment has now been resolved, I am wondering if the final issuance of the license for these two permits can now occur. I would appreciate it if you could please advise.

Very Truly Yours,



Ted S. Sorenson

TSS/ptj

C:\My Documents\Word Perfect\Ted's Letters\Saxton3.ltr.wpd

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DEC 12 2001

See W.R. file No. 32-07128
for complete info. regarding
Ted Sorenson & Birch Creek
Power Co.

MICROFILMED

JAN 3 8 2004



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
ALAN G. LANCE

September 10, 1998

RE: In the matter of Application for Amendment of Water Right Permit Nos. 32-07128 and 32-07136 in the name of Ted Sorenson dba Sorenson Engineering

Dear Interested Party:

The accompanying order is a "**recommended order**" issued by the department pursuant to Section 67-5243, Idaho Code. The provisions of this order will not become effective until the Director issues a final order in this matter.

Each party to these proceedings who appeared at the hearing may file a petition for reconsideration, briefs and exceptions to the recommended order and may request oral argument before the Director of the department as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of the order. The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

EXCEPTIONS AND BRIEFS

Within twenty-one (21) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of a recommended order and may file briefs in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

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ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the recommended order shall be served on all other parties to these proceedings in accordance with Rules of Procedure 302 and 303.

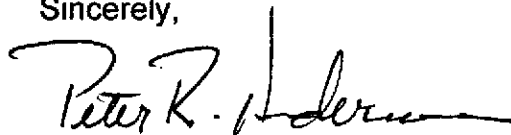
FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

APPEAL OF FINAL ORDER TO DISTRICT COURT

A party aggrieved by a final order of the Director is entitled to judicial review in compliance with sections 67-5271 through 67-5279, Idaho Code.

Sincerely,



PETER R. ANDERSON
Deputy Attorney General
Hearing Officer

Enclosure

c: IDWR - Eastern Region

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JAN 08 2001

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MAY 14 1998

Department of Water Resources

Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
330 Shoup Avenue, Third Floor
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF THE
APPLICATION FOR AMENDMENT OF
WATER RIGHT PERMITS NOS. 32-
07128 and 32-07136 IN THE NAME OF
TED SORENSON, d/b/a SORENSON
ENGINEERING

and

IN THE MATTER OF APPLICATION
FOR PERMIT NO. 32-07252 (formerly
no. 31-07646) IN THE NAME OF
BIRCH CREEK RANCHES, L.L.C.

**AMENDED AFFIDAVIT OF TED S.
SORENSON IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION
TO PROTESTANTS' MOTIONS FOR
SUMMARY JUDGMENT**

STATE OF IDAHO)
)ss.
County of Bonneville)

Ted S. Sorenson, being first duly sworn, on his oath deposes and says:

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1) I am the applicant in the above named consolidated matters presently pending before the Idaho Department of Water Resources, have personal knowledge of the facts set forth herein, and based on such personal knowledge testify as follows:

2) After obtaining B.S. and M.E. degrees in civil engineering from the University of Idaho and have worked on various water and small hydro electric projects. I moved to Idaho Falls in 1980. From both my schooling and my work experience, I was aware of the Public Utility Regulatory Policies Act of 1978, and the potential opportunities it presented for development of small hydro-electric projects.

3) Commencing in 1981, I began a feasibility investigation in Birch Creek Valley regarding the potential for a small hydro-electric power project using the waters of Birch Creek. Early in my investigation I became aware of the lands irrigated from Birch Creek, and it became apparent that the greatest potential for a viable project would be at the lower end of Birch Creek. As I studied available flow and irrigation use data and measurements, it became apparent to me that large seepage losses historically occurred in the lower portion of Birch Creek and in the Reno Ditch, a private ditch which diverted all of the waters of Birch Creek and transported them a distance of over 8 miles to the lands irrigated therefrom.

4) As I considered the possibilities, it became apparent to me that there was a potential for reducing the amount of the large seepage losses by construction of a new feeder canal for the power plant in which a soil sealant material could be used. In February of 1982, I approached Mr. Ben Wilding, one of the downstream irrigators and the watermaster for Birch Creek, and Mr. Paul DeMourant, whom I understood to be a principle in D&D Enterprises, Inc., the other downstream irrigator, about the concept of a hydro-electric project using the waters of Birch Creek and potentially saving some of the water being lost to seepage. My original idea was for them to develop the hydro electric-facility and retain me as the engineer. They expressed no interest in the idea.

5) As I recall, I heard that Mr. Paul DeMourant's interest in the D&D ranch was taken over by him son, Jim DeMourant, about eight months later. I then went to Jim

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DeMourdan and suggested the same idea, which he also ignored. Over the next few months, I also proposed other concepts to Mr. Jim DeMourdan and Mr. Ben Wilding, including a joint venture. A copy of a memo I prepared and presented to them dated February 2, 1983, is attached hereto as Exhibit "A". The irrigators did not respond to my suggestions. From my investigation, I became convinced of the feasibility of the project and decided to proceed on my own.

6) As I continued my engineering efforts, it became more and more apparent that it would be necessary to move the point of diversion for the feeder canal for the power plant upstream from the Reno ditch diversion. In my contacts with Idaho Department of Fish and Game and Bureau of Land Management, I came to understand that they would insist on a bypass flow of 5.0 CFS for mitigation of riparian amenities along Birch Creek between any new point of diversion and the Reno ditch diversion. They also suggested I try to enter into an agreement with D&D and Wildings to move the ditch. I then prepared a letter dated April 4, 1983, which I sent to D&D and Wildings, a copy of which is attached hereto as Exhibit "B", seeking formal permission to substitute a new ditch for some portion of the old Reno ditch. I never received a written or verbal response to the letter, and neither Wildings nor D&D ever agreed to or granted permission for relocation of the ditch, verbally or in writing.

7) I eventually applied for a preliminary permit from the Federal Energy Regulatory Commission (FERC) which was granted, effective September 1, 1983. A copy of the letter from FERC advising me of the issuance of the preliminary permit is attached as Exhibit "C".

8) I also filed application with Idaho Department of Water Resources for a water right in September of 1982, which was assigned no. 32-7128. Then, in January of 1984, I filed a second application which was numbered 32-7136. Ben Wilding and D&D protested these applications. During these months I also met with Ben Wilding, Jim DeMordant, Roger DeMordant and their attorney on various occasions to advise them that my findings indicated a savings of more than 14.0 CFS could potentially be effected, and that it appeared

there would be 5.0 CFS required as a bypass flow. They indicated they were not interested in participating in any manner and continued their protests. A hearing on the protests was held before Mr. Bobby D. Fleenor of IDWR on April 5, 1984. After the proposed memorandum decision and order were issued by Mr. Fleenor, D&D and Wildings objected and filed exceptions to it. Even after the final decision by IDWR and Mr. Fleenor, D&D appealed it to the district court.

9) I have reviewed the Ray Michener letter dated February 16, 1984, but since I already had a preliminary FERC permit and hence the exclusive right to develop the project using the waters of Birch Creek, I do not believe his proposal had any viability.

10) By December of 1984, I had finally decided to locate the power house at or near its present location and to use PVC liner, which I believed would be more effective in reducing seepage losses. I first approached D&D and was able to purchase an option to acquire a small parcel of wasteland. In 1986 I purchased from D&D and Ben Wilding the small tracts of land where the power plant is now located and for access. The land I purchased was unproductive land covered with sagebrush. I paid \$500 per acre for the land, which was 5-10 times its market value at that time. I certainly made no representations about furnishing saved water to either irrigator in connection with the purchase of the land.

11) I completed the project and began to divert water through the new lined canal and to generate power in the spring of 1987. I also bypassed 11%, up to 5.0 CFS, as required, down the channel of Birch Creek, but the water never flowed down the channel more than about 500-800 feet before it all sank. As I began to work with the Idaho Department of Fish and Game and the Bureau of Land Management to remedy this problem, it became apparent that it could be done with a series of lined ponds supplied by a plastic pipe which could also provide water for a number of watering troughs with only a small fraction of the 5.0 CFS bypass flow requirement. I drove to Jim DeMordaunt's home where I met with him and discussed what I felt was a possibility to save most of the 5.0 CFS bypass water which could be available for irrigation. I invited him to join me in the effort and to use

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JAN 08 2001

the extra 5.0 CFS and anything else we could save for irrigation. He declined. I also visited with Cleo Wilding about the possibility but he indicated he had no interest.

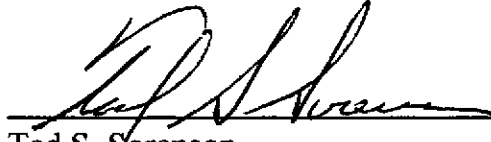
12) I went ahead on my own with the revised mitigation plan and by January 11, 1990, I received the written approval of the Bureau of Land Management and on March 12, 1990, I received written approval of Idaho Fish and Game to terminate the 5.0 CFS bypass flow and continue with just the .11 CFS required to supply the ponds and the troughs. On June 15, 1990 I received formal approval from FERC. Copies of the formal approvals are attached as Exhibits D, E and F. After having received notice that the substituted mitigation would be accepted, I filed application with IDWR to have the condition regarding the 5.0 CFS bypass flow modified on the two water right permits. Again D&D and Wilding protested the application.

13) The cost of the revised mitigation work has been just under \$100,000. Yearly maintenance has average about \$2,000. In recent years, I again offered Jim DeMourant and LaVar Newman an opportunity to receive the additional 4.89 CFS of saved water by contributing, between them, from \$15,000-25,000 to the cost of the additional mitigation work. They have continued to decline and to press their protests to my application.

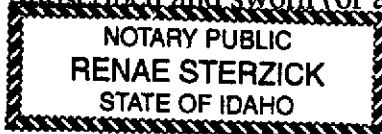
14) When I was performing my feasibility investigation and doing the preliminary engineering back in 1981, 1982 and 1983, I obtained all the records and data I was able to find of measurements at various locations to determine the magnitude of the seepage losses in the relevant reaches, both of Birch Creek and the Reno ditch. I also employed the services of Don Shenton in making additional measurements. From records of USGS for the Eight Mile Canyon road gauge and the University of Idaho for the gauge on Reno ditch about a mile upstream from the old splitter box structure, I prepared a summary entitled, "Reno Ditch Flow Comparison", a copy of which is attached hereto as Exhibit "G". A copy of a map, showing the distances and relevant locations with respect to the proposed hydro-electric project is also attached as Exhibit "H". Since the filing of my application for saved water, I have employed Dr. Charles E. Brockway to review and analyze seepage losses, both as to

the historical amount in the dewatered portions of the Birch Creek channel and the Reno ditch that have been replaced by the feeder canal for the power plant, and as to the losses which presently occur through the new facilities.

Dated: 5-8-98


Ted S. Sorenson

Subscribed and sworn (or affirmed) before me this 8th day of May, 1998.



Residing at Idaho Falls, Idaho
My Commission Expires Jan. 14, 2004

(seal)


Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 1-14-2004

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CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

DOCUMENT SERVED: AMENDED AFFIDAVIT OF TED S. SORENSON IN
SUPPORT OF MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO PROTESTANTS' MOTIONS
FOR SUMMARY JUDGMENT

ATTORNEYS SERVED:

Blair J. Grover, Esq.
GROVER & ARCHIBALD
P.O. Box 36
Rigby, Idaho 83442-0036

[First Class Mail]

George C. Petersen, Esq.
PETERSEN, MOSS, OLSEN,
MEACHAM & CARR
485 "E" Street
Idaho Falls, Idaho 83402

[First Class Mail]

Peter Anderson
IDAHO DEPARTMENT OF WATER
RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

[First Class Mail]



Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Dated: 5/14/98

G:\WPDATA\KWF\6936\TEDAFFID.AMD:kmc

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EXHIBIT "A"

Ted S. Sorenson P.E.-L.S.
CONSULTING ENGINEER
550 LINDEN DRIVE
IDAHO FALLS, IDAHO 83401

Rev. 208-522-8069
Rev. 208-529-2469

M E M O

TO: Ben Wilding
Steve Phillips
Jim DeMordaunt

DATE: February 2, 1983

RE: BEDLOSS ELIMINATION DATA

Gentlemen,

Attached is a sheet which will give you some idea of the water that can be utilized which is now seeping away as bedloss.

The upstream flow was measured at the USGS gaging station at Eight Mile Canyon Road (approximately 8,000 feet upstream of the proposed diversion). The downstream flow was measured by the University of Idaho Water Resource Institute where the road crosses Reno Ditch as shown on the attached map (approximately 1 mile southwest of Reno Ranch). The total distance between the two measuring points is approximately 49,500 feet. Of this distance, approximately 28,000 L.F. would be replaced by the new ditch.

With the proper sealing of the new ditch, approximately 57% (28,000/49,500) of the present bedloss could be eliminated.

The far right column shows the additional water that would be available (average 9.3 cfs or 465 inches) June through September.

Trusting this to be of value.

Very truly yours,



Ted S. Sorenson, P.E.
Consulting Engineer

TSS:kw MICROFILMED
encs.

JAN 08 2001

Ted S. Sorenson P.E.-L.S.
CONSULTING ENGINEER
550 LINDEN DRIVE
IDAHO FALLS, IDAHO 83401

Bus: 208-522-8069
Res: 208-529-2469

April 4, 1983

TO: RENO DITCH IRRIGATORS

Gentlemen,

Enclosed is an analysis of the impact of the proposed new ditch on irrigational flows. Figure 1 shows the overall project as well as the present estimated bedloss based upon flow measurements taken by the University of Idaho (attached as Exhibit One) at the locations shown. For example, presently approximately 3.7 cfs is lost from Eight Mile Gauging Station downstream to the present diversion. Approximately 17 cfs is lost from Eight Mile Gauging Station downstream to the Reno Ranch splitter box. This data is calculated using flow data from the USGS Gauging Station at Eight Mile Road and flow data taken by the University of Idaho near the Reno Ranch splitter box. The data is enclosed for your examination. I would like to take several measurements this summer to further verify these numbers.

Table 1 lists the comparison between the present situation and the proposed situation. Although the new ditch could provide 9.3 cfs additional flow if bedloss and evaporation were totally eliminated (of course this is not possible), a reasonable estimate of the additional water available would be 9.3 cfs less 3.0 cfs (for evaporation and bedloss in the new ditch) or 6.4 cfs additional flow (approximately 315 inches).

The next question that arises is - Can the irrigators divert the water at the new diversion? Essentially all the water available at the new diversion would be required to meet your existing decreed water rights. The question arose - What about early spring and late fall flows in excess of 45 cfs? Apparently this water is let down from upstream irrigators when not needed. Accordingly, you have the right (according to my understanding) to lease water from existing upstream decreed water rights and therefore divert in excess of 45 cfs.

What about Fish & Game and the B.L.M.'s requirements for bypass flows? My approach would be to file a minor license with FERC for the project. This has the effect of giving the final say to the Federal Energy Regulatory Commission (FERC) - not the Fish & Game or the B.L.M. The loss of water in 3,000 L.F. of Birch Creek

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JAN 08 2001

RENO DITCH IRRIGATORS
April 4, 1983
Page Two

would be offset by 6 miles of new ditch which could support a fishery. I would need to hire a fisheries expert to document same. Therefore, no continuous bypass flow would occur because the loss of fishery habitat would be offset by production in the new ditch and because all water must be diverted to satisfy your existing water rights.

I would appreciate your permission to install the new ditch to deliver your irrigation water with the express provisions that:

- 1) The new diversion divert water for which you have a legal right.
- 2) That the bedlosses in the new ditch be less than the segment of old ditch replaced.
- 3) If the new ditch fails to meet these conditions you would have the right to abandon the new ditch and revert to the old ditch.

Trusting this to be of value.

Very truly yours,



Ted S. Sorenson, P.E.
Consulting Engineer

TSS:kw

MICROFILMED

JAN 08 2001

B. W. Smith

FEDERAL ENERGY REGULATORY COMMISSION
REGIONAL OFFICE
819 Taylor Street
Fort Worth, Texas 76102
September 28, 1983

In response refer to:
OEPR-FW-7194-ID

Mr. Ted S. Sorenson
550 Linden Drive
Idaho Falls, Idaho 83401

Dear Mr. Sorenson:

The preliminary permit, effective September 1, 1983, for the proposed Birch Project, No. 7194, was issued September 7, 1983, to Birch Power Company for a period of 24 months.

The Fort Worth Regional Office has the responsibility to monitor activities being performed under the permit. This will include review of various studies required by the permit, performing field inspections, and attending pertinent planning meetings as appropriate. It is requested that you keep us informed of scheduled meetings that would entail planning for your project.

Our immediate concerns are the requirements of Articles 8 and 9 of the preliminary permit. Article 8 requires the submission of reports each six months on the progress of all investigations, consultations, studies accomplished, and work contemplated. As a minimum, the report must briefly describe the purposes and scope of all conferences and investigations, identify participants, summarize decisions and conclusions, provide a schedule for completing remaining work, and contain copies of important correspondence and studies. Each report must include a statement summarizing the permittee's conclusion as to the feasibility of the project and permittee's anticipated date for submitting a license or exemption application, as appropriate. The first report is due on February 28, 1983, and should include a specific schedule showing when study tasks will start and when they will be completed. One copy of the report should be submitted to this office, and three copies to the Director, Office of Electric Power Regulation, Federal Energy Regulatory Commission, Mail Stop 300-RB, 825 North Capitol Street, N.E., Washington, D.C. 20426.

In particular, the report should address the following items:

- (1) the studies conducted during the past 6-month period (copies of study reports should be furnished);
- (2) summary of consultations with agencies, and copies of correspondence and meeting notes verifying that such consultations took place during the past 6-month period;
- (3) an outline and summary of engineering, environmental, and other investigations to be conducted during the ensuing 6-month period to determine the feasibility of the project as delineated by Article 1;

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(4) a summary of the consultations with the appropriate Federal, state, and local agencies that will take place during the ensuing 6-month period as outlined by Articles 7 and 10; and

(5) an assessment of the feasibility of the project.

You are especially urged to contact the appropriate Federal, state, and local agencies to obtain their views and requirements regarding the studies you intend to undertake. The list of agencies you must contact is included in our publication titled "Hydropower Licenses and Preliminary Permits." If you do not have this list, a copy of the publication may be obtained for \$7.50 from Federal Energy Regulatory Commission, Division of Public Information, Room 1000, 825 N. Capitol Street, N.E., Washington, D. C. 20426.

Article 9 specifies that the permittee designate a liaison officer for the purpose of assuring the cooperation required by the terms of the permit. You should advise this office by November 7, 1983, as to who will assume your liaison responsibilities. Article 9 requires that the liaison officer communicate with appropriate agencies within 60 days of the date of the permit's issuance. The liaison officer should also keep these agencies informed of the progress of investigations. Mr. Jack Quarles, Civil Engineer, of this office, telephone number 817-334-4560, has been designated as our representative who will work with your liaison officer.

This office will exercise administrative supervision over those activities within the scope of the permit that include required onsite inspections, assurance of timely submittal and review of submitted reports, and review of work in progress.

Failure to diligently pursue investigations or comply with other requirements could result in cancellation of the permit. In order to maintain your priority for license application, an application for the project must be filed before the permit expires. Due to the competition for hydropower sites and the benefit of renewable resources, neither the period for the permit nor the time for filing a license application will be extended unless extenuating circumstances develop.

Sincerely yours,

Arthur C. Martin
Regional Engineer

By  Acting

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JAN 08 2001

DECISION/RATIONALE

EA Number: ID-030-9-46

EA Name: Lower Birch Creek Mitigation

Environmental Compliance:

The environmental document has been analyzed and a finding of no significant impact has resulted. Therefore, it is concluded that the proposed action would not significantly affect the quality of the human environment. Preparation of an environmental impact statement pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969 is not required to proceed with the proposed action.

Decision and Rationale:

I have received the environmental assessment and have determined that the proposed action would provide improved mitigation for Lower Birch Creek. Based on this review and my personal knowledge of the area, my decision is to accept the proposed action with the following stipulations:

1. Birch Power Company will obtain written concurrence or authorization from FERC, Idaho Department of Fish and Game, and Idaho Department of Water Resources prior to taking any action on this proposal.
2. The 5 cfs minimum flow will continue to be delivered to Lower Birch Creek until the mitigation pond system (2.0 acres) and drip system (0.46 acre) is in place and operational.
3. The drip system will be monitored and if determined to be in adequate to maintain the existing birch trees (within 600 feet below the diversion) an additional 0.46 acres of riparian pond system will be developed by Birch Power).
4. Birch Power will be responsible for construction, operation, and maintenance of the mitigation development.
5. Should the mitigation proposed fail to provide adequate aquatic/riparian habitat (as specified in proposal) due to improper design and construction or lack of necessary maintenance, the minimum flow requirement will be reinstated.

Approved By: Debra Cook

Area Manager

Date 11 Jan 90

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JAN 08 2001



IDAHO FISH & GAME

600 South Walnut / Box 25
Boise, Idaho 83707

EXHIBIT "E"

March 12, 1990

Mr. Ted Sorenson
Sorenson Engineering
550 Linden Drive
Idaho Falls, ID 83401

Re: Birch Creek Hydro, FERC No. 7194
Amendment to Article 404
Minimum Stream Flow

Dear Mr. Sorenson:

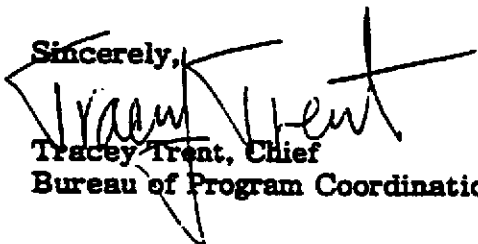
Idaho Department of Fish and Game personnel have reviewed your proposal to mitigate lost riparian vegetation in Lower Birch Creek due to inadequate stream resource maintenance flows. The Idaho Department of Fish and Game will not object to the proposal as submitted, which includes:

1. Replace riparian vegetation at a rate of 1.5:1.
2. Eliminate the 5 cfs minimum flow in the by-pass reach.
3. Construct and maintain a drip irrigation system to support riparian vegetation.
4. Construct and maintain six to eight ponds/riparian systems.
5. Construct 1 1/4 miles of fence as outlined by the U.S. Bureau of Land Management.
6. Develop one livestock watering facility.

Although we will not object to the proposed mitigation for Lower Birch Creek, we wish to make it clear Idaho Fish and Game will not follow this same path again. For all future developers, we will insist on flows that will insure protection of riparian communities.

Thank you for the opportunity to comment.

Sincerely,


Tracey Trent, Chief
Bureau of Program Coordination

TT:WR:tlv

cc: Reg. 6 (Idaho Falls)
FERC
BLM (Big Butte Resource Area)
USF&WS

Cecil D. Andrus / Governor
Jerry M. Conley / Director



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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Birch Power Company

Project No. 7194-009
IdahoORDER MODIFYING MINIMUM FLOW REQUIRED BY ARTICLE 404,
APPROVING RIPARIAN HABITAT MITIGATION PLAN AND
DELETING ARTICLE 405
(Issued June 15, 1990)

On March 9, 1990, the Birch Power Company, licensee for the Birch Creek Hydroelectric Project, requested that the minimum flow requirement of article 404 be modified. Article 404 requires the licensee to discharge from the project a continuous minimum flow of 5 cubic feet per second (cfs), or 11 percent of the flow of Birch Creek, whichever is less, as measured immediately downstream from the project diversion, for the protection of riparian vegetation and wildlife resources. The licensee now proposes to reduce the minimum flow to the amount necessary to maintain riparian habitat it will develop below the project diversion.

As an alternative to releasing the required 5-cfs minimum flow, the licensee proposes to build and maintain 6 to 8 ponds below the diversion. Approximately 2.46 acres of riparian habitat will be created in association with the ponds. The principal components of the licensee's plan are installing about 6,000 feet of buried water pipeline, constructing 6 to 8 ponds, installing 1,000 feet of drip irrigation system, constructing 1.25 miles of livestock fencing, and developing one livestock water facility.

The licensee proposed the alternative minimum flow and riparian habitat mitigation plan because the current minimum flow discharged into Birch Creek will not preserve a significant portion of the riparian habitat below the project diversion. The bypass flow percolates into an alluvial fan within a short distance from the diversion. This flow will maintain only about 64 acres of riparian habitat. By implementing the alternative mitigation plan, about 2.46 acres of riparian habitat will be created and maintained.

The U.S. Fish and Wildlife Service, the Idaho Department of Fish and Game, and the Bureau of Land Management concur with the licensee's proposal to modify article 404 and develop the riparian habitat below the diversion.

DC-A-7

EXHIBIT "F"

The licensee's plan to create and maintain riparian habitat will result in an increase in riparian habitat compared to long-term conditions under the current minimum flow required by article 404. The minimum flow can be reduced to the amount necessary to maintain the planned riparian habitat without causing adverse impacts. Further, by reducing the minimum flow to the amount necessary to maintain the planned riparian habitat, about 2,700 acre-feet of water will be available for power production and irrigation.

After considering the environmental information in the licensee's request for modification of article 404, the staff's independent assessment 1/, and agency comments, the Director finds that the issuance of this order is not a major Federal action significantly affecting the quality of the human environment.

Article 405 requires the licensee to install a streamflow gage below the diversion. Because the streamflow gage will no longer be necessary, article 405 should be deleted from the license.

The Director orders:

(A) The licensee shall implement the Birch Creek Alternative Flow Mitigation Plan filed on March 9, 1990, to create and maintain riparian habitat below the project's diversion.

(B) Article 404 is amended as follows:

"Article 404. Licensee shall discharge from the Birch Creek Project diversion a continuous minimum flow sufficient to maintain the riparian habitat described in its Birch Creek Alternative Flow Mitigation Plan

1/ Environmental Assessment, Plan to Provide Alternative Minimum Flow and Create Riparian Habitat, Birch Creek Hydroelectric Project, FERC No. 7194-009, Idaho, Federal Energy Regulatory Commission, dated June 4, 1990. This document is available in the Commission's public files associated with this proceeding.

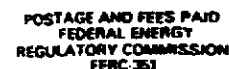
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(c) The licensee shall file with the Commission an annual report providing the results of its monitoring and maintenance of the riparian community developed according to the plan required by paragraph A. The report shall include any changes in design or operation of the system necessary to support the amount and quality of riparian vegetation specified by the plan. The licensee's filing shall also include the comments of the Bureau of Land Management, the U.S. Fish and Wildlife Service, and the Idaho Department of Fish and Game on the annual report. The annual reports shall be filed by December 31 of each year beginning in 1991 and continue for 10 years or until directed otherwise by the Commission. The Commission reserves the right to require changes to the mitigation plan required by paragraph A.

(E) This order is issued under authority delegated to the Director and is final unless appealed to the Commission under Rule 1902 within 30 days from the date of its issuance.

J. Mark Robinson
J. Mark Robinson
Director, Division of Project
Compliance and Administration

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, \$300

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EXHIBIT TWO

RENO DITCH

FLOW COMPARISON

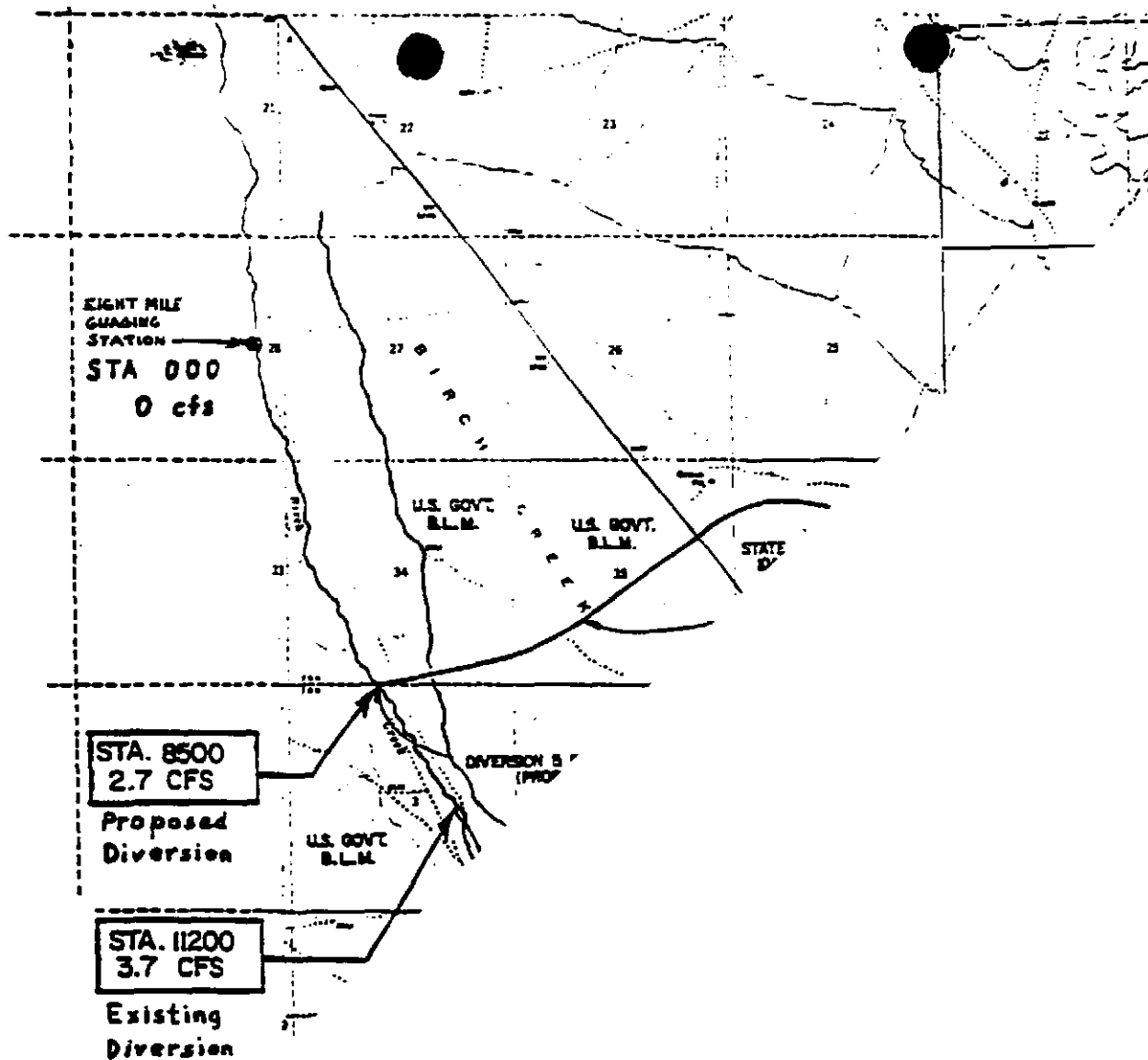
1980 USGS / U OF I DATA VS. 1983
 (All flows in cfs, 1 cfs = 50 inches)

	<u>8/80</u>	<u>8/23/83</u>
1. Proposed Diversion (STA 85 + 00)	43.0*	43.77
2. Existing Diversion (STA 112+00)	42.0*	42.07
3. Flow - Reno Ditch near Micro Wave Tower (STA 36 + 500)	34.0*	33.13
4. Flow at Reno Ranch Splitter Box (STA 500 + 00)	28.7* 30% 50%	30.2
5. Bedloss Existing to Proposed Diversion	1.0	1.7
6. Bedloss - Proposed Diversion to Micro Wave Site	9.0	10.64
7. Bedloss Proposed Diversion to Reno Ranch Splitter Box	14.3	13.57

*1970 - 1980 USGS average (Eight Mile) less 1980 prorated
 bedloss (U of I Gauge)

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Blair Grover
GROVER & ARCHIBALD
215 Farnsworth Way
P.O. Box 36
Rigby, Idaho 83442
(208) 745-6653

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE APPLICATION FOR)	
AMENDMENT OF WATER RIGHT PERMITS)	PROTESTANT NEWMAN'S
NOS. 32-07128 AND 32-07136 IN THE NAME)	MOTION FOR SUMMARY
TED SORENSON d/b/a SORENSON)	JUDGMENT
ENGINEERING)	
)	
and)	
)	
IN THE MATTER OF APPLICATION FOR)	
PERMIT NO. 32-07252 (formerly No. 31-07646))	
IN THE NAME OF BIRCH CREEK RANCHES,)	
L.L.C.,)	
_____)	

COMES NOW the protestant Lavar Newman and pursuant to IDAPA 7.01.01 (Rule 565) and IRCP 56, and moves for an order granting a summary judgment and/or otherwise holding the applicant is not entitled to any saved water for the following reasons:

1. Applicant has no right to any alleged water saved in the Reno Ditch because it is a private ditch and the water flowing therein has already been appropriated.
2. The applicant's claim to saved water is barred by the doctrines of equitable estoppel and quasi estoppel.

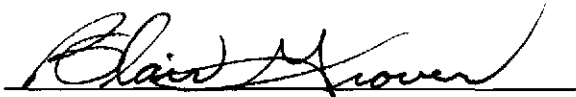
This motion is based on the records and files herein, the Memorandum submitted in support hereof, and the Affidavit of Blair Grover submitted in support hereof.

PROTESTANT NEWMAN'S MOTION FOR SUMMARY JUDGMENT

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DATED this 7 day of April, 1998.

GROVER & ARCHIBALD


BLAIR GROVER

CERTIFICATE OF SERVICE

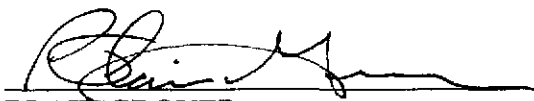
I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, with my office in Rigby, Idaho; that I served a copy of the foregoing document or pleading upon the following person(s) at the addresses below their names either by hand delivering, by facsimile transmission (Fax), or by mailing said document in the United States mail with the correct postage thereon, a true and correct copy thereof this 14 day of March, 1998.

Attorney Served: Peter R. Anderson (Mail)
Department of Water Resources Fax
1301 North Orchard Street
Boise, ID 83706-2237

Kent W. Foster, Esq. (Mail)
P.O. Box 50130 Fax
Idaho Falls, ID 83405

George Petersen, Esq. (Mail)
485 "E" Street
Idaho Falls, ID 83402

Breck H. Barton, Esq. (Mail)
P.O. Box 100
Rexburg, ID 83440


BLAIR GROVER

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GROVER & ARCHIBALD
215 Farnsworth Way
P.O. Box 36
Rigby, Idaho 83442
(208) 745-6653

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE APPLICATION FOR)	
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NOS. 32-07128 AND 32-07136 IN THE NAME)	MEMORANDUM IN SUPPORT OF
TED SORENSON d/b/a SORENSON)	MOTION FOR SUMMARY
ENGINEERING)	JUDGMENT
)	
and)	
)	
IN THE MATTER OF APPLICATION FOR)	
PERMIT NO. 32-07252 (formerly No. 31-07646))	
IN THE NAME OF BIRCH CREEK RANCHES,)	
L.L.C.,)	
)	

A. FACTUAL BACKGROUND.

The evidence already adduced in the transfer proceeding, indicates Birch Creek rises from springs in Clark County and flows southward approximately two (2) miles to the Upper Simmons Ranch at an elevation of 6,300 feet. The first irrigation diversions are there and were made by Simmons in approximately 1977. It continues in a southerly direction, with intermittent diversions for irrigation of lands along its banks in Birch Creek Canyon for another five (5) miles. It continues southerly for approximately eight (8) more miles where the entire creek is now diverted in what is

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known as the "Power Channel." Historically, it continued flowing south and west into the desert where it disappeared into what are known as the "Birch Creek Sinks."

Sometime in the early part of the century, the Reno Family constructed a ditch approximately five and one-half (5 ½) miles in length to carry water from Birch Creek to what became known as the "Reno Ranch" now owned by protestants Lavar Newman (Newman) and D&D Enterprises, Inc. (D&D). In the summertime, the entire flow of Birch Creek was diverted into the Reno Ditch, while in the winter most of it flowed to the Birch Creek Sinks. The rights to use of the water were determined by the Reno Decree dated September 6, 1922.

Seepage losses in both the creek and the ditch were and are significant. While there are numerous measurements of the losses on Birch Creek, there are far fewer measurements of losses in the Reno Ditch. In fact, there are no known measurements of losses in the ditch prior to 1983 when the applicant employed Don Shenton, watermaster, to make some measurements. Those measurements reflect losses of 10 cfs to 15 cfs.

For many years, losses were controlled and reduced by use of bentonite. D&D and Wilding used 600 to 800 cubic yards of bentonite per year from a pit owned by the Wilding Family (Cleo Wilding testimony - March 12, 1997; Steve Phillips testimony, Transcript April 17, 1990 hearing p. 399). That represents a major effort: at 10 yards per load it is 60 to 80 truck loads per season.

In approximately 1977, the Bureau of Land Management prohibited further use of bentonite. That left few viable alternatives to control losses in the creek or ditch. In 1991, the parties installed a liner on a portion of the creek. At first the losses increased substantially. They are now back to where they were before the liner was installed. It remains to be seen whether it will furnish any

significant benefit. A pipe could have been used, but it would have been a major expense for 5 ½ miles of pipe large enough to carry the water. It was also possible to line the ditch with cement. However, weather breaks cement ditches so badly they are rarely used. Given the low margins in agriculture during the 1970's and 1980's, it would have been difficult to justify doing either of those things in the Reno Ditch.

In approximately 1982, Ted Sorenson (Sorenson) on behalf of the applicant, began talking to D&D and Wilding about, changing the diversion point of their irrigation water, constructing and lining a new ditch, and installing a power generating facility. He represented both orally and in writing as irrigators they would receive the benefit of any saved water that resulted. By letter dated April 4, 1983 to the Reno Ditch irrigators (Exhibit 245 in Transfer Proceeding), he represented the new ditch "could provide 9.3 cfs additional flow" which would be available for the irrigators. He made similar representations orally to Jim DeMordaunt.

At the hearing for the permit held April 5, 1984, applicant's attorney, Ray Rigby, represented at the beginning:

"Ours is an application for a nonconsumptive use, theirs is an in-stream, or consumptive use, those water rights are established, they're regulated by the Department and not by us and so we feel that it should be for clarification purposes and not with any intent whatsoever to suggest that it should or it should not be a condition of the permit, and that's a matter that should be resolved between the respective water rights holders." (p.4)(emphasis supplied).

Further, Mr. Rigby states:

"MR. RIGBY: Whatever he is allowed to take for power purposes if a permit is granted, he would take down the in effect the new ditch.

MR. PETERSEN: The new ditch.

MR. RIGBY: Right, and leave it to the Department and the relative rights of the water users to decide how else that should be treated. In other words, it's just not ours to decide. . . the amount we'd like to use is as contained in the application, 45 by 7128 and 30 by 7136." (pp.5 and 6).

Sorenson himself testified in that hearing as follows:

"One, the irrigators for many, many years have lost a great deal of their water from the point of diversion to the point of use and in my discussions with Mr. Wilding over the past several years, in the years that he has ranched in that area, he has looked, schemed, investigated ways to increase his water supply, to my knowledge they have lands that go dry each year for the want of water. The, to my knowledge the pump lift, if they are to pump water from well is on the order of 4-500 feet. And the answer to the, my answer to that is this, the only economical way to increase that water supply is either to pipe it or ditch on a contour and put it in a pipe, some combination. This is what we are proposing to do. Our interest is to develop power. The site benefit is increased water, decreased bed loss, so it's to their benefit to increase irrigational supplies. So there's a public benefit in my mind, to the irrigators both Mr. Wilding and the D&D Ranch." (p.24)(emphasis supplied).

"So my answer to that question, is that the irrigators it's to their benefit and to the Fish and Game and to the sportsmen and the environmental needs of the state of Idaho, they can both come out ahead. Yes." (p.25)(emphasis supplied).

Wilding certainly had the impression any savings would inure to the benefit of the irrigators and testified:

"MR. RIGBY: Mr. Wilding as I understand it you and the other users of water have been concerned for years about the tremendous ditch bed losses all along Birch Creek and particularly from the point of diversion down to your place of use, isn't that true?

MR. WILDING: This is right.

MR. RIGBY: Have you and your people studied this proposal of Mr. Sorenson's and come to the conclusion that this may aid in that loss?

MR. WILDING: We have.

MR. RIGBY: And what would be your conclusion?

MR. WILDING: Well, my conclusion is that it would save us a tremendous amount of water.

MR. RIGBY: Ok, that's all I have now." (pp. 127 and 128).

The position of the parties and the representations at that time are also corroborated by the following:

1. At that time, the applicant only intended to use the water of D&D and Wilding, and was not making any claim for consumptive use of the same. He did not acquire Simmons' water until five (5) years later so there was no reason for him to want any "salvaged or saved water."
2. Applicant not only needed use of the water belonging to D&D and Wilding, but needed land owned by both for right of way and location of the power plant. The incentive for them to sell and allow use of their water was the representation and promise they would benefit from any savings of water that might occur.
3. The representations made are confirmed by fifteen (15) years of conduct. Applicant did not file any claims to alleged saved water until February, 1997 when he filed Application No. 31-7646.

It is protestant Newman's position, applicant is not legally entitled to alleged saved water for two (2) reasons:

1. The Applicant, an outside third party, cannot save and claim water in a private ditch.
2. The applicant is barred by the doctrines of equitable estoppel and quasi estoppel from now claiming saved water.

B. ARGUMENT.

1. Saved Water Is A Troublesome Doctrine That Does Not Fit Within Established Principles Of Idaho Water Law.

A. Saved water appears to undermine the conclusiveness of licenses and decrees, and in this case the Reno Decree. If there is insufficient water to fill the decreed rights of Newman and D&D, how can the applicant have a right that takes precedence over a decree that has been in place for more than 75 years.

B. What is the priority of the so-called saved water? Does it have a priority that precedes all of the priorities in the Reno Decree? Is the priority the same if there is a drought or an abundance of water? If decreed rights are being cut because of insufficient water, does the saved water continue to be filled at 100%?

C. There is no policy or precedence for administration of saved water. There is not a single water right within Water District No. 1 administered as saved or salvaged water.

D. There is no statutory recognition of salvaged or saved water.

2. While There Is Common Law Recognition Of Salvaged Water, Which Has Not Been Appropriated, There Is No Precedent For A Third Party To Claim Water Saved From A Private Ditch.

A. The doctrine of saved water arises from Reno v. Richards, 32 Idaho 1, 178 P.81 (1918). Richards and others claimed the waters of Pass Creek did not reach Birch Creek (the same Pass Creek and Birch Creek that are at issue in this proceeding) because of brush, logs, rocks and debris in the Pass Creek channel. They claimed they moved the debris and cleaned the channel so at least

2 cfs reached Birch Creek. The trial court denied their claim but the Supreme Court held if they had in fact generated Pass Creek flow into Birch Creek, they were entitled to the water so salvaged.

B. *Hill v. Green*, 47 Idaho 157, 160, 274 P.110 (1928), was a private adjudication of a very similar situation. Plaintiffs claimed they had constructed "... headgates, diversion works, flumes, conduits and other structures. . ." in Indian Creek generating a flow of 3 cfs into Medicine Lodge Creek thereby enhancing the flow of the latter by the 3 cfs. The Supreme Court affirmed there could be a salvage of water "... not theretofore used by prior appropriators in order that the right by salvage may be acquired . . ."

The court further observed:

"...there is no question but that the burden of proof rested upon respondents to show by competent evidence that the water salvaged by them had not theretofore been appropriated or used by others with prior rights." (p.160)(emphasis supplied).

In this case, that holding means the water allegedly saved in the Reno Ditch is not available to the applicant because it has already been appropriated (decreed) by D&D, Newman and their predecessors.

C. In *Basinger v. Taylor*, 30 Idaho 289, 164 P.522 (1917); 36 Idaho 591, 211 P.1085 (1922), the appellants were all farmers except for an irrigation company, who diverted water from Dry Creek across low lands and gravel bars through a ditch known as the "Farmers' Ditch" into Wet Creek where it flowed 1 ½ miles to the farmers point of diversion. They had a 1907 decree for 22 cfs. In 1908, Taylor located near Dry Creek and installed a diversion a short distance above the diversion to the Farmers' Ditch. Initially, he did not have a licence or decree, but his right was

apparently recognized as a so-called constitutional diversion. Later, Taylor received a license for 9.86 cfs.

In 1910, the appellant Irrigation Company was given a permit for 150 cfs out of Dry Creek. It constructed a pipe line approximately seven (7) miles upstream from the Farmers' Ditch and the Taylor diversion. In 1912, it completed the pipe-line and carried the water from Dry Creek to Corral Creek to Wet Creek thereby eliminating the Farmers' Ditch. By agreement with the irrigation company, the farmers changed their point of diversion to the pipe-line and thereafter took their water through it.

In the first appeal, the Supreme Court held the farmers could not claim more than their decreed 22 cfs at their diversion point in Dry Creek without modification of their decree; and any so-called saved water did not have a priority over Taylor's constitutional appropriation.

In the second appeal, there was a finding that moving the diversion seven (7) miles up the creek saved approximately ten percent (10%) of the water (8 cfs) previously lost in the creek, and that elimination of the Farmers' Ditch saved an additional 25 cfs.

With regard to the two kinds of savings, the court held:

"This applies to the act of the corporate appellant in preventing, by the construction and use of its pipe-line, the 10 per cent loss which occurred in Dry Creek itself between the intake of the pipe-line and the old point of diversion of the individual appellants, or the point of diversion of respondents. To that extent it has materially augmented the amount of water available from the stream for beneficial use and should have a prior right to its use. This is not the case with the saving of 50 per cent which is brought about by eliminating the loss from the old Farmers' Ditch." (p.596-97)(emphasis supplied).

The court then noted there is an allowance for a reasonable transmission loss, which is apparently not subject to salvage, and unreasonable losses which the farmers could salvage. It said the farmers could not reasonably have been expected to build a cement lined ditch, but they could have prevented their water from "spreading out at several places." For that reason, the court said "... the loss was unreasonable, excessive, and against public policy. . ." and the farmers could have been forced to reduce the loss but no one raised that. The court then held the farmers were entitled to their 22 cfs, even though much of it had previously apparently been lost in the Farmers Ditch. In effect, the farmers received the benefit of any savings up to their decree. The Irrigation Company's claim was subject to Taylor's claim even though Taylor couldn't have used any water "saved" from the Farmers Ditch. The Irrigation Company received the rest. Several things should be noted:

1. The farmers who sustained the loss in the Farmers' Ditch were in part the same ones making the claim to the saved water by eliminating the ditch.
2. While the court recognized there was a difference between claiming saved water flowing in a natural stream, and saved water in the Farmers' Ditch, it did not evaluate practical and policy reasons for distinguishing the same.
3. The alleged saved water of the Irrigation Company was subject to the rights of the prior appropriator, Taylor, even though he could not have diverted or used it.

Basinger is of little precedential value in this case because:

1. There is no evidence the losses in either Birch Creek or the Reno Ditch were unreasonable. Until prohibited by the United States Bureau of Land Management, the irrigators used bentonite to reduce the losses. There is no evidence of "water spreading" or other careless practices in the Reno Ditch. It can hardly be argued the

losses were contrary to public policy, when the same public policy prohibited use of bentonite to reduce those losses.

2. The farmers who were claiming saved water, were the very same farmers who had previously lost it in their ditch. That is a notable distinction from this case where a third party applicant is seeking water already appropriated by others allegedly saved after its diversion into a private ditch. The Irrigation Company was not awarded any water decreed to the farmers whether "saved" or not.
3. The saved water was subject to the prior appropriation of *Taylor*. Even though it was saved from the Farmers' Ditch which *Taylor* could not possibly have diverted, it was nevertheless subject to his appropriation. If the applicant is allowed any savings, it is subject to all previous appropriations as reflected in existing decrees and licenses.

3. Public Policy Considerations Prohibit A Third Party Salvage of Reasonable Losses in Private Ditches.

A. Allowing salvage of reasonable losses in a private ditch would result in perpetual fights and disputes between ditch users. By definition, reasonable losses would not be economically feasible to recover. Consequently, only a well-to-do user could undertake such a salvage. As a practical matter, users on a lateral ditch need to cooperate. That simply would not happen where one user claimed "saved water."

Moreover, seepage losses in private ditches vary depending on the amount of maintenance. Could a third party salvage those losses during years of minimum maintenance when the losses are at a maximum, or could he only salvage during times of maximum maintenance when losses are at a minimum? In the Reno Ditch is a third party entitled to salvage at maximum flows? minimum flows? following use of bentonite?

B. Once the waters are allegedly salvaged by a third party, can the owners reclaim the waters if technology provides a feasible way to accomplish the same savings?

C. The rights of common ditch users are set forth in Idaho Code § 42-1301 (Lateral Ditch Users Association) and Idaho Code § 42-909, 910 (appointment of watermaster for common users). None of those provisions support the right of any one user, or any other person, to make improvements saving water, and claim the water saved as a result thereof.

D. The first section of Idaho Water Law, Idaho Code § 42-101 provides in part:

"Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose. . . ." (p.2)(emphasis supplied).

That declaration of water policy may include water which is salvaged or saved so long as it is flowing in "natural channels." However, it clearly does not include the right to claim water which has been diverted into a private ditch and is no longer flowing in a "natural channel."

4. Applicant's Claim To Saved Water Is Barred By Doctrines Of Equitable Estoppel And/Or Quasi Estoppel.

"3. Estoppel - The elements of equitable estoppel are (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) the party asserting estoppel did not know or could not have discovered the truth; (3) the false representation or concealment was made with the intent that it be relied upon; and (4) the person to whom the representation was made or from whom the facts were concealed relied and

acted upon the representation or concealment to this prejudice. *Twin Falls Clinic and Hospital Bldg. v. Hamill*, 103 Idaho 19, 644 P.2d 341 (1982). . .

The doctrine of quasi-estoppel, on the other hand, does not require a false representation. Rather, it is a doctrine designed to prevent a party from reaping an unconscionable advantage, or from imposing an unconscionable disadvantage upon another, by changing positions. See *Keese v. Fetzek*, 111 Idaho 360, 723 P.2d 904 (Ct.App.1986). The doctrine of quasi-estoppel may be invoked against a person asserting a right inconsistent with a position previously taken by him, with knowledge of the facts and his rights, to the detriment of the person seeking to apply the doctrine. *Evans v. Tax Comm'n*, 97 Idaho 148, 540 P.2d 810 (1975); *Treasure Valley Bank v. Butcher*, 121 Idaho 531, 826 P.2d 492 (Ct.App.1992)." (*Young v. Idaho Department of Law Enforcement*, 123 Idaho 870, 874-875, 853 P.2d 615 (1993)). (See also *The City of Sandpoint v. Sandpoint Independent Highway District*, 126 Idaho 145, 879 P.2d 1078 (1994); *Record Steel and Construction, Inc., v. Martell Construction, Inc.*, 129 Idaho 288, 923 P.2d 995 (App.1996); *Soloaga v. Bannock County*, 119 Idaho 678, 809 P.2d 1157 (1990)).

In *Schiewe v. Farwell*, 125 Idaho 70, 867 P.2d 944 (App.1993), a five (5) year written lease was executed between Farwell and Schiewe in which Schiewe was to pay as rental one-half (1/2) of all crops grown on the farm land. The lease expired in 1974, but the parties continued under a verbal year to year lease with the same terms through February, 1987. At that time, Farwell and Schiewe entered into a ten (10) year CRP Contract which both parties signed. Schiewe prepared the land, seeded it with grass and sprayed for noxious weeds, but no crops could be grown.

A year later, Farwell proposed a lease which reduced Schiewe's share of the CRP payment from \$50,000 to \$30,000, so Schiewe refused to sign. Schiewe indicated she would sign a lease consistent with the terms of the CRP Contract. Farwell then threatened to evict Schiewe who commenced an action for declaratory relief contending she had a right to remain on the land for the

ten (10) years of the CRP Contract. The District Court held in favor of the lessor, Farwell. The Supreme Court reversed and in doing so, observed and held as follows:

"Quasi estoppel is a broadly remedial doctrine, often applied *ad hoc* to specific fact patterns. *Keese v. Fetzek*, 111 Idaho 360, 362, 723 P.2d 904, 906 (Ct.App.1986). Our Supreme Court discussed the doctrine of quasi estoppel at length in *KTVB*, 94 Idaho at 281-82, 486 P.2d at 994-95. The doctrine is designed to prevent a party from reaping an unconscionable advantage, or from imposing an unconscionable disadvantage upon another, by changing positions. *Keese*, 111 Idaho at 362, 723 P.2d at 906. Quasi estoppel, unlike the more traditional form of estoppel (called estoppel *in pais* or equitable estoppel) does not require misrepresentation by one party or actual reliance by the other. *Id.*, 111 Idaho at 362, 723 P.2d at 906 (citing *Evans v. Idaho State Tax Commission*, 97 Idaho 148, 540 P.2d 810 (1975); *Williams Lake Lands v. LeMoyne Development*, 108 Idaho 826, 829, 702 P.2d 864, 867 (Ct.App.1985)(citing *Clontz v. Fortner*, 88 Idaho 355, 364-65, 399 P.2d 949, 954 (1965)). Instead, the doctrine of quasi estoppel requires that "the person against whom the estoppel is sought must have gained some advantage for himself...; in addition it must be unconscionable to allow the person against whom the estoppel is sought to maintain a position which is inconsistent with the one in which he accepted the benefit." *Tommerup v. Albertson's, Inc.*, 101 Idaho 1, 6, 607 P.2d 1055, 1060 (1980), *overruled on other grounds by Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989); *KTVB*, 94 Idaho at 282, 486 P.2d at 994.

The applicability of quasi estoppel turns upon the specific facts and circumstances of the case under consideration. *Williams Lake Lands*, 108 Idaho at 829, 702 P.2d at 867. As noted above, the facts in this case are not in dispute. After having enjoyed a long landlord-tenant relationship, Schiewe, together with Farwell, entered into a ten-year CRP Contract. By entering into the CRP Contract, and by having Schiewe sign the contract as the operator of the land, Farwell led Schiewe to believe that she would have the benefit of the ten-year contract which would pay her \$50,000 per year. Under the terms of the contract, Schiewe took the land out of production. Schiewe incurred considerable expense to prepare the land, seed it with grass, and spray it for noxious weeds. After Schiewe's husband died, Farwell attempted to terminate Schiewe's tenancy. Initially, Farwell presented Schiewe with a five-year lease contract which would have reduced the amount she received yearly to \$30,000. Schiewe refused to sign the contract. Farwell then gave her notice of his intent to terminate her tenancy.

Farwell gained an advantage for himself by inducing Schiewe to enter the CRP Contract and perform the work necessary to take the land out of production. After he obtained this benefit, he decided to terminate her tenancy. Terminating Schiewe's tenancy midway through the contract is a position which is inconsistent with the representation Farwell initially made to Schiewe by entering into the CRP Contract. By changing his position and terminating the contract, Farwell deprives Schiewe of the benefits she expected to enjoy as a participant in the CRP program. This is an unconscionable disadvantage to Schiewe. In reaching this conclusion, we rely on our interpretation of the CRP Contract which prohibits a landlord from unilaterally excluding a tenant from enjoying the benefits of the CRP program. . ." (p.74,75).

In *Evans v. Idaho State Tax Commission*, 97 Idaho 148, 540 P.2d 810 (1975), plaintiffs sold a motel complex including personal property to respondents Bedingfield. Prior to the sale, the parties, their accountants and attorneys met together and discussed the sales tax. Respondent Bedingfield advised everyone present he would "pay no more for the business, sales tax or no sales tax." Plaintiffs' attorney told all present if a sales tax was imposed, plaintiffs would fight it on the grounds there was no taxable transaction. After closing the sale, the State Tax Commission imposed a sales tax of \$2,987, and an action was filed to determine who should pay it. The Supreme Court held in favor of the respondent Bedingfield on the basis of quasi estoppel and observed:

"We find the doctrine of quasi estoppel applicable to these facts. That doctrine is properly invoked against a person asserting a claim inconsistent with a position previously taken by him with knowledge of the facts and his rights, to the detriment of the person seeking application of the doctrine. *KTVB, Inc. v. Boise City*, 94 Idaho 279, 282, 486 P.2d 992 (1971). The doctrine is distinguished from an estoppel in pais in that no concealment or misrepresentation of existing facts on the one side, no ignorance or reliance on the other, is a necessary ingredient. *KTVB, Inc., v. Boise City*, *supra* citing *Clontz v. Fortner*, 88 Idaho 355, 399 P.2d 949 (1965). (p.150).

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The facts are similar to the ones before the hearing officer in this case. The applicant needed land from Wilding and D&D for right-of-way and for location of the power plant. It was also critical they accept a transfer in their place of diversion, and use of a different ditch. Applicant induced the sales, change of diversion, and new ditch by telling Wilding and D&D they would receive any water saved as a result of the project. Applicant may dispute what he told Wilding and D&D, but his testimony under oath in the 1984 hearing, quoted herein should be conclusive as to the representations made not only to the irrigators, but to all of the governmental agencies including the Idaho Department of Water Resources. When the applicant needed consent of the agencies, Wilding and D&D, he unequivocally testified the water saved in the Reno Ditch would benefit all of them: "So my answer to that question, is that the irrigators it's to their benefit and to the Fish and Game and any sportsman and the environmental needs of the State of Idaho, they can both come out ahead. Yes." (p.25 Transcript Hearing 1994). Applicant's position now is clearly inconsistent with his position in 1984 and there is substantial detriment to D&D and Newman (successor to Wilding) including:

1. They will be deprived of 10 to 15 cfs which both need;
2. The water has been removed from the Reno Ditch so they now have no opportunity to do anything to reduce the losses in the ditch;
3. D&D decided not to proceed with its own power development because of the anticipated saved water;
4. The transfer claim of 17 to 20 cfs, and the saved water claim of 17 cfs, nearly equals the entire flow at the Splitter Gate during critical irrigation season so there is little or none for D&D and Newman- contrary to 75 years of irrigation practice;

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5. There is insufficient data to determine the savings under varying weather conditions so any award of the same to the applicant may in fact be awarding portions of D&D and Newman's appropriated water.

This is a classic situation for application of quasi estoppel.

The elements of equitable estoppel are also applicable:

1. The applicant made a false representation or concealment by declaring the alleged savings of losses in the Reno Ditch would go to the benefit of the irrigators;
2. The irrigators did not know it was a false representation because at the time the applicant had no consumptive use for any saved water;
3. The applicant clearly expected the irrigators and all governmental agencies to rely on his representations as an inducement to acquire fee title, right of ways and use of the water;
4. The irrigators relied on that representation to their now substantial prejudice as set forth in paragraph 1 through 5 above.

C. SUMMARY.

Applicant is involved in a major effort to again enlarge and change the water rights on Birch Creek. IDWR permitted a substantial enlargement in 1983 when it approved the Simmons Transfer Application for water to the Upper Simmons' Ranch: irrigated acreage expanded from approximately 500 to 800 or 900 acres.¹ The Applicant has filed a companion preceding, Transfer No. 3553 seeking to transfer 18.6 cfs of Simmons water with virtually no transmission loss, along with 2.9 cfs of forfeited Woody water to some 1,120 acres.²

¹The amount of acreage depends on the total number of irrigated acres at the Lower Simmons' Ranch, and the number of irrigated acres at the Upper Simmons' Ranch. There has never been any surveys and the data is conflicting.

²The place of use on the Transfer Applications lists 1,120 acres located in Sections 36, 31, and 32. (Part B5 of application).

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Consequently, the Simmons transfer acreage expands from 500 to 800 to 1,120.

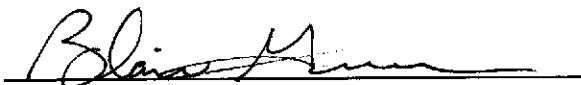
This application seeks another 17 cfs of "saved water" for another 1,264 acres.³ What started in 1984 as a nonconsumptive use has now blossomed into a consumptive claim for nearly all of the water at the Splitter Gate during the irrigation season to irrigate nearly 2,400 acres. The amount of water to do that does not exist. Factually, the claimed water is simply not there.

Legally, the applicant is not entitled to water saved in a private ditch. Statutory appropriation is permitted of water flowing in its "natural channel." Common law has permitted appropriation of unappropriated saved water. The water allegedly saved in the Reno Ditch is not unappropriated. It has been appropriated and decreed since 1922.

Finally, the claim of the applicant to saved water is barred by equitable and quasi estoppel. Sorenson's unequivocal testimony in the 1984 hearing that the irrigators would benefit from any saved water confirms the oral representations to them. When he needed the irrigators, he agreed they should have the water. Now that the power plant is in place, he no longer needs them and seeks to take the water from them. He is barred from doing so by both equitable and quasi estoppel.

DATED this 7th day of April, 1998.

GROVER & ARCHIBALD


BLAIR GROVER

³The place of use for the "saved water" is 1,264 acres located in Sections 33, 34, 8 and 17. (Paragraph 19 of application). In addition to the saved water, applicant has apparently leased at least 10.14 cfs of groundwater from Gneiting for use on the 1,264 acres. (Lease with Right of Refusal).

CERTIFICATE OF SERVICE

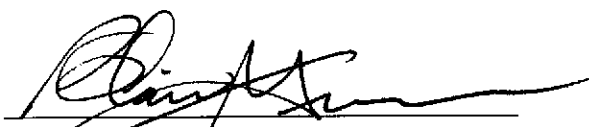
I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, with my office in Rigby, Idaho; that I served a copy of the foregoing document or pleading upon the following person(s) at the addresses below their names either by hand delivering, by facsimile transmission (Fax), or by mailing said document in the United States mail with the correct postage thereon, a true and correct copy thereof this 14 day of April, 1998.

Attorney Served: Peter R. Anderson (Mail)
Department of Water Resources Fax
1301 North Orchard Street
Boise, ID 83706-2237

Kent W. Foster, Esq. (Mail)
P.O. Box 50130 Fax
Idaho Falls, ID 83405

George Petersen, Esq. (Mail)
485 "E" Street
Idaho Falls, ID 83402

Breck H. Barton, Esq. (Mail)
P.O. Box 100
Rexburg, ID 83440


BLAIR GROVER

Blair Grover
GROVER & ARCHIBALD
215 Farnsworth Way
P.O. Box 36
Rigby, Idaho 83442
(208) 745-6653

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE APPLICATION FOR)	
AMENDMENT OF WATER RIGHT PERMITS)	AFFIDAVIT OF BLAIR
NOS. 32-07128 AND 32-07136 IN THE NAME)	GROVER
TED SORENSON d/b/a SORENSON)	
ENGINEERING)	
)	
and)	
)	
IN THE MATTER OF APPLICATION FOR)	
PERMIT NO. 32-07252 (formerly No. 31-07646))	
IN THE NAME OF BIRCH CREEK RANCHES,)	
L.L.C.,)	
_____)	

STATE OF IDAHO)
)ss
County of Jefferson)

BLAIR GROVER, being first duly sworn deposes and states:

1. He is the attorney for the protestant Lavar Newman.
2. Attached hereto are copies of pages from the transcript of the hearing held before the Department of Water Resources on April 15, 1984 which protestant Newman submits in support of estoppel. (emphasis supplied).

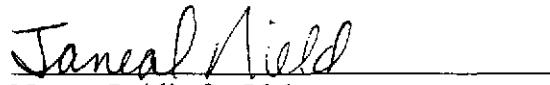
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DATED this 14 day of April, 1998.

GROVER & ARCHIBALD


BLAIR GROVER

SUBSCRIBED and sworn to before me this 14 day of April, 1998.


Notary Public for Idaho
Residing at: Lewiston, ID
Commission Expires: 11/29/2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, with my office in Rigby, Idaho; that I served a copy of the foregoing document or pleading upon the following person(s) at the addresses below their names either by hand delivering, by facsimile transmission (Fax), or by mailing said document in the United States mail with the correct postage thereon, a true and correct copy thereof this 14 day of April, 1998.

Attorney Served: Peter R. Anderson
Department of Water Resources
1301 North Orchard Street
Boise, ID 83706-2237

(Mail)
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Kent W. Foster, Esq.
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Breck H. Barton, Esq.
P.O. Box 100
Rexburg, ID 83440

(Mail)


BLAIR GROVER

Before Bobby Fleenor, Hearing Officer, Idaho Department
of Water Resources.

For the Applicant:

**Counsel for Mr. Sorenson
Birch Power Company**

**Counsel for the Idaho
Department of Fish
and Game**

**Representatives of the
Bureau of Land
Management**

**Counsel for D & D
Enterprises, Inc.**

Representative of the
Waterusers

Bobby D. Fleenor
Bobby Fleenor
Hearing Officer

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1 senting the BLM.

2 MR. MCCARDY: My name is Bob McCardy, I'm the area wildlife biolo-
3 gist for the Big Butte Resource area.

4 HEARING OFFICER: Ok, now for Water District No. 32-D.

5 MR. WILDING: Ben Wilding, Watermaster.

6 HEARING OFFICER: Ok, then finally for D & D Enterprises.

7 MR. PETERSEN: George C. Petersen, Jr., attorney.

8 HEARING OFFICER: Ok, are there any other parties here that are
9 present that feel they are protestants other than those four?

10 -----: We are (inaudible) BLM (inaudible) our concern
11 (indistinguishable)

12 HEARING OFFICER: Why don't you state your name for the record.

13 MR. Ball: Ronald Ball, Paul Brother Sheep Company.

14 HEARING OFFICER: Ok, did you file a written protest of any kind?

15 MR. BALL: No.

16 HEARING OFFICER: Against either one of these applications?

17 MR. BALL: No.

18 HEARING OFFICER: Ok, are there any preliminary motions or matters
19 that need to be taken care of on the record, any evidence that
20 you have come to an agreement on that we can take notice of or
21 that you could stipulate to?

22 MR. RIGBY: The applicant wishes for the record to amend both
23 application No. 32-7128 and application 32-7136 by removing
24 all references to 5 cfs for fish propogation and I'd like to
25 explain the purpose of the motion. It was the intention of the

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1 applicant when the second application, 32-7136, was filed, to
2 remove that reference to 5 cfs for fish propagation as contained
3 in 7128, and if you will refer to item 5 in the original 7128, it
4 says 45 cfs less minimum 5 cfs for fish propagation. And in
5 32-7136 in item 5 it talks about 25 cfs without any reference to
6 the 5 cfs already allowed for fish propagation and some question
7 has arisen here this morning among the parties as to whether or
8 not the both applications are subject to that limitation or
9 whether either one is. And applicant does this only for ~~one~~
10 reason, and that is that the applicant does not own this water
11 ~~this water right~~, the applicant has no right to give or to with-
12 hold and therefore believes that to leave it in there confuses
13 the record and makes it difficult, say for the irrigators to know
14 and it makes it difficult for the Fish and Game or BLM or anyone
15 else to know what is intended and this is within the prerogative
16 of the Department, if it ever does grant a permit, whether to
17 make that a condition or not to make it a condition. Ours is an
18 application for a nonconsumptive use, theirs is an in-stream, or
19 consumptive use, those water rights are established, they're
20 regulated by the Department and not by us and so we feel that it
21 should be done for clarification purposes and not with any intent
22 whatsoever to suggest that it should or it should not be a con-
23 dition of the permit, that that's is a matter that should be
24 resolved between the respective water rights holders.

25 HEARING OFFICER: So you wish to simply delete the statement in

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1 answer to question 5, it says the total quantity to be
2 appropriated, you wish to delete the portion that says less the
3 minimum 5 cubic feet per second for fish propagation?

4 MR. RIGBY: That's right and any other reference in either of the
5 applications that anyone might imply still refers to it.

6 MR. PETERSEN: Mr. Fleenor, by way of clarification, do I
7 understand Mr. Rigby that it is your proposal that all of the
8 water would go down one ditch rather than two ditches, is that
9 correct?

10 MR. RIGBY: The application, Mr. Petersen, then I think would be
11 quite clear and the proof would be quite clear that as far as the
12 non-consumptive use that the applicant proposes to make of this
13 water would be down just the one channel

14 MR. PETERSEN: Just

15 MR. RIGBY: Whatever he is allowed to take for power purposes if
16 a permit is granted, he would take down in effect the new
17 ditch

18 MR. PETERSEN: The new ditch

19 MR. RIGBY: Right, and leave it to the Department and the rela-
20 tive rights of the water users to decide how else that should be
21 treated. In other words, it's just not ours to decide. We don't
22 propose, in other words, to take the water for power purposes
23 down two different channels. The old channel and the new chan-
24 nel. Whatever we're allowed to use, if any, we'll take down one
25 channel, and the amount we'd like to use is as contained in the

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1 application, 45 by 7128 and 30 by 7136.

2 HEARING OFFICER: I think the applicant certainly has the per-
3 rogative of amending their application to reflect that as their
4 intent and certainly for purposes of this hearing we ought to
5 discuss it in that particular light.

6 MR. DILLON: Mr. Fleenor, for the record then, I would object
7 to that amendment on two reasons, first the narrative on applica-
8 tion 32-7136 does not speak to deleting the 5 cfs for fish propo-
9 gation, it simply states that the second application is just an
10 amendment to the first application to increase the amount of
11 water that the applicant would be able to utilize. Second, the
12 fact that the 5 cfs to remain in the Birch Creek Channel, if that
13 were to be deleted, that is we believe, is a material change in
14 the application and that it materially effects our interests and
15 that Fish and Game is charged with the duty by statute to protect
16 fish and wildlife in the state of Idaho. And because this is a
17 material change in the application and because it does materially
18 effect the interest of Fish and Game in this matter, we would
19 request a continuance to prepare for the application as it has
20 been amended if the Department does amend the application.

21 MR. RIGBY: Can I be heard on that?

22 HEARING OFFICER: Yes, go ahead Mr. Rigby.

23 MR. RIGBY: Mr. Fleenor, I certainly disagree with counsel that
24 that amends the application. This doesn't go nor could it have
25 gone to the ultimate issue of whether or not he is entitled to

1 the amount of water he's asked for for power production. The
2 fact that he states in there that he is willing to send 5 cfs
3 down that old channel is an absolute (indistinguishable). It's
4 not binding on the Department, its not binding on the water users
5 in any way shape or form, what we are really talking about is
6 proof, and the proof, counsel, this matter has been discussed,
7 and like I told you prior to this hearing, we don't want to be in
8 a position of offending the Fish and Game Department. On the
9 other hand, we are not in a position of offending the water
10 users, either one of you, and it seems to me that the problem
11 that you raise, you've already been cognizant of, and that is, to
12 perpetuate the 5 cfs, so that's your proof. Your testimony here
13 today can be, we want the 5 cfs, that then can be discussed and
14 the testimony of the irrigators can talk about the 5 cfs, it
15 doesn't involve this applicant, never did, even if he put it in
16 there. What if he had put in the application that he was going
17 to grant to BLM so much for stock watering, that he would grant
18 to other parties along the line for other purposes, it's a
19 complete nullity, he doesn't own the water, he can't give it,
20 it isn't changing the application. The only material thing is
21 he's asked for that power production and so at least our position
22 is that we can't ask the Department to take, say if it is the
23 irrigators water, from them and run it down the old channel.
24 We're saying, nevertheless, if that's the Department's decision,
25 we'd abide by ~~MICROFILM~~ and we're prepared to stipulate with the

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1 parties here, that whatever either way they go we're willing to
2 accept, and that's the important point. We're willing to accept
3 that. But your dispute is with the water rights holders, not
4 with us. We'll do it either way.

5 MR. DILLON: Well Mr. Rigby, I understand what your position is
6 and I just wanted to make my objection for the record and submit
7 it to Mr. Fleenor.

8 HEARING OFFICER: Ok, I going to deny the request for a con-
9 tinuance at this particular point. I think, you certainly can't
10 argue that there is a 5 cubic foot per second minimum flow needed
11 in that particular region of the stream, I think that doesn't
12 materially change your position that you've taken all time, but
13 I would agree with Mr. Rigby that it probably is not really an
14 amendment of the application as much as it is an explanation of
15 the intent of the application. One thing that the Department
16 will reserve a ruling on is the actual amount of the application
17 whether it was really intended for 45 cubic feet per second or
18 whether it is intended for 40 cubic feet per second for power
19 production. That will be part of the decision that we reach.
20 Ok, do you understand what I am saying?

21 MR. RIGBY: Maybe we could even clarify that, Mr. Fleenor.

22 HEARING OFFICER: Ok.

23 MR. RIGBY: That the intent of the two applications taken
24 together is for a total of what 75.

25 HEARING OFFICER: So on the first application for permit the

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1 back upstream only as far as it took to be able to lay in a
2 feeder ditch and make it work. And that moved the diversion of
3 the new feeder ditch approximately three thousand feet upstream
4 from the existing diversion. Now I might make a point about the
5 impact this would have on the downstream irrigators or anyone for
6 that matter on the basis of water supply. The present Reno ditch
7 is laid on a grade such that the water velocity, as we have
8 measured them, are in the 5 to 8 foot per second range. In this
9 velocity range, the water scours, it essentially will roll gravel
10 down the stream bed. It's impossible, or should I say it's not
11 successfully been able to be sealed using Bentonite. And there-
12 fore, as measured by data taken by the University of Idaho, as
13 compared against United States U.S.G.S. gauging station at Eight
14 Mile Road, and also spot measurements taken by Mr. Don Shenton,
15 the Reno ditch irrigators presently lose approximately one-third
16 of their water from their point of diversion to their point of
17 use. They divert in the range of 45 second feet and deliver in
18 the range of 28 to 30 second feet. The numbers are in the
19 report. The new feeder ditch, in that it is laid on a shallower
20 slope, and designed for a velocity in the range greater than 1.5
21 feet per second, less than 2.5 feet per second, means that the
22 velocity of the ditch is fast enough that there precludes a
23 mossaing problem that's slow enough that you don't scour out the
24 fines. We have done a study and I have consulted with the United
25 States Soil Conservation Service and also consulted with a com-

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1 commercial supplier of a soil sealant in the feeder ditch. We have
2 designed the feeder ditch such that we can limit the bed loss to
3 one quarter inch per day, and over the wetted surface of the
4 ditch, and the length of the ditch, this amounts to approximately
5 eight-tenths of a second foot. I have assumed as a practical
6 matter that over time the sealing of the ditch wouldn't be as
7 successful as we had anticipated. Therefore, I have given an
8 allowance of the new feeder ditch would have a loss of not eight-
9 tenths of second foot but rather three second feet. And so from
10 the point of diversion, proposed point of diversion, to the pro-
11 posed point of return for option A in Reno ditch, I have calcu-
12 lated there's approximately nine second feet of bed loss. By
13 putting this ditch in, we could eliminate three, correction, we
14 would eliminate five to six second feet of this bed loss.
15 Therefore, the water that would be able to be delivered to the
16 Reno ditch irrigators under option A would amount to an increase
17 of five to six second feet. Most certainly it would not result
18 in a decrease of water delivered. There is also an option B
19 which is contained in the report, it is shown here on this map
20 that's on the wall. And that reach there is approximately thir-
21 teen second feet of bed loss if we allow three cfs in the new
22 ditch this would mean an increase of ten to eleven second feet of
23 water that is available for use of the irrigators, if it belongs
24 to them as their water rights or its available for the use of the
25 Fish and Game to bypass for downstream use, whatever the case may

1 be. I am saying we do not decrease the water supply, that is
2 available, we increase it. Secondly, the report speaks to
3 litigation efforts for the development of the fisheries

4 MR. RIGBY: Before we get into that, Mr. Sorenson, I hate to
5 interrupt your narrative because you understand your report, you
6 referred to the map that is pasted on the wall, who prepared that
7 exhibit?

8 MR. SORENSON: I did, sir. It was prepared with my information
9 under my direction.

10 MR. RIGBY: I wonder if we could, by stipulation, have that
11 introduced because several people will be referring to it.

12 MR. SORENSON: I might point out that those two maps, copies of
13 them are contained in the report.

14 MR. RIGBY: Oh, they are

15 MR. SORENSON: Yes, they have been reduced, the option A map is
16 contained as figure 3 of the report in section, I guess its
17 section 2 or 3, in any event its figure A of the report, it
18 is listed in the index, it's found on page 9 of the report.
19 Option B is listed as figure 4 and it's listed as page 10 of
20 the report.

21 MR. RIGBY: Those two then are exact copies and duplicates of the
22 two exhibits that are now is that right?

23 MR. SORENSON: Yes, sir, with the exception they have been
24 reduced. In scale.

25 MR. RIGBY: And since applicant's exhibit 1 has been introduced

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1 MR. SORENSON: Correct. It is.

2 MR. RIGBY: It needs to be done as soon as possible.

3 MR. SORENSON: Yes, sir. I have been into negotiations with Utah
4 Power and Light and we have concluded the format and the price
5 for the power sales. To put it bluntly, my market is now fixed,
6 I, its in my best interest to move into construction as rapidly
7 as possible to preclude any inflation that may occur in materials
8 and equipment.

9 HEARING OFFICER: Before you ask the next question (tape ends)
10 (tape 3 begins here)

11 MR. RIGBY: We have said things about the natural resources but
12 again, just a little summary to answer the question, has the
13 applicant sufficient natural resources with which to complete the
14 project?

15 MR. SORENSON: The answer to that question is yes.

16 MR. RIGBY: There are representations on that issue that are
17 found in your report, exhibit 1?

18 MR. SORENSON: Yes, sir.

19 MR. RIGBY: And we have witnesses here to testify in detail and
20 make themselves available for cross examination, is that right?

21 MR. SORENSON: Yes, sir. Actually, those representations are
22 found in the exhibit, or appendix rather, appendix 7 of the
23 report. And we have additional letters that have been submitted
24 to the Department of which you have copies there, Mr. Rigby.

25 MR. RIGBY: And the last thing, will this proposed use under this

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1 permit, if granted, conflict with any local public interest?
2 MR. SORENSON: My answer to that question is no. And I will
3 state it on two sides. One, the irrigators for many, many years
4 have lost a great deal of their water from the point of diversion
5 to the point of use and in my discussions with Mr. Wilding over
6 the past several years, in the years that he has ranched in that
7 area, he has looked, schemed, investigated ways to increase his
8 water supply, to my knowledge they have lands that go dry each
9 year for the want of water. The, to my knowledge the pump lift,
10 if they are to pump water from well is on the order of 4-500
11 feet. And the answer to the, my answer to that is this, the only
12 economical way to increase that water supply is either to pipe it
13 or ditch on a contour and put it in a pipe, some combination.
14 This is what we are proposing to do. Our interest is to develop
15 power. The site benefit is increased water, decreased bed loss,
16 so it's to their benefit to increase irrigational supplies. So
17 there's a public benefit in my mind, to the irrigators both Mr.
18 Wilding and the D & D Ranch. Secondly, on the other side of
19 the coin, Birch Creek, with respect to the fisheries and the
20 environment. I am not insensitive to that both on a personal
21 level and a pragmatic level because they have check points in
22 this, one is this water right hearing, they all have check points
23 in the FERC process also. But basically, it's my view if you are
24 going to do something all parties involved should come out ahead.
25 And I relied on Dr. ~~GROFF~~ ^{MICROFILMED} to develop the data. It is our

1 opinion, my opinion based upon his study that we can improve the
2 fisheries of Birch Creek and have the sportsmen of the State of
3 Idaho come out ahead. I don't mean to imply that the Fish and
4 Game aren't taking some risks, they have, they have been good to
5 work with, they are taking some risks, we are willing to give
6 guarantees, bonded guarantees to the effect if we say we are
7 going to increase the fisheries by 2 to 300% that we will per-
8 form. So my answer to that question, is that the irrigators it's
9 to their benefit and to the Fish and Game and to the sportsmen
10 and the environmental needs of the state of Idaho, they can both
11 come out ahead. Yes.

12 MR. RIGBY: What about the public lands?

13 MR. SORENSON: The public lands, I guess the answer to that
14 question is Reno ditch now, kind of washes, I guess the way
15 they formed the ditch was they took a plow behind a horse and let
16 the water wash behind them and let the ditch wash in. And in
17 places it washes out in the wintertime, and water runs hither and
18 nil across the desert, this is a method to contain it. It's a
19 method to enhance the value of the public lands with the fishery
20 and its also to enhance the public lands because one of the
21 charges of the Bureau of Land Management is the development of
22 the resources much as you would do a mining claim, this is a
23 development of the water resources to provide a renewable energy
24 resource for both the state of Idaho and the nation to make us,
25 if anything else, less dependent in its own small way upon

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1 as evidence.

2 MR. RIGBY: Could I ask just a question before

3 MR. DILLON: Certainly.

4 MR. RIGBY: As I understand it, this material was, in fact, put
5 together by you, Mr. Moore? and then it was signed by the regional
6 supervisor. Mr. Moore is here if you have any questions. So we
7 can get as much information from you about this as we could from
8 Mr. Reinecker, is that right? Then we have no objections.

9 HEARING OFFICER: Mr. Petersen, do you have any objection?

10 MR. PETERSEN: No objection for what it proports to be at least
11 as far as the Birch Creek water users are concerned, but we're
12 not part of that agreement and certainly would not give up our
13 rights to go ahead and correct the ditch in the event Mr.
14 Sorenson didn't take care of it.

15 HEARING OFFICER: Does the BLM have any objections?

16 MR. ESGET: No objections.

17 HEARING OFFICER: Mr. Wilding, do you have any objections to the
18 mission of this exhibit?

19 MR. WILDING: There's one questions I've got and that's the
20 matter of the measuring device at the point of diversion. If he
21 puts in a measuring device at the point of diversion that's
22 where our water is measured. From then on throughout the project
23 it's our water loss or gain.

24 HEARING OFFICER: That's no different then it is now (inaudible)
25 the Reno ditch. MICROFILMED

1 MR. DILLON: When you say it's short, have you ever done any
2 measurements at the diversion to see how short it is? Have you
3 personally done any measurements at the diversion?

4 MR. WILDING: Well, yes.

5 MR. DILLON: The main source of your loss is the loss in the
6 ditch from the diversion.

7 MR. WILDING: That is the biggest and the quick, now according to
8 my figures here there's about 1380 inches of water loss in the
9 creek from the head measuring at the head and measuring at our
10 diversion. There's around 1300 inches of loss.

11 MR. DILLON: When you say head what do you mean by that?

12 MR. WILDING: Well, the head of the creek, the last, above all
13 the ranches, whatever.

14 MR. DILLON: Oh, ok. And I have no further questions.

15 HEARING OFFICER: Mr. Rigby do you have any questions?

16 MR. RIGBY: ~~Mr. Wilding as I understand it you and the other~~
17 ~~users of that water have been concerned for years about the tre-~~
18 ~~mendous ditch bed losses all along Birch Creek and particularly~~
19 ~~from the point of diversion down to your place of use, isn't that~~
20 ~~true?~~

21 MR. WILDING: This is right.

22 MR. RIGBY: Have you and your people studied this proposal of Mr.
23 Sorenson's and come to the conclusion that this may aid in that
24 loss?

25 MR. WILDING: We have.

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1 MR. RIGBY: And what would be your conclusion?

2 MR. WILDING: Well, my conclusion is that it would save us a tre-
3 mendous amount of water.

4 MR. RIGBY: Ok, that's all I have now.

5 HEARING OFFICER: Mr. Petersen, do you have any other questions?

6 MR. PETERSEN: I have no further questions of Mr. Wilding.

7 HEARING OFFICER: Ok, thank you Mr. Wilding. Do you have another
8 witness you would like to call Mr. Petersen?

9 MR. PETERSEN: Yes, I'd like to call Mr. Steve Phillips. I pro-
10 mised Mr. Phillips if he'd come we'd call him as a witness.

11 HEARING OFFICER: Do you swear the testimony you are about to
12 give to be the truth, the whole truth and nothing but the truth
13 in this matter?

14 MR. PHILLIPS: Yes, I do.

15 MR. PETERSEN: Mr. Phillips, would you state your name, please?

16 MR PHILLIPS: Steve Phillips.

17 MR. PETERSEN: And where do you reside?

18 MR. PHILLIPS: Well,

19 MR. PETERSEN: New address, huh?

20 MR. PHILLIPS: Star Route, yes, it's in Dubois, mailing address
21 is Box 15.

22 MR. PETERSEN: Your occupation?

23 MR. PHILLIPS: I'm the ranch manager for D & D Enterprises.

24 MR. PETERSEN: Mr. Phillips, I'm going to ask you if you would
25 tell the group here the water practices or the practices of D & D

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

D&D Enterprises, Inc., by and through its attorneys of record, joins with protestant Lavar Newman in moving for summary judgment in this matter on the issue of whether the applicant is entitled to a water right in any of the so-called "saved water" which may have resulted from a rerouting of the waters of lower Birch Creek so that they now flow through a new ditch to applicant's power plant and then to the protestants D&D and Newman, instead of flowing through the Old Reno Ditch. D&D moves the hearing officer for a judgment that, as a matter of law, the applicant is not entitled to a water right in any such waters; or alternatively, that any water rights in saved waters to which applicant may be entitled have a priority date as of applicant's filing date in 1997.

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This motion is based on D&D Enterprises, Inc.'s Memorandum in Support of Motion for Summary Judgment, submitted herewith, the Memorandum of Lavar Newman previously submitted, and the entire record in this matter.

DATED this 2nd day of April, 1998.

PETERSEN, MOSS, OLSEN, CARR
ESKELSON & HALL



Wm. Charles Carr

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 2nd day of April, 1998, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered as defined by Rule 5(b), I.R.C.P.

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF AMENDED)
APPLICATION FOR TRANSFER)
NO. 3553 OF WATER RIGHTS NOS.)
32-00090, 32-00093, 32-00068,)
32-00061C, 32-00069, 32-00089,)
32-00092, 32-00091, 32-00101,)
32-00102, 32-00073, 32-00085,)
32-00077, 32-00086, 32-00078,)
32-00087, and 32-00079 IN THE NAME)
OF BIRCH CREEK RANCHES, L.L.C.)

**D & D ENTERPRISE, INC.'s
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

1.0 ISSUE STATEMENTS

The following issues should be decided as matters of law, since there can be no material dispute as to the controlling facts pertaining to each issue:

1.1 Estoppel: D&D Enterprises and Ben Wilding used all the water in lower Birch Creek for many decades, transporting it via the Old Reno Ditch. In 1982 Ted Sorenson approached them about eliminating the Old Reno Ditch and reroute the resulting increased water through a new ditch and his proposed power plant. Without their consent, his power plant scheme had no viability. He promised the increased water would be theirs. In reliance on Mr. Sorenson's

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promise, they agreed to his proposal. Is Sorenson estopped from now claiming the increased water for himself?

1.2 Water in a Private Ditch: Idaho law only allows appropriation of the waters of a natural stream. Ted Sorenson claims to have eliminated the losses resulting from D&D and Newman's use of the Old Reno Ditch. He seeks to appropriate this "saved" water. But the Old Reno Ditch was not a natural stream, rather a private ditch carrying the irrigation waters of D&D and Wilding. Does Sorenson therefore have a legal basis for appropriating water saved in the Old Reno Ditch?

1.3 Sorenson and D&D/Newman's Competing Claims to Appropriation: The change in diversion of Birch Creek from the Old Reno Ditch to the new ditch and power plant occurred in late 1986. In the spring of 1987, D&D and Newman began using all of the water flowing through the power plant. This constituted a "constitutional" appropriation of the saved water, but they did not follow the statutory requirements for appropriating water. Knowing that he had promised the saved water to D&D and Newman and that in reliance on his promises, they were beneficially using the water, Sorenson waited 10 years to apply for a permit to appropriate the saved water. Who has the right to the saved water?

2.0 DISCUSSION OF THE ISSUES

2.1 Ted Sorenson is Estopped from Claiming a Right in Any Saved Water

A. This Case Calls for Application of the Doctrine of Estoppel

The doctrine of estoppel, whether equitable estoppel or quasi estoppel, is firmly established in Idaho. As stated in *Twin Falls Clinic & Hospital Building Corp. v. Hamill*,¹:

¹103 Idaho 19, 644 P.2d 341 (1982).

Estoppel is a long accepted portion of Anglo-American jurisprudence. [citations] In one of this Court's early decisions . . . it was stated that estoppel as a principle is "so well established * * * that it needs no citation of authority to support it."²

(1) Equitable estoppel

The Court in *Twin Falls Clinic* set forth the elements of equitable estoppel as:

(1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth, (2) the party asserting estoppel did not know or could not discover the truth, (3) the false representation or concealment was made with the intent that it be relied upon and (4) the person to whom the representation was made or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice.³

If these elements are present, the promisor is estopped from asserting a defense or otherwise taking a legal position that prevents the injured party from obtaining a remedy against the promisor.

(2) Quasi estoppel

Quasi estoppel applies when a person changes position to the unconscionable disadvantage of another. The Court in *Keesee v. Fetzek*⁴ explained quasi estoppel in this way:

Quasi estoppel is a broadly remedial doctrine, often applied ad hoc to specific fact patterns. It "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him." [citation] The doctrine is designed to prevent a party from reaping an unconscionable advantage, or from imposing an unconscionable disadvantage upon another, by changing positions. [citation] Quasi estoppel, unlike equitable estoppel, does not require misrepresentation by one party or actual reliance by the other. [citation]⁵

²644 P.2d at 343.

³*Supra* at 344.

⁴111 Idaho 360, 723 P.2d 904 (Idaho App. 1986).

⁵723 P.2d at 906.

(3) **Estoppel applies in this case.**

From the uncontested facts of this case, both equitable estoppel and quasi estoppel apply. Indeed, invoking estoppel here is akin to holding that a water right cannot be initiated by trespass.⁶ In the same way, and upon the same legal and equitable principles, a valid water right cannot be obtained by misrepresentation or the breaking of a promise upon which others relied.

B. Ted Sorenson promised D&D and Wilding that whatever additional water he created would belong to them.

In a deposition under oath, Ted Sorenson said:

"Q: Did you give them any assurances as to the power plant not interfering with their water rights?

A: I gave them assurances that the power plant by implementation of it would create a bed loss savings in their ditch, that in fact there would be more water available for irrigation." (Sorenson Deposition, November 16, 1989, pp. 44-45)

In an earlier statement, also under oath, Mr. Sorenson stated:

One, the irrigators for many, many years have lost a great deal of their water from the point of diversion to the point of use and in my discussions with Mr. Wilding over the past several years, ... he has looked, schemed, investigated ways to increase his water supply And the answer to the, my answer to that is this, the only economical way to increase that water supply is either to pipe it or ditch on a contour and put it in a pipe, some combination. This is what we are proposing to do. **Our interest is to develop power. The [side] benefit is increased water, decreased bed loss, so it's to their benefit to increase irrigational supplies. So there's a public benefit in my mind, to the irrigators both Mr. Wilding and the D&D Ranch.**⁷

⁶*Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1974).

⁷Hearing transcript, April 5, 1984, p.24 (emphasis added).

Ted Sorenson made a similar representation in his letter to D&D and Wilding on April 4, 1983.⁸ In that letter, Mr. Sorenson recognized that D&D and Wilding had water rights of 44 cfs. He said that the new power plant scheme should increase the water available to them by at least 6 cfs, and that "(e)ssentially all the water available at the new diversion would be required to meet your existing decreed water rights." Attached to that letter was "Table One, Impact on Water Availability of New Ditch." It also showed this promised increase in water available to D&D and Wilding. In the March, 1998, hearing, Mr. DeMordaunt testified that Mr. Sorenson also made similar oral promises to him in person.

C. D&D and Newman relied on the promises of Ted Sorenson

Mr. Jim DeMordaunt testified that he relied on the several representations of Mr. Sorenson that any water saved or conserved by rerouting water down the new canal instead of the Old Reno Ditch would belong to D&D and Wilding. D&D and Wilding allowed this rerouting to take place and allowed Mr. Sorenson to use their water for the generation of electricity. Mr. DeMordaunt also testified that had he known before he gave his consent that Ted Sorenson was going to later claim the saved water, he would not have consented.

In reliance on Mr. Sorenson's representation that the water available to them would actually increase with the construction of the power plant facility, D&D and Newman also decided to forego another option which had been presented to them by Raymond T. Michener-- that they divert Birch Creek, increase the flow of available water, and operate their own power plant without involving Mr. Sorenson.⁹

⁸Exhibit No. 245.

⁹Exhibit 246.

In reliance on Mr. Sorenson's representations, D&D sold the land to Sorenson on which he built his power plant. Wilding granted him a right-of-way access to the power plant.¹⁰

Finally, in reliance on Mr. Sorenson's representations that the saved water would belong to D&D and Newman, they did not seek a permit from IDWR to appropriate the saved water-- they simply began to use it. They were at the end of the line; there was no discussion or thought that anyone else would be claiming this water for consumptive use.

D. Ted Sorenson's promises and D&D's and Newman's reliance on them preclude Sorenson from a right to the saved water

Ted Sorenson has clearly changed his position to the great detriment of D&D and Newman. As a matter of law, the doctrine of quasi estoppel does not allow him to benefit from this and harm D&D and Newman.¹¹

If Sorenson is allowed to appropriate the waters which he claims have been saved, and if he is given the earliest possible priority for this water, then:

- * The life-blood of D&D and Newman's farming operations will be threatened, since it is clear that most of the time there will not be enough water left to deliver to D&D and Newman either the amount of water decreed under their water rights or the amount of water they have historically received.
- * They will be deprived of the needed additional saved water that Sorenson promised them.
- * They have already been deprived of the opportunity to develop their own power plant or to do anything to reduce the losses in the Old Reno Ditch.
- * The principles behind equitable and quasi estoppel will have been violated.

¹⁰Testimony of Jim DeMordaunt at the hearing on March 13, 1998.

¹¹Given his present position, Sorenson's promises to D&D and Wilding also were apparently false. The elements of equitable estoppel therefore are all present.

To prevent the injustice which would otherwise result, the doctrine of estoppel should be applied as a matter of law. Ted Sorenson should be precluded from obtaining any interest in the saved water.

2.2 Water In a Private Ditch is not Subject to Appropriation

A. Idaho's Constitutional and Statutory Law Only Provides for the Appropriation of Water in Natural Streams

Article XV of the Idaho Constitution provides a right to "divert and appropriate the unappropriated waters of any natural stream for beneficial uses." The statutes under which Ted Sorenson seeks to appropriate the claimed saved water all deal with waters "flowing in their natural channels,"¹² "waters of rivers, streams,"¹³ "natural watercourse,"¹⁴ "natural streams"¹⁵ or the like. None of them gives a right to appropriate water in a private ditch.

As stated in *King v. Chamberlin*, 20 Idaho 504, 118 P. 1099 (1911):

Neither the statute nor the Constitution ever contemplated authorizing one man to appropriate and divert the property of another. Both the Constitution and statute were dealing with the *public, unappropriated* waters of the state as distinguished from private property.¹⁶

Similarly, the Idaho Supreme Court in *Public Utilities Commission v. Natatorium Co.*¹⁷ said:

The constitutional provisions, namely, article 15, Secs. 1, 2, and 3, do not declare that all waters of the state are public waters and subject to appropriation.

¹²Idaho Code Sec. 42-101

¹³Idaho Code Sec. 42-103

¹⁴Idaho Code Sec. 42-201. *Burgess v. Salmon River Canal Co.* 119 Idaho 299, 805 P.2d 1223, 1229 (1991) said that a "natural watercourse" was one which discharged "itself into some other stream or body of water."

¹⁵Idaho Code 42-202

¹⁶118 P. at 1101 (emphasis in original)

¹⁷36 Idaho 287, 211 P. 533 (1922).

. . . .

C.S. Sec 5556, provides that all waters of the state *when flowing in their natural channels*, . . . are declared to be the property of the state, whose duty it shall be to supervise their appropriation This statute contains a limitation, in that it declares that *the waters of the state consist of such waters only as flow in their natural channels*,^{18 19}

B. D&D and Newman had a Private Property Right to Water in the Old Reno Ditch

There is no question that a water right is a private, real property right.²⁰ When the waters of Birch Creek were diverted into the Old Reno Ditch, they were no longer the public waters of the State of Idaho flowing in a natural stream. D&D and Wilding then had an absolute right to the use of these waters so long as they put them to beneficial use. They were no longer subject to appropriation by Ted Sorenson--a stranger to these waters.

C. Case Law Does Not Authorize the Appropriation of Water in a Private Ditch

No cases have been found, either in Idaho or other jurisdictions, where the court has held water saved in a private ditch can be appropriated.

(1) *Reno v. Richards*

The first mention of saved water is found in *Reno v. Richards*²¹. *Reno* involved the cleaning out of Pass Creek so that its flow could reach and augment the flow in Birch Creek. The Court there stated:

¹⁸211 P. at 535 (emphasis added).

¹⁹See also *Boise City Irrigation & Land Co. v. Stewart*, 10 Idaho 38, 77 P. 25, (1904).

²⁰See e.g., *In re Robinson*, 61 Idaho 462, 103 P. 2d 693 (1980); *Olson v. Bedke*, 97 Idaho 825, 555 P.2d 156 (1976).

²¹32 Idaho 1, 178 P. 81 (1918)

In the absence of detriment to other users of water from Birch creek, there is no doubt of their right to make a diversion from Birch creek, at their point of diversion, of the amount of water which they caused to flow therein"²²

The *Reno* Court cited numerous authorities, but all of the cases cited dealt with natural streams, not private ditches.

Reno also involved another claim for saved water. Owners of the downstream "Richards" water right constructed the Old Reno Ditch to bypass a leaking reach of lower Birch Creek. They claimed a right in the water saved. The Supreme Court held that ". . . the water so conserved should be decreed to them and apportioned to them according to their respective rights."²³ It appears that the amount of saved water they were given by the Court was the difference between the amount of water needed to flow in the bypassed section of Birch Creek to supply the Richards' right and the amount of water needed to flow in the Old Reno Ditch to supply the Richards right, **not** the total amount of water saved through bypassing that stretch of Birch Creek. (The Richards water was not the only water flowing in the ditch.) The priority of this right was the date of the permit to construct the bypass canal, not some earlier date.

Reno can therefore be distinguished from this case in that it involved irrigators with prior rights on the natural stream who improved their water rights by decreasing losses in the stream. It did not involve, as here, a stranger who had no had no prior rights to the stream and who claims saved water in a private ditch, not in the natural stream.

²²178 P. at 82 (emphasis added).

²³178 P. at 85.

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(2) *Hill v. Green*

*Hill v. Green*²⁴ is ever further removed from the circumstances of this case. There the applicants diverted water from Indian Creek to their lands. This water would not have reached Medicine Lodge Creek and the diversion points of prior appropriators on Medicine Lodge Creek. In granting this Indian Creek right to applicants, the Court made some important observations regarding *Reno*:

Conceding the opinion may be subject to some criticism, in that it fails expressly to state that it must be shown that the increased surface flow would not reach prior appropriators by subflow, and that there must be a salvage of waters not theretofore used by prior appropriators in order that the right by salvage may be acquired, the general principles of law announced touching the salvage or saving of waters, and the prior right thereto, are correct.

There is no question but that the burden of proof rested upon respondents to show by competent evidence that the water salvaged by them had not theretofore been appropriated or used by other with prior rights. It being shown, however, that the water salvaged would not, if undisturbed, reach the point of diversion of prior appropriators, their supply would not be decreased, and they have therefore no cause for complaint.²⁵

(3) *Basinger v. Taylor*

The final Idaho case dealing with saved waters is *Basinger v. Taylor*.²⁶ There an irrigation company replaced a stretch of natural stream (Dry Creek) and a leaking ditch ("Farmers' Ditch") with a pipeline. The pipeline eliminated losses in both Dry Creek and Farmers' Ditch and the irrigation company claimed it was entitled to all the water so saved. On the basis of its earlier decision in *Reno v. Taylor*, the Court awarded the irrigation company the water saved in the natural stream but not the water saved in the private ditch.

²⁴ 47 Idaho 157, 274 P. 110 (1928).

²⁵ 274 P. at 111.

²⁶ 30 Idaho 289, 164 P. 522 (1917) and 36 Idaho 591, 211 P. 1085 (1922).

Just as there is no basis in constitutional or statutory law, there is also no basis in case law upon which Sorenson can rely for his claim to water saved in a private ditch.

D. Sorenson's Claims to the Saved Water Threaten to Significantly Reduce the Amount of Water Historically Delivered to D&D and Newman

There is an interesting parallel between the irrigation company which sought the saved water in *Basinger* and the applicant here. Speaking of losses and saved water in the private ditch, the Court in *Basinger* stated:

However, it appears that the issue [of excessive losses] was never raised, that they got along amicably, and all seemed to have enough water until the corporate appellant appeared on the scene.²⁷

Here, until stopped by the government, D&D and Wilding made regular efforts to reduce the losses in the creek and in the Old Reno Ditch through the use of bentonite.²⁸ Despite the losses in the ditch, D&D and Wilding made do. Historically, they received an average of 35 cfs of water during the irrigation season.²⁹ All was well until Ted Sorenson came on the scene with his promise to create additional water for the irrigators. Now, as in *Basinger*, if Mr. Sorenson has his way, D&D and Newman will have significantly less water than they had before the "savings." Indeed, if Mr. Sorenson is awarded 17 cfs of saved water with the earliest priority, and if the 18 to 22 cfs of Simmons/Woody water is transferred downstream with little apportioned loss, there will be very little water left for D&D and Newman.

²⁷211 P. at 1087.

²⁸Testimony of Cleo Wilding at the hearing on March 12, 1998.

²⁹Exhibits 216 and 217.

2.3 The Saved Water Belongs to D&D and Newman, not Sorenson.

Sorenson claims he has the right to water saved in a private ditch. For the sake of argument, even if he is legally correct, he still does not have this right for the following reasons:

A. Sorenson Failed to Make a Timely Filing on the Saved Water

(1) Application for a permit must be made before construction begins.

Idaho Code Section 41-202 says that one must make application for a permit to make an appropriation of water **before** constructing the diversion or other works. This sets the timetable for when an application for appropriation must be filed--in this case, before Sorenson began his effort to save the water.

(2) Sorenson only applied for a non-consumptive use.

Because he had promised this water to D&D and Wilding, he only filed for a non-consumptive use. This did not preserve Sorenson's right to a claim for saved water.

(3) Sorenson waited too long before filing on the saved water.

For a period of 10 years Sorenson said nothing about D&D and Newman's application of the water to a beneficial use. He did nothing to acquire any right to this water. Sorenson cannot sit idly by forever, watch others make beneficial use of this water as he promised them they could, and then after a long wait, step in and claim the earliest priority right to the water.

(4) Sorenson waived, forfeited, or abandoned any right to the saved water.

If Sorenson acquired the right to claim the saved water when he rerouted the water through his power plant, then either the common law of abandonment or waiver, or the five year forfeiture statute, I.C. Section 42-350, should apply. Because Sorenson failed to apply the water to a beneficial use, he lost any right he had.

- (5) **At the very least, Sorenson lost any claim to a priority earlier than his 1997 filing.**

If Sorenson had some inherent right to the saved water, with a priority preceding that of any of D&D's or Newman's rights, this right had to be asserted by filing prior to or at the time of the creation of the saved water. Sorenson's delay at the very least requires that the priority of any right Sorenson now acquires in this water is a priority as of the filing date in February of 1997.³⁰

B. D&D and Newman Acquired the Rights to Any Saved Water.

- (1) **D&D and Newman applied any saved water to a beneficial use.**

When the new diversion works were in place and the water began to be saved in 1987, it was not Sorenson but D&D and Newman who applied all the water coming through the power plant, including any saved water, to a beneficial use.

- (2) **Appropriation and application to a beneficial use gave D&D and Newman a constitutional right to the saved water.**

The right to any saved water was acquired by D&D and Newman through a constitutional appropriation: they took all the water in the new ditch and applied it beneficially to their lands.³¹

- (3) **Under the circumstances, compliance with the statutory filing requirements was not necessary.**

By putting any saved water to a beneficial use, D&D and Newman have acquired a constitutional water right. They did not file for this appropriation, as required by Idaho Code, Section 42-202. Nevertheless, they acquired this right for the following reasons:

³⁰Idaho Code Section 42-219(4).

³¹Idaho Constitution, article XV, sec. 3; *Nielsen v. Parker*, 19 Idaho 727, 115 P. 488 (1911).

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- a. Despite the seemingly mandatory filing requirements, they have made a constitutional appropriation. To deny them this appropriation would be a violation of their constitutional rights.
- b. Statutory law provides that the only way to obtain a water right is by following a statutorily-defined process.³² However, the applicable statutes speak of filing prior to the construction of the diversion works and before diverting the water.³³ D&D and Newman built no diversion works nor did they divert this additional water from a natural stream. They made no application for any change in point of diversion. They simply continued to receive the water that came down the lower reaches of Birch Creek. There is no applicable procedure for acquiring a water right which would apply to them in this circumstance. Therefore, their recourse was to the constitutional method of appropriation.
- c. Idaho Code Section 42-1426 applies here so that D&D and Newman need not follow the filing procedures.³⁴ (To the extent that Section 42-1426 only allows an expanded use but not an increase in total rate of diversion, D&D and Newman are at least entitled to a guarantee that all their water rights are filled before those of Sorenson's saved water consumptive rights. That is, D&D's and Newman's appropriation and use of the saved water before Sorenson filed on the saved water must give them a priority on all of their prior water rights which is senior to any right that Sorenson acquires by virtue of his filing on the saved water.)
- d. Sorenson is estopped from claiming that D&D and Newman's claims to the saved water are invalid because they did not make the requisite filings. (See Section 1.1 of this brief) Indeed, one reason they did not make such a filing is that they had been promised by Ted Sorenson that the water would all be theirs and at the time, Mr. Sorenson was only seeking a non-consumptive use.

³²I.C. Section 42-103; 42-201.

³³E.g., I.C. Section 42-202.

³⁴" . . . the mandatory permit requirements of sections 42-201 . . . are waived"

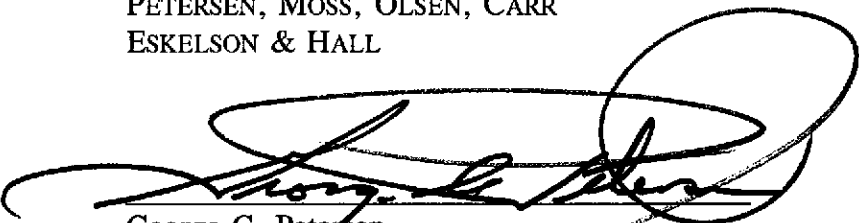
JAN 08 2001

3.0 D&D AND NEWMAN ARE ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

Where there are no genuine issues of material fact pertinent to a legal issues, summary judgment is appropriate. In this case there are three separate legal issues pertaining to whether Ted Sorenson is entitled to any of the alleged saved water. The resolution of any one of these issues in favor of D&D and Newman means that Sorenson is not entitled to the saved water as a matter of law, or that at the very least, his priority in the saved water right will be later than all the priorities of D&D and Newman. Because of his repeated promises to D&D and Wilding, Sorenson is now estopped from claiming the water which he promised to D&D and Wilding. In addition, Sorenson has no legal basis for appropriating water from a private ditch. Finally, if anyone has appropriated any saved water, it is D&D and Newman, so that it belongs to them, not to Mr. Sorenson.

Respectfully submitted this 9th day of April, 1998.

PETERSEN, MOSS, OLSEN, CARR
ESKELSON & HALL



George C. Petersen



Wm. Charles Carr

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 2nd day of April, 1998, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered as defined by Rule 5(b), I.R.C.P.

Persons Served:

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Wm. Charles Carr



State of Idaho

DEPARTMENT OF WATER RESOURCES

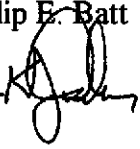
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PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

MEMORANDUM

To: Governor Philip E. Batt
Date: May 2, 1997
From: Karl J. Dreher 
cc: Service list for No. 32-00061C et al
Service list for Nos. 32-07128 & 32-07136
Representative JoAn Wood
Ron Carlson
Don Shenton
Subject: Pending Water Rights Issues Involving Birch Creek Ranches & Sorenson Engineering
Constituent Affairs Tracking Memorandum No. 19505

As you requested, I have reviewed the concerns expressed in a letter dated February 18, 1997 which you received from Mr. Ted S. Sorenson of Birch Creek Ranches and Sorenson Engineering. Mr. Sorenson believes that the Department of Water Resources (the "Department") is biased against him and has asked that a hearing officer from outside the Department be appointed to hear the water right matters pending before the Department. The concerns of Mr. Sorenson involve applications he filed with the Department to amend two water right permits for hydropower purposes and to transfer numerous irrigation water rights involving water diverted from Birch Creek. I received a formal petition from Mr. Sorenson's attorney requesting that an outside hearing officer be appointed for these protested applications, and I made the requested appointment on March 7, 1997.

Since protests have been filed against these applications, and I will have to make determinations regarding these applications following hearing, I am obligated to refrain from discussing the merits of Mr. Sorenson's allegations. However, the following background information may be useful to you in understanding the nature of the disputes involved.

The water rights generally referred to by Mr. Sorenson include decreed water right nos. 32-00061C, 32-00068, 32-00069, 32-00073, 32-00077, 32-00078, 32-00079, 32-00085, 32-00086, 32-00087, 32-00089, 32-00090, 32-00091, 32-00092, 32-00093, 32-00101, and 32-00102, together with protested applications for water right permits numbered 32-07128 and 32-07136. The Department's involvement with Mr. Sorenson regarding these water rights has been extensive as summarized by the following chronology of events:

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- September 8, 1982 - Birch Power Company ("Sorenson") filed application for permit number 32-07128 proposing the diversion of 45 cfs of water from Birch Creek to be used for hydropower purposes. The application was protested by several entities.
- January 3, 1984 - Sorenson filed a second application (permit number 32-07136) proposing the diversion of an additional 30 cfs of water from Birch Creek for hydropower purposes. This application also was protested by several entities.
- April 5, 1984 - The Department conducted a hearing on both applications.
- March 26, 1985 - The Department approved both applications with conditions and limitations, including a requirement for a bypass flow of 5 cfs to remain in Birch Creek below the diversion into Sorenson's power canal.
- June 26, 1986 - After the Department's decision approving both applications was appealed to district court by one of the protestants, the district court upheld the Department's decision.
- April 19, 1989 - Birch Creek Ranches (also "Sorenson") filed application for transfer number 3553 involving nine water rights which were used for the irrigation of land above Blue Dome. The applications sought to change the place of use to lands downstream from Sorenson's power plant and were protested by several entities.
- September 18, 1989 - Sorenson submitted proof of beneficial use of water for permits numbered 32-07128 and 32-07136. Shortly thereafter, the Department initiated the process for issuing licenses for the permits.
- April 17 & 18, 1990 - The Department conducted a hearing on the protested application for transfer number 3553 but at the request of the parties, the final decision was delayed. This delay allowed Sorenson and one of the protestants to enter into a settlement agreement. The settlement agreement resulted in Sorenson amending application for transfer number 3553 on February 12, 1991, and in the filing of a separate application for transfer by the protestant.
- May 1, 1990 - Sorenson filed applications for amendment seeking to have the 5 cfs bypass flow requirement for approved permits numbered 32-07128 and 32-07136 eliminated. The applications for amendment were protested.
- May 17, 1990 - With the consent of the protestants, the Department granted Sorenson interim approval to use the irrigation water rights (involved in application for transfer number 3553) below Sorenson's power plant as requested in the protested application for transfer.

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- November 6, 1991 - The Department advised Sorenson that it could not issue licenses for water rights numbered 32-07128 and 32-07136 until the protested amendments were resolved.
- July 10, 1992 - At the request of Sorenson and the protestants, the Department delayed the hearing on the applications for amendment to water rights numbered 32-07128 and 32-07136 and on the application for transfer number 3553 until more was known about the failure of a liner placed by Sorenson and others in the channel of Birch Creek.
- Spring of 1994 - Sorenson lost access to the place of use downstream of his power plant for which application for transfer number 3553 had been filed and interim approval had been granted. The need for a hearing on the application for transfer was therefore moot.
- July 5, 1995 - Sorenson's attorney advised the Department that until Sorenson was able to acquire a place of use downstream from his power plant that "it will accomplish little to try to process most, if not all of the pending applications."
- September 25, 1995 - The Department advised Sorenson through his attorney as follows regarding the processing of the protested applications -
 - i. Sorenson would need to withdraw or amend application for transfer number 3553 in connection with proposed changes to the place of use for his irrigation water rights.
 - ii. The Department would continue to hold the applications to amend water right permits numbered 32-07128 and 32-07136 at Sorenson's request to allow all the protested matters to be combined into one hearing.
- April 2, 1996 - Sorenson filed an amended application for transfer number 3553 claiming to have acquired another downstream place of use for the irrigation water rights. Notice of the amendment was published and renewed protests were filed with the Department in January 1997.
- February 21, 1997 - Sorenson's attorney filed a motion for blanket disqualification of all employees of the Department from acting as hearing officer for the protested applications. IDAPA Rule 37.01.01412 (Procedure Rule 412) requires the automatic disqualification of all employees of the Department, except its director, upon timely request of any party.
- March 7, 1997 - The Department designated Mr. Peter Anderson as the hearing officer. Mr. Anderson is a Deputy Attorney General and is not an employee of the Department. A hearing on the protested applications is being scheduled.

In closing, I want to respond to the reasons why Mr. Sorenson believes the Department has been biased and has discriminated against him. As noted above, the Department can not issue licenses in connection with Mr. Sorenson's power plants until the applications for amending the permits, which were filed by Mr. Sorenson, have been resolved. Given the history summarized on the previous pages of this memorandum, I do not believe Mr. Sorenson should conclude "No action has been taken" or the permit amendments "have yet to be processed." Furthermore, the delays in scheduling hearings were the result of Mr. Sorenson's request for time to seek resolution of the protests and to allow the protested applications for transfer to be combined into the same hearing as the protested applications for amendment of the permits.

Regarding the question of bed loss, the Department has not made a decision on the question of bed loss. The watermaster for Water District 01, Mr. Ron Carlson, does not have the authority to make a final determination of this issue. Rather, this will be an element of the decision that will be issued by the Department following hearing. By letter from Mr. Carlson to the watermaster, dated June 13, 1995, the Department did authorize the "test to actually determine what the bedloss [sic] would be" as requested by Mr. Sorenson provided that other water rights would not be injured by the test or with agreement by those whose water rights would be affected.

On February 24, 1997, Mr. Sorenson submitted an application to the Department for a permit seeking to appropriate 17 cfs of "saved" or "salvaged" water in Birch Creek in exchange for ceasing ground water diversions from certain irrigation wells. The Department advertised this application on April 3 and again on April 10, 1997. Like Mr. Sorenson's other applications, protests against this latest application have been filed with the Department by several entities.

In the meantime, I have been contacted by Representative JoAn Wood who requested that I meet with some of her constituents who are concerned about Mr. Sorenson's actions. If her constituents are protestants in the administrative hearing process or intend to discuss substantive issues regarding Mr. Sorenson's pending applications, it would be inappropriate for me to meet with them regarding Mr. Sorenson's actions until after the Department's administrative process is complete and the Department has issued its final decisions.

I believe the Department of Water Resources has cooperated with Mr. Sorenson in processing his various water rights transactions and allowing him time to seek negotiated solutions to the objections raised by those who believe their water rights would be injured. Mr. Sorenson correctly points to the lengthy period of time it has taken to resolve these matters. However, Mr. Sorenson has changed his proposals several times which has compounded the time requirements. These changes have not been proposed because of any request or interference from the Department. It does appear that all of Mr. Sorenson's applications are ready for further administrative action, and this action will be promptly taken.

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FEB 10 1997

Department of Water Resources

February 5, 1997

Mr. Norm Young
IDAHO DEPARTMENT OF
WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Re: Application to amend permits to appropriate water, nos. 32-7128 and 32-7136

Dear Mr. Young:

On April 30, 1990, we sent directly to you, for filing and processing, an application for amendment of permits nos. 32-7128 and 32-7136. Notice of the proposed amendment was protested by Mac and Betty Wagoner, D & D Enterprises, Inc., Elda H. Wilding and Woodie Land & Livestock. To our knowledge, the protests have never been scheduled for hearing.

On November 6, 1991, Mr. Gary Spackman wrote a letter to the applicant suggesting "that a hearing for these amendments be held in conjunction with the applications to transfer which are now pending and for which a hearing has been tentatively set." A hearing was never held, and of course the applications for transfer were held up for a time and have now been amended and notice republished. A hearing will need to be held on the protests to the amended application, and while we have no objection to hearing both matters on a consolidated basis, we do request that the matter of the application for amendment of the two permits be set for hearing as soon as possible.

Thank you for your kind attention to this matter.

Very truly yours,



Kent W. Foster

pc. Ted Sorenson
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State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

September 29, 1995

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

Kent Foster
Holden, Kidwell, Hahn & Crapo
P. O. Box 50130
Idaho Falls, Idaho 83405

Re: Birch Creek Ranches
(Application for Transfer of Nos. 31-00067/90 and
Applications for Amendment of Permit Nos. 32-07128/07136)

Dear Kent:

Your letter of July 5, 1995, asks for my thoughts on the status and processing procedure on several applications seeking to change the use of water rights held by Birch Creek Ranches and Ted Sorenson d/b/a Sorenson Engineering. Subsequent to your letter, Mr. Sorenson discussed with me his intentions with regard to the processing of the applications. The purpose of this letter is to document my understanding that Mr. Sorenson will be filing revised applications to change the point of diversion and place of use of irrigation rights he holds from Birch Creek with pending applications either being amended or withdrawn. In addition, he has asked that IDWR continue to hold the application to amend the hydropower rights relative to the required bypass flow to allow the applications to be considered in a single hearing.

Delaying the processing of the pending applications is acceptable, however, relinquishment of any applications that are no longer relevant is desirable. IDWR will continue to withhold processing of the application of amendment of the hydropower right for up to six months, but it is necessary that this matter be addressed. Licensing of the hydropower permits should follow action on the pending amendment.

Sincerely,

NORMAN C. YOUNG
Administrator

c: Ted Sorenson
Breck Barton
Alva Harris

George Peterson
Mac & Betty Wagoner
Don Shenton

Blair Grover

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JAN 08 2001
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Department of Water Resources

July 5, 1995

Mr. Norm Young
IDAHO DEPARTMENT OF
WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Re: Birch Creek Ranches and Ted Sorenson d/b/a Sorenson Engineering Pending Applications

Dear Norm:

We are writing to you about several pending matters of Birch Creek Ranches, Inc. and Ted Sorenson d/b/a Sorenson Engineering, because of some procedural concerns we have and because we are receiving pressure to do something. From our records it appears there are a number of pending applications or amendments. We have referenced each in the list below and have tried to explain some of our concerns.

1. Application for Permit No. 33-7128, for 45cfs of the flow of Birch Creek was originally filed on September 8, 1982, by Birch Power Company. Application for Permit No. 32-7136, for 30cfs of the flow of Birch Creek, was filed by the same entity on January 3, 1984. The two applications were protested and consolidated for hearing. A combined hearing was held April 5, 1984. The final decision on the protests to the two applications is reflected in an "Order Adopting Modified Memorandum Decision and Order" signed by the director, A. Kenneth Dunn, on March 26, 1985, and the "Modified Memorandum Decision and Order" thereby adopted by the director's order, which bears the signature of Bobby Fleenor, and is dated March 27, 1985. That final decision was appealed to the District Court which entered its "Memorandum Decision" in Bonneville County Case No. 33072, affirming the decision of the director, on June 26, 1986. The two permits were assigned by Birch Power Company to Ted S. Sorenson, d/b/a Sorenson Engineering, on August 21, 1986. The use of the water for power generation is, of course, a nonconsumptive use. The matter that became the main issue in the protest hearing, and which was ~~was~~ **MICROFILMED** in the Department's

JAN 08 2001

Mr. Norm Young
July 5, 1995
Page 2

final decision, was the contemplated savings of water which would result from the construction of the power plant. The point of diversion for the old Reno Ditch was to be moved upstream and some 3,000 feet of the natural channel of Birch Creek, as well as some five miles of the upstream portion of the Reno Ditch, were to be dewatered and replaced with a shorter, lined canal and a pipeline to the power plant, which would then discharge water into the Reno Ditch at the downstream location. The department found that the water to be saved by the construction of the project (the elimination of 3,000 feet of Birch Creek Channel and five miles of Reno Ditch) would be 22% of the total flow of Birch Creek at the new diversion, and that such savings belonged to the applicant. Further, the savings was apparently estimated to be, on the average, about 9.0 to 10.0cfs. The department then assigned one-half of the savings, 11% of the flow of Birch Creek or 5.0cfs, whichever is greater, to be allowed to flow past the new diversion works in Birch Creek to mitigate the riparian, fish and wildlife values in the public interest, and to provide stock watering. The second half of the savings, or 11%, was assigned to reduce contemplated seepage losses through the new feeder canal or power channel. Later, also in August of 1986, the permits were amended to change the location of the power plant from the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of S.17, T.8N., R.31E. to the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of S.14, T.8N., R.31E., a distance of an additional three miles. We assume the elimination of the extra three miles of the Reno Ditch has resulted in an even greater savings than 22%. If the elimination of 3,000 feet of Birch Creek channel and five miles of the Reno Ditch results in 22% savings, would the elimination of 3,000 feet of Birch Creek channel and eight miles of Reno Ditch result in something like 33 to 34% savings? Proof of beneficial use was submitted for both permits about February 11, 1989, but no license has yet been issued.

2. On April 19, 1989, Birch Creek Ranches, Inc., filed an application to transfer nine Simmons water rights, totaling 18.6cfs, from the Simmons lands on Birch Creek above Blue Dome to D&D lands below the power plant and the Reno Ranch. A hearing was held on the protests on April 17 and 18, 1990. A draft provisional or interim order for delivery of water rights was prepared shortly after the hearing and circulated for comments. We provided comments, but have never received or been provided with a final version of such order. Before any decision on the merits of the protests was issued, Birch Creek Ranches entered into negotiations with two of the protestants, Mac Wagoner and George Woodie, which resulted in the next round of filings in January and February of 1991.

3. Before the 1991 filings, and during the time period when preparation for and conducting of the April, 1990, hearing occurred, matters regarding the conditions of permits Nos. 32-7182 and 32-7136 relating to the saved water had progressed to a point which

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JAN 08 2001

Mr. Norm Young
Julu 5, 1995
Page 3

resulted in the filing of another application to amend the two permits. Within a short time after construction of the project, it had become apparent that the 11% or 5.0cfs bypass flow did not accomplish the objectives of Idaho Department of Fish & Game and the Bureau of Land Management for riparian habitat. After a study, Mr. Sorenson had made a proposal to substitute a system of plastic pipe and lined ponds. After approval by Idaho Fish & Game and the BLM, the proposal was implemented, and by March of 1990, Mr. Sorenson had received written acceptance of the new system which requires less than .1cfs to provide the amenities, instead of the 5.0cfs bypass flow. When Mr. Sorenson contacted you about this circumstance, you advised him by letter of March 20, 1990, that the Department of Water Resources could not waive the bypass flow condition without processing an application to amend the permits. Pursuant thereto, Ted S. Sorenson, d/b/a Sorenson Engineering, filed an application about April 30, 1990, to amend the two permits by eliminating the 5.0cfs bypass flow requirement. After publication of notice, the application was protested. In November of 1991, Gary Spackman, who had been assigned as hearing officer on the 1991 application for transfer and amended applications for transfer of Wagoners and Birch Creek Ranches, Inc., sent a letter suggesting that the hearing on the protests to the application to amend the permits be held in conjunction with the hearing on the protests to the proposed transfers.

4. In early 1991, after a tentative agreement was entered into by Birch Creek Ranches with Mac and Betty Wagoner, and after Birch Creek Ranches had purchased the George Woodie water right on Birch Creek, Wagoners filed, about January 21, a new application for transfer of eight of their rights, totaling 6.0cfs, from their lands to the D&D lands. Pursuant to the agreement, Birch Creek Ranches then filed two amended applications for transfer, one to transfer 4.0cfs (Right No. 0067 and one-half of Right No. 0090) from the Simmons land to Wagoner land, and another to transfer the balance of nine of the Simmons rights, totaling 14.6cfs, and the Woodie right for 2.9cfs, to the D&D lands. Again there were protests, and before a hearing was held, Birch Creek Ranches and the major protestants, D&D and Newman, agreed to cooperate in a stream lining project to salvage more water. Before completion of the lining project, BLM and Idaho Fish & Game placed certain conditions on placement of the lining material which resulted in a problem with the lining effort. In fact, instead of increased flows in the lined segment, losses increased. The processing of the pending applications was put on hold and numerous attempts were made to work out a plan acceptable to all involved state and federal agencies to rectify the problem. All such attempts have, to date, been unsuccessful. By about 1993, it appeared that the increased losses in the lined reach had diminished approximately to normal. Now, it appears that the lining may, in fact, be reducing losses in that reach. By the Spring of 1994, it appeared we could recommence processing of the applications, but then D&D refused to

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JAN 08 2001

Mr. Norm Young

July 5, 1995

Page 4

renew its lease of water rights from Birch Creek Ranches, and withdrew its lands as the prospective place of use. Then Wagoners unilaterally filed an amended application to transfer the eight water rights it had sold to Birch Creek Ranches, totaling 6.0cfs, upstream to Simmons lands, rather than downstream to D&D lands. While Birch Creek Ranches has worked out a tentative accommodation agreement with Wagoners, and has been laboring diligently to locate an alternative downstream place of use for the water rights, not enough has yet been completed to be able to redo the applications. We keep receiving requests from the Eastern Region Office of IDWR to withdraw and relinquish the applications.

5. Since completion of the power plant project, records of diversions from Birch Creek into the feeder canal for the power plant, as well as of discharges from the power plant into the Reno Ditch, disclose that since the bypass flows at the new point of diversion were terminated, the amounts diverted are essentially equal to the amounts discharged at the power plant, indicating that transmission losses through the power channel and pipeline are virtually nil. Whether the savings of water resulting from substitution of the lined power channel and pipeline, over historical losses in 3,000 feet of Birch Creek and more than eight miles of the old Reno Ditch, is 22% or as much as 34%, the fact is that virtually every drop of water diverted from Birch Creek at the new point of diversion is discharged into the Reno Ditch at the power plant location. Today, the diversion at the new point of diversion is about 50.0cfs. 50.0cfs is also being discharged from the power plant into the Reno Ditch. At that location, there is between 11.0 and 17.0cfs more water present in the Reno Ditch than there ever would have been absent the power project and the consequent savings. In November of 1993, we completed and presented for filing, an application to transfer the saved water right to D&D lands for irrigation purposes. The department never accepted it for filing. Eventually you and I had one or more discussions about the department's apparent reluctance to deal with the saved water. My understanding of your expressions of departmental concerns is primarily that the uses, to which the saved or salvaged water created by the power project were assigned by the permits, had a strong public interest element. We then suggested that since those particular public interests were being otherwise fully served, we would be willing to utilize the saved or salvaged waters to replace any transmission losses in the portion of Birch Creek from the old points of diversion of the Simmons, Woodie and Wagoner rights, down to the new Reno diversion, which might be attributable to such rights because of the proposed change in point of diversion. We suggested this concept had something of a public interest benefit in it because it would result in keeping higher flows in Birch Creek during the irrigation season (as a result of the transfer downstream from the points of diversion for the Simmons, Woodie and Wagoner rights), which would be a benefit to the public in general, and that there could also be a benefit to every water user in particular

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JAN 08 2001

Mr. Norm Young
July 5, 1995
Page 5

by insuring that more than enough water is assigned to potential transmission losses. The downstream users, D&D and Newman, would benefit the most because of the augmented flows, some of which would accrue to them and increase the amount of actual water available under their existing rights. We interpreted your response to be positive, so we withdrew the November application and presented another application about May 17, 1994. To our knowledge, it has never been accepted for filing.

Until such time as our client is able to acquire a potential place of use downstream from the power plant, it will accomplish little to try to process most, if not all of the pending applications. As we try to analyze the ramifications of withdrawing any or all applications at this time, our major concern is whether IDWR perceives some negative consequence of doing so. If you would be so kind, we would very much appreciate your thoughts and comments before we take further action.

Very truly yours,



Kent W. Foster

pc. Ted Sorenson
G:\WPDATA\KWF\6936\IDWR0622.LTR:sjw

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JAN 08 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

July 10, 1992

RE: Transfers filed by Birch Creek Ranches and Mac and Betty Wagoner; Application for Amendment by Birch Creek Ranches - Nos. 32-00061, 32-00067, 32-00068, 32-00069, 32-00089, 32-00090, 32-00091, 32-00092, 32-00093, 32-00102

Dear Interested Party:

I spoke to George Peterson, who represents D & D Enterprises in the above disputed matters. Mr. Peterson stated that he had visited with Blair Grover, attorney for Newman, and Kent Foster, attorney for Sorenson. He stated that because of the uncertainty about the existing condition of Birch Creek because of the liner failure, some additional delay in the hearing would be helpful.

I told Mr. Peterson that I am willing to delay the hearing until there is some physical certainty about the delivery of water in Birch Creek. I do not intend to let these applications go unaddressed for years in the files of the Department, however.

I will defer setting the hearing for an additional six (6) months. On or about January 1, 1993, I will again call it up for review. If there is any change in the status prior to that time, I would appreciate being informed.

Sincerely,

GARY SPACKMAN, Manager
Water Right Permits Section

GS:js

MICROFILMED

JAN 08 2001

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of July, 1992, I mailed a true and correct copy of the attached letter, to the following individuals:

Breck Barton
P.O. Box 100
Rexburg, ID 83440

Alva Harris
171 S. Emerson
Shelley, ID 83274

George Peterson
485 "E" Street
Idaho Falls, ID 83402

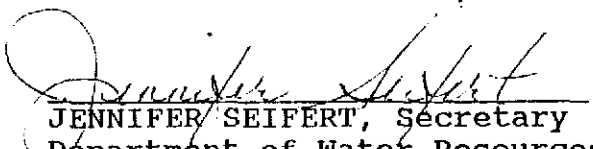
Kent Foster
P.O. Box 50130
Idaho Falls, ID 83405

Mac and Betty Wagoner
P.O. Box 296
Dubois, ID 83423

Don Shenton
Dubois, ID 83423

Blair Grover
P.O. Box 36
Rigby, ID 83442-0036

IDWR - Eastern Region


JENNIFER SEIFERT, Secretary
Department of Water Resources

MICROFILMED

JAN 08 2001

CERTIFICATE OF MAILING

I hereby certify that on the 25th day of June, 1992, I mailed a true and correct copy of the attached letter, postage prepaid, to the following individuals:

Breck Barton
P.O. Box 100
Rexburg, ID 83440

Alva Harris
171 S. Emerson
Shelley, ID 83274

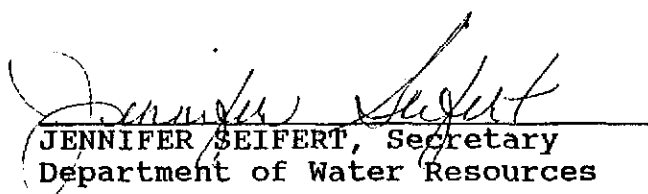
George Peterson
485 "E" Street
Idaho Falls, ID 83402

Kent Foster
Attorney at Law
P.O. Box 50130
Idaho Falls, ID 83405

Mac and Betty Wagoner
P.O. Box 296
Dubois, ID 83423

Don Shenton
Dubois, ID 83423

Blair Grover
P.O. Box 36
Rigby, ID 83442-0036


JENNIFER SEIFERT, Secretary
Department of Water Resources

MICROFILMED

JAN 08 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

June 25, 1992

<address>

RE: Transfers filed by Birch Creek Ranches and Mac and Betty & Wagoner; Application for Amendment by Birch Creek Ranches

Dear <sal>:

Parties to the above protested applications for transfer and amendment have been negotiating a possible settlement of the applications for transfer and application for amendment. I have not heard of any agreement. I recall seeing a letter, signed by Breck Barton, which set a deadline for completion of certain activity, although I cannot find it in my files.

This letter is an inquiry about the status of the negotiations, and the desires of the parties regarding a hearing. I do not want this matter to languish in the files of the Department forever without resolution.

I will set this matter for hearing at the end of thirty (30) days. If you are unavailable during certain time periods, I suggest you contact me prior to the end of the thirty days. If the protests are resolvable in some other way, I would appreciate being informed.

Respectfully,

A handwritten signature in cursive script that reads "Gary Spackman".

GARY SPACKMAN, Manager
Water Right Permits Section

GS:js

cc: Eastern Region

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JAN 08 2001

LAW OFFICES OF
BRECK BARTON & ASSOCIATES, P.A.
305 WEST MAIN
REXBURG, IDAHO 83440

BRECK H. BARTON

January 31, 1992

P.O. Box 100
(208) 356-4880

RECEIVED

FEB 07 1992

Department of Water Resources
Eastern District Office

Kent Foster, Esq.
P.O. Box 50130
Idaho Falls, ID 83405

RE: Wagoner water rights

Dear Kent:

As you know, many months ago we attempted to reach an agreement in the dispute that Ted Sorensen claimed existed with Mac and Betty Wagoner over their use of their Birch Creek water rights. We had understood the substance of that agreement to be that Mac would receive the earliest decreed water rights in the creek to 200 inches of water as measured at his point of diversion.

Subsequent to the drafting and signing of the memorandum of agreement, Mr. Sorensen asserted that the transfer to Mac would be subject to any conditions placed thereon by the Department of Water Resources, including but not limited to the condition that Mac would be responsible for a transmission loss as part of the exchange. Such was not our understanding. Further, Ted Sorensen refused to pay Mac for the water. Sorensen contended that payment would only be due upon the department's approval of the transfer. Such was not the understanding of the Wagoners. The memorandum of agreement was signed on or about April 20, 1989. No monies were tendered by Sorensen until a check in the amount of \$8,000.00 arrived at our office together with your cover letter of April 10, 1991. Your letter references the dispute concerning your clients understanding and our clients understanding of the meaning of the term transfer. You were advised at that time that the check was not acceptable and that the Wagoners interpretation of the agreement differed from Sorensens and, that because of the differing opinions and understandings, it appears there was no agreement between our clients.

On January 14, 1992, a check arrived from your office in the amount of \$16,000.00. You are advised that such check would not be accepted inasmuch as the disputes still existed as to the understandings of the respective clients. Your letter that came with the check indicated that there was a "major problem" in connection with the lining project on Birch Creek downstream from the Wagoner property.

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JAN 08 2001

We understand that your client in conjunction with Lavar Newman and the D & D, and with apparent approval of the Department of Water Resources, attempted to line a portion of the Birch Creek channel downstream from my client's point of diversion. Such lining project has, we understand, utterly failed and, in fact, has resulted in an increased loss of the waters of Birch Creek. As you can appreciate, where my client's diversion is upstream from this loss, it may very well be that the actions taken by these individuals could damage my client by depriving him of his decreed water. If such were the case, he would have the remedy of petitioning a court for a decree requiring that those parties responsible for the loss bear that loss and that his water right not be affected or, in the alternative, for substantial damages for the taking of his property without just compensation and/or interference with his property and proprietary rights.

Mr. and Mrs. Wagoner are still willing to discuss settlement of their claims against Sorensen and therefore propose as follows:

1. A trade of water rights be executed so that Mac and Betty Wagoner have decreed to them, and measured at their point of diversion on Birch Creek, 200 inches of the earliest decreed rights in Birch Creek.
2. The season of use for agriculture purposes of said water would be set by the department which we understand is generally from April 1 through November 1.
3. The Wagoners retain the 200 inches of decreed water for stock watering purposes and would use the same as necessary when their cattle were on the property and needed water.
4. This agreement would be stipulated to by the protestants in the currently pending protest, that is D & D and Wilding and their predecessor, Newman. The Department would execute an approved transfer application which we have submitted. There would be no transmission loss between the 200 inches swapped between Wagoner and Sorensen.
5. Sorensen would pay to Wagoner the \$15,000.00 previously referenced for transfer to Sorensen of Wagoner's 100 inches of later decreed priority rights. Any protest as to the transfer to any point of diversion of these later decreed priority rights would be left to the Department to decide based upon protests that have been filed by D & D and/or Wilding and/or Newman.
6. Wagoner would withdraw his claim in the SBRA to the 500 inches of irrigation rights claimed during the winter months.

This proposal would eliminate the long standing difficulty between these individuals. However, it must be implemented and finalized on or before April 1, 1992. Mr. Sorensen has had the use of Mr. Wagoner's 100 inches of water for two seasons without any compensation for the same. Mr. Wagoner does not request payment

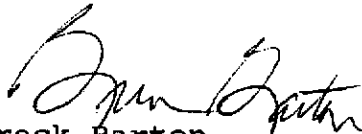
MICROFILMED
JAN 08 2001

for use of that water if this agreement can be completed on or before April 1, 1992 by and between the Wagoners as well as the Sorensens and all other protestants to the currently pending transfer.

In the event the agreement cannot be consummated, there would be no agreement. Mr. and Mrs. Wagoner would retain their 300 inches and all other constitutional claims that they claim. They would anticipate that they would be allowed, through the water master, the use of their water rights as per their decree. However, if the water master were to terminate prior to the normal termination date any of such rights due to a loss of water in Birch Creek downstream from their point of diversion, as you have alluded to in your most recent communication, then the Wagoners reserve full right to bring whatever actions they may deem necessary to seek recompense and/or damages for that injury.

We send a copy of this letter to counsel for D & D and counsel for Newman as well as to Norm Young of the Department. We sincerely desire that this matter be resolved. In any event, it will be resolved in one fashion or another by April 1, 1992. If the matter has not been consummated by that date, then the Wagoners will instruct the water master that he may not deliver the 100 inches of water previously used by Sorensen to anyone other than Wagoners at their decreed point of diversion.

Very truly yours,



Breck Barton

BB/cb

cc: Department of Water Resources
George Petersen/D & D Enterprises
Blair Grover/Lavar Newman

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JAN 08 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

November 6, 1991

Ted Sorensen
Sorensen Engineering
2988 Tipperary Ln.
Idaho Falls, ID 83401

RE: Permits to Appropriate Water Nos. 32-7128 and 32-7136

Dear Mr. Sorensen:

This letter acknowledges receipt of your correspondence inquiring about the status of the above referenced permits. My review of the file shows that you filed an application to amend the permits, which was protested by Mac and Betty Wagoner and D & D Enterprises, Inc., and Elda H. Wilding. Licenses for these permits cannot be issued until the protests are resolved.

I suggest that a hearing for these amendments be held in conjunction with the applications to transfer which are now pending and for which a hearing has been tentatively set.

Sincerely,

GARY SPACKMAN, Manager
Water Right Permits Section

GS:js

cc: Eastern Region
Kent Foster
Don Shenton

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JAN 08 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 -(208) 327-7900

CECIL D. ANDRUS

GOVERNOR

R. KEITH HIGGINSON

December 6, 1999

TED S. SORENSON
DBA SORENSON ENGINEERING
550 LINDEN DR.
IDAHO FALLS, ID 834010000

RE: PERMIT NO. 32-07136

Dear Permit Holder(s):

The above referenced water right is in the process of being licensed. However, before a license can be issued, your permit must be amended to correspond with the findings of the Department's field examiner.

The enclosed application for amendment contains information that will be included on the license when it is issued. Please review carefully and if you concur, sign the amendment and return with the \$20.00 filing fee within 30 days.

If you do not concur with these findings or if you have any questions, please contact us within the 30-day period.

Sincerely,

JIM JOHNSON
Water Rights Supervisor

JJ:sc

Enclosure

- ① Measuring device to determine how in the channel + flow released into the Berle channel as well as diversion rate.
- ② Repurcation to insure water supply to power when turbine is off.
- ③ Data to prove 75 cfs has gone thru diversion -

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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

Date of Priority: January 3, 1984 Maximum Diversion Rate: 30.00 CFS
Maximum Diversion Volume:¹ 21719.3 AF

Comes now TED S. SORENSON
DBA SORENSON ENGINEERING

550 LINDEN DR.
IDAHO FALLS, ID 834010000

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. 32-07136, and requests that the permit be changed as follows:

Source: BIRCH CREEK tributary to SINKS

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
POWER	01/01 to 12/31	30.00 CFS	21719.3 AF

LOCATION OF POINT(S) OF DIVERSION: SESW , Sec. 34, Township 09N, Range 30E
CLARK County

PLACE OF USE: POWER

TWN RGE SEC

08N 31E 14 NENE

MICROFILMED

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 at _____, this _____ day of _____, 19____.

(Signature)

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

MICROFILMED

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 2001

30 DAY
change P/D

cert. exam

WATER RIGHT NO. 32-07136

Priority: January 3, 1984 Amount: 30.00 CFS

21,719.32 AFA

This is to certify, that DBA SORENSON ENGINEERING

TED S. SORENSON

2988 TIPPERARY LN. 550 Linden Dr.

IDAHO FALLS, ID 83401-0000

has complied with the terms and conditions of the permit issued pursuant to Application for Permit dated January 3, 1984 and has submitted proof to the Department of Water Resources on January 9, 1989 that water has been applied to a beneficial use; an examination by the Department indicates that the works have a diversion capacity of 79.0 cfs of water from:

~~SEWAGE TREATMENT PLANT~~

tributary to ~~SEWAGE TREATMENT PLANT~~

source and that a water right has been established as follow:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>VOLUME</u>
POWER	01/01 to 12/31	30.00 CFS	21,719.32 AFA
<u>LOCATION OF POINT OF DIVERSION(S):</u>		NEW, Sec. 3, Township 08N, Range 30E SESW CLARK County	

PLACE OF USE: POWER

TWN RGE SEC

08N 31E 14

NENE

CONDITIONS/REMARKS:

1. The right to the use of water hereby confirmed is limited to the amount which can actually be beneficially used and is restricted and appurtenant to the lands or place of use and to the purpose herein described, as provided by the laws of Idaho.
2. This right is subject to all prior water rights and may be forfeited by five years of non-use.
3. Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho Code, or the applicable Idaho law.
4. 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.

delete-

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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

Date of Priority: January 3, 1984

Maximum Diversion Rate: 30.00 CFS
Maximum Diversion Volume:¹ 21719.3 AF

Comes now

TED S. SORENSON
DBA SORENSON ENGINEERING

550 LINDEN DR.

IDAHO FALLS, ID 834010000

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. 32-07136, and requests that the permit be changed as follows:

Source: BIRCH CREEK

tributary to SINKS

BENEFICIAL USE

PERIOD OF USE

RATE OF DIVERSION

ANNUAL VOLUME

POWER

01/01 to 12/31

30.00 CFS

21719.3 AF

LOCATION OF POINT(S) OF DIVERSION:

SESW, Sec. 34, Township 09N, Range 30E
CLARK County

PLACE OF USE: POWER

TWN RGE SEC

08N 31E 14

~~NONE~~

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 at _____, this _____ day of _____, 19____.

MICROFILMED

(Signature)

JAN 08 2001

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.
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

MICROFILMED
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't 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

IV

MICROFILMED
JAN 08 2001

September 5, 1990

Mr. Ted S. Sorensen
Sorensen Engineering
2988 Tipperary Lane
Idaho Falls, ID 83401

Dear Mr. Sorensen:

Enclosed are copies of protests filed against the application for amendment of permit No. 32-07128/32-7136. The Department suggests you contact the protestants directly in an effort to determine the nature of the protest and to attempt to resolve the protests.

Unless this office is advised that either the matter has been resolved or there exists extenuating circumstances requiring additional time, our objective is to schedule a conference and/or hearing to consider the protests within 60 days. At a conference and/or hearing, the following are the principle items the Department can consider in either approving or denying the application for permit (Sec. 42-203, Idaho Code):

1. Will the amendment reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purpose intended?
3. Is the application made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?
5. Will the proposed use under this permit conflict with the local public interest?
6. That it is contrary to conservation of water resources within the State of Idaho.

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JAN 0 8 2001

Mr. Ted Sorensen
September 5, 1990
Page 2

The applicant must be prepared to present evidence and/or testimony addressing each of the five items. Although representation by legal counsel is not mandatory at a proceeding before the Department, you may retain an attorney in your behalf.

If this office can be of further assistance, please contact us.

Very truly yours,

HAROLD W. JONES
Water Rights Supervisor

HWJ:CW

Enclosure

cc: IDWR - State Office

MICROFILMED
JAN 08 2001

September 5, 1990

RE: Application for Amendment No. 32-7128/32-7136
SORENSEN ENGINEERING

Mr. George Woodie, President
Woodie Land & Livestock
HC 65, Box 1018
Howe, ID 83244

Dear Mr. Woodie:

Your protest against approval of the above referenced application for amendment has been received and a copy has been sent to the applicant. The Department suggests you contact the applicant directly in an effort to determine what is proposed by the application and to attempt to resolve the protest.

Unless this office is advised that either the matter has been resolved or there exists extenuating circumstances requiring additional time, our objective is to schedule a conference and/or hearing to consider the protests within 60 days. At such a conference and/or hearing, the following are the principle items the Department can consider in either approving or denying the application for amendment (Sec. 42-203, Idaho Code):

1. Will the proposed amendment reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purpose intended?
3. Is the amendment made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?
5. Will the proposed use under this permit conflict with the local public interest?
6. That it is contrary to conservation of water resources within the State of Idaho.

MICROFILMED

JAN 08 2001

Mr. George Woodie
September 5, 1990
Page 2

The protestant must be prepared to present proof of allegations involving one or more of the five items.

If this office can be of further assistance, please contact us.

Very truly yours,

HAROLD W. JONES
Water Rights Supervisor

HWJ:CW

Enclosure

cc: IDWR - State Office

MICROFILMED
JAN 08 2001

RECEIVED

AUG 31 1990

Department of Water Resources
Eastern District Office

Howe, Idaho
8/ 30/ 90

Director
Keith Higginson
Department of Water Resources

Woodie Land and Livestock

Protest Amendments

No. 32-7128

No. 32-7136

Request to remove requirement to by pass 5 cfs or
11% of the flow of Birch Creek down the old
Birch Creek channel.

Reason;

Consideration of stock water.

George K. Woodie

President

Woodie Land and Livestock

He 65 Box 1018
Howe, Idaho
83244

NOTICE OF PROPOSED

AMENDING OF WATER PERMIT

NOTICE IS HEREBY GIVEN that TED
S. SORENSON d/b/a SORENSON
ENGINEERING or BIRCH POWER has
applied to the Department of Water
Resources to amend hydropower permits
as follows:

NO. 32-7128

AMOUNT: 45 CFS

PURPOSE: POWER PRODUCTION

SOURCE: BIRCH CREEK tributary of
BIRCH CREEK SINKS TO GROUND-
WATER AQUIFER.

POINT OF DIVERSION: NENE SEC 3 T
8N R 30E, CLARK COUNTY

The water is used for power generation
within the NENE SEC 14 T8N R 31E,
B.M.

NO. 32-7136

AMOUNT: 30 CFS

PURPOSE: POWER PRODUCTION

SOURCE: BIRCH CREEK tributary of
BIRCH CREEK SINKS TO GROUND-
WATER AQUIFER.

POINT OF DIVERSION: NENE SEC 3 T
8N 30E, CLARK COUNTY

The water is used for power generation
within the NENE SEC 14 T8N R 31E,
B.M.

This amendment is requested to remove
a requirement to bypass 5 cfs or 11% of
the flow of Birch Creek down the old
Birch Creek Channel.

Any protest to the proposed amending of
the permits must be filed with the Idaho
Department of Water Resources, 150
Shoup Ave., Idaho Falls, ID 83401, on or
before SEPTEMBER 3, 1990.

Published: August 16, 23, 1990

MICROFILMED
JAN 08 2001

September 5, 1990

RE: Application for Amendment No. 32-7128/32-7136
SORENSEN ENGINEERING

Mr. Jerry R. Rigby
Attorney at Law
P.O. Box 250
Rexburg, ID 83440

Dear Mr. Rigby:

Your protest, in behalf of Elda H. Wilding, against approval of the above referenced application for amendment has been received and a copy has been sent to the applicant. The Department suggests you contact the applicant directly in an effort to determine what is proposed by the application and to attempt to resolve the protest.

Unless this office is advised that either the matter has been resolved or there exists extenuating circumstances requiring additional time, our objective is to schedule a conference and/or hearing to consider the protests within 60 days. At such a conference and/or hearing, the following are the principle items the Department can consider in either approving or denying the application for amendment (Sec. 42-203, Idaho Code):

1. Will the proposed amendment reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purpose intended?
3. Is the amendment made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?
5. Will the proposed use under this permit conflict with the local public interest?
6. That it is contrary to conservation of water resources within the State of Idaho.

MICROFILMED

JAN 9 8 2001

Mr. Jerry Rigby
September 5, 1990
Page 2

The protestant must be prepared to present proof of allegations involving one or more of the five items.

If this office can be of further assistance, please contact us.

Very truly yours,

HAROLD W. JONES
Water Rights Supervisor

HWJ:CW

Enclosure

cc: IDWR - State Office

MICROFILMED
JAN 08 2001

LAW OFFICES

RIGBY, THATCHER, ANDRUS,

RIGBY & KAM, *Chartered*

25 NORTH SECOND EAST - P.O. BOX 250 - REXBURG, IDAHO 83440

RAY W. RIGBY - GORDON S. THATCHER - G. RICH ANDRUS

JERRY R. RIGBY - MICHAEL S. KAM

TELEPHONE (208) 356-3633 - TELEPHONE (208) 529-5531 I.F.

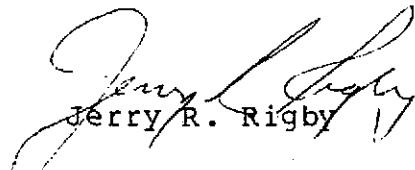
FAX (208) 356-0768

August 30, 1990

Dept. of Water Resources
150 Shoup Avenue
Idaho Falls, ID 83401

Enclosed please find Protest of Elda H. Wilding. Please file the same.

Sincerely,


Jerry R. Rigby

JRR:aw
Enclosures

RECEIVED

AUG 31 1990

Department of Water Resources
Eastern District Office

MICROFILMED

JAN 08 2001

RECEIVED

AUG 31 1990

Department of Water Resources
Eastern District Office

Jerry R. Rigby
of RIGBY, THATCHER, ANDRUS,
RIGBY & KAM, Chartered
Attorneys at Law
25 North Second East
Rexburg, Idaho 83440
Telephone: 208 356-3633

Attorneys for Elda H. Wilding

BEFORE THE DEPARTMENT WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE	)	
APPLICATION OF TED S. SORENSON,	)	
dba SORENSON ENGINEERING or	)	PROTEST OF
BIRCH POWER TO AMEND	)	ELDA H. WILDING
HYDROPOWER PERMIT NOS. 32-7128	)	
and 32-7136.	)	
	)	
	)	

Elda H. Wilding, c/o Jerry R. Rigby, of Rigby, Thatcher, Andrus, Rigby & Kam, Chartered, 25 North Second East, Rexburg, Idaho 83440, hereby enters her protest against approval of the application of Ted S. Sorenson, dba/Sorenson Engineering or Birth Power (hereinafter "Sorenson") to amend Hydropower Permit Nos. 32-7128 and 32-7136 on the following grounds:

1. Elda H. Wilding is a substantial user of the waters of Birch Creek, said use thereof and the properties of Elda H. Wilding being situated downstream from the site of the proposed diversion and construction referred to in Sorenson's application. From a preliminary review of Sorenson's application, it appears that the proposed diversion and

MICROFILMED

JAN 08 2001

construction would be detrimental to, and not in the best interests of, other water users of Birch Creek.

2. Sorenson's application fails to provide adequate plans on which a valid decision can be made regarding the possible detrimental effects of the proposed diversion and construction. Additionally, Sorenson has failed to provide adequate information to show whether sufficient financial resources will be available to complete and maintain the work proposed in Sorenson's application; Elda H. Wilding questions Sorenson's financial ability to maintain the changes proposed in the application and to restore Birch Creek to its present condition and flow should Sorenson make changes to the condition or flow of Birch Creek.

3. Sorenson's application presents inadequate proof of the feasibility of Sorenson's plan. Specifically, Sorenson's application lacks proof of feasibility that the ponds, drip irrigation system and other proposals can be established and maintained with the water flows proposed.

4. Sorenson's application contains no definitive statement of construction cost information which would allow a reasoned evaluation of the feasibility of the proposed project.

5. Sorenson's application contains no definitive statement of maintenance costs and other maintenance information which would allow a reasoned evaluation of the feasibility of the maintenance of the proposed project.

6. Sorenson's application contains no proof of any

firm commitment of sufficient financial resources with which to complete the work proposed.

7. Assuming, arguendo, that the proposed project could be constructed and maintained as outlined in Sorenson's application, the application is deficient because it does not make provision for the beneficial use of the increased stream flow below the Birch Creek hydroproject. If Sorenson's application is approved, it should be conditioned on the application of the increased stream flow to fill the decreed, but unsatisfied, water rights of the downstream water users of Birch Creek, specifically, Elda H. Wilding.

8. Assuming, arguendo, that the proposed project could be constructed and maintained as outlined in Sorenson's application, Sorenson's application is deficient because it does not provide any proposal to establish guidelines or duties under which the watermaster would administer the increased stream flow below the Birch Creek hydroproject.

9. Sorenson's application is deficient because it fails to define accurately the flow to be eliminated. Sorenson's application apparently proposed elimination of a maintenance flow of the lesser of 5 cfs or 11 percent of the flow of Birch Creek, but it does not establish the point of measuring the flow of Birch Creek. The flow in Birch Creek varies widely.

10. Sorenson's application is deficient because it fails to compare the amount of water presently used for

MICROFILMED

maintenance flows with the amount which would be required under Sorenson's proposal.

Elda H. Wilding hereby respectfully requests the right to amend this protest following receipt of reports and recommendations from his water engineer or following the receipt of additional information from Sorenson or other interested parties.

DATED This 30th day of August, 1990.


Jerry R. Rigby
of RIGBY, THATCHER, ANDRUS,
RIGBY & KAM, Chartered

September 5, 1990

RE: Application for Amendment No. 32-7128/32-7136
SORENSEN ENGINEERING

Mr. George C. Petersen
Attorney at Law
485 "E" Street
Idaho Falls, ID 83402

Dear Mr. Petersen:

Your protest, in behalf of D & D Enterprises, Inc., against approval of the above referenced application for amendment has been received and a copy has been sent to the applicant. The Department suggests you contact the applicant directly in an effort to determine what is proposed by the application and to attempt to resolve the protest.

Unless this office is advised that either the matter has been resolved or there exists extenuating circumstances requiring additional time, our objective is to schedule a conference and/or hearing to consider the protests within 60 days. At such a conference and/or hearing, the following are the principle items the Department can consider in either approving or denying the application for amendment (Sec. 42-203, Idaho Code):

1. Will the proposed amendment reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purpose intended?
3. Is the amendment made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?
5. Will the proposed use under this permit conflict with the local public interest?
6. That it is contrary to conservation of water resources within the State of Idaho.

MICROFILMED

JAN 08 2001

Mr. George Petersen
September 5, 1990
Page 2

The protestant must be prepared to present proof of allegations involving one or more of the five items.

If this office can be of further assistance, please contact us.

Very truly yours,

HAROLD W. JONES
Water Rights Supervisor

HWJ:CW

Enclosure

cc: IDWR - State Office

MICROFILMED
JAN 08 2001

RECEIVED

AUG 31 1990

George C. Petersen, Jr., Esq.
PETERSEN, MOSS, OLSEN, MEACHAM & CARR
485 "E" Street
Idaho Falls, Idaho 83402
(208) 523-4650

Department of Water Resources
Eastern District Office

Attorneys for D & D Enterprises, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE)
APPLICATION OF TED S. SORENSON,)
dba/SORENSON ENGINEERING or)
BIRCH POWER TO AMEND)
HYDROPOWER PERMIT NOS. 32-7128)
and 32-7136.)
_____)

PROTEST OF D & D
ENTERPRISES, INC.

D & D Enterprises, Inc., an Idaho corporation, c/o George C. Petersen, Jr., Petersen, Moss, Olsen, Meacham & Carr, 485 "E" Street, Idaho Falls, Idaho 83402, hereby enters its protest against approval of the application of Ted S. Sorenson, dba/Sorenson Engineering or Birch Power (hereinafter "Sorenson") to amend Hydro-power Permit Nos. 32-7128 and 32-7136 on the following grounds:

1. D & D Enterprises, Inc. is a substantial user of the waters of Birch Creek, said use thereof and the properties of D & D Enterprises, Inc. being situated downstream from the site of the proposed diversion and construction referred to in Sorenson's application. From a preliminary review of Sorenson's application, it

MICROFILMED

JAN 08 1991

appears that the proposed diversion and construction would be detrimental to, and not in the best interests of, other water users of Birch Creek.

2. Sorenson's application fails to provide adequate plans on which a valid decision can be made regarding the possible detrimental effects of the proposed diversion and construction. Additionally, Sorenson has failed to provide adequate information to show whether sufficient financial resources will be available to complete and maintain the work proposed in Sorenson's application; D & D Enterprises, Inc. questions Sorenson's financial ability to maintain the changes proposed in the application and to restore Birch Creek to its present condition and flow should Sorenson make changes to the condition or flow of Birch Creek.

3. Sorenson's application presents inadequate proof of the feasibility of Sorenson's plan. Specifically, Sorenson's application lacks proof of feasibility that the ponds, drip irrigation system and other proposals can be established and maintained with the water flows proposed.

4. Sorenson's application contains no definitive statement of construction cost information which would allow a reasoned evaluation of the feasibility of the proposed project.

5. Sorenson's application contains no definitive statement of maintenance costs and other maintenance information which would allow a reasoned evaluation of the feasibility of the maintenance of the proposed project.

MICROFILMED

JAN 08 2001

6. Sorenson's application contains no proof of any firm commitment of sufficient financial resources with which to complete the work proposed.

7. Assuming, arguendo, that the proposed project could be constructed and maintained as outlined in Sorenson's application, the application is deficient because it does not make provision for the beneficial use of the increased stream flow below the Birch Creek hydroproject. If Sorenson's application is approved, it should be conditioned on the application of the increased stream flow to fill the decreed, but unsatisfied, water rights of the downstream water users of Birch Creek, specifically, D & D Enterprises, Inc.

8. Assuming, arguendo, that the proposed project could be constructed and maintained as outlined in Sorenson's application, Sorenson's application is deficient because it does not provide any proposal to establish guidelines or duties under which the water-master would administer the increased stream flow below the Birch Creek hydroproject.

9. Sorenson's application is deficient because it fails to define accurately the flow to be eliminated. Sorenson's application apparently proposes elimination of a maintenance flow of the lesser of 5 cfs or 11 percent of the flow of Birch Creek, but it does not establish the point of measuring the flow of Birch Creek. The flow in Birch Creek varies widely.

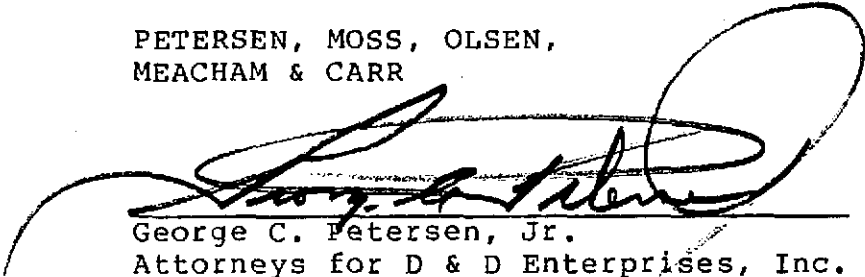
MICROFILMED
JAN 08 2001

10. Sorenson's application is deficient because it fails to compare the amount of water presently used for maintenance flows with the amount which would be required under Sorenson's proposal.

D & D Enterprises, Inc. hereby respectfully requests the right to amend this protest following receipt of reports and recommendations from his water engineer or following the receipt of additional information from Sorenson or other interested parties.

DATED this 30th day of August, 1990.

PETERSEN, MOSS, OLSEN,
MEACHAM & CARR



George C. Petersen, Jr.
Attorneys for D & D Enterprises, Inc.

1862G

MICROFILMED
JAN 08 2001

September 5, 1990

RE: Application for Amendment No. 32-7128/32-7136
SORENSEN ENGINEERING

Mr. Breck Barton
Attorney at Law
P.O. Box 100
Rexburg, ID 83440

Dear Mr. Barton:

Your protest, in behalf of Mac and Betty Wagoner, against approval of the above referenced application for amendment has been received and a copy has been sent to the applicant. The Department suggests you contact the applicant directly in an effort to determine what is proposed by the application and to attempt to resolve the protest.

Unless this office is advised that either the matter has been resolved or there exists extenuating circumstances requiring additional time, our objective is to schedule a conference and/or hearing to consider the protests within 60 days. At such a conference and/or hearing, the following are the principle items the Department can consider in either approving or denying the application for amendment (Sec. 42-203, Idaho Code):

1. Will the proposed amendment reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purpose intended?
3. Is the amendment made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?
5. Will the proposed use under this permit conflict with the local public interest?
6. That it is contrary to conservation of water resources within the State of Idaho.

MICROFILMED

JAN 08 1991

Mr. Breck Barton
September 5, 1990
Page 2

The protestant must be prepared to present proof of allegations involving one or more of the five items.

If this office can be of further assistance, please contact us.

Very truly yours,

HAROLD W. JONES
Water Rights Supervisor

HWJ:CW

Enclosure

cc: IDWR - State Office

MICROFILMED
JAN 08 2001

LAW OFFICES OF
BRECK BARTON & ASSOCIATES, P.A.
305 WEST MAIN
REXBURG, IDAHO 83440

BRECK H. BARTON

P.O. Box 100
(208) 356-1880

August 28, 1990

RECEIVED

SEP 4 1990

Idaho State Department of
Water Resources
150 Shoup Avenue, Suite 15
Idaho Falls, ID 83402

Department of Water Resources
Eastern District Office

ATTN: Ron Carlson

RE: Notice of Proposed change of water right of
Ted Sorenson, d/b/a Sorenson Engineering

Dear Mr. Carlson:

For and behalf of our clients, Mac and Betty Wagoner, we hereby protest the Notice of Amending Water Permit #32-7128 and #32-7136. The basis of the protest is that the amendment of said water rights to provide 5 CFS or 11 per cent of the flow of Birch Creek may constitute an enlargement of use of said water right and may result in harm to Mac and Betty Wagoner. Further, Mr. Sorenson by way of Memorandum Agreement, has agreed to subordinate any interest in said water to Mac and Betty Wagoner. I've previously forwarded to you a copy of this Memorandum Agreement which was arrived at in a prior Birch Creek transfer proceeding but for your review I enclose an additional copy herein.

Our specific area of concern is as follows: Ted Sorenson by memorandum agreement intends to transfer water right #32-0067 and #32-0090 to Mac and Betty Wagoner. Mac and Betty Wagoner intend to transfer to Ted Sorenson and/or his assigns waters rights numbered 32-0102, 32-0073, 32-0085, 32-0077, 32-0086, 32-0078, 32-0087, 32-0079. We have previously forwarded to the Department of Water Resources information concerning the intent of applying for transfer of these rights.

The purpose of the transfers referenced above is to eliminate and settle controversies now existing between the Wagoners and Mr. Sorenson. The import and understanding of the agreement was that Mac and Betty Wagoner would have at their point of diversion a guaranteed 4 CFS of water. We recognize that the guarantee would of course be subject to stream flow of Birch Creek and any rights prior to those sought to be transferred to Wagoners.

Inasmuch as we are not specifically familiar with the provision of the water permits now sought to be amended by Ted Sorenson we

MICROFILM

JAN 08 2001

believe that the appropriate procedure should be to first effectuate the transfer above detailed between Sorenson and Wagoners so that there be no misunderstanding that Sorenson's water permits should not in any way impair nor affect the pending proposed transfer or delivery of water to Wagoners after the same has been completed.

We will be willing to withdraw this protest when transfers between Wagoner and Sorenson are finished and/or subrogation of the new Sorenson permits to the Wagoners is completed.

We understand pursuant to past requests that the Department is preparing the proposed applications for transfer and that the same will be done expeditiously. It is not our intent in any fashion to in any way hinder Mr. Sorenson in his now proposed amendment of water permit. Nevertheless, inasmuch as the proposed transfer between Sorenson and Wagoner has not taken place we believe it necessary for preservation of the legal position of Mac and Betty Wagoner that we file this protest.

Very truly yours,



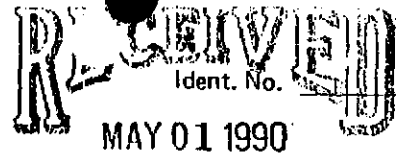
Breck Barton

BB/cb

Enclosure

cc: Kent Foster
Mac & Betty Wagoner

MICROFILMED
JAN 08 2001



STATE OF IDAHO

Department of Water Resources

APPLICATION FOR AMENDMENT OF A PERMIT

MAY - 5 1990

To change the point of diversion and/or the place of use.

Department of Water Resources

Eastern District Office
Comes now

Ted S. Sorenson d/b/a Sorenson Engineering Phone 522-8069

of (address) 2988 Tipperary Lane, Idaho Falls, Idaho 83401, 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. 32-7128, and requests that the permits be changed as follows: See attached description of requested change and supporting documents. No other changes.

1. Point of diversion: 1/4 1/4, Section , Township , Range , B.M.,

County of . Other points of diversion:

2. Period and nature of use: (irrigation, domestic, stockwatering, industrial, etc.)

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)

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

3. Place of use or land to be irrigated:

TWP	RGE	SEC	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	

Total number of acres to be irrigated =

4. a. Who owns the property at the point of diversion?
b. Who owns the land to be irrigated or the place of use?
c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing:

MICROFILMED

JAN 08 2001

Complete the following map by showing land and point of diversion as proposed by this amendment.

Show 40-acre subdivisions, townships, ranges and ditches.

Scale: 2 inches equal 1 mile.

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

Signed at _____, this _____ day of _____, 19 _____.

Del. H. Green
(Signature)

FOR DEPARTMENT USE ONLY

Preliminary check by _____ Fee = \$20.00 CO16616 Received by Julia Date 5-1-90

Publication prepared by RB Date 8-2-9-90 Published in statewide

Publication dates _____

ACTION OF THE DEPARTMENT OF WATER RESOURCES

I, _____, of the Department of Water Resources hereby

Witness my hand this _____ day of _____, 19 _____.

MICROFILMED
JAN 08 2001

DESCRIPTION OF REQUESTED CHANGE

Permittee requests removal of the condition of approval of Permits Nos. 32-7128 and 32-7136 requiring a bypass of 5 cfs or 11% of the stream flow. The enclosed letter from Idaho Department of Fish and Game and the letter with attached environmental assessment and decision from the United States Bureau of Land Management explain the agreement which has been reached between Mr. Sorenson and such agencies and describe the proposed alternative minimum stream flow mitigation plan as well.

#6936.00
8176h/srr

MICROFILMED
JAN 08 2001

WATER RIGHT SUMMARY

<u>ACTION</u>	<u>RIGHT NO.</u>	<u>NAME</u>	<u>AMOUNT CFS</u>
Original Permit	32-7136	Birch Power Co.	30.0
Full Assignment	32-7136	Sorenson, Ted S. DBA Sorenson Engineering	30.0

RECEIVED
AUG 22 1986

State of Idaho
Department of Water Resources

ASSIGNMENT OF PERMIT

Department of Water Resources

Birch Power Company hereby assigns to Ted S. Sorenson d/b/a Sorenson Engineering with his principal place of business at 2988 Tipperary Lane, Idaho Falls, Idaho 83401, all of Birch Power Company's, right, title and interest in and to Permit No. 32-7136 to appropriate the public waters to the State of Idaho.

Executed this 21 day of August, 1986.

BIRCH POWER COMPANY

By: Ted S. Sorenson
Ted S. Sorenson, President

STATE OF IDAHO)
) ss.
County of Bonneville)

On this 21st day of Aug, in the year 1986, before me, the undersigned, a Notary Public in and for said state, personally appeared Ted S. Sorenson, known or identified to me to be the President of Birch Power Company, the corporation that executed the instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

(seal)

David E. Be. ten
Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 10-18-91

1302e/jk

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCESRECEIVED
AUG 12 1986

APPLICATION FOR AMENDMENT OF A PERMIT

Department of Water Resources

To change the point of diversion and/or the place of use.

APPROVED

Comes now BIRCH POWER COMPANYof (address) 550 Linden Drive, Idaho Falls, Idaho 83401, 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. 32-7136, and requests that the permit and permit map be changed as follows:

1. Point of diversion: $\frac{1}{4}$ $\frac{1}{4}$, Section , Township , Range , B.M.,
County of . Other points of diversion:
(No change)

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

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)

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

3. Place of use ~~and land to be irrigated~~: The power plant and penstock will be located upon a tract of approximately 2 3/4 acres located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 14, T. 8N., Rge. 31 E.M. (See plat and legal descriptions attached hereto)

TWP	RGE	SEC	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				TOTALS
			NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	

Total number of acres to be irrigated =

4. a. Who owns the property at the point of diversion? No change
- b. Who owns the land to be irrigated or the place of use? Birch Power Company
- c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing: N.A.

RECEIVED

Show 40-acre subdivisions, townships, ranges and ditches.

(See attached map)

(See attached map)

Scale: 2 inches equal 1 mile. SEE ATTACHED EXPLANATION

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

Signed at Idaho Falls, Idaho

8th day of August

~~BIRCH POWER COMPANY~~

President
(Signature)

This application is filed in association with a like application for permit No. 32-7128

FOR DEPARTMENT USE ONLY

Preliminary check by _____ Fee = \$20.00

Received by Date

Publication prepared by _____
Date _____

Published in

Publication dates

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

A. KENNETH DUNN

, Director of the Department of Water Resources hereby

Approve the above referenced Amendment provided the conditions as set forth in

Permit No. 32-7136 are met.

Witness my hand this 27 day of

Director

This amendment would adopt the "current" option which changes the location of the power plant and replaces the entire length of the Reno Ditch to eliminate bed loss. The power plant would still discharge the water into the same channel of the diversionary works of the irrigators as it would under option A or option B, but further down stream. All consumptive irrigation use is down stream of either the location of the power plant in option A (Section 17) or option B (Section 15) and is down stream of the location under the "Current" option. The "Current" option merely eliminates more bed loss associated with the existing Reno Ditch. To this end the downstream irrigators have sold a parcel of ground in Section 14 to Birch Power to locate the power house. This location allows for a fee simple ownership and more head for greater power production. Since there is absolutely no effect on existing water rights and no one will be adversely affected, request is hereby made for an immediate ex parte amendment without publication of notice thereof.

AMENDED

BENTON ENGINEERING
550 Lindbergh
IDAHO FALLS, IDAHO 83401
Phone 522-8033

JOB DICKIN LEECH HYDRO
SHEET NO. OF
CALCULATED BY D. L. J. DATE 5-30-86
CHECKED BY DATE
SCALE 1" = 200'

N.E. CORNER
SECTION 14
T. 8 N., R. 31 E. B.M.

S 85° 24' 30" W 1335.5 ±
SEC. 14

25.08

25'

SOUTH 1027.7 ±

NORTH 781.97

S 86° 01' W

224.94

2.00
ACRES

250.00

NORTH 246.00

As described in Exhibit A - 1

SOUTH LINE WILDING PROPERTY
N 86° 01' E

NORTH LINE De MORDAUNT PROPERTY

As described in Exhibit A - 2

WEST LINE OF
E. 152, N.E. 154



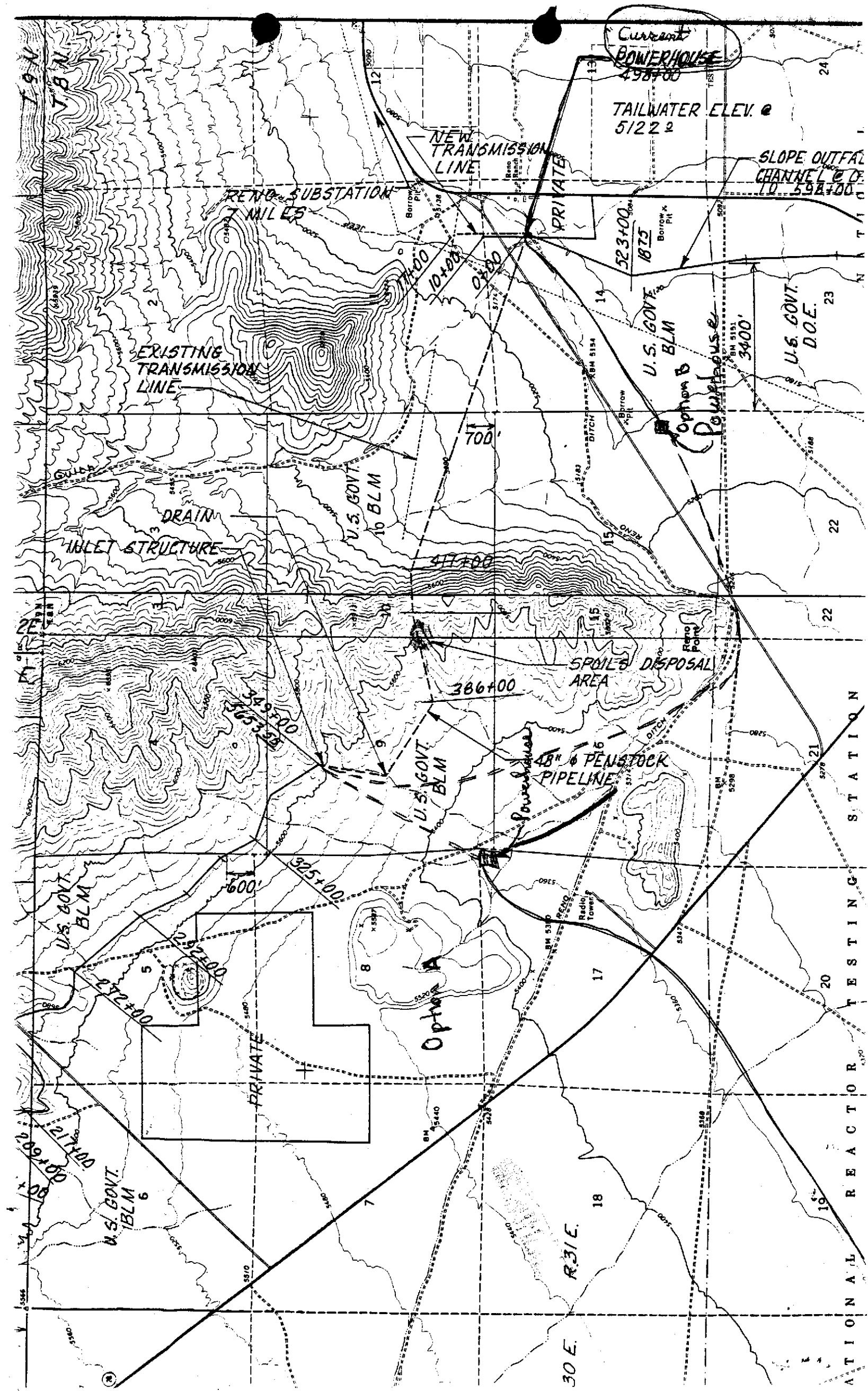
EXHIBIT A - 1

Beginning at the Northwest Corner of the East Half of the Northeast Quarter ($E\frac{1}{2}$, N.E. $\frac{1}{4}$) of Section 14, Township 8 North, Range 31 East of the Boise Meridian, said point being S. $85^{\circ}24'30''$ W. 1335.5 feet more or less along the Section line, from the Northeast Corner of said Section 14, and running thence South 1027.7 feet more or less along the West line of said East half of the Northeast Quarter ($E\frac{1}{2}$, N.E. $\frac{1}{4}$), to a point that is common to the North boundary of the property owned or formerly owned by D & D Enterprisses, Inc., and the South boundary of the property owned or formerly owned by Ben Wilding; thence N. $86^{\circ}01'$ E. 250.00 feet along said common boundary; thence North 246.00 feet; thence S. $86^{\circ}01'$ W. 224.94 feet; thence North 781.97 feet more or less to the North line of said Section 14; thence S. $85^{\circ}24'30''$ W. 25.08 feet to the point of beginning, containing 2.00 acres more or less.

NOTED

EXHIBIT A - 2

Beginning at a point on the West line of the East half of the Northeast Quarter, ($E\frac{1}{2}$, $NE\frac{1}{4}$) of Section 14, Township 8 North, Range 31 East of the Boise Meridian, said point being common to the North boundary of the property owned or formerly owned by D & D Enterprises, Inc., and the South boundary of the property owned by Ben Wilding, said point also being described as S. $85^{\circ} 24' 30''$ W. 1335.5 feet more or less along the Section line, and South 1027.7 feet more or less, along the West line of said East half of the Northeast Quarter ($E\frac{1}{2}$, $N.E.\frac{1}{4}$) from the Northeast Corner of said Section 14, and running thence South along said West line 200.00 feet; thence N. $86^{\circ} 01'$ E. 150.00 feet parallel to said common boundary line; thence North 200.00 feet to said common boundary line; thence S. $86^{\circ} 01'$ W. 150.00 feet along said common boundary line, to the point of beginning.



George C. Petersen, Jr., Esq.
PETERSEN, MOSS, OLSEN, MEACHAM & CARR
485 "E" Street
Idaho Falls, Idaho 83402
(208) 523-4650

RECEIVED
APR 26 1985

Department of Water Resources

filed: Apr 25, 1985

PJ2 5/22/85

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

IN THE MATTER OF THE PETITION)
FOR REVIEW OF D & D)
ENTERPRISES, INC., FROM THE)
ORDER AND DECISION OF THE)
DEPARTMENT OF WATER RESOURCES)
OF THE STATE OF IDAHO.)

Case No. 33072
PETITION FOR REVIEW
Fee Category: R.2.
Fee: \$44

D & D Enterprises, Inc., hereby petitions the Court as follows:

1. The petitioner, D & D Enterprises, Inc., is a corporation organized under the laws of the State of Idaho.
2. The Idaho Department of Water Resources (hereinafter "Department of Water Resources") is an executive department of the State of Idaho under Idaho Code §42-1701 et seq.
3. The above-named court has jurisdiction over this matter by virtue of, and this Petition for Review is brought by authority of, Idaho Code §67-5215.

MICROFILMED

4. This Petition for Review is brought from the March 26, 1985 Department of Water Resources' Order Adopting Modified Memorandum Decision and Order in the matter of applications for Permit Nos. 32-7128 and 32-7136 in the name of Birch Power Company, and from the Department of Water Resources' March 27, 1985 Modified Memorandum Decision and Order in the matter of the applications for Permit Nos. 32-7128 and 32-7136 in the name of Birch Power Company.

5. The petitioner has exhausted all administrative remedies available to petitioner within the Department of Water Resources and is aggrieved by the final decision of the Department of Water Resources.

6. The hearing for the Department of Water Resources was had in Bonneville County, Idaho, and under the provisions of Idaho Code §67-5215(b), Bonneville County is the proper venue for this Petition for Review.

7. This appeal is taken both on questions of law and questions of fact. The grounds for this Petition for Review are that the administrative findings of fact and law, inferences, conclusions, and decisions are:

(1) in violation of constitutional and statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) effected by other error of law; (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and (6) arbitrary, capricious, and characterized by abuse of discretion or clearly unwarranted exercise of discretion.

MICROFILMED

WHEREFORE, the petitioner prays the court to review the above described order and decision of the Department of Water Resources and reverse or modify the order and decision to conform with the law and the facts.

DATED this 25th day of April, 1985.

PETERSEN, MOSS, OLSEN,
MEACHAM & CARR



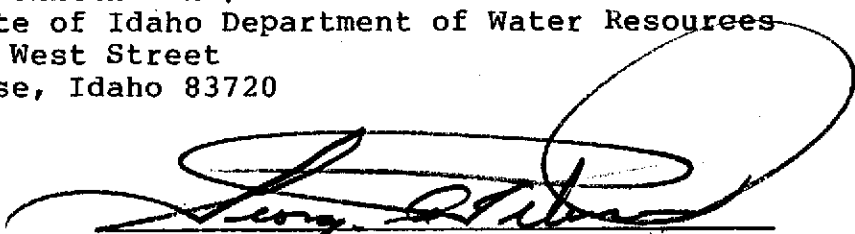
George C. Petersen, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho, and that on the 25th day of April, 1985, I served a true and correct copy of the foregoing document on the persons listed below by mailing, with the correct postage thereon, or by causing the same to be hand delivered.

Persons Served:

() Hand (X) Mail A. Kenneth Dunn, Director
State of Idaho Department of Water Resources
450 West Street
Boise, Idaho 83720



George C. Petersen, Jr.

1095b

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

MICROFILMED

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

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

UNFILMED

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 McCardy, 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 Reincker, 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 PERMIT

APPROVED

To appropriate the public waters of the State of Idaho

1. Name of applicant BIRCH POWER COMPANY Phone (208) 522-8069
Post office address 550 Linden, Idaho Falls, ID 83401
2. Source of water supply Birch Creek which is a tributary of Birch Ck. 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 30E*B.M. Clark County, additional points of diversion if any: _____

*kw 5/18/84

4. Water will be used for the following purposes:

Amount 30 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. 25- *30 cubic feet per second and/or b. _____ acre-feet per annum.

6. Proposed diverting works: *Changes as per telecon with Ted Sorenson 1/6/84
EMC

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:

(1) Give the place of use of water: NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 17 Township 31E
Range 8N B.M.

(2) Amount of power to be generated: 700 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

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[illegible] $\bar{V}/N$

c. If the property is owned by a person other than the applicant, describe the arrangement enabling the

Bureau of Land Management.

irrigational uses and/or returned to Birch Creek.

approximately 5 cfs.

Intersection with Reno Ditch to afford irrigational diversion as desired.

addition of 30 cfs.

[illegible]

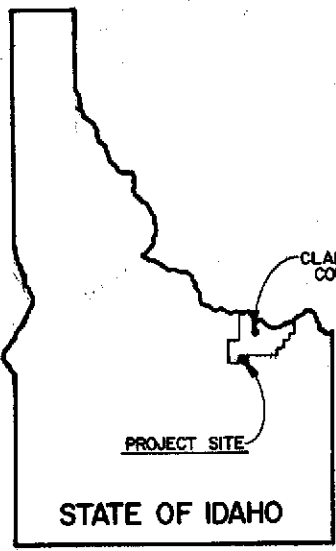
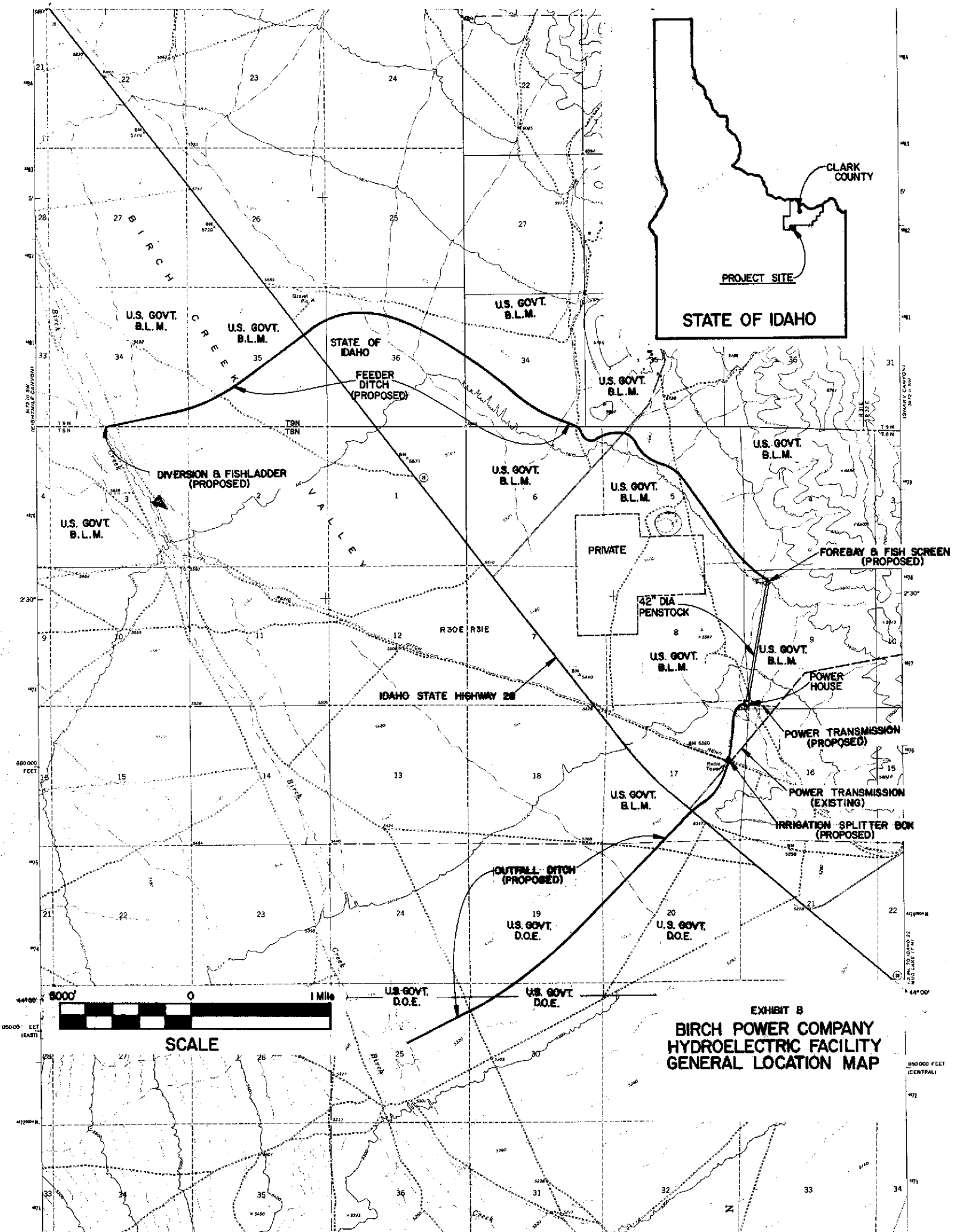


EXHIBIT B
BIRCH POWER COMPANY
HYDROELECTRIC FACILITY
GENERAL LOCATION MAP

11. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.

[illegible]

Scale: 2 inches equal 1 mile.

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth.


(Applicant)

REF ID: A66387

Priority date: January 3, 1984

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Received by BP Date 1/3/84 Time 4:30 pm
Preliminary check by EMC Fee \$ 525.00
Received by BP Date 1/4/84 # 29785
Publication prepared by BP Date 1/11/84
Published in Standard Journal
Publication dates 1/19 & 1/26/84
Publication approved BP Date 2/9/84
Protests filed by: Ben Wilding, W.M. Water District 32-D;
Fish & Game, BLM
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. 32-7136, 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.

Chief, Operations Bureau

D. Ann Saylor

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this the 27th day of March, 1985, true and correct copies of the ORDER ADOPTING MODIFIED MEMORANDUM DECISION AND ORDER and MODIFIED MEMORANDUM DECISION AND ORDER, were mailed, postage prepaid to:

Ted S. Sorenson
Birch Power Co.
550 Linden Dr.
Idaho Falls, ID 83401

D & D Enterprises, Inc.
c/o George C. Petersen, Jr.
485 "E" St.
Idaho Falls, ID 83402

Idaho Dept. of Fish and Game
1515 Lincoln Road
Idaho Falls, ID 83401

Ray W. Rigby, Esq.
RIGBY, THATCHER, ANDRUS, BARTON & WALTERS
25 N. 2nd E.
Rexburg, ID 83440

William B. Dillon, III
Attorney General's Office
Statehouse
Boise, ID 83720

James A. Esget and Robert McCurdy
Bureau of Land Management
920 Lincoln Road
Idaho Falls, ID 83401

William T. Simmons
Dubois, ID 83423

Ben Wilding, Watermaster
Water District No. 32-D
Dubois, ID 83423


RITA I. FLECK
Secretary/Records Manager
Idaho Dept. of Water Resources

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

IN THE MATTER OF APPLICATIONS FOR PERMIT)
DOS. 32-7128 AND 32-7136 IN THE NAME OF)
BIRCH POWER COMPANY)

ORDER ISSUING
PROPOSED DECISION

A. Kenneth Dunn, Director of the Department of Water Resources, having reviewed the attached proposed decision prepared by his appointee, Bobby D. Fleenor, who conducted the hearing or who has read the record in this case, hereby approves the same as a proposal for decision pursuant to Idaho Code, § 67-5211 and orders that said proposed decision and a copy of this order be served upon each of the parties to these proceedings who appeared at the hearing on April 5, 1984, of this matter or upon their attorneys in accordance with Rule 7.3 of the Rules of Practice and Procedure of this Department.

Each party to these proceedings who appeared at the hearing is hereby afforded the opportunity, pursuant to Idaho Code §§ 42-1701A and 67-5211, to file exceptions to the attached proposed decision and to present briefs and oral arguments in accordance with the provisions of this order. Exceptions may not be filed and briefs and oral arguments may not be presented by parties who did not appear at the hearing of this case. If no timely and proper exceptions are received, an order by the Director will be entered adopting and issuing the proposed decision as his final decision.

I.
EXCEPTIONS

A. To be considered by the Director, exceptions must:

1. be received by the Director on or before the 15th day following the day of service of this Order and the proposed decision,
2. specifically identify the portions of the proposed decision to which exceptions are made and specifically state the grounds for those exceptions, and
3. be sent to each of the parties who appeared or their attorneys.

B. Exceptions not in compliance with the above stated requirements will not be considered and will be deemed an acceptance of the proposed decision.

II.
BRIEFS

A. Any briefs in support of exceptions to the proposed decision shall be filed with the Director at the same time that party's exceptions are filed with the Director.

B. Any party desiring to file a brief in response to any exceptions filed by any other party may do so by filing such brief with the Director on or before the 15th day following the last day any exceptions by any other party were served upon that party desiring to respond.

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III.
ORAL ARGUMENTS

A. No oral arguments before the Director on the proposed decision will be held unless specifically requested by a party filing exceptions to the proposed decision and unless that request is filed with the Director concurrently with the filing of that party's exceptions.

B. If oral arguments have been properly requested by a party filing exceptions, any other party, upon reasonable notice to the Director, shall have the right to present oral arguments in response to the exceptions filed.

C. Oral arguments before the Director on exceptions to the proposal for decision shall be heard at the discretion of the Director, pursuant to Idaho Code, § 42-1701A. After all exceptions, briefs and requests for oral arguments have been received, the Director will decide whether to hear oral arguments. If oral arguments are to be heard, the Director will, within a reasonable time, set the case for oral arguments and notify each party of the place, date and hour the oral arguments will take place and of the period of time allocated for the arguments of this case. Unless the Director orders otherwise, all oral arguments shall be heard in Boise, Idaho.

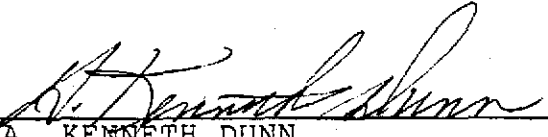
IV.
CERTIFICATION OF SERVICE

A. All exceptions, briefs, requests for oral arguments and other matters filed with the Director in connection with the proposed decision shall be served on all other parties to these proceedings in accordance with Rule 7.2.

V.
FINAL DECISION

A. Following the submission of all exceptions and briefs and oral arguments, if they are heard, the Director shall issue a final decision adopting, modifying or rejecting and replacing the proposed decision. Copies of the decision and order shall be served on all parties.

Dated this 27th day of November, 1984.


A. KENNETH DUNN
Director
Department of Water Resources

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMIT	)	PROPOSED
NOS. 32-7128 AND 32-7136 IN THE NAME OF	)	MEMORANDUM DECISION
BIRCH POWER COMPANY	)	AND ORDER

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 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

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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.

consistently 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 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 5 cfs or 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 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 but no 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

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

fishery, but would be sufficient to provide stockwater and maintain the 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.

CONCLUSIONS OF LAW

1) The water that will be saved by sealing the feeder ditch is essentially 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 stockwater and preserve the riparian habitat along the natural stream channel.

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 3,300 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 minimum 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.

5) The feeder canal shall be constructed and maintained in a manner that will reduce the amount of seepage loss by about 5 cubic feet per second.

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.

Dated this 21 day of November, 1984.


BOBBY D. FLEENOR
Hearing Officer

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this the 27th day of November, 1984, true and correct copies of the foregoing ORDER ISSUING PROPOSED DECISION and PROPOSED MEMORANDUM DECISION AND ORDER, were mailed, postage prepaid to:

Ted S. Sorenson
Birch Power Company
550 Linden Drive
Idaho Falls, ID 83401

Virgil Moore
Idaho Department of Fish and Game
1515 Lincoln Road
Idaho Falls, ID 83401

William B. Dillon, III
Attorney General's Office
Statehouse Mail
Boise, ID 83720

James A. Esget and Robert McCardy
Bureau of Land Management
920 Lincoln Road
Idaho Falls, ID 83401

William T. Simmons
Dubois, ID 83423

Ben Wilding, Watermaster
Water District No. 32-D
Dubois, ID 83423

D & D Enterprises, Inc.
c/o George C. Petersen, Jr.
485 "E" St.
Idaho Falls, ID 83402

Ray W. Rigby, Esq.
RIGBY, THATCHER, ANDRUS, BARTON & WALTERS
25 North 2nd East
Rexburg, ID 83440


RITA I. FLECK
Secretary/Records Manager
Idaho Department of Water Resources

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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
AFFIDAVIT FOR WATER RIGHTS TO BE USED
FOR POWER PURPOSES

A. Establishment of Residency: (Complete either 1, or 2).

1. Individual Applicant or Individual Members of a Partnership:

I, _____ of _____,
(name) (city)
county of _____, State of Idaho, being duly sworn, do
hereby certify that I am a bona fide resident of the State of Idaho.

2. Corporation:

I, Ted S. Sorenson of Idaho Falls,
(name) (city)
County of Bonneville, State of Idaho, being duly sworn, depose
and say: That I am the designated registered agent of the Birch
Power Company: that as such I am in charge of the registered
(name of corporation)
office of the said corporation as required by Section 30-1-12, Idaho Code, at
Idaho Falls, Idaho, wherein are kept the corporate records required
(city)
by Section 30-1-52, Idaho Code: and that Birch Power Company
(name of corporation)

is a corporation qualified to do business in the State of Idaho under the laws of
the State of Idaho.

B. Ownership of Facilities: (To be completed for hydropower projects only)

The hydropower facility to be developed pursuant to the attached Application for
Permit:

- (check one)
- ☒ Will not utilize existing man-made irrigation facilities such as a dam or a
canal.
- ☐ Will utilize existing man-made irrigation facilities such as a dam or a canal,
and permission of the owner is documented in an affidavit attached hereto.
- ☐ Will utilize existing man-made irrigation facilities such as a dam or a canal
and the owner of the facilities is the signee of this affidavit.

State of Idaho
County of Bonneville } ss.

Ted Sorenson
Applicant

On this 16th day of November, 1983, personally
appeared before me the signer(s) of the above instrument, who duly acknowledged
to me that he (she) (they) executed the same.

David E. Benton
Notary Public residing at
Idaho Falls Id

seal

My commission expires:

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The REXBURG STANDARD and
The REXBURG JOURNAL
REXBURG, IDAHO

3

Affidavit of Publication

STATE OF IDAHO }
County of Madison } ss.

I, Bruce Porter
being first duly sworn, depose and say,
that I am the printer of THE REXBURG

Journal, a newspaper printed and
published weekly at Rexburg, Madison
County, Idaho; and I do solemnly swear
that the

Notice Of Application

a copy of which notice appears attached
hereto, was published in the regular and
entire issue of said newspaper, and not in

any supplement issue thereof for
consecutive issues, the first publication hav-

ing been made on Jan. 19, 1984
and the last publication having been made

on Jan. 26, 1984

Further, that said newspaper is one of
general circulation in said county; that it
is a legal newspaper, conforming to legal
specifications under the Idaho Statutes; that
it has at least two hundred bona fide sub-
scribers living within the county of publica-
tion; and that it has been continuously and
uninterruptedly published in said county dur-
a period of seventy-eight consecutive weeks
prior to the first publication of the said not-
ice.

Subscribed to and sworn to before me

this Jan. 27, 1984

Geri Garner

Notary Public.

(SEAL)

My commission expires Life.

**NOTICE OF APPLICATION
FOR WATER RIGHT**

The following application(s) have been filed
to appropriate the public waters of the State
of Idaho:

32-7136

BIRCH POWER CO.
550 LINDEN, IDAHO FALLS, ID 83401
Source: BIRCH CREEK trib. to SINKS
Date Filed: 01/03/1984
Diverside Pt: NENW Sec 03 T 08N R 30E
Use: POWER (30.00 CFS)
In: NENW Sec 17 T 08N R 31E

The permit(s) will be subject to all prior
water rights. Protests must be filed with the
Director, Dept. of Water Resources, 150
Shoup Ave., Suite 15, Idaho Falls, Idaho
83402 on or before FEBRUARY 6, 1984.

KENN DUNN
Director

Publ. Jan. 19 and 26, 1984J

32-7128
32-7136

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Birch Power Company

Project No. 7194-009
Idaho

NOTICE OF AVAILABILITY OF ENVIRONMENTAL ASSESSMENT

(June 7, 1990)

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's regulations, 18 CFR Part 380 (Order No. 486, 52 F.R. 47910), the Office of Hydropower Licensing (OHL) has reviewed the application for amendment of license for the Birch Creek Hydroelectric Project to amend the minimum flow requirement of article 404. The project is located on Birch Creek in Clark County, Idaho. The staff of OHL's Division of Project Compliance and Administration has prepared an Environmental Assessment (EA) for the proposed action. In the EA, staff concludes that approval of the amendment of license would not constitute a major federal action significantly affecting the quality of the human environment.

Copies of the EA are available for review in the Reference and Information Center, Room 3308, of the Commission's Offices at 941 North Capitol Street, NE, Washington, DC 20426

Lois Cashell
Secretary

*Do
to
file
#2*

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JUN 15 1990

Department of Water Resources

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JAN 08 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 -(208) 327-7900

CECIL D. ANDRUS

GOVERNOR

R. KEITH HIGGINSON

DIRECTOR

December 13, 1989

Cecil Thomas
Box 868
Homedale, ID 83628

RE: Field Examination for Permits Nos. 32-7128 and 32-7136

Dear Mr. Thomas:

I have reviewed the information supplementing your earlier submitted field examination for permits nos. 32-7128 and 32-7136. I find that you have responded to each of the concerns which I originally raised.

Again, I appreciate the thoroughness with which you prepared your field examination.

Sincerely,

A handwritten signature in cursive script that reads "Gary Spackman".

GARY SPACKMAN, Manager
Water Right Permits Section

GS:js

cc. Eastern Region

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JAN 08 2001

MEMORANDUM

TO: File Nos. 32-7128 and 32-7136 in the Name of Ted S.
Sorenson: Birch Creek Hydro Power Project
FROM: Gary Spackman *Gary*
DATE: December 7, 1989

Idaho Code § 42-203B requires that the Department set a term of years for water right licenses. The Department is required to review the P.U.C. policy, the term of the power sales contract, the term of the FERC license, and downstream water users.

The FERC license has been issued for a period of fifty (50) years. This license exceeds the time period allowed by P.U.C. It probably also exceeds the present period that purchasers of power will sign a contract. Last of all, there are no downstream users, other than the users to whom Ted Sorenson delivers water after it discharges from his power plant.

I recommend that the term of the license for 32-7128 and 32-7136 be the term of the FERC license, or fifty (50) years.

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JAN 08 2001

December 6, 1989

TED S. SORENSON
DBA SORENSON ENGINEERING
550 LINDEN DR.
IDAHO FALLS, ID 834010000

RE: PERMIT NO. 32-07136

Dear Permit Holder(s):

The above referenced water right is in the process of being licensed. However, before a license can be issued, your permit must be amended to correspond with the findings of the Department's field examiner.

The enclosed application for amendment contains information that will be included on the license when it is issued. Please review carefully and if you concur, sign the amendment and return with the \$20.00 filing fee within 30 days.

If you do not concur with these findings or if you have any questions, please contact us within the 30-day period.

Sincerely,

JIM JOHNSON
Water Rights Supervisor

JJ:sc

Enclosure

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JAN 08 2001

MEMORANDUM

TO: SHARLA

FROM: ROXANNE MCCARTHY

RE: ADDITIONAL CONDITIONS/REMARKS FOR 32-7136

DATE: 5-DEC-1989

=====

4. <<R39>>

5. <<R04>> 32-D, Birch Creek

6. Eleven percent of the flow of Birch Creek at the diversion to the feeder ditch, or 5 cubic feet per second, whichever is least, shall be allowed to flow past the feeder canal diversion in the natural channel of Birch Creek.

7. 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.

8. The first 1 1/2 miles of ditch must be maintained and operated in a manner that supports a fishery as shown in Applicant's Exhibit No. 6.

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. <<R23>>

11. 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.

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FEB 15 1989

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
BENEFICIAL USE FIELD REPORT Department of Water Resources

A. GENERAL INFORMATION

1. Owner: Ted Sorenson

Permit No. 32-07128, 32-07136

Phone No. (208) 522-8069

Current Address: 550 Linden Drive, Idaho Falls, Idaho 83401

2. Accompanied by: Cecil A. Thomas

EXAM. DATE: July 19, 1988

Address: 3775 N Locust Grove, Meridian, Idaho 83642

Phone No. (208) 888-3087

Relationship to Permit Holder: Water rights examiner

3. Source: Birch Creek tributary to Birch Creek sinks

B. OVERLAP REVIEW

1. Other water rights with same place of use: None

☐ Copies Attached

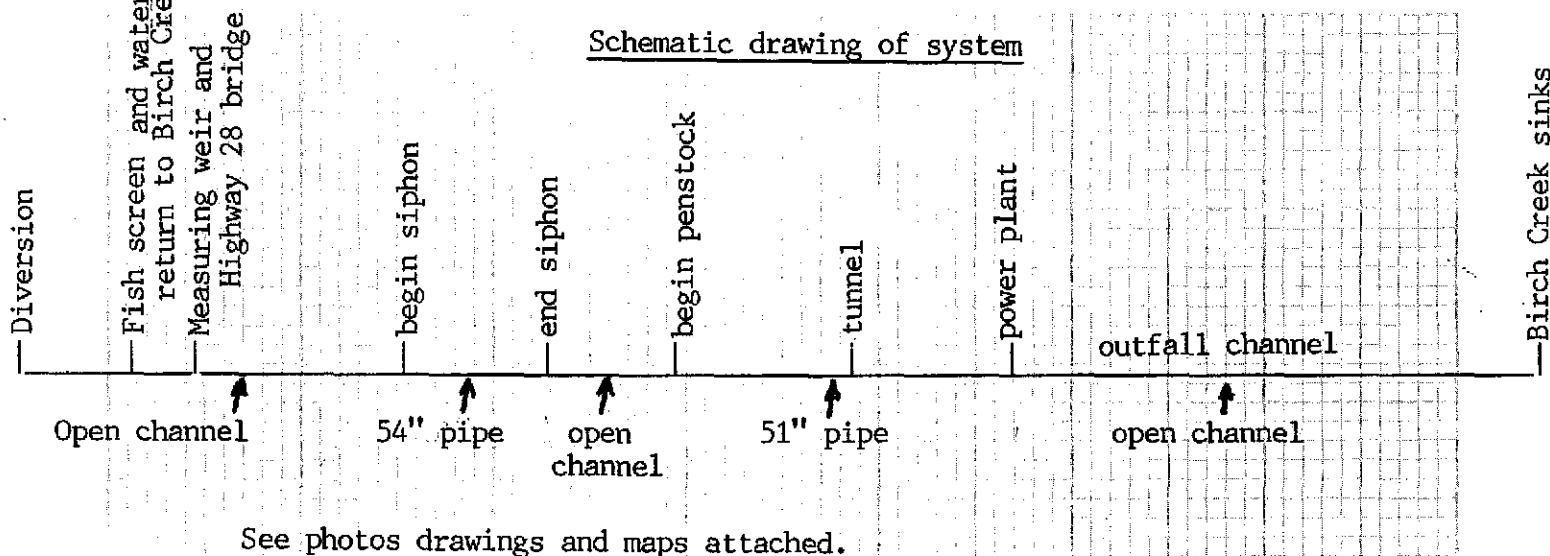
2. Other water rights with same point of diversion: 32-04062, 32-04062, 32-00061D, 32-00070A, 32-00043
32-02045, 32-02057, 32-00065

☐ Copies Attached

☐ Copies of Field Exam's Attached

C. SYSTEM DESCRIPTION

1. **Diversion System Diagram:** Indicate all major components and distances between components. Indicate weir size/ditch size/pipe i.d. as applicable. ☐ Alternative diagram attached



Approximate
Scale: 1" = 2 miles

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2. ☐ Copy of U.S.G.S. Quadrangle Attached
Showing location(s) of point(s) of diversion and
place(s) of use (required).

☐ Photo of Diversion and System Attached

(required for all but single household domestic groundwater, and stockwater.

☐ Aerial Photo Attached
(required for irrigation of 10 acres or more).

System Description (continued)

3. **Narrative:** Description (As operating at time of measurement. Indicate pressure, number of sprinklers, etc.)
Flow in Birch Creek is diverted into the new canal of Birch Creek Power Company one mile upstream from the abandoned heading of Reno ditch. The diversion is accomplished with a gate and flashboards and a low earthen dike. Discharge and stage varies in a very narrow range because the stream is springfed. See picture 2. A fish screen is installed 1.2 miles below the diversion, and a channel is provided for wasting flows into the Birch Creek channel from the canal below the fish screen to maintain flow in this part of the fishery when the powerplant shuts down. A 10 foot long rectangular weir is installed at the downstream end of the bridge 1.6 miles below the head of the diversion. (See pictures).

☒ See Remarks on page 4 for continuation

4.

Well or Diversion Identification No.*	Motor Make	Hp	Motor Serial No.	Pump Make	Pump Serial No. or Discharge Size
Generator	Ideal	2700KW	335203	4160 V	900RPM
Turbine	Gilkes 1986	3557 BHP	56318	489 ft. head	Max. discharge 57cfs

*Code to correspond with No. on map and aerial photo

5. **Point(s) of Diversion:**

Ident. No.	Gov't. Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Method of Determination/Remarks
			SE	SW	34	9N	31E	Clark	Survey by Dennis Jones Registered Land Surveyor, State of Idaho

6. **Place(s) of Use:**

Indicate Method of Determination Survey by Dennis Jones

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
8N	31E	14	SW																

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Do not use this space

Do not use this space

D. FLOW MEASUREMENTS

☐ Additional Data Sheets Attached

1.

Measurement Equipment	Type	Make	Model No.	Serial No.	Size	Calib. Date
Rectangular weir	10 feet	long	sharp crested	(see picture)		

2. Measurements:

Observed gage height 0.88 feet on weir at 5:45 pm on July 19, 1988

Discharge = $K_L H^{3/2} = 3.4 \times 10 \times 0.88^{3/2} = 28.1$ cfs

Observed gage height 0.90 feet on July 20, 1988, at 9:30 am.

Discharge = $3.4 \times 10 \times 0.90^{3/2} = 29.0$ cfs

E. FLOW CALCULATIONS

☐ Additional Computation Sheets Attached

1. Measured Method: Sharp crested weir computation.

2. Alternate Method for Checking Purposes:

F. PUMP EFFICIENCY DATA (Optional)

Discharge Pressure: _____ psi x 2.31 = _____ ft (1); Dynamic pumping level: _____ ft (2)

Total Head: (1) + (2) = _____ (3) ; Flow rate: _____ cfs (4)

Water HP: (3) x (4) ÷ 8.8 = _____ (5)

Meter Input KW: 3.6 x _____ KH x _____ CTR or _____ MULT x _____ PTR x _____ N/ _____ T = _____ (6)

Meter Input HP: (6) x 1.34 = _____ (7)

Panel Input KW: _____ Ave PF x _____ Ave Volts x _____ Ave Ampsx .001732 = _____ (6)

Panel Input HP: (6) x 1.34 = _____ (7) Efficiency: (5)/(7) x 100 = _____ %

G. VOLUME CALCULATIONS

1. Volume Calculations for Irrigation:

$V_{I.R.} = (\text{Acres Irrigated}) \times (\text{Irrigation Requirement}) =$ _____

$V_{D.R.} = [\text{Diversion Rate (cfs)}] \times (\text{Days in Irrigation Season}) \times 1.9835 =$ _____

$V = \text{Smaller of } V_{I.R.} \text{ and } V_{D.R.} =$ _____

2. Volume Calculations for Other Uses:

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H. REMARKS AND OVERLAP REVIEW ANALYSIS

The open channel continues 4.1 miles from the diversion where the flow enters a siphon of 54" pipe 1.1 mile long which spans a swale on the route. The discharge then enters an earth channel a mile long, then enters the penstock which is a 51" pipe 1.7 miles long. A tunnel carries the penstock through a mountain near the upper end. Head on the turbine is 479 feet.

The open channel sections are lined with 20 mil PVC fiber to minimize losses. The flow from the tailrace is divided to the various irrigation and other rights by the trifurcation. See pictures 11 and 12. During non-irrigation periods the flow is carried in the outfall channel from the tailrace to the Birch Creek sinks. See map attached.

I. RECOMMENDATIONS

1. Recommended Amounts

Beneficial Use	Period of Use From To	Rate of Diversion Q (cfs)	Annual Volume V (afa)
On the basis of 85 months of daily records of discharge in Birch Creek at 8-mile Canyon Road and 77 months of daily records at Blue Dome Inn (few winter records) I estimate during years of relatively high flows the diversion will average 52 cfs or a total of 37,600 acre feet per year. The discharge within the regulations will range from the allowable diversion of 75 cfs during some freshet seasons to zero discharge during long			

2. Recommended Amendments

- ☐ Change P.D. as reflected above ☐ Add P.D. as reflected above ☐ None ☐ Other
- ☐ Change P.U. as reflected above ☐ Add P.U. as reflected above

J. AUTHENTICATION

Field Examiner's Name Cecil A. Thomas
Signature Cecil A. Thomas
Certification Date Feb. 11, 1989
Field Report Preparation Date Feb. 11, 1989



K. Licensing recommendation shall be prepared by an Idaho Department of Water Resources employee on a computer printout attached hereto.

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JAN 08 2001

MEMORANDUM

TO: File Nos. 32-7136 and 32-7128; Birch Creek Power Project,
Ted Sorenson
FROM: Gary Spackman *Gary*
DATE: November 2, 1989
RE: Adequacy of the Field Examination

On August 8, 1989, I mailed a letter to Cecil Thomas requesting additional information about the Birch Creek Hydropower Project.

The major concern expressed in my letter was compliance with two conditions of the Memorandum Decision issued by the Director. I believe both of the conditions are related. The first condition required installation of measuring devices to determine the loss in the delivery system. The second condition required a diversion bypass flow equal to the lesser of: (1) 11% of the flow of Birch Creek; (2) the amount of water saved by the new ditch; or (3) five cubic feet per second. The field examination did not address these conditions.

Cecil Thomas represented to me that a measuring weir is installed near the highway approximately 8,000 feet below the diversion from the creek. Two more measuring weirs are located below the bifurcation to the Reno and the D & D Ditch.

Cecil Thomas represented that the upper measuring weir is not installed properly. It is also installed a mile and one half downstream from the actual diversion, and would not determine losses in the first 8,000 feet.

It appears to me that the condition requiring a measuring device is only for the purpose of determining how much water should bypass the diversion structure. If the upper weir is not installed correctly, the measuring devices cannot be used to determine the amount of water saved. I propose that Ted Sorenson be required to bypass the lesser of 11% of the flow of Birch Creek or 5 cfs.

Cecil Thomas also told me that Don Shenton is not requiring that the water bypass the diversion structure. Mr. Shenton should be instructed that the water must bypass the diversion structure.

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Cecil Thomas represented to me that the water is being diverted year round except when Ted Sorenson has problems with icing.

Cecil Thomas stated in a letter that the point of diversion should be changed to the point of diversion located in the SE1/4SW1/4, Section 34, T9N, R30E, B.M. This is a change from the point of diversion authorized in the permit and the permit must be amended.

Ted Sorenson has indicated that the maximum amount of water diverted through the power plant is 79 cfs. The total combined rate of diversion for the two permits is 75 cfs. Therefore the flow rate should be limited to 75 cfs.

The annual volume authorized to be diverted through the power plant should be 32,000 acre-feet.

With the above information, these permits are ready to prepare for licensing.

cc. Cecil Thomas

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JAN 08 2001

Cecil A. Thomas
Consulting Hydrologist, Civil Engineer, Land Surveyor
Idaho License No. 645

Box 868
Homedale, Idaho 83628

RECEIVED
OCT 26 1989

State of Idaho Department of Water Resources
1301 North Orchard Street, Boise, Idaho 83720

Department of Water Resources

RE: Field Examination of Applications for Permits 32-7128 and 32-7136
Attn. Gary Spackman

This is to confirm that according to a survey by Dennis Jones on 6/26/87 to locate the point of diversion from Birch Creek the major portion of the diversion embankment is in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 34, T9N, R30E. I note that his Survey of Record and my uncorrected report shows R31E and should be R30E. .

Also on the application for the permit, the location of the power plant was to be in NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, Township 31 East, Range 8 North. The location of the power plant is in SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 14, Township 8 North, Range 31 East.

If you have any more questions let me know.

Sincerely,

Cecil A. Thomas P. E.

MICROFILMED
JAN 08 2001

Cecil A. Thomas

Consulting Hydrologist, Civil Engineer, Land Surveyor
Idaho License No. 645

Box 868

Homedale, Idaho 83628

State of Idaho
Department of Water Resources
1301 North Orchard Street
Boise, Idaho 83720

Attn. Gary Spackman

Regarding your letter of August 8, 1989, and related answer from Ted Sorenson dated August 18, 1989, RE examination of applications for Permits N. 32-7128 and 32-7136 I am submitting some additional information.

Measuring weirs have been installed on the ditches below the power plant and pictures are enclosed. The measuring weir at the highway crossing 8000 feet below the diversion pond was previously described. Water is diverted all year except when ice conditions prohibit diversion.

Except during short lived periods of local runoff in the creek, practically all flow in the creek comes from the Birch Creek Spring and all flow reaching the diversion point can be utilized in the power plant. The amount available for diversion is the amount gaged at the gaging station 13117030 Birch Creek at Eight-mile Canyon Road, near Reno less channel losses in the creek in the 1.3 mile reach between the gage and the diversion. A copy of the discharge as gaged for water year 1987 is enclosed. The average discharge during 1987 was 59.4 cfs which is considerably more than the 44 cfs estimated by Mr. Sorenson, which is a realistic average at the diversion site.

When I last visited the project I computed more flow at the outflow than at the upper weir. It is also apparent from the published discharge that the apparent loss between the gage and the upper weir is exorbitant. I believe there is a significant velocity of approach on the upper weir or some other effect on the discharge measurement at that point. A meter measurement below the upper weir is advisable to check discharges as measured by the weirs.

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JAN 08 2001

Sincerely,



Cecil A. Thomas P.E.

Cecil A. Thomas

Consulting Hydrologist, Civil Engineer, Land Surveyor
Idaho License No. 645

Box 868

Homedale, Idaho 83628



Six foot weir on ditch to the west below the power plant



Six foot weir on ditch to the east below the power plant



Downstream side of gate structure releasing flow to Birch Creek below the power plant diversion

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Photos of weirs on ditches below Birch Creek power plant and the diversion structure below the diversion pond.

MUD LAKE-LOST RIVER BASINS

13117030 BIRCH CREEK AT EIGHT-MILE CANYON ROAD, NEAR RENO, ID

LOCATION.--Lat 44°04'49", long 112°52'30", in NW 1/4, NE 1/4, SE 1/4, sec. 28, T.9 N., R.30 E., Clark County, Hydrologic Unit 17040216, U.S. Bureau of Land Management lands, 300 ft downstream from Eight-Mile Canyon road crossing, 5.5 mi downstream from Blue Dome Inn, and 14 mi southeast of Reno.

DRAINAGE AREA.--400 mi², approximately.

PERIOD OF RECORD.--June 1967 to September 1981. March 1984 to December 1987 (discontinued).

GAGE.--Water-stage recorder. Elevation of gage is 5,770 ft above National Geodetic Vertical Datum of 1929, from topographic map.

REMARKS.--Records good except for estimated daily discharges, which are fair.

EXTREMES FOR PERIOD OF RECORD.--Maximum discharge recorded, 122 ft³/s Apr. 18, 1984, gage height, 1.63 ft; minimum recorded, 11 ft³/s July 5, 1967, gage height, 0.97 ft.

EXTREMES FOR CURRENT YEAR.--Maximum daily discharge, 82 ft³/s Dec. 15; minimum, 37 ft³/s Sept. 25, gage height, 1.07 ft.

October to December 1987: Maximum discharge during period, 76 ft³/s Nov. 25, gage height, 1.34 ft; minimum daily, 36 ft³/s Oct. 6-7, 17-22.

DISCHARGE, IN CUBIC FEET PER SECOND, WATER YEAR OCTOBER 1986 TO SEPTEMBER 1987
MEAN VALUES

DAY	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP
1	58	63	e69	e68	e72	e69	70	58	53	47	49	40
2	58	66	e67	e68	e74	e72	70	57	53	47	49	40
3	61	66	e66	e69	e73	e72	70	58	53	48	48	41
4	62	66	e67	e70	e72	e74	69	57	52	48	47	41
5	61	66	e69	e67	e71	e75	69	57	52	48	47	41
6	60	67	e70	e66	e72	e76	70	57	52	47	46	41
7	60	67	e71	e65	e73	e76	70	58	53	47	46	41
8	61	69	71	e63	e74	e76	70	57	53	48	46	41
9	61	71	69	e64	e71	77	70	56	53	47	46	40
10	61	e68	67	e64	e72	75	70	56	52	49	44	41
11	61	e70	69	e63	e73	71	70	57	51	50	44	41
12	62	e71	76	e63	e74	70	70	57	50	48	44	40
13	60	e70	e78	e62	e73	69	69	56	50	48	43	40
14	62	e70	e81	e61	e72	70	69	57	49	49	43	40
15	62	70	e82	e60	e72	70	69	56	49	50	44	39
16	61	70	e81	e59	e71	70	67	56	50	52	43	39
17	56	70	e79	e61	e70	70	66	58	48	61	42	40
18	56	70	e76	e63	e68	70	65	56	49	62	42	40
19	56	70	e74	e64	e67	70	64	56	49	58	42	40
20	55	70	e73	e65	e66	70	64	55	48	57	41	40
21	55	70	e71	e66	e68	70	64	55	47	57	40	40
22	55	70	e69	e67	e69	71	64	54	48	58	40	40
23	56	70	e68	e69	e70	71	63	53	46	56	40	39
24	57	70	e67	e71	e69	70	63	52	46	55	40	38
25	57	70	e68	e73	e68	70	62	52	46	54	41	37
26	57	e68	e68	e74	e67	70	63	53	46	53	40	38
27	58	e70	e67	e73	e66	69	62	53	46	52	40	38
28	61	e71	e67	e71	e68	69	61	52	46	51	41	38
29	61	e71	e68	e70	---	69	60	53	46	51	41	38
30	63	e71	e69	e70	---	69	60	52	47	50	41	38
31	63	---	e69	e69	---	69	---	52	---	49	41	---
TOTAL	1837	2071	2206	2058	1975	2209	1993	1716	1483	1597	1341	1190
MEAN	59.3	69.0	71.2	66.4	70.5	71.3	66.4	55.4	49.4	51.5	43.3	39.7
MAX	63	71	82	74	74	77	70	58	53	62	49	41
MIN	55	63	66	59	66	69	60	52	46	47	40	37
AC-FT	3640	4110	4380	4080	3920	4380	3950	3400	2940	3170	2660	2360

CAL YR 1986 TOTAL 22620 MEAN 62.0 MAX 82 MIN 42 AC-FT 44870
WTR YR 1987 TOTAL 21676 MEAN 59.4 MAX 82 MIN 37 AC-FT 42990

e Estimated

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SORENSEN ENGINEERING

CONSULTING ENGINEER

550 LINDEN DRIVE

IDAHO FALLS, IDAHO 83401

208-522-8069

FAX 208-522-8223

August 18, 1989

Amend permit of Diversion

Cecil Thomas
P. O. Box 868
Homedale, ID 83628

RE: FIELD EXAMINATION APPLICATION FOR PERMITS #32-7128 AND
#32-7136 BIRCH CREEK

Dear Cecil:

Here is some information that may be of help to you.

1. Attached is a copy of the Statement of Compliance which I have sent on to Gary Spackman. A measuring device (i.e. weir) has been located at the diversion works, about 8,000 feet downstream of the pond. The water master in conjunction with the downstream irrigators requested that the weir be placed downstream at the highway as shown on the attached map. This location was selected because in their mind it is the point of the diversion in that the bypass control is located at that point. ✓

The bed loss can be determined via the installation of two weirs located adjacent to the tailrace of the power plant. One weir has been placed in the D and D ditch and one weir has been placed in the Wilding ditch. These two irrigators consume all of the water from the power plant. Don Shenton has determined the bedloss to be minimal.
(208) 482-6200

2. Minimum flow is controlled by an adjustable weir located at the pond as shown on the attached map. The weir is calibrated and is adjustable. *gate*
3. Water is diverted year round except for icing conditions (i.e. when the Creek froze off above the pond). *Wp calibration except as measured in alternate watermaster. He says there is no request from water users below so he let it all go to Sorenson.*
4. The point of diversion has not changed. The location of the measuring weir as requested by the water master is approximately 8,000 feet downstream.

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SEP 08 2001

Cecil Thomas - page 2

5. The maximum flow which we have routed through the plant has been approximately 79 cfs (see attached records).
6. The average yearly flow based upon 12,000,000 KW-HR production is approximately 44 cfs. The canal and penstock are designed for 80 cfs. The turbine will handle 79 cfs.

Trusting this information to be of value.

Very truly yours,



Ted S. Sorenson, P.E.
Birch Creek Power

TSS:mm

Enclosure

MICROFILMED

JAN 08 2001

BORENSON ENGINEERING
CONSULTING ENGINEER
550 LINDEN DRIVE
IDAHO FALLS, IDAHO 83401
208-522-8069
FAX 208-522-8223

September 18, 1989

RECEIVED
SEP 22 1989

Department of Water Resources

Gary Spackman
Idaho Department of Water Resources
1301 North Orchard Street
Statehouse Mail
Boise, ID 83705

RE: BIRCH CREEK PERMIT #32-7128 AND 32-7136

Dear Mr. Spackman:

Pursuant to your letter of 8/8/89 to Cecil Thomas, here is a signed proof of beneficial use as requested.

Very truly yours,



Ted S. Sorenson, P.E.
Project Engineer

enclosure

cc: Cecil Thomas, w/enclosures

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JAN 08 2001

RECEIVED

SEP 22 1989

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

no fee encl.
Department of Water Resources

PROOF OF BENEFICIAL USE

For Office Use Only
Fee Received _____
Date _____
Receipt # _____
Receipt by _____
Reviewed by _____
Sent to region _____

The Idaho Department of Water Resources will consider this form as a statement that the permit holder(s) has completed all development that will occur under this permit and that water has been applied according to the provisions of the permit for the beneficial use(s) described below. This form must be accompanied by a license examination fee or a completed field examination report prepared by a certified water right examiner who has been appointed by the department.

Permit No. 32-7128 & 32-7136

Name(s) of Permit Holder: Birch Power Company

Post Office Address: 2988 Tipperany, Idaho Falls, ID 83401

Telephone No. (208) 522-8069 (208) 529-2469

Source of Water: Birch Creek

Extent of Use:

Domestic _____ (number of households) Stockwater _____ (number and type of stock)

Irrigation _____ (acres) Other/Remark Power Generation

Total rate and/or volume for which proof is submitted 75 cfs _____ acre-feet

Show the date water was first diverted and beneficially used under this permit: April 5, 1987

Measuring Device: Required? ☒ Yes ☐ No
Installed? ☒ Yes ☐ No

Fee enclosed \$ _____
(See License Examination Fee Schedule)

Flow Measurement Port: Required? ☐ Yes ☐ No
Installed? ☐ Yes ☐ No

Person to contact to accompany the Department representative during the field examination:

Ted S. Sorenson, P.E.
(Name)

(208) 522-8069
(Telephone Number)

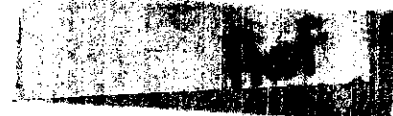
550 Linden, Idaho Falls, ID 83401

(Address)

The above information is my true statement of the extent to which the above numbered permit has been developed and I relinquish any undeveloped portion of the permit to the state of Idaho.

9/18/89
Date

[Signature]
Signature of Permit Holder (and title, if appropriate)



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State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 - (208) 327-7900

August 8, 1989

CECIL D. ANDRUS

GOVERNOR

R. KEITH HIGGINSON

DIRECTOR

Cecil Thomas
P.O. Box 868
Homedale, ID 83628

RE: Field Examination of Applications for Permit Nos. 32-7128
and 32-7136

Dear Cecil:

I have reviewed your field examination for permits nos. 32-7128 and 32-7136 for the Birch Creek Hydropower Project developed by Ted S. Sorenson. I congratulate you on a well prepared field examination. You obviously consulted the beneficial use examination rules and regulations.

Prior to discussing the field examination, I have searched the files, and do not find a proof of beneficial use. Proof of beneficial use for the two permits is not due until March 1, 1990. If you wish to use the field examination submitted for proof of beneficial use, the proof form must be signed by the permit holder and submitted to the department. I will carbon copy this letter to Ted Sorenson, and also enclose a proof of beneficial use form that he can complete, and mail back to this office.

A few minor questions arose in my review of your field examination. The questions do not warrant my returning the field examination to you, however:

1. Rule 5,1,6. requires a statement of compliance with the conditions of the permit. You prepared a very good summary of compliance with the conditions set forth in the memorandum decision issued by the Director. I am uncertain about compliance with two conditions, however. One of the conditions of the order states that a measuring device must be maintained both at the diverting works and near the end of the feeder ditch so loss can be determined. I cannot tell from the field exam report whether the measuring devices have been installed. The field examination report states that Don Shenton determined the loss in the delivery canal, but the method of determination is unclear.

2. Another condition requires that a minimum flow remain in Birch Creek downstream of the diversion works. The examination report does not state whether the minimum streamflow is being bypassed, and in what manner it is being controlled.

3. A statement in the examination leads me to believe that water may not be diverted year round. Rule 5,1,13. requires that

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the examiner set forth the period of use.

4. Rule 5,1,16. requires that the field examiner identify any changes in the description of the permit that must be amended. The point of diversion location on the field examination is different than the point of diversion identified by the permit. Do you recommend the Department send a licensing amendment to Mr. Sorenson?

5. I am uncertain what flow rate and volume you are recommending for licensing. You referred to flow data apparently gathered on the river, and used that data for determining a volume and a flow rate. I do not know, however, whether the flow rate recommended excludes the required bypass flow, and whether there are other diversions that require water before it can be delivered to the power plant. Please determine the maximum flow rate that has been diverted through the canal from Ted Sorenson's records. If the maximum flow rate does not represent the capacity of the canal and the generating facilities, I will accept some estimate of the flow capacity based on slope, configuration of the canal, size, type of pipe, and the capacity of the generators. Finally, an annual volume must be calculated from an average flow number. I believe annual volume should be calculated from an average of the water diverted to the power plant over the time that the plant has been producing electricity.

6. Last, I am disappointed that you did not provide photographs and an aerial photograph pinpointing the location of the twelve to fifteen inch fish you observed. I suppose I must travel to the site on my own time, and determine their location myself.

I request that this information be sent within thirty days of this letter. The permits will not lose priority for failure to immediately submit the information, however, because proof is not yet due. I urge you, however, to submit it as quickly as possible, and I will attempt to prioritize on review of this filing. We will also await receipt of the proof of beneficial use.

Sincerely,



GARY SPACKMAN, Manager
Water Right Permits Section

GS:js

Enclosure

cc. Ted Sorenson

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JAN 08 2001

FIELD EXAM REVIEW

TO: File 32-7136
 FROM: ~~Jim Johnson~~ Gary Spackman
 DATE: 8/4/89

Review of Compliance with Beneficial Use Rules & Regulations

Rule 3. Authority of Representative

✓ 3,1. ✓ 3,2.

Rule 4. Qualification

✓ 4,1.

Rule 5. Examination for Beneficial Use

5,1. Field Report:

✓ 5,1,2. ✓ 5,1,3. ✓ 5,1,4. ✓ 5,1,5. ✓ 5,1,6.
N/A 5,1,7. N/A 5,1,8. N/A 5,1,9. ✓ 5,1,10. N/A 5,1,11.
✓ 5,1,12. ✓ 5,1,13. ✓ 5,1,14. ✓ 5,1,15. ✓ 5,1,16. ✓ 5,1,17.

How much is being
beneficially
used? (Except for compliance
w/min flow bypass)

No irrigation N/A 5,1,17. Can water be diverted year round. point of diversion

5,2. Field Report Acceptability:

✓ 5,2,1. ✓ 5,2,2. Not for exam 5,2,3. that exam is acceptable 5,2,4.

5,3. General:

N/A 5,3,1. N/A 5,3,2. N/A 5,3,3. N/A 5,3,4. N/A 5,3,5.

Rule 6. Water Measurement

6,1. Measurement Terminology:

? 6,1,1. ? 6,1,2. ? 6,2. ✓ 6,3. ? 6,4.
✓ 6,5.

normal capacity

Remarks:

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JAN 08 2001

MEMORANDUM

To: Bob Fleenor
From: L. Glen Saxton *LS*
RE: REQUEST FOR HEARING RECORD - BIRCH CREEK POWER
Date: April 17, 1989

→ Ron Carlson called today and advised that Mack Wagner, a water user on Birch Creek has requested a copy of the record developed during the hearings on the matter.

Apparently Wagner has a copy of the later hearing which was apparently transcribed, but wants information on the earlier hearing. (?)

Can you either provide the information to Ron C. or advise Rita what is needed and where the information can be located?

#32-7136
32-7128

4-24-89

It appears that the tapes are still in I.F. Don is going to look for them.

J

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SORENSEN ENGINEERING

CONSULTING ENGINEERS

550 LINDEN DRIVE

IDAHO FALLS, IDAHO 83401

208-522-8069

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FEB 16 1988

Department of Water Resources

February 10, 1988

Mr. Cecil Thomas, P.E.
3775 N. Locust Grove
Meridian, ID 83642

32-7128 ✓
-7136

SUBJECT: BIRCH CREEK HYDROELECTRIC FACILITY - WATER RIGHT
CERTIFICATION, CLARK COUNTY, IDAHO

Dear Cecil,

I am anxious to have the water right certified for the water meeting by the 1st of March. Accordingly, I have talked to Mr. Jim Johnson of the Idaho Department of Water Resources in Boise. He will be reviewing your certification. I would appreciate it if you would get the certification to him within the next week. Mr. Johnson is calling your attention to the supplemental information required for beneficial use. I would appreciate it if you would call him at 334-7947 to confirm precise information he needs.

Cecil, I really appreciate your help in this matter.

Very truly yours,



Ted S. Sorenson, P.E.
Project Engineer

TSS:

cc: Mr. Jim Johnson, Idaho Dept. of Water Resources, Boise, ID

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JAN 08 2001

Bob Fleene

1 IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
2 OF THE STATE OF IDAHO, COUNTY OF BONNEVILLE

3 * * *

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OCT 15 1986

Department of Water Resources

4 IN THE MATTER OF)
5 APPLICATION FOR PERMIT)
6 NOS. 32-7128 AND 32-7136 ✓)
IN THE NAME OF BIRCH)
POWER COMPANY,)

7)
8 D & D ENTERPRISES, INC.,)
9 Protestant-Appellant,)

10 vs.)

Case No. 33072

11 A. KENNETH DUNN, Director)
12 IDAHO DEPARTMENT OF WATER)
13 RESOURCES,)

MEMORANDUM DECISION
ADDENDUM

14 Respondents,)

15 and)

16 BIRCH POWER COMPANY,)

17 Applicant-Respondent,)

18 The Court in writing this Memorandum
19 Decision adopts the prior decision of the Court, dated
20 June 30, 1986. Through some misfortunate
21 circumstances, D&D Enterprises did not receive a copy
22 of the Court's earlier decision, and also the Court
23 did not have the benefit of D&D's brief. That brief
24 has been thoroughly reviewed, and the Court will treat
25 the matters raised in the brief.

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1 When D&D points out evidence or
2 testimony that they were not receiving their decreed
3 rights at the point of diversion, they are not raising
4 any issue that could be used as a basis to overrule
5 the Director's decision in this case. There is no
6 evidence that this alleged shortage is due to anything
7 but a reduced stream flow down Birch Creek when the
8 water drops during the later summer. This has nothing
9 to do with the salvaged water that we are dealing
10 with.

11 The argument that has merit is the claim
12 that the director has established a minimum stream
13 flow without following the statutory requirements of
14 Idaho Code 42-1503. D&D argues that to take the
15 position that the diversion of five CFS of water down
16 the existing Birch Creek channel is not the
17 establishment of a minimum flow, but rather a permit
18 condition under 42-2203(a), not only begs the
19 question, but also defies logic. The Court is not
20 sure what question it begs, and so that will not be
21 discussed. But the defying of logic will be
22 discussed.

23 As the Court understands the facts, the
24 present Reno Ditch Diversion diverts the entire flow
25 of Birch Creek throughout the year except when the

1 creek is frozen. As a condition for granting the
2 permit to establish the hydroelectric project, the
3 water that will be saved under the project will travel
4 down the Birch Creek Channel that has always been
5 dewatered. The order of the Director provides that 11
6 percent of the flow of Birch Creek at the diversion of
7 the feeder ditch, the amount of water saved by the new
8 ditch, or 5 cubic feet per second, whichever is least,
9 shall be allowed to flow past the feeder canal
10 diversion in the natural channel of Birch Creek. This
11 order clearly provides that such a requirement is in
12 the public interest. An appropriate question asks
13 whether the Director promulgated this order under the
14 authority of Idaho Code 42-1501 or 42-203(a). In
15 Shokal v. Dunn 109 Idaho 330, the Court made the
16 following statement:

17 ...the term public interest (is) common to
18 both Sections 42-1501 and 42-203(a), and
19 common to the same title...also the legislature
20 approved the term "public interest" in both
21 sections on the same day. Clearly the
22 legislature in 42-203(a) must have intended the
23 public interest...to include the public
24 interest elements listed in 42-1501. Fish
25 and wildlife habitat....

22 From all the circumstances, it can be
23 logically deduced that this flow, as established by
24 the Department, is a viable condition under Idaho Code
25 42-203(a). That logic might be further enhanced by a

1 further analysis of Idaho Code 42-1503. The
2 establishment of a minimum stream flow in this code
3 section is through the process of appropriation. The
4 statute makes it clear that the establishment of a
5 minimum stream flow is an appropriation of
6 unappropriated waters. The crucial question is
7 whether we are dealing with appropriated or
8 unappropriated waters in the instant case.

9 - D&D has an established water right to
10 cover the full flow of Birch Creek at the diversion.
11 If the water is lost by seepage, such does not change
12 the nature of the water from appropriated waters to
13 unappropriated waters. If D&D had at any time over
14 the many years of its diversion eliminated any amount
15 of the seepage, they could have applied the water to a
16 beneficial use it being their appropriated water. If
17 someone else saves the water under the case law set
18 forth in the Court's Memorandum Decision, that
19 appropriated water gains a new owner. The law would
20 not recognize a new owner if it were a race to see who
21 saved the water first, but the original owner cannot
22 just sit back and wait for the saving action and then
23 step in and make a claim.

24 There is still another hurdle -- the use
25 of the water by Birch Power will be non-consumptive,

1 and thus it could be argued that an appropriation does
2 not take place. Idaho Code 42-203(b) speaks of what
3 water right for power purposes, and that water right
4 is held by Birch Power in the form of a trust. Idaho
5 Code 42-203(b)(4) provides that the user of water for
6 power purposes does so as beneficiary of the trust
7 established in subsections 2 and 3, and shall be
8 entitled to use water available at its facilities to
9 the extent of the water right. The people of the
10 State of Idaho are subject to becoming the
11 beneficiaries of that trust. Thus Birch Power saves
12 the water -- by permit the Director allows the water
13 to be used for power purposes -- this appropriation to
14 a power use is an appropriation in trust -- the public
15 is the beneficiary of that trust. Birch Power becomes
16 the vehicle through whom the appropriated water
17 traverses from the D&D to the public.

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1 The Court finds and reaffirms that the
2 decision of the Director be affirmed and upheld.

3 Dated: October 8, 1986.

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6
7 *H. Reynold George*
 H. Reynold George
 District Judge

8
9 cc: GEORGE C. PETERSON, JR.
10 - RAY W. RIGBY
 STEPHEN V. GODDARD
11 PHILLIP J. RASSIER
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LEGAL
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSIONNCF
Birch Power Company)Project Nos. 9940-003 and
9725-00332-7128
32-7136
NOTICE OF DENIAL OF REHEARING

(September 19, 1986)

The National Marine Fisheries Service (NMFS) has requested that the Commission rehear its August 8, 1986 order denying appeal in the above-captioned proceedings. 1/ Since the rehearing request raises no new questions of law or policy not previously considered by the Commission, the Commission agreed to take no action on NMFS' rehearing request. Accordingly, the request for a rehearing is denied pursuant to Section 313(a) of the Federal Power Act, 16 U.S.C. § 8251(a) (1982), and Rule 713(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(f) (1986).

Kenneth F. Plumb

Kenneth F. Plumb,
Secretary.RECEIVED
SEP 29 1986

Department of Water Resources

DC-A-5

1/ 36 FERC ¶ 61,208 (1986).

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32-7136 ✓

P-7194-002

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Department of Water Resources

Notice of Application filed with the Commission

(September 10, 1986)

Take notice that the following hydroelectric application has been filed with the Federal Energy Regulatory Commission and is available for public inspection:

- a. Type of Application: Transfer of License
- b. Project No.: 7194-002
- c. Date filed: August 11, 1986
- d. Applicant: Birch Power Company - Licensee; Birch Power Company and Ted S. Sorenson, d/b/a Sorenson Engineering - Transferee
- e. Name of Project: Birch Creek
- f. Location: On Birch Creek in Butte and Clark Counties, Idaho
- g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 5791(a) - 825(f)
- h. Contact Person: Ted S. Sorenson
550 Linden Avenue
Idaho Falls, ID 83401
(208) 522-8069
- i. Comment Date: OCT 27 1986
- j. Description of Transfer: On May 21, 1986, a major license was issued to the Birch Power Company for the construction, operation, and maintenance of the Birch Creek Project No. 7194. Birch Power Company has proposed to transfer the license to the Birch Power Company and Ted S. Sorenson, d/b/a Sorenson Engineering. The transferee is a private corporation and a sole proprietorship organized and existing under the laws of the State of Idaho and qualified to do business in the State of Idaho.
- k. This notice also consists of the following standard paragraphs: B and C.

The licensee certifies that it has fully complied with the terms and conditions of its license and obligates itself to pay all annual charges accrued under the license to the date of transfer. The transferee accepts all the terms and conditions of the license and agrees to be bound thereby to the same extent as though it was the original licensee.

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JUL 8 1986

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, COUNTY OF BONNEVILLE

Department of Water Resources

* * *

D & D ENTERPRISES, INC.,)
Plaintiffs,)
-vs-)
A. KENNETH DUNN, et al.,)
Defendants.)

Case No. 33072

MEMORANDUM DECISION

Permit Nos. 32-7128
32-7136

This matter comes before the Court in its appellate capacity, and the Court will review the administrative decision made by the Director of the Idaho Department of Water Resources. Birch Power Company sought water right permits directed towards a proposed construction of a small hydroelectric project on Birch Creek. An administrative hearing was held, and the Director filed a Proposed Decision on November 27, 1985, and a Modified Memorandum Decision and Order was issued March 26, 1985. From that Modified Decision, D & D Enterprises filed its Petition for Review.

In the planned construction, which involves the construction of a new feeder ditch to the hydroelectric plant, Birch Power contends its feeder

1 ditch system will save water. The Director, in his
2 Decision, placed a condition on the Birch Power
3 Project that a portion of the water shall remain in
4 the natural channel of Birch Creek to satisfy a public
5 purpose. D & D Enterprises claims that this saved
6 water is subject to their right to apply the water to
7 a beneficial use on their farm ground, and that the
8 Director's determination is in error.

9 The Court considers the primary issue to
10 be whether D & D can make any legal claim to the
11 salvaged water saved by the construction of the feeder
12 ditch by Birch Power. In the case of Basenger v.
13 Taylor 36 Idaho 591 (1922), the Court held that the
14 party who saved an extensive amount of water by
15 constructing a pipeline was allowed to receive the
16 water so saved. The irrigators had an earlier
17 priority date, but under the authority of the Basenger
18 Case, they were not allowed to recoup any of the water
19 that had been lost to seepage in their ditch and later
20 saved by the pipeline. In the case of Hill v. Green
21 47 Idaho 157 (1928), the supply of water to prior
22 appropriators was not decreased, and were not entitled
23 to certain salvaged water. This reasoning or outcome
24 was followed in the case of Reno v. Richards 22 Idaho
25 1. This being the law, D & D Enterprises has no

1 standing to attack the administrative decision in that
2 it takes away its right to apply the water to a
3 beneficial use on their properties.

4 The only other basis that D & D can
5 attack the decision is based on a claim of abuse of
6 discretion in directing the use or flow of the saved
7 water. In the recent case of Shokal v. Dunn 109 Idaho
8 330; 707 P.2d 441, the Supreme Court reviewed the
9 procedure involved in the public interest evaluations
10 as carried out by the Water Resources Board. Using
11 Shokal as a guideline, the Court finds, in the instant
12 case, that the Water Resources Department has
13 adequately shown that the impact of the hydroelectric
14 project promotes the public interest. And the Court
15 finds that D & D Enterprises has not carried its
16 burden to show any harm peculiar to itself. Under
17 Shokal, such a finding supports the decision of the
18 public agency.

1 Based upon the transcript and the
2 briefs, the Court upholds the ruling of the Idaho
3 Department of Water Resources.

4 Date: June 26, 1986.

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7 
8 H. Reynold George
District Judge

9 cc: GEORGE C. PETERSEN, JR.
10 STEPHEN V. GODDARD
11 PHILLIP J. RASSIER
12 RAY W. RIGBY
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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Birch Power Company) Project No. 7194-001

ORDER ISSUING LICENSE
(Major Project - Unconstructed)

(Issued May 21, 1986)

Birch Power Company has filed a license application under Part I of the Federal Power Act (Act) to construct, operate, and maintain the Birch Creek Project, located in Butte and Clark Counties, Idaho, on Birch Creek. The project would occupy lands of the United States under the jurisdictions of the Department of Energy and the Bureau of Land Management.

Notice of the application has been published. The motions to intervene that have been granted and the comments and protests filed by agencies and individuals have been fully considered in determining whether to issue this license, as discussed below.

The Idaho Department of Fish and Game (IDFG) filed a motion to intervene on November 13, 1985. The motion recommends that ten specific mitigative measures or stipulations be included in any license issued in order to protect or enhance the states fish and wildlife resources. The applicant's proposed fishery mitigative plan will provide for the implementation of six stipulations, the applicant's plan for the development of riparian vegetation along the proposed power canal will satisfy another two stipulations, and special articles included in this license will require the licensee to implement the two remaining stipulations.

SUMMARY OF FINDINGS

The design of this project is consistent with the engineering standards governing dam safety. The project will be safe if constructed, operated, and maintained in accordance with the requirements of this license. Analysis and support for related license articles are provided in the Safety and Design Assessment attached to this order.

ENVIRONMENTAL CONSIDERATIONS

Erosion and Sedimentation

Ground disturbance during borrow and spoil-producing activities, and construction of the dam, feeder ditch, intake, penstock, powerhouse, and tailrace will result in increased erosion and sedimentation, particularly along steeper slope segments of the

38-7128
32-7136 ✓

-2-

Department of Water Resources

MAY 27 1986

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penstock. Rupture of the penstock could cause locally severe erosion. Implementation of appropriate control measures will assure adequate protection against these impacts. Article 401 requires the licensee, after consultation with the U.S. Bureau of Land Management (BLM) and other appropriate resource agencies, to prepare and implement a BLM-approved erosion and sediment control plan.

An automatic shut-off device at the intake structure will minimize erosion in the event of a pipeline or penstock rupture. Article 402 requires the licensee to include at the intake structure an automatic shut-off device that will operate in the event of pipeline or penstock rupture.

Mineral Resources

The U.S. Department of the Interior (Interior) recommends that a field check be conducted to determine the project's effects on mineral deposit development and utilization. Ore minerals in the general project vicinity include copper, lead, zinc, silver, gold, uranium, and iron. Although the proposed project facilities will cross public lands that include several mining claims, no economically mineable deposits have been reported. A field check for mineral resources at the project site, including the transmission line corridor and the subsequent development of a mitigative plan to minimize project impacts to mineral resource development and utilization will ensure that any adverse impacts are minimal. Article 403 requires the licensee, after consultation with the BLM and the U.S. Bureau of Mines, to conduct a mineral resource field check and prepare a mineral resource mitigative plan for the project.

Riparian Vegetation

Operation of the project will result in significant adverse impacts to approximately 30 acres of riparian vegetation located (1) adjacent to the 0.6-mile-long reach of Birch Creek below the proposed diversion and (2) adjacent to the existing Reno Ditch. The Applicant, in consultation with the BLM, the U.S. Fish and Wildlife Service (FWS), and the Idaho Department of Fish and Game (IDFG), has developed and filed an extensive plan to establish riparian vegetation along the 6.6 miles of proposed feeder ditch. The applicant also will establish riparian vegetation at the new diversion impoundment and at several livestock and wildlife watering sites throughout the project area. The establishment of riparian vegetation, as planned, not only will mitigate project impacts, but also will increase the overall amount of riparian habitat in the project area. Because the implementation of the

applicant's plan to establish riparian vegetation addresses IDPG's Stimulation Nos. 4 and 9, and is necessary to mitigate project impacts to existing riparian communities, the plan is approved herein and made a part of the project license.

Minimum Flow for Riparian Habitat

Operation of the project will reduce flows in the 0.6-mile-long section of Birch Creek from the new diversion downstream to the existing Reno Ditch diversion. This area currently supports an excellent riparian community, including a variety of trees and shrubs with a lush herbaceous understory. The proposed flow reductions will decrease the extent and quality of riparian vegetation along this reach of Birch Creek. The applicant, IDPG's Stimulation No. 8, and the Idaho Department of Water Resources agree to the release of a minimum flow of 5 cubic feet per second (cfs), or 11 percent of the flow of Birch Creek, whichever is less, into Birch Creek below the project diversion. Although this minimum flow will not be sufficient to maintain pre-project levels of riparian vegetation, it will be adequate to support a remnant riparian community. Further, since the minimum flow will be allowed to remain in the Birch Creek channel downstream of the existing Reno Ditch diversion, the poor-quality, riparian habitat located below the Reno Ditch diversion will be enhanced for a distance of about 1 mile. Article 404 requires the licensee to release a minimum flow of 5 cfs, or 11 percent of the flow of Birch Creek, whichever is less, into Birch Creek below the project diversion.

Streamflow Monitoring

The PLM recommends that: (1) the applicant install a stream gage to measure flows released from the proposed diversion structure to Birch Creek; and (2) the applicant maintain a flow release record, which is made available for inspection by the PLM and the IDPG.

The maintenance of accurate minimum flow data is essential to monitor Applicant's proposed riparian mitigative plan. Article 405 requires that the licensee install streamflow monitoring equipment to ensure that the minimum flow is accurately measured and maintained.

Raptor Protection

A variety of raptors, including the golden eagle and the ferruginous hawk, a candidate for Federal listing as an endangered or threatened species, occur in the Birch Creek Project area. Unless the project's 0.5-mile-long transmission line is properly designed and constructed to prevent electrocution of raptors, it would be a hazard to the aforementioned species. The applicant proposes to protect raptors from hazards associated with the project's transmission line, thereby satisfying IDPG's Stimulation No. 10. Article 406 requires

the licensee to design and construct the project transmission line in a manner that minimizes the line's electrocution hazard to raptors.

Fishery Mitigative Plan

The applicant proposes to develop the first 1.5 miles of feeder ditch into fishery habitat as mitigation for the loss of fishery habitat in the 0.6-mile-long reach of Birch Creek below the project diversion. The applicant also will install fish screens at the end of the 1.5 miles of fishery habitat and will implement a monitoring program to assess the new fishery.

Because applicant's proposed fishery mitigative plan will satisfy IDPG's Stimulation Nos. 1, 2, 3, 5, 6 and 7, and will provide for adequate mitigation of major project impacts, the plan is approved herein and made a part of the project license. However, the plan currently lacks an implementation schedule and detailed drawings of fish screens(s). Article 407 requires the licensee to file, for Commission approval, an implementation schedule for its fishery mitigative measures. Further, Article 408 requires the licensee to consult with the IDPG and the PWS concerning the design of fish screens, and to file as-built drawings with the Commission upon completion of their installation.

Fisherman Access

The applicant proposes to construct fisherman access points: (1) along the 1.5-mile-long section of feeder ditch that will be developed as fish habitat; and (2) along the fence that will be installed around the 2-acre impoundment. No comments on these proposed facilities were received from the reviewing agencies. Article 409 requires the licensee to design, construct, operate, and maintain (or arrange for the design, construction, operation, and maintenance) of the above-named facilities and to file with the Commission as-built drawings that show the type, number, and location of these facilities.

Cultural Resources

No known archaeological or historic properties will be affected by the proposed project. The only known archaeological property in the vicinity of the proposed project can be avoided. Article 410 requires the licensee (1) to implement cultural resources protection measures to avoid impacts to that site, and (2) to protect any archaeological or historic sites that may be discovered during the proposed construction.

Northwest Power Planning Council Fish and Wildlife Program

The Fish and Wildlife Program (Section 1204) developed by the Northwest Power Planning Council contains a framework for assessing

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the impacts of new hydroelectric development of fish and wildlife resources, and lists a number of generic mitigative measures that should be implemented for any new development. Part of this framework requires consultation between the developer and the agencies and Indian tribes on the formulation of appropriate mitigative measures.

The mitigative measures proposed by the applicant and required herein satisfy the intent of the Program that adequate mitigation be provided. The consultation requirements of the Program have occurred during the processing of this license application. However, Article 201 is included herein reserving to the Commission the right to require changes in project structures or operations, on its own motion or when petitioned by the agencies or Indian Tribes, to take into account the requirements of the Program.

Other Environmental Concerns

Water quality certification of the Birch Creek Hydroelectric Project, FERC No. 7194-001, as required by Section 401 of the Clean Water Act, was granted on April 15, 1985, by the State of Idaho, Department of Health and Welfare.

No Federally listed threatened or endangered species or critical habitat will be affected by the project.

FINDING OF NO SIGNIFICANT IMPACT

Construction of the proposed facilities will produce some minor, short-term, adverse impacts, including dust, noise, and exhaust emissions caused by vehicles and machinery. These effects will disturb trout anglers along Birch Creek and area wildlife. Construction activities will cause minor erosion on steep slopes as well as some sedimentation and turbidity in Birch Creek below the diversion site. During the proposed 10-month construction period, project-related truck and automobile traffic may cause minor traffic delays on Idaho State Highway 28 near the project site.

Operation of the project will divert all flows above 5 cfs, or 11 percent of the flow of Birch Creek, whichever is less, from a 0.6-mile-long portion of Birch Creek. The minimum instream flow will be sufficient to maintain some riparian habitat in Birch Creek below the project diversion, but aquatic habitat will be eliminated. To mitigate for this loss, the licensee will implement a plan to develop and maintain the first 1.5 miles of new feeder ditch as a trout fishery.

The proposed project will necessitate the permanent removal of approximately 3 acres of riparian vegetation from the diversion site. In addition, by diverting flows from the existing Reno

Ditch to the proposed ditch, the project will result in the eventual loss of existing riparian vegetation along the Reno Ditch. To mitigate for these losses, the licensee will implement an agency-approved plan to develop and maintain riparian vegetation at the periphery of the project's 2-acre impoundment and along the proposed project ditch.

Article 401 requires the licensee to prepare and implement a plan for the control of dust, erosion, and sediment. Article 402 requires the licensee to provide at the intake structure an automatic shut-off device that will prevent water from entering the pipeline/pensstock in the event of a pipeline or pensstock rupture. Article 403 requires the licensee to conduct a mineral resources field check of areas that will be impacted by the construction of project facilities, and to prepare a mitigative plan to protect any mineral resources that could be mined economically. Article 404 requires the licensee to provide a minimum instream flow of 5 cfs, or 11 percent of the flow of Birch Creek, whichever is less, below the project diversion dam for the protection of riparian vegetation and associated wildlife populations. Article 405 requires that the licensee install streamflow monitoring equipment to ensure that the required minimum flow is continuous; released to Birch Creek below the project diversion dam.

Article 406 requires that the licensee design and construct the project transmission line to minimize its electrocution hazard to raptors. Article 407 requires the licensee to file an implementation schedule for the project fishery mitigative plan. Article 408 requires the licensee to design and install fish screens at the project bypass headgate. Article 409 requires the licensee to implement the proposed plan to develop fishermen access points at the project impoundment and along the section of feeder ditch that is developed as fish habitat. Article 410 requires that the licensee implement the proposed plan to avoid 1 archeological site located along the route of the proposed pipeline.

In accordance with the National Environmental Policy Act of 1969, an environmental assessment was prepared for the Birch Creek Hydroelectric Project (FERC No. 7194-001) on January 30, 1986.

This document is available in the Division of Public Information and in the Commission's public file associated with this proceeding. On the basis of the record, and Staff's independent environmental analysis, issuance of a license for the project, as conditioned herein, will not constitute a major Federal action significantly affecting the quality of the human environment.

OTHER ASPECTS OF COMPREHENSIVE DEVELOPMENT

The Director, Office of Hydropower Licensing concludes that the project would not conflict with any planned or authorized development, and would be best adapted to comprehensive development of the waterway for beneficial public uses.

The Director orders:

(A) This license is issued to the Birch Creek Hydroelectric Project (licensee) for a period of 50 years, effective the first day of the month in which this order is issued, to construct, operate, and maintain the Birch Creek Project. This license is subject to the terms and conditions of the Act, which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provision of the Act.

(B) The project consists of:

(1) All lands, to the extent of the licensee's interests in those lands, enclosed by the project boundary shown by Exhibit G:

Exhibit G-	FERC No. 7194-	Showing
1A (Rev.)	10	Project Land & Boundaries
1B	11	Project Land & Boundaries
2A	12	Plan & Profile
2B	13	Plan & Profile

(2) Project works consisting of: (a) a 10-foot-high earth-fill diversion structure; (b) a small reservoir having normal water surface elevation 5671.0 feet; (c) an 8,200-foot-long, 25-foot-wide trapezoidal-shaped feeder canal; (d) a headworks structure and a 7,985-foot-long return channel to Birch Creek; (e) a 26,700-foot-long, 25-foot-wide trapezoidal-shaped canal; (f) a screened, concrete intake structure; (g) a 15,900-foot-long, 48-inch-diameter underground steel pipeline/penstock; (h) a powerhouse containing a generating unit rated at 2,850-KW operated at a head of 532 feet and at a flow of 75 cfs; (i) a tailrace to the Reno Ditch having water surface elevation 5122.0 feet; (j) a 37,200-foot-long outfall channel to the Birch Creek Sink; (k) a 2,400-V/12.47-KV transformer; (l) a 1,700-foot-long, 12.47-KV transmission line; and (m) appurtenant facilities.

The project works generally described above are more specifically shown and described by those portions of Exhibits A and P recommended for approval in the attached Safety and Design Assessment.

(3) All of the structures, fixtures, equipment or facilities used to operate or maintain the project and located within the project boundary, all portable property that may be employed in connection with the project and located within or outside the project boundary, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) The Exhibit G described above and those sections of Exhibits A and P recommended for approval in the attached Safety and Design Assessment are approved and made part of the license.

(D) The (1) Birch Creek Hydroelectric riparian mitigation plan included in the Report on Fish, Wildlife, and Botanical Resources, Exhibit E, of the Application for License, filed February 21, 1985, and (2) the plan to provide mitigation and enhancement of riparian vegetation at the project's diversion impoundment, filed June 8, 1985, are approved and made part of the license.

(E) The Applicant's proposed fishery mitigation plan for the project entitled, "Feasibility of Developing a Trout Population in the Proposed Birch Creek Hydroelectric Project Feeder Ditch," filed on February 21, 1985, is approved and made a part of this license.

(F) The Report on Recreational Resources of the Environmental Report, Exhibit E, filed on February 21, 1985, is approved and made a part of this license.

(G) This license is subject to the articles set forth in Form L-2, (October 1975), entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Lands of the United States." The license is also subject to the following additional articles:

Article 201. The Commission reserves the authority to order, upon its own motion or upon the recommendation of federal or state fish and wildlife agencies or affected Indian tribes, alterations of project structures and operations to take into account to the fullest extent practicable the regional fish and wildlife program developed pursuant to the Pacific Northwest Electric Power Planning and Conservation Act.

Article 202. The licensee shall pay the United States the following annual charge, effective the first day of the month in which this license is issued:

a. For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 3,800 horsepower.

b. For the purpose of recompensing the United States for the use, occupancy and enjoyment of 136.6 acres of its lands other than for transmission line right-of-way, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

c. For the purpose of recompensing the United States for the use, occupancy, and enjoyment of 0.7 acres of its lands for transmission line right-of-way, a reasonable amount as

determined in accordance with the provisions of the Commission's regulations in effect from time to time.

Article 203. Pursuant to Section 10(d) of the Act, after the first 20 years of operation of the project under license, a specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. One half of the project surplus earnings, if any, accumulated after the first 20 years of operation under the license, in excess of the specified rate of return per annum on the net investment, shall be set aside in a project amortization reserve account at the end of each fiscal year. To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year after the first 20 years of operation under the license, the amount of that deficiency shall be deducted from the amount of any surplus earnings subsequently accumulated, until absorbed. One-half of the remaining surplus earnings, if any, cumulatively computed, shall be set aside in the project amortization reserve account. The amounts established in the project amortization reserve account shall be maintained until further order of the Commission.

The annual specified reasonable rate of return shall be the sum of the annual weighted costs of long-term debt, preferred stock, and common equity, as defined below. The annual weighted cost for each component of the rate of return shall be calculated based on an average of 13 monthly balances of amounts properly includable in the licensee's long-term debt and preferred stock accounts. The cost rates for long-term debt and preferred stock shall be their respective weighted average costs for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10 year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

Article 301. The licensee shall commence construction of project works within two years from the issuance date of the license and shall complete construction of the project within four years from the issuance date of the license.

Article 302. The licensee shall at least 60 days prior to start of construction, submit one copy to the Commission's Regional Director and two copies to the Director, Division of Inspections, of the final contract drawings and specifications for pertinent features of the project, such as water retention structures, powerhouse, and water conveyance structures. The Director, Division of Inspections, may require changes in the plans and specifications to assure a safe and adequate project.

Article 303. The licensee shall review and approve the design of contractor-designed cofferdams and deep excavations prior to the start of construction and shall ensure that construction of cofferdams and deep excavations is consistent with the approved design. At least 30 days prior to start of construction of the cofferdam, the licensee shall submit to the Commission's Regional Director and Director, Division of Inspections, one copy each of the approved cofferdam construction drawings and specifications and the letter(s) of approval.

Article 304. The licensee shall within 90 days of completion of construction file with the Commission, for approval, revised Exhibits A, F, and G to describe and show the project as built.

Article 401. Licensee, after consulting with the U.S. Bureau of Land Management (BLM), the U.S. Fish and Wildlife Service, and the Idaho Department of Fish and Game, shall prepare and file with the Commission, within 1 year from the date of issuance of this license, a BLM-approved plan to control erosion and dust and to minimize the quantity of sediment or other potential water pollutants resulting from construction and operation of the project, including spoil disposal. The plan also shall include: functional design drawings and map locations of control measures; an implementation schedule, monitoring and maintenance programs for project construction and operation; and provisions for periodic review of the plan and for making any necessary revisions to the plan. Documentation of agency consultation, BLM approval, and copies of any agency comments or recommendations on the plan shall be included in the filing.

In the event that the licensee does not concur with any agency recommendations, licensee shall provide a discussion of the reasons for not concurring based on actual site geological, soil, and groundwater conditions. The Commission reserves the right to require changes to the plan. Unless the Director, Office of Hydropower Licensing, directs otherwise, the licensee may commence ground-disturbing or spoil-producing activities at the project 90 days after filing the above plan.

Article 402. Licensee shall provide an automatic shut-off device at the pipeline intake structure to operate in the event of a pipeline or penstock rupture. Licensee shall file as-built drawings within 3 months after completion of its construction.

Article 403. Licensee, after consultation with the U.S. Bureau of Land Management (BLM) and the Section of Minerals Involvement of the U.S. Bureau of Mines-Western Field Operations Center (USRM), shall conduct a field check for mineral resources at the project site, including the transmission line route, and prepare and file with the BLM, USRM, and the Commission, within 1 year from the date of issuance of this license, a report on the results of

the field check that includes: description and map indicating the location of the project; a description and map indicating the location of mineral claims with respect to the proposed project facilities; a description of any impacts that the project will have on mineral deposit development or utilization; a plan to minimize project impacts to the development and utilization of mineral resources discovered at the project; and documentation that consultation with the BLM and the USBM occurred prior to conducting the field check. The Commission reserves the right to require changes to the plan.

Article 404. Licensee shall discharge from the Birch Creek Project a continuous minimum flow of 5 cubic feet per second, or 11 percent of the flow of Birch Creek, whichever is less, as measured immediately downstream from the project diversion, for the protection of riparian vegetation and wildlife resources in Birch Creek. This flow may be temporarily modified if required by operating emergencies beyond the control of licensee, and for short periods upon mutual agreement among the licensee, the Idaho Department of Fish and Game, and the U.S. Bureau of Land Management.

Article 405. Licensee, within 6 months from the date of issuance of this license, and after consultation with the Idaho Department of Fish and Game, and the U.S. Bureau of Land Management, shall install a streamflow gage in Birch Creek immediately downstream of the diversion structure. Licensee shall monitor streamflows and maintain weekly records from April 15 to October 15 of each year, and monthly records for the remainder of the year. These streamflow records shall be made available to the above-named agencies upon request.

Article 406. Licensee, after consultation with the U.S. Fish and Wildlife Service, the U.S. Bureau of Land Management, and the Idaho Department of Fish and Game, and within 1 year from the date of issuance of the license, shall file a transmission line design plan, prepared in accordance with the guidelines set forth in "Suggested Practices for Raptor Protection on Power Lines," Raptor Research Report No. 4, Raptor Research Foundation, Inc., 1981. The plan shall include detailed design drawings of the transmission line, clearly showing phase spacing, configuration, and grounding practices, a construction schedule, and agency comments on the adequacy of the design plan. Unless the Director, Office of Hydropower Licensing, instructs otherwise, licensee may commence construction of the project transmission line 90 days after filing the plan.

Article 407. Licensee, after consultation with the U.S. Bureau of Land Management, the U.S. Fish and Wildlife Service, and the Idaho Department of Fish and Game, shall prepare and file with the Commission, within 6 months from the date of issuance of this license, an implementation schedule for the project fishery

mitigative plan. In the event that licensee does not concur with agency recommendations, the licensee shall provide a discussion of the reasons for not concurring. The Commission reserves the right to require changes to the schedule. Unless the Director, Office of Hydropower Licensing, directs otherwise, the licensee may commence ground-disturbing activities at the project 90 days after filing the above plan.

Article 408. Licensee shall consult with the U.S. Bureau of Land Management, the U.S. Fish and Wildlife Service, and the Idaho Department of Fish and Game on the final design of the bypass headworks and fish screening facilities. Within 6 months from the date of issuance of this license, licensee shall file with the Commission, for approval, functional design drawings of the fish screening structure for the bypass headgate. The filing shall include documentation of consultation with the above-named agencies and any comments of the consulted agencies on the drawings. Licensee shall file as-built drawings with the Commission within 6 months after construction of the bypass headworks at the project.

Article 409. Licensee, after consultation with the U.S. Bureau of Land Management, the Idaho Department of Parks and Recreation, and the National Park Service, shall construct, operate, and maintain, or arrange for the construction, operation, and maintenance of fisherman access points along the first 1.5 miles of the project feeder ditch and around the proposed 2-acre impoundment. Within 4 years from the date of issuance of this license, the licensee shall complete construction of the above-named recreational facilities, and file with the Commission as-built drawings that indicate their number, location, and type.

Article 410. Licensee, after consultation with the Idaho State Historic Preservation Officer (SHPO), shall develop and implement a cultural resource management plan to prevent impacts to archaeological site BC-2, located near the proposed pipeline. Licensee, within 1 year from the date of issuance of this license, shall file: (a) a detailed plan for avoiding the site, and (b) a copy of a letter from the SHPO accepting the plan. The Commission reserves the right to require changes to the plan. Unless the Director, Office of Hydropower Licensing, directs otherwise, the licensee may commence ground disturbing or spoil-producing activities at the project 90 days after filing the above plan. Licensee, within 4 years from the date of issuance of this license, shall file a letter from the SHPO indicating that the plan has been implemented as approved and that archaeological site BC-2 has been avoided.

If any previously unrecorded archaeological or historic properties are discovered during the course of construction or development of any project works or other facilities at the project, construc-

tion activity in the vicinity of these properties shall be halted. A qualified archeologist shall be consulted to determine the significance of the properties, and the SHPO shall be consulted in the development of a mitigative plan for the protection of significant archeological or historic resources. If Licensee and the SHPO cannot agree on the amount of money to be expended on archeological or historical work related to the project, the Commission reserves the right to require Licensee to conduct, at its own expense, any such work found necessary.

Article 411. (a) In accordance with the provisions of this article, the licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain other types of use and occupancy, without prior Commission approval. The licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensee shall also have continuing responsibility to supervise and control the uses and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, cancelling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The types of use and occupancy of project lands and waters for which the licensee may grant permission without prior Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 water craft at a time and where said facility is intended to serve single-family type dwellings; and (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the uses and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements. Before

granting permission for construction of bulkheads or retaining walls, the licensee shall: (1) inspect the site of the proposed construction; (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the licensee's costs of administering the permit program. The Commission reserves the right to require the licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensee may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges and roads for which all necessary state and federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kv or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir. No later than January 31 of each year, the licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary federal and state water quality certificates or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary federal and state approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (1) the

Amount of land conveyed for a particular use is five acres or less: (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from the edge of the project reservoir at normal maximum surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 45 days before conveying any interest in project lands under this paragraph (d), the licensee must submit a letter to the Director, Office of Hydropower Licensing, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the proposed use, the identity of any federal or state agency official consulted, and any federal or state approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the licensee to file an application for prior approval, the licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraphs (c) or (d) of this article:

(1) Before conveying the interest, the licensee shall consult with federal and state fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

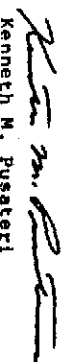
(3) The instrument of conveyance must include covenants running with the land adequate to ensure that: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project.

(4) The Commission reserves the right to require the licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G or K drawings would be filed for approval for other purposes.

(g) The authority granted to the licensee under this article shall not apply to any part of the public lands and reservations of the United States included within the project boundary.

(h) This order is issued under authority delegated to the Director and is final unless appealed under Rule 1902 to the Commission by any party within 30 days from the issuance date of this order. The licensee's failure to appeal this order shall constitute acceptance of the license.


Kenneth M. Pusateri
Acting Director, Office of
Hydropower Licensing

SAFETY AND DESIGN ASSESSMENT
BIRCH CREEK PROJECT
FERC NO. 7194-001--IDAHO

-2-

I. EVALUATION OF DESIGN, CONSTRUCTION AND PERFORMANCE

The proposed Birch Creek Project would be located on Birch Creek, near Idaho State Highway 28, in Clark County, Idaho.

The Birch Creek Project would consist of a 10-foot-high, earthen diversion dam that would create an insignificant amount of impoundment: a 34,900-foot-long earthen feeder ditch; a 48-inch-diameter steel penstock approximately 15,900 feet long; and a prefabricated steel powerhouse containing a Francis turbine and a 2850-KW generator unit.

The applicant would operate the project as a run-of-river facility diverting up to 75 cfs from Birch Creek. During the 7-month irrigation season (April 15 to November 15), flows exiting the powerhouse would be returned to Reno Ditch for delivery to downstream irrigators. During the non-irrigation season, all flows through the powerhouse would be returned to Birch Creek via the project's outfall channel.

Our review indicates that the upstream and downstream slopes of the proposed small homogeneous earthfill dam are within the standard ranges recommended for small dams by the U.S. Bureau of Reclamation (P.265, Design of Small Dams, 1977). The dam would impound only an insignificant amount of water and its failure would not cause loss of downstream life or property damage. There are no engineering problems which would make the construction, operation and maintenance of the project infeasible.

Construction of the project is estimated to be completed within 20 months from the date the license is issued. Article 301 would provide the licensee adequate time to initiate and complete construction.

Since the details of the design and construction procedures have not been finalized, article 302 should be included in the license requiring the licensee to submit a copy of final contract plans and specifications prior to start of construction.

Article 303 requires the licensee to review and approve the design of contractor-designed cofferdams and deep excavations to ensure that construction is consistent with the approved design.

Article 304 requires the filing with the Commission of as-built exhibits. The license will be amended to include these revised exhibits.

The project will be safe and adequate if constructed in accordance with sound engineering practices.

II. EXHIBITS

The following portions of Exhibit A and the following Exhibit F drawings conform to the Commission's rules and regulations and should be included in the license.

Exhibit A Paragraphs (1) through (2) of the application
Filed on February 21, 1985.

Exhibit F - Drawing	FERC No. 7194-	Description
1 (Rev)	1	Diversion Structure
2	2	Canal Section
3 (Rev)	3	Bypass Headworks
4	4	Typical Canal Section
6	6	Inlet Canal Section
7	7	Powerhouse - Plan
8	8	Powerhouse - Elevation

III. RESOURCES DEVELOPMENT

A. Purpose

The proposed project would provide an estimated average annual generation of 15,500,000 kWh for use by the Utah Power and Light Company.

B. Hydroelectric Power and Resources Utilization Evaluation

The proposed project would operate run-of-river. The 2.85-MW power plant would operate when the stream flows available for generation are between 25 cfs and 75 cfs. The project will not have any dependable capacity.

We have made an independent study of hydropower potential at the proposed project site based on streamflows recorded at the U.S. Geological Survey Gaging Station #13117030 on Birch Creek. Our study found that the average annual energy generation would be 9.4 GWh instead of 15.5 GWh as estimated by the applicant. The difference can be attributed to the different flow duration curves; the energy calculations were based on. The applicant used an annual duration curve where as we used separate monthly duration curves. We believe our estimate is more accurate because measurable flows at the stream gage are available only during irrigation season (i.e. April through September) each year.

Power generated by the project would be sold to Utah Power and Light Company. Based on the power sale contract between Utah Power and Light and Robert Packrell, filed on February 5, 1986, 13.0 percent of cost of money, and an average annual energy production of 9.4 GWh, the project would be economically feasible.

Agency comments received at this time regarding the construction and operation of the proposed powerplant do not impact on the safety, adequacy or economic feasibility of the project.

Alternatives to the Proposed Project

Hydroelectric projects are unique in the electric power generation field because of their rugged machinery, high reliability, low operation and maintenance costs, long life, and use of a renewable resource. These characteristics plus a guaranteed market under PURPA and tax advantages such as rapid depreciation and energy credits have made small hydroelectric project development an attractive business venture and have fostered a considerable amount of competition for the more feasible hydroelectric projects.

There exists a finite number of economically feasible hydroelectric sites. Generally, hydro sites are selected based on the availability of adequate streamflow, favorable topography, i.e. sharp vertical drop in a short horizontal distance, accessibility, power transmission distance and minimum streamflow and fishery requirements. This site has been selected for development by the applicant and alternatives are either to construct or not construct the project.

If the project is not constructed, the energy represented by falling water will continue to be wasted and the power that would have been developed will be provided by non-renewable fuels, a negative influence on energy independence. With regard to considering other non-passive renewable resources in lieu of the project, it is presumed they will be installed when commercially and economically feasible. Likewise, whether the project is built or not, installation of passive renewable resources and conservation efforts will continue until the market saturates or economic feasibility becomes unfavorable.

FEDERAL ENERGY REGULATORY COMMISSION

TERMS AND CONDITIONS OF LICENSE FOR
UNCONSTRUCTED MAJOR PROJECT
AFFECTING LANDS OF THE UNITED STATES

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission. Provided, however, That if the licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional, exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project works shall be constructed in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam, or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alteration, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes shall be subject to prior approval of the Commission, which in its order shall be subject to such alteration as the Commission may direct.

Upon the completion of the project, or at such other time as the Commission may direct, the licensee shall submit to the Commission for approval revised exhibits insofar as necessary to show any divergence from or variations in the project area and project boundary as finally located or in the project works as actually constructed when compared with the area and boundary shown and the works described in the license or in the exhibits approved by the Commission, together with a statement in writing setting forth the reasons, which in the opinion of the licensee necessitated or justified variation in or divergence from the approved exhibits. Such revised exhibits shall, if and when approved by the Commission, be made a part of the license under the provisions of Article 2 hereof.

Article 4. The construction, operation, and maintenance of the project and any work incidental to additions or alterations shall be subject to the inspections and supervision of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The licensee shall cooperate fully with said representative and shall furnish him a detailed program of inspection and shall furnish that will provide for an adequate and qualified inspection force for construction of the project and for any subsequent alterations to the project. Construction thereof shall not be initiated until the program of inspection for the project works or any feature or alteration thereof has been approved by said representative. The licensee shall also furnish to said representative such further information as he may require concerning the construction, operation, and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

Article 5. The licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear, and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Article 6. In the event the project is taken over by the United States upon the termination of the license as provided in Section 14 of the Federal Power Act, or is transferred to a new licensee or to a non-power licensee under the provisions of Section 15 of said Act, the licensee, its successors and assigns shall be responsible for, and shall make good any defect of title to, or of right of occupancy and use in, any of such project property that is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and shall pay and discharge, or shall assume responsibility for payment and discharge of, all liens or encumbrances upon the project or project property created by the licensee or created or incurred after the issuance of the license; provided, that the provisions of this article are not intended to require the licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to, or right of occupancy and use in, any of such project property than was necessary to acquire for its own purposes as the licensee.

Article 7. The actual legitimate original cost of the project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Federal Power Act and the Commission's Rules and Regulations thereunder.

Article 8. The licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 9. The licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

Article 10. The licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the licensee as the Commission may order.

Article 11. Whenever the licensee is directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement, the licensee shall reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereof as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such determination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States, the licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the cost of making the determinations pursuant to the then current regulations of the Commission under the Federal Power Act.

Article 12. The operations of the licensee, so far as they affect the use, storage and discharge from storage of waters affected by the licensee, shall at all times be controlled by such reasonable rules and regulations as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Commission may prescribe for the purposes hereinafter mentioned.

Article 13. On the application of any person, association, corporation, Federal agency, State or municipality, the licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity

for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

Article 14. In the construction or maintenance of the project works, the licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the licensee from any responsibility or requirement which may be imposed by any other lawful authority for avoiding or eliminating inductive interference.

Article 15. The licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

Article 16. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the licensee shall permit the United States or its designated agency to use, in fee of cost, such of the licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the licensee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the licensee of any obligation under this license.

Article 17. The licensee shall construct, maintain, and operate, or shall arrange for the construction, maintenance, and operation of such reasonable recreational facilities, including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities, and utilities, giving consideration to the needs of the physically handicapped, and shall comply with such reasonable modifications of the project, as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal or State agencies, after notice and opportunity for hearing.

Article 18. So far as is consistent with proper operation of the project, the licensee shall allow the public free access, to a reasonable extent, to the project waters and adjacent project lands owned by the licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting; provided, that the licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Article 19. In the construction, maintenance, or operation of the project, the licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 20. The licensee shall consult with the appropriate State and Federal agencies and, within one year of the date of issuance of this license, shall submit for Commission approval a plan for clearing the reservoir area. Further, the licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. Upon approval of the clearing plan all clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 21. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works, or in the clearing of said lands, shall be paid for, and the resulting slash and debris disposed of, in accordance with the requirements of the agency of the United States having jurisdiction over said lands. Payment for merchantable timber shall be at current stumpage rates, and payment for young growth timber below merchantable size shall be at current damage appraisal values. However, the agency of the United States having jurisdiction may sell or dispose of the merchantable timber to others than the licensee; provided, that timber so sold or disposed of shall be cut and removed from the area prior to, or without undue interference with, clearing operations of the licensee and in coordination with the licensee's project construction schedules. Such sale or disposal to others shall not relieve the licensee of responsibility for the clearing and disposal of all slash and debris from project lands.

Article 22. The licensee shall do everything reasonably within its power, and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparations for suppression of, and to suppress fires on the lands to be occupied or used under the license. The licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation, or maintenance of the project works or of the works appurtenant or accessory thereto under the license.

Article 23. The licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit, or body of water, natural or artificial, used by the licensee in the operation of the project works covered by the license, or the use by said parties of water for sanitary and domestic purposes from any stream, conduit, or body of water, natural or artificial, used by the licensee in the operation of the project works covered by the license.

Article 24. The licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 25. The licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment

of said lands by the licensee for the purposes of the license. This license shall not be construed as conferring upon the licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 26. In the construction and maintenance of the project, the location and standards of roads and trails on lands of the United States and other uses of lands of the United States, including the location and condition of quarries, borrow pits, and spoil disposal areas, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 27. The licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

Article 28. The licensee shall make use of the Commissioner's guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the transmission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 29. The licensee shall cooperate with the United States in the disposal by the United States, under the Act of July 31, 1947, 61 Stat. 681, as amended (30 U.S.C. sec. 601, et seq.), of mineral and vegetative materials from lands of the United States occupied by the project or any part thereof. Provided, That such disposal has been authorized by the Commission and that it does not unreasonably interfere with the occupancy of such lands by the licensee for the purposes of the license; Provided further, That in the event of disagreement, any question of unreasonable interference shall be determined by the Commission after notice and opportunity for hearing.

Article 30. If the licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the licensee or its agent, the Commission will deem it to be the intent of the licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the licensee to surrender the license.

Article 31. The right of the licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the licensee has obtained a new license pursuant to the then existing laws and regulations, or an annual license under the terms and conditions of this license.

Article 32. The terms and conditions expressly set forth in the license shall not be construed as implying any terms and conditions of the Federal Power Act which are not expressly set forth herein.

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1 JIM JONES
2 Attorney General
3 State of Idaho
4 Statehouse, Room 210
5 Boise, Idaho 83720
6 Telephone: (208) 334-2400

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AUG 19 1985

Department of Water Resources

5 WILLIAM B. DILLON, III
6 STEPHEN V. GODDARD
7 Deputy Attorneys General
8 Idaho Dept. of Fish and Game
9 600 South Walnut
10 P. O. Box 25
11 Boise, ID 83707
12 Telephone: (208) 334-3715

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

11 IN THE MATTER OF APPLICATION)
12 FOR PERMIT NOS. 32-7128)
13 AND 32-7136 IN THE NAME OF)
14 BIRCH POWER COMPANY)

✓
PERMIT NOS. 32-7128 AND 32-7136

OBJECTIONS TO THE TRANSCRIPT

14 D & D ENTERPRISES, INC.)
15)

16 Protestant-Appellant,)
17)

17 v.)
18)

18 A. KENNETH DUNN, Director,)
19 Idaho Department of Water)
20 Resources)

20 Respondent,)
21)

21 and)
22)

22 BIRCH POWER COMPANY)
23)

23 Applicant-Respondent.)
24)

25 TO: THE DEPARTMENT OF WATER RESOURCES, ALL PARTIES AND THEIR COUNSEL.
26

27 The Idaho Department of Fish and Game hereby objects to
certain portions of the transcript filed in this matter. The table

OBJECTIONS TO THE TRANSCRIPT - p. 1

MICROFILMED

JIM JONES

Attorney General

State of Idaho

Statehouse, Room 210

Boise, Idaho 83720

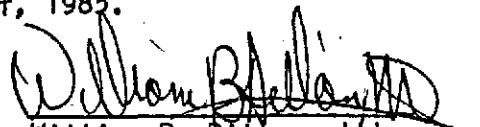
Telephone: (208) 334-2400

below shows the objected language and the language Fish and Game believes to be correct.

<u>Transcript</u>	<u>Objected Language</u>	<u>Correct Language</u>
P. 19, L. 3	litigation	mitigation
P. 23, L. 11 & 13	natural	financial
P. 24, L. 15	site	side
P. 31, L. 12	anchors in size	(?)
P. 48, L. 15	Bill M.	BLM
P. 70, L. 14	moral	oral
P. 110, L. 15	preparing	repairing
P. 147, L. 21	they	the

Fish and Game does not desire oral argument on these objections.

DATED This 15th day of August, 1985.


William B. Dillon, III
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY That true and correct copies of the foregoing OBJECTIONS TO THE TRANSCRIPT were mailed, postage prepaid, to the following on August 15th 1985:

Ray W. Rigby, Esq.
RIGBY, THATCHER, ANDRUS, RIGBY
& PERKES
25 N. Second East
P. O. Box 250
Rexburg, ID 83440

JIM JONES

Attorney General
State of Idaho
Statehouse, Room 210
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George C. Petersen, Jr., Esq.
PETERSEN, MOSS, OLSEN, MEACHAM
& CARR
485 "E" Street
Idaho Falls, ID 83401

Philip J. Rassler, Esq.
Deputy Attorney General
Idaho Dept. of Water Resources
Statehouse
Boise, ID 83720

James A. Esget and Robert McCurdy
Bureau of Land Management
920 Lincoln Road
Idaho Falls, ID 83401

William T. Simmons
Dubois, ID 83423

Ben Wilding, Watermaster
Water District No. 32-D
Dubois, ID 83423


WILLIAM B. DILLON, II
Deputy Attorney General
Idaho Dept. of Fish and Game

R9AT185TV

P-7194-001

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Notice of Application filed with the Commission
(September 17, 1985)

Take notice that the following hydroelectric application
has been filed with the Federal Energy Regulatory Commission
and is available for public inspection:

- a. Type of Application: Major License
- b. Project No.: 7194-001
- c. Date Filed: February 21, 1985
- d. Applicant: Birch Power Company
- e. Name of Project: Birch Creek
- f. Location: On Birch Creek in Clark County, Idaho, and affecting U.S. lands under the jurisdictions of the Department of Energy and the Bureau of Land Management
- g. Filed pursuant to: Federal Power Act, 16 U.S.C. §4791(a) - 825(r)
- h. Contact Person: Ted S. Sorenson, P.E.
550 Linden Drive
Idaho Falls, ID 83401
- i. Comment Date: NOV 18 1985
- j. Description of Project: The proposed run-of-river project would consist of: (1) a 10-foot-high earth-fill diversion structure; (2) a small reservoir having normal water surface elevation 5671.0 feet; (3) an 8,200-foot-long, 25-foot-wide trapezoidal-shaped feeder canal; (4) a headworks structure and a 7,985-foot-long return channel to Birch Creek; (5) a 26,700-foot-long, 25-foot-wide trapezoidal-shaped canal; (6) a screened, concrete intake structure; (7) a 15,900-foot-long, 48-inch-diameter underground steel pipeline/penstock; (8) a powerhouse containing a generating unit rated at 2,850-KW operated at a head of 532 feet and at a flow of 75 cfs; (9) a tailrace to the Reno Ditch having water surface elevation 5122.0 feet; (10) a 37,200-foot-long outfall channel to the Birch Creek Sink; (11) a 2,400-V/12.47-KV transformer; and (12) a 1,700-foot-long, 12.47-KV transmission line.

The application was filed during the term of Applicant's preliminary permit. Applicant estimates that the average annual energy generation would be 15,500,000 kWh and that the total capital cost would be \$3,600,000 in 1985 dollars..
- k. Purpose of Project: Project energy would be sold to Utah Power & Light Company.
- l. This notice also consists of the following standard paragraphs: A3, A9, B, C, D1

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Department of Water Resources

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A3. Development Application -- Any qualified development applicant desiring to file a competing application must submit to the Commission, on or before the specified comment date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified comment date for the particular application. Applications for preliminary permit will not be accepted in response to this notice.

A9. Notice of Intent -- A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, include an unequivocal statement of intent to submit, if such an application may be filed, either (1) a preliminary permit application or (2) a development application (specify which type of application), and be served on the applicant(s) named in this public notice.

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B.

Comments, Protests, or Motions to Intervene - Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of the Rules of Practice and Procedure, 18 C.F.R. §§385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C.

Filing and Service of Responsive Documents - Any person must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST" or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing is in response. Any of the above named documents must be filed by providing the original and the number of copies required by the Commission's regulations to: Kenneth F. Plumb, Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: Mr. Fred E. Springer, Director, Division of Project Management, Federal Energy Regulatory Commission, Room 203-R8, at the above address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

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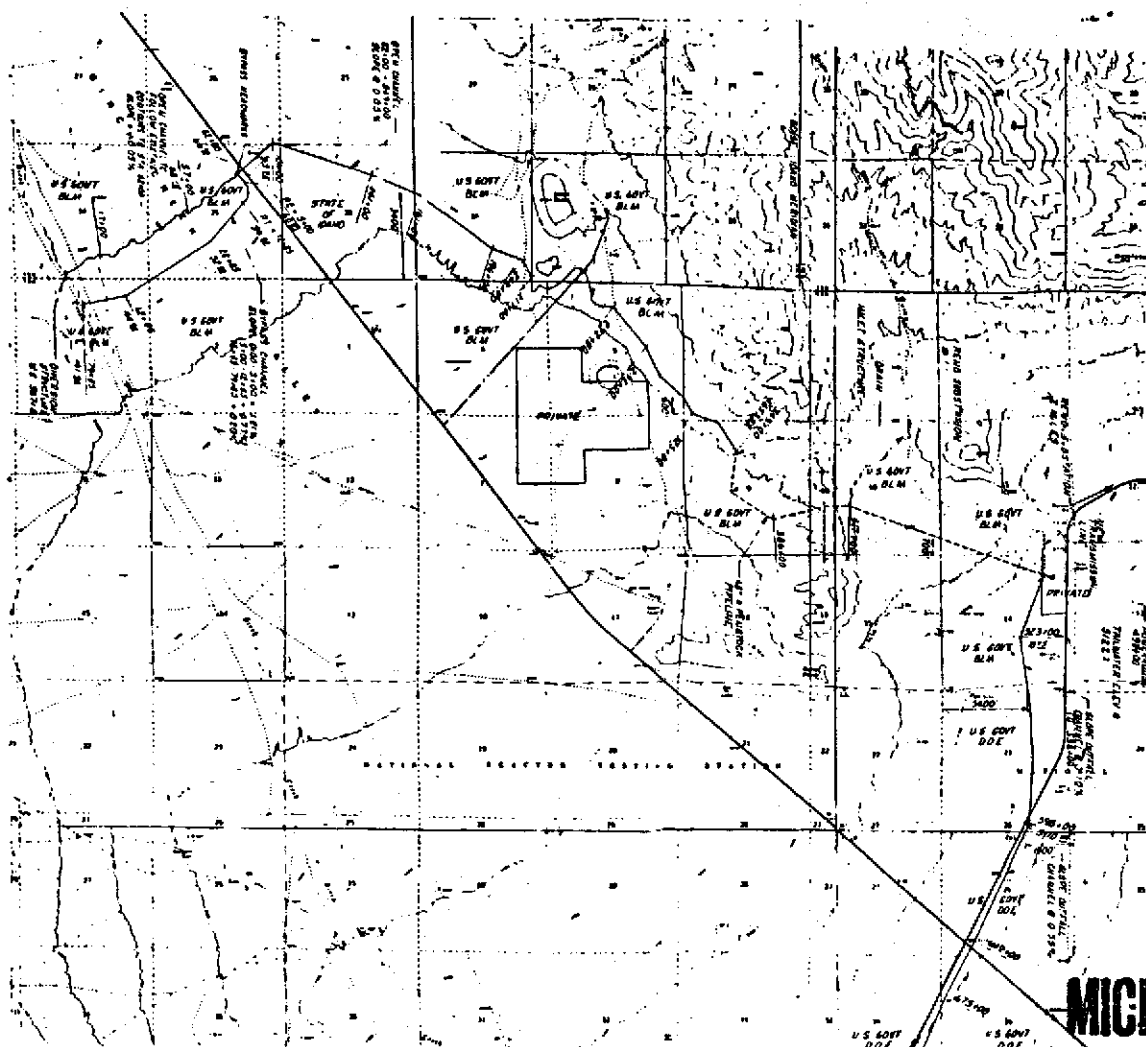
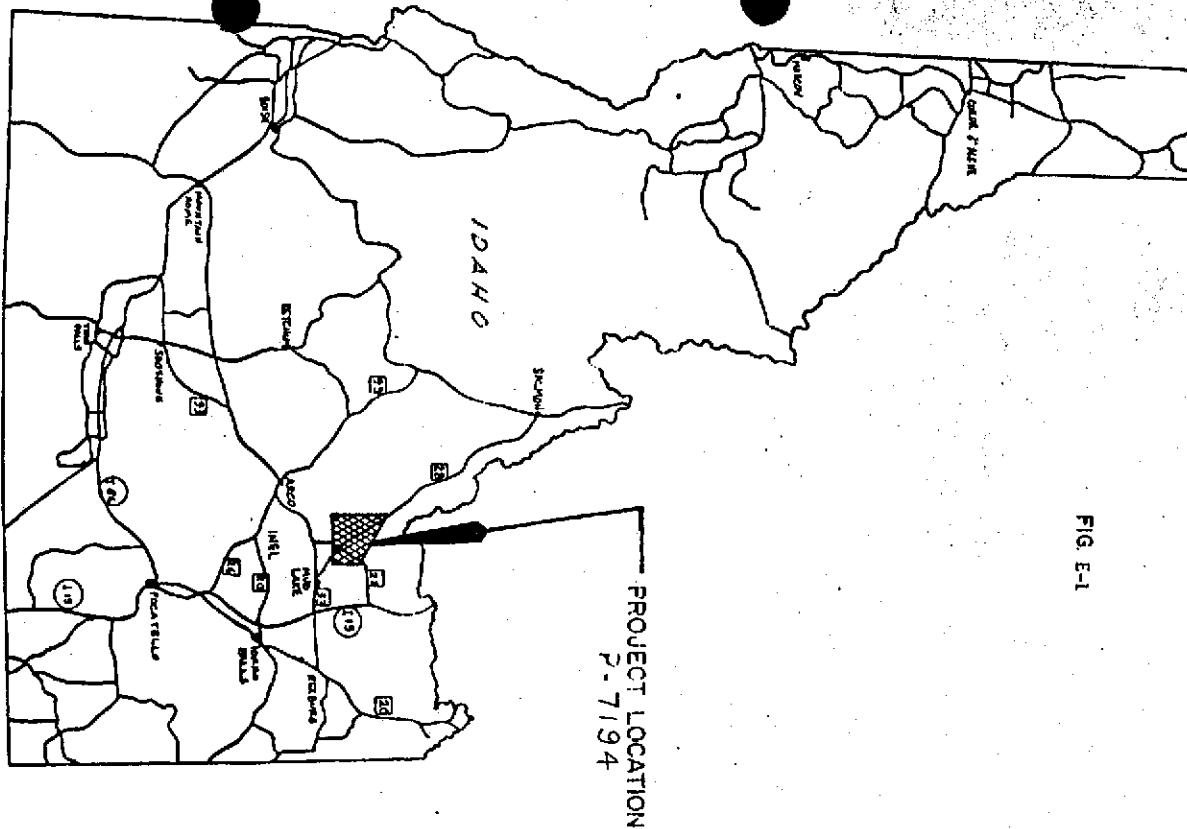
D1.

Agency Comments - Federal State, and local agencies that receive this notice through direct mailing from the Commission are requested to provide comments pursuant to the Federal Power Act, the Fish and Wildlife Coordination Act, the Endangered Species Act, the National Historic Preservation Act, the Historical and Archeological Preservation Act, the National Environmental Policy Act, Pub. L. No. 88-29, and other applicable statutes. No other formal requests for comments will be made.

Comments should be confined to substantive issues relevant to the issuance of a license. A copy of the application may be obtained directly from the Applicant. If an agency does not file comments with the Commission within the time set for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be set to the Applicants representatives.

Lois D. Cashell
Acting Secretary

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MAR 30 1984

Department of Water Resources
Eastern District Office



Department of Water Administration	
PROTESTANT'S	
Exhibit	Fish & Game #1
Date Admitted	4/05/84 EMC

IDAHO DEPARTMENT OF FISH AND GAME
REGION 6
1515 Lincoln Road
Idaho Falls • Idaho • 83401

March 26, 1984

Mr. Ted Sorenson
550 Linden Drive
Idaho Falls, ID 83401

RE: Birch Creek Hydropower project FERC No. 7194 and Applications for Water Right Permits (No. 32-7128 and No. 32-7136).

Dear Ted:

After review of your "Preliminary Engineering Design and Plan Report - Birch Power Company" and our discussions with you and the BLM, we would like to offer the following comments.

This project design, either option A or B, is significantly different than what we had commented on previously in terms of water needed. The present plan calls for use of all but 6 cfs of the Birch Creek flow as measured at Eight Mile Canyon up to 70 cfs. Your previous proposal was for a maximum of 45 cfs with all water over 45 cfs to remain in Birch Creek. Both project plans call for a 5 cfs minimum flow for riparian habitat maintenance along the 3,000 ft of Birch Creek below your proposed diversion to the Reno diversion. Our initial lack of opposition to the original 45 cfs project was based on receiving all flows over that amount to remain in the stream bed to help reestablish the poor riparian zone below Reno diversion, by its closure as a result of your new canal. To regain this valuable riparian area, we were willing to accept considerable loss of the fishery productivity.

The present proposed project would preclude the reestablishment of the riparian zone and result in a nearly total loss of fishery below your diversion even with a 5 cfs riparian flow. The necessary minimum fishery flows needed to maintain aquatic productivity is 22 cfs.

To mitigate these impacts you have proposed the construction of fish habitat in the power ditch and the establishment of riparian vegetation along the ditch. The project design presently being considered is acceptable with that proposed mitigation with the following stipulations:

1. No dewatering is to occur for any reason in the ditch from point of diversion to Highway 28 (approximately 1.5 miles). We suggest a return ditch and headgate be built near the highway to divert flow into the Reno ditch as necessary for irrigation when repair and maintenance are needed below this point.

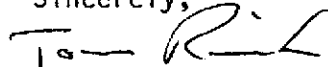
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2. No alteration or work below the water line in the power ditch above the highway without consultation and approval of the Idaho Department of Fish and Game (IDFG) and Bureau of Land Management (BLM).
3. The establishment of a fishable wild trout population comparable to that which presently exists below the proposed diversion. Trout are to be replaced in terms of fish/mile not total numbers, so as to maintain catch rates.
4. Design the canal to allow for additional habitat improvement which would increase the densities of trout by 300 percent. Present management plans call for improvement on Birch Creek in the stretch to be impacted by the hydroproject. Improvement projects presently in place on Birch Creek show a 250 to 300 percent increase in trout carrying capacity. We suggest that Dr. Griffith include additional meanders in his final project design for fish habitat. The final plan will have to be submitted to IDFG and BLM for approval.
5. The establishment of a minimum flow of 5 cfs past the diversion in Birch Creek for riparian habitat maintenance. A continuous recording flow measuring device will have to be installed.
6. The establishment of a riparian zone along the power ditch. This will require a riparian habitat enhancement plan be written and submitted to IDFG and BLM for approval.
7. No bentoniting or sealing of canal after initial sealing. Gravel will be added to provide substrate for invertebrate production.
8. A permanent diversion on Birch Creek with no headgate. Outlet work would have to be designed to maintain a constant 5 cfs minimum flow. A fish ladder should be included in this design.
9. Permanent closure of Reno ditch once the deliverability of water from the power ditch to the irrigators is shown.
10. Agreement by the Reno Ditch Water Users that the power ditch is Birch Power Company's and that they have no authority over its operation or maintenance.

If these stipulations can be agreed to, then we will remove our protest from both water rights. These stipulations will also become part of the terms and conditions for the FERC exception to licensing. Our stipulations are designed to give the power ditch from Birch Creek to Highway 28 the same protection and productivity that Birch Creek has. Without this protection, the permanence of the mitigation is questionable.

If you have further questions, please let us know.

Sincerely,



Tom Reinecker
Regional Supervisor
Region 6

cc: USFWS
BLM
Water Resources
Fisheries

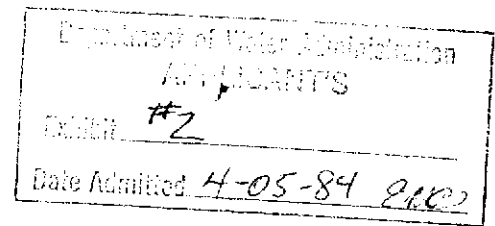
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MIDSTATE DISTRIBUTING, INC.

Phone 233-9601

Route 1-Box 114A
Pocatello, Idaho
83201

GILSONITE
ASPHALT SEALERS
and
SOIL SEALERS



April 4, 1984

Mr. Ted S. Sorenson
Sorenson Engineering, P.A.
550 Linden Drive
Idaho Falls, ID 83401

RE: BIRCH POWER PROJECT

Dear Mr. Sorenson,

This letter is to follow up our conversation regarding the Birch Power Project.

Our product has been widely used in the past 22 years on various canals, waste ponds, etc. SS13 soil sealant was originally developed for the purpose of reducing excessive leakage and loss factors on large canal systems.

Midstate Dist. of Idaho is the authorized manufacturer of the soil sealant material of the northwest.

I have been to the Birch Creek project and have taken soil samples. More testing will be performed at a later date to determine the amounts of sealant material to be used to accomplish a .25 loss factor on this project. At this time, through our testing we have found that we can contain within allowable criteria. Midstate will give a written warranty for this project on products and leakage.

I hope this information will be of assistance to you.

Sincerely,

A handwritten signature in cursive script that reads "Don McGahey".

Don McGahey
General Manager

DM:kw

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Copy of letter to Birch Creek

UTAH POWER & LIGHT COMPANY

1407 WEST NORTH TEMPLE STREET
P. O. BOX 899
SALT LAKE CITY, UTAH 84110

Department of Water Administration
APPLICANT'S

Exhibit #3.

Date Admitted 04/05/84 E.P.C.

February 14, 1984

Mr. Ted Sorenson
Birch Power Company
590 Linden Drive
Idaho Falls, ID 83401

Dear Ted:

I appreciate the opportunity I've had of discussing the Birch Creek Project with you. It is my opinion that the project is well conceived and the project cost estimates are reasonable. It is also my opinion that the project is financially viable.

When the Utah Power & Light subsidiary has received final regulatory approvals, it would be interested in taking an equity position in the project and helping you arrange debt financing.

Sincerely,

Brian

Brian D. Holt
Director, Customer Service
Planning & Research

BDH:tj (19:27)

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THE CONTINENTAL BANK AND TRUST COMPANY

SALT LAKE CITY, UTAH 84130

January 6, 1984

Mr. Ted S. Sorenson, P.E.
550 Lindon Drive
Idaho Falls, Idaho 83401

Department of Water Administration
APPLICANT'S

Exhibit #4

Date Admitted 4-05-84 ERIC

Dear Ted:

After reviewing option "B" of the Birch Creek project and preparing a repayment schedule, it has been concluded that the project is financially feasible, providing certain conditions are met.

One of the conditions is the approval of this project by the Idaho Division of Water Resources which will allow tax exempt financing. Another condition is securing an enforceable power purchase agreement with the utility that will be purchasing the power from the proposed facility.

Once these conditions are satisfied and all permits and licenses are in place, financing of the project can be pursued.

Sincerely,

Lyle J. Larson
Assistant Vice President

LJI/ad

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BIRCH CREEK HYDRO ELECTRIC PROJECT

FINANCIAL FEASIBILITY SCHEDULE

	(1) Gross Revenues	(2) Operating Expense	(3) Net Revenues	(4) Principal	(5) Interest	(6) Total	(7) Coverage	(8) Surplus
1 1985	\$577,700	\$ 75,000	\$502,700	\$ 45,000	\$356,400	\$401,400	1.25	\$101,300
2 1986	589,000	77,200	511,800	55,000	351,450	406,450	1.26	105,350
3 1987	601,200	79,500	521,700	70,000	345,400	415,400	1.26	106,300
4 1988	614,500	81,900	532,600	90,000	337,700	427,700	1.25	105,200
5 1989	628,700	84,400	544,300	110,000	327,800	437,800	1.25	106,500
6 1990	644,200	86,900	557,300	130,000	315,700	445,700	1.25	111,600
7 1991	660,800	89,500	571,300	155,000	301,400	456,400	1.25	114,900
8 1992	678,800	92,200	586,600	185,000	284,350	469,350	1.25	117,250
9 1993	698,300	95,000	603,300	220,000	264,000	484,000	1.25	119,300
10 1994	719,200	97,800	621,400	260,000	239,800	499,800	1.24	121,600
11 1995	741,900	100,800	641,100	300,000	211,200	511,200	1.25	129,900
12 1996	766,400	106,900	659,500	350,000	178,200	528,200	1.25	131,300
13 1997	792,800	110,100	682,100	400,000	139,700	539,700	1.27	142,400
14 1998	821,300	113,400	707,900	430,000	95,700	525,700	1.35	182,200
15 1999	852,200	116,800	735,400	440,000	48,400	488,400	1.51	247,000

(1) Gross Revenues based on recent Utah Power and Light rates.

(2) Estimated operating expense @ 3% growth.

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- (3) Net Revenues available for debt service.
- (4, 5, 6) \$3,240,000 debt @ 11% for 15 years.
- (7) Coverage factor of 1.25, Net Revenues in excess of total debt service payment.
- (8) Surplus available after debt service is paid.

Project Cost	\$2,640,000
Sinking Fund Reserve	500,000
R & R Reserve	<u>100,000</u>
TOTAL	\$3,240,000

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THE CONTINENTAL BANK AND TRUST COMPANY

SALT LAKE CITY, UTAH 84130

October 25, 1983

Department of Water Administration
APPLICANT'S

Exhibit #5

Date Admitted 4-05-84 EMC

Mr. Ted S. Sorenson, P.E. - L.S.
550 Lindon Drive
Idaho Falls, ID 83401

After reviewing the Birch Creek proposed hydroelectric project and preparing a repayment schedule, it has been concluded that the project is financially feasible, providing certain conditions are met.

One of the main conditions is the approval of your project by the Board of Water Resources which will allow tax exempt bonds to be issued. Another condition is securing water rights which will aid in the signing of a power purchase agreement with Utah Power & Light Company.

These are the two main conditions. Once they are accomplished and all the permits and licenses are in tact, financing of the project should be accomplished within six to eight weeks.

Please feel free to call if you have any questions or need any further assistance.

Sincerely

Lyle J. Larson
Assistant Vice President

LJL:nk

Enclosure

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BIRCH CREEK HYDROELECTRIC PROJECT

Financial Feasibility Schedule

Year	(1) Gross Revenues	(2) Operating Revenues	(3) Net Revenues	(4) P	(5) I	(6) Total	(7) Coverage	(8) Surplus
1985	\$311,700	\$25,000	\$286,700	\$ 20,000	\$209,000	\$229,000	1.25	\$57,000
1986	317,800	25,000	292,800	30,000	206,800	236,800	1.24	56,000
1987	324,400	25,000	299,400	40,000	203,500	243,500	1.23	55,900
1988	331,500	25,000	306,500	45,000	199,100	244,100	1.25	62,400
1989	339,200	25,000	314,200	55,000	194,150	249,200	1.26	65,000
1990	347,600	25,000	322,600	70,000	188,100	258,100	1.25	64,500
1991	356,700	25,000	331,700	85,000	180,400	265,400	1.25	66,300
1992	366,300	25,000	341,300	100,000	171,050	271,050	1.26	70,250
1993	376,900	25,000	351,900	120,000	160,050	280,050	1.25	71,850
1994	388,200	25,000	363,200	145,000	146,850	291,850	1.25	71,350
1995	400,400	25,000	375,400	170,000	130,900	300,900	1.25	74,500
1996	413,600	25,000	388,600	200,000	112,200	312,200	1.24	76,400
1997	427,900	25,000	402,900	230,000	90,200	320,200	1.26	82,700
1998	443,400	25,000	418,400	270,000	64,900	334,900	1.25	83,300
1999	458,534	25,000	433,000	320,000	35,200	355,200	1.22	77,800

(1) Revenues based on Utah Power & Light rates

(2) Estimated operating expense

(3) Revenues available for Debt Service

4, 5, 6) \$1,900,000 Debt @ 11% for 15 years

(7) Revenues exceed Debt Service by 125 times

(8) Surplus available after debt service is paid

Project Cost	\$1,600,000
Sinking Fund Reserve	200,000
Repair and Replacement Reserve	70,000
Total Amount of Bond	\$1,900,000

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Department of Water Administration

APPLICANT'S

Exhibit #6

Date Admitted 4-05-84 EMC

Feasibility of Developing a Trout Population in the Proposed

Birch Creek Hydroelectric Project Feeder Ditch

(Revised 5 April 1984)

To: Mr. Ted S. Sorenson, Birch Power Co.
550 Linden Drive
Idaho Falls, ID 83401

By: J. S. Griffith, Ph. D.
Box 8007
Pocatello, ID 83209

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The proposed hydroelectric project would divert water from Birch Creek (Clark County, Idaho) approximately 3,000 feet upstream from the existing Reno diversion and pass it through a feeder ditch approximately 29,500 feet in length before entering a penstock and power house. The objectives of this report are to:

- a. briefly describe the existing aquatic resources in the 3,000-foot portion of Birch Creek that would be partially dewatered,
- b. examine the feasibility of developing the proposed feeder ditch as habitat suitable for sustaining a population of both wild and hatchery trout, and
- c. suggest the construction design and necessary materials to provide that habitat.

EXISTING AQUATIC RESOURCES

Birch Creek originates from springs in the upper portion of the watershed. Flows at the USGS Eightmile gauging station (elevation 5770 feet) immediately upstream from the proposed diversion have ranged from 36 to 71 cfs throughout May through September during the period 1971-1980, averaging about 45 cfs. The minimum recorded was 11 cfs in July 1967. Specific conductance of the water checked by Andrews (1972) in 1970-71 ranged from 530-650 mhos/cm, indicating a relatively high potential for biotic production. Channel gradient in the lower river is 1.6%. No systematic water temperature data are available.

Land adjoining the lower portion of Birch Creek is largely publicly owned and administered by the Bureau of Land Management. Riparian areas

and aquatic habitat in this area have been "severely abused. Channel changes, annual addition of bentonite to the stream by downstream water users, and overuse of riparian habitat by livestock have restricted aquatic improvements. These problems predominate in the lower six miles of stream on national resource lands." (BLM 1975, p.1 & 4). Objectives of the 1975 BLM Management Plan include improvement and protection of riparian areas and provision of benefits for the multiple uses of water. Specific objectives include increasing deepwater habitat by 100% with a goal of increasing the average size of rainbow trout in the lower 7 miles of stream from 8.5 to 19.5 inches.

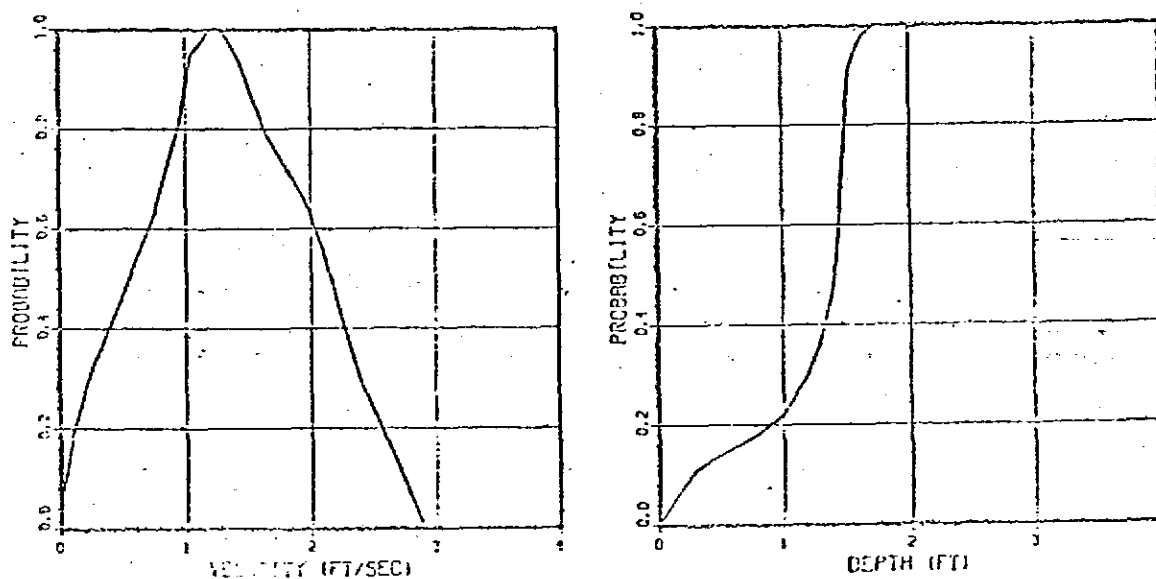
Rainbow trout (Salmo gairdneri) are essentially the only salmonid fish species present in the area, although brook trout (Salvelinus fontinalis) are reported to be present in the drainage. Fish populations were examined by Idaho Fish and Game personnel on 1 October 1982. Based on electroshocking samples taken in a 155-yard section and a 185-yard section at the point of the proposed diversion, they estimated the wild trout population to be 296 per mile and 434 per mile at the two sites, respectively. Trout size averaged approximately 8.5 inches at both sites, with a maximum of 13 inches. Approximately 20,000 catchable-sized hatchery rainbow trout are stocked annually in the lower portion of the river, with few surviving in the area after the summer of stocking. Approximately 55% of these hatchery fish are caught by anglers. The catch rate of trout is close to 1 fish per angler-hour, the objective set by the Idaho Department of Fish and Game in its current management plan.

On 14 June 1983 I electroshocked a short section of Birch Creek at the site of the proposed diversion and based upon this feel that the Idaho Fish and Game Department estimate of fish size and abundance is reasonable. I also captured shorthead sculpin (Cottus confusus) in slackwater areas, although sculpin populations are at a low level.

Rainbow trout populations in lower Birch Creek appear to be held at relatively low levels by the shallowness of the water, making it unsuitable habitat for larger trout. Probability of use curves compiled for adult rainbow trout (Bovee 1978, Figure 1) suggest that water depth of about 2 feet or greater is required.

Qualitative aquatic invertebrate samples from Birch Creek were made by Andrews (1972 and in BLM 1975), but no quantitative data were available. On 14 June 1983 I took a series of four Hess net samples (mesh size 390 μ) from a riffle at the site of the proposed diversion. A total of 20 taxa of invertebrates was collected (Table 1). Diversity and abundance were typical of the Lost Rivers, indicating a moderately high level of production and a good substrate. Some Chara comprised the only aquatic vegetation present. From these samples, it appears that the availability of invertebrates for trout food is good and fish populations are not limited by food supply.

Figure 1. Probability of use curves for utilization of water velocity and water depth by adult rainbow trout. From Bovee 1978.



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Table 1. Aquatic invertebrates collected in four Hess net samples from Birch Creek at site of proposed hydroelectric project diversion, 14 June 1983.

taxon	NUMBERS IN SAMPLE			
	1	2	3	4
EPHEMEROPTERA				
<u>Baetis tricaudatus</u>	7	6	1	10
<u>Ephemerella nemis</u>	51	55	28	194
<u>Ephemerella grandis</u>	0	4	1	3
<u>Rhithrogena hageni</u>	1	16	19	0
<u>Paraleptophlebia heteronea</u>	0	0	0	4
PLECOPTERA				
<u>Claasenia sabulosa</u>	1	6	4	0
<u>Isoperla sp.</u>	1	4	0	1
<u>Cultus sp.</u>	6	9	14	8
<u>Pteronarcella badia</u>	0	1	0	1
<u>Pteronarcys californica</u>	0	1	0	0
TRICHOPTERA				
<u>Hydropsyche sp.</u>	5	1	4	6
<u>Rhyacophila sp.</u>	2	3	2	1
COLEOPTERA				
<u>Optioservus quadrimaculatus</u>	0	2	0	1
DIPTERA				
Chironomidae - larvae	437	321	340	96
Chironomidae - pupae	8	9	6	2
<u>Atherix</u>	2	0	0	1
<u>Hexatoma</u>	0	0	0	1
NON-INSECTS				
<u>Turbellaria</u>	1	2	5	1
<u>Lumbriculus</u>	0	33	37	47
<u>Lymnea</u>	1	4	2	1
<u>Physa</u>	0	1	2	2
Total Number	523	478	465	380
Total taxa	12	17	13	17
Extrapolated number/m ²	8368	7648	7440	6080

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PROPOSED AQUATIC ENVIRONMENT

The portion of the proposed feeder ditch to be developed as trout habitat would originate at the proposed diversion where Birch Creek passes between Townships 8N and 9N and would extend to the east to Highway 28, a distance of 8,000 feet. The overall gradient would be approximately 0.1%. The system would be designed to carry a normal flow of 70 cfs. Typical width of the channel bottom would be 4 feet, with bank slopes of 1:1. Channel substrate will be local alluvial gravel overlying a bentonite or polymer sealant.

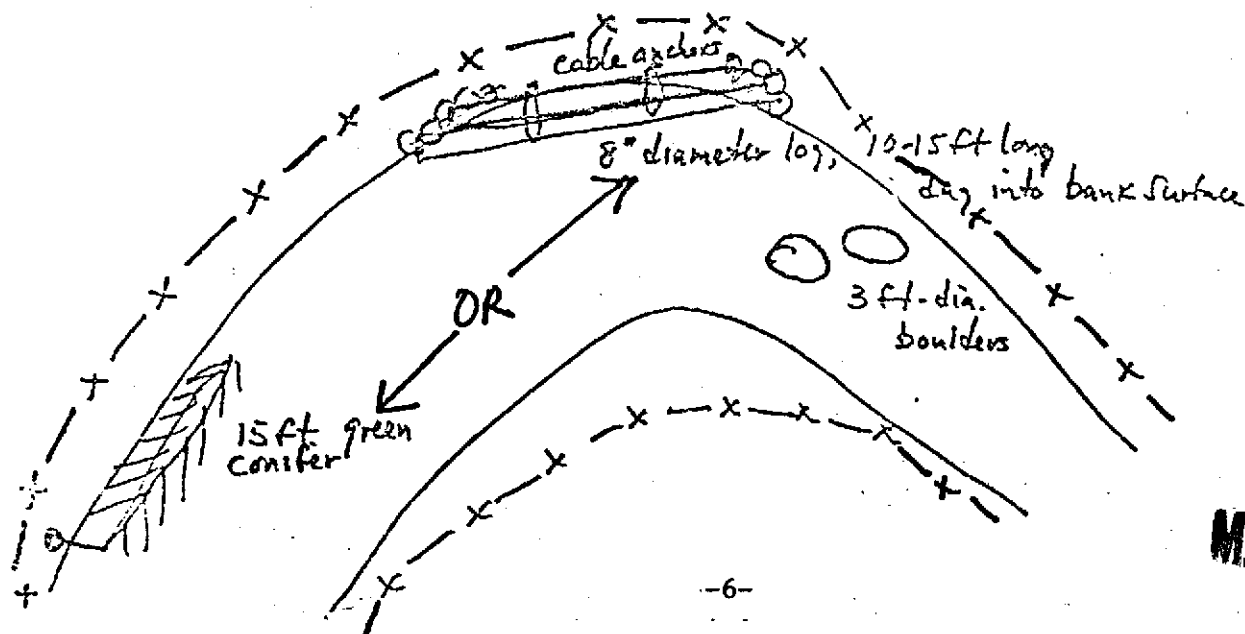
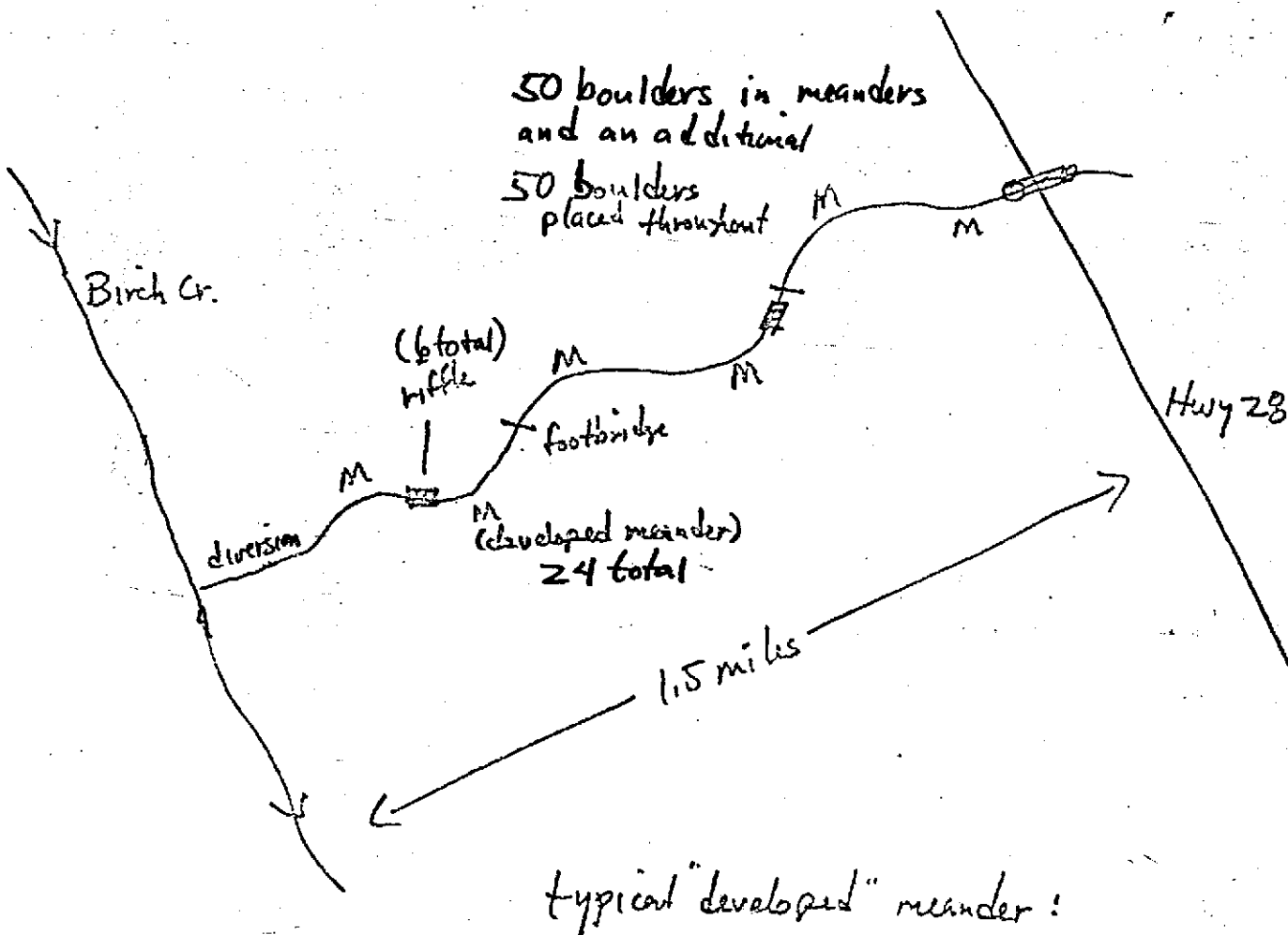
The feeder ditch should be capable of maintaining a substantial population of rainbow trout given a continuous flow of water. The design goal is to provide habitat to sustain a minimum of 560 trout (370 trout/mile), a density equivalent to that in the 3,000 feet of Birch^{creek} that would be dewatered by the project. The expected average size of trout in the feeder ditch would likely exceed the present average size of 8.5 inches in the lower portion of the creek.

Proposed modifications to enhance the trout population

1. A total of 24 meanders would be incorporated into the new channel, giving a spacing of 330 feet on average between meanders.
2. An average water velocity of 1.5 to 2.0 feet/second would be maintained to provide an ideal range for rainbow trout and for aquatic insect production.
3. The average water depth would range from 3 to 4 feet, except in riffles.

4. Six riffles 15 feet wide by 30 feet long would be made by introducing washed alluvial gravel and spaced relatively evenly throughout the 8,000-foot section. They would enhance aquatic insect production, aerate water, and provide spawning substrate for trout.
5. Instream cover would be provided in the form of 100 three-foot diameter boulders placed singly and in pairs. In addition, green conifers would be anchored to the stream bank in alternate meanders to provide cover for juvenile trout. In the remaining 12 meander pools, overhead cover would be added in the form of pairs of logs anchored into the bank.
6. Footbridges would be installed at intervals along the channel for the convenience of anglers.
7. Riparian vegetation would be established as described in the riparian habitat enhancement plan.
8. Additional habitat could be developed in the future by the placement of additional boulders and the construction of wing deflectors in the stream portions between meanders.

Birch Creek



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MATERIALS REQUIRED

boulders: approx. 3 ft. diameter
100 total

washed alluvial gravel: 1/2 to 1 1/2 in.
50 cubic yds.

logs: 8 in. x 10-15 ft.
24 total, with anchor cable and rock fill

green conifers: approx. 15 ft. long
12 total, with anchors and cable

fencing: as needed

footbridge materials

Colonization by invertebrates and fishes

The newly-constructed stream should be partially colonized by rainbow trout from Birch Creek during the initial summer of operation. Some of the hatchery fish stocked into lower Birch Creek at present typically move downstream, occasionally leading to loss of substantial numbers into the unscreened Reno ditch (BLM 1975). This is likely due to a lack of adequate habitat in the existing channel and a tendency toward normal downstream dispersal, especially if water temperatures at time of stocking are below 10 C (Cresswell 1981). Habitat in the new feeder ditch should be more attractive for these fish, and many would be expected to take up residence. Colonization by wild rainbow trout would also be expected, but due to the low density populations upstream this would not be particularly rapid.

Colonization by aquatic invertebrates depends principally upon the quality of the source of individuals available for colonization and the distance from that source. In Summit Creek in the Little Lost drainage, areas of stream bottom were completely recolonized in one month during summer if they were immediately adjacent to a source (Griffith and Andrews 1981). In an irrigation canal leading from the Big Lost River, colonization of the upper 2.6 km was complete after four summer months (Fuller 1981). Downstream in the canal from that point, some invertebrate species declined in numbers but levels of the species most important for trout food stayed high for an additional 5 km. Flow in that canal was only 3% of that expected in the Birch Creek feeder ditch, and insect drift in the latter should be more rapid. Food organisms should develop quickly enough to support trout as they enter the feeder ditch.

Project monitoring

It is recommended that relatively intensive monitoring be conducted for a 2-year period following completion of the project. This could be carried out by an ISU fisheries graduate student supervised by myself.

Monitoring should concentrate on assessing:

1. colonization rates of fishes and aquatic invertebrates
2. distribution and size of trout in feeder ditch, especially utilization of habitat structures
3. angler effort and catch (creel census)
4. turbine mortality
5. ice formation and possible fish mortality in winter

The student would reside on the site in summer, during which time the creel census, electroshocking to assess fish populations, and sampling to monitor invertebrates would be conducted. The student would visit the site approximately monthly during the remainder of the 2-year period to collect supporting data.

For the project and fish populations to be compatible, it will be necessary to prevent dewatering of the channel due to spring washouts, mechanical breakdowns, etc. Also, it will be imperative to avoid the addition of substances (demossing agents, bentonite, etc.) in concentrations that are toxic or stressful to trout.

Some initial stocking of rainbow trout into the project area will probably be appropriate, but it would be advantageous to develop a self-sustaining population of wild rainbows that are adapted to conditions there. To do this, it may be necessary to protect wild fish from excessive angler harvest, possibly by closing a different section for 1-2 years on a rotation basis.

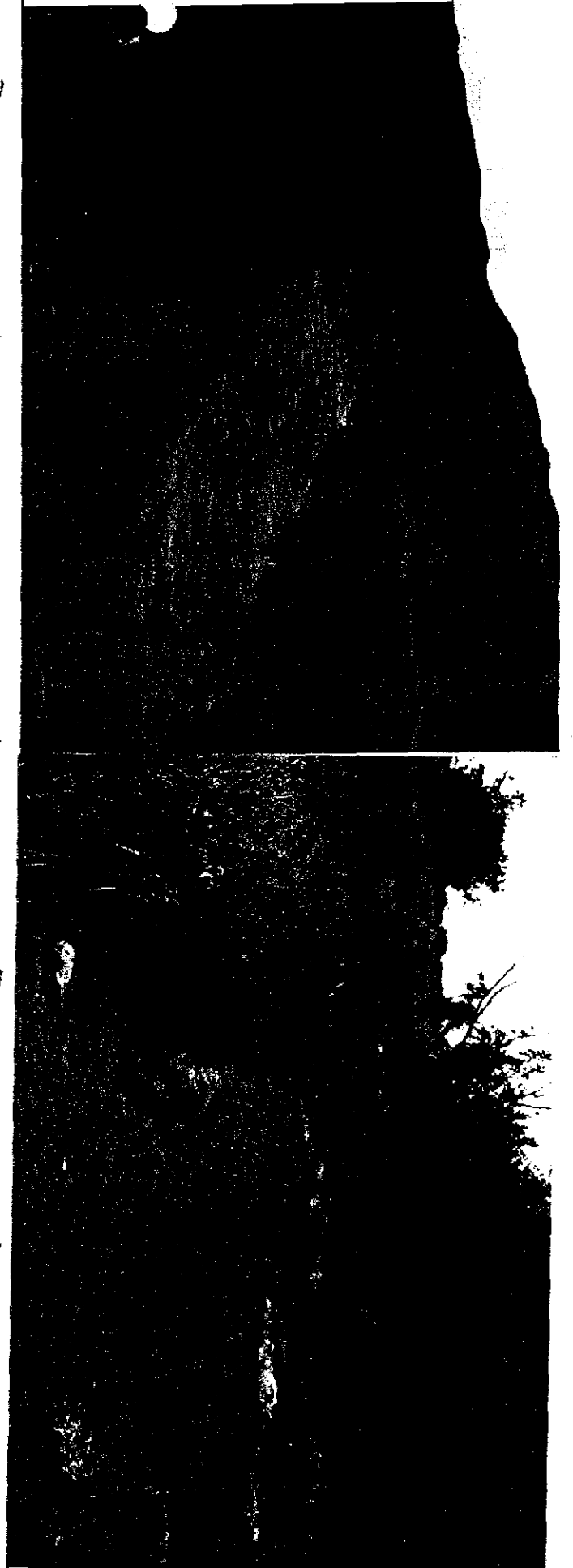
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Bird Creek in Vicinity of Proposed Diversion

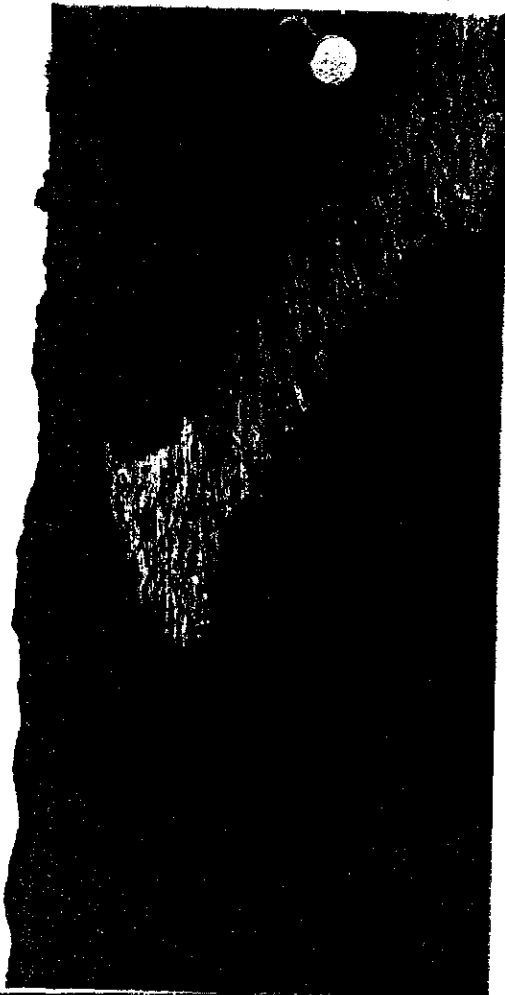


Department of Water Administration
APPLICANT'S
Exhibit <u>#7</u>
Date Admitted <u>4-05-84 BMC</u>

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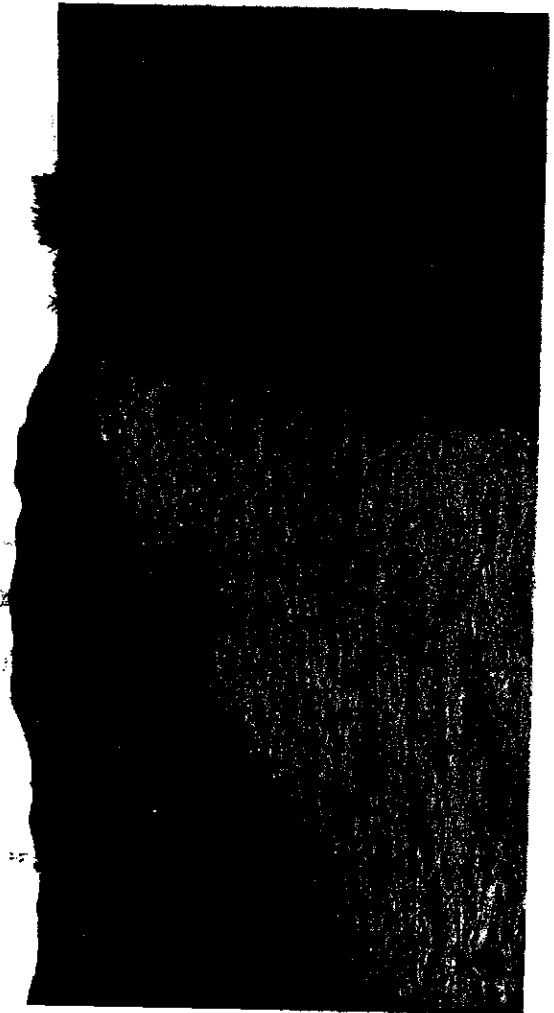
Existing Diversion



Reno Ditch

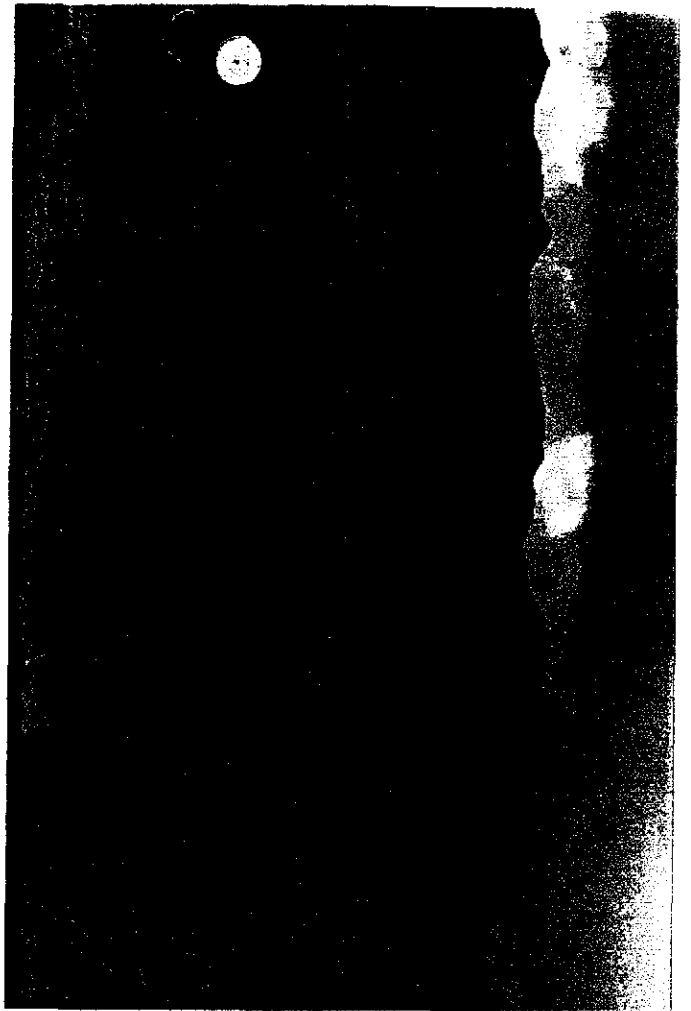
Department of Water Administration	
APPLICANT'S	
Exhibit	#8
Date Added	4-05-84 EMC

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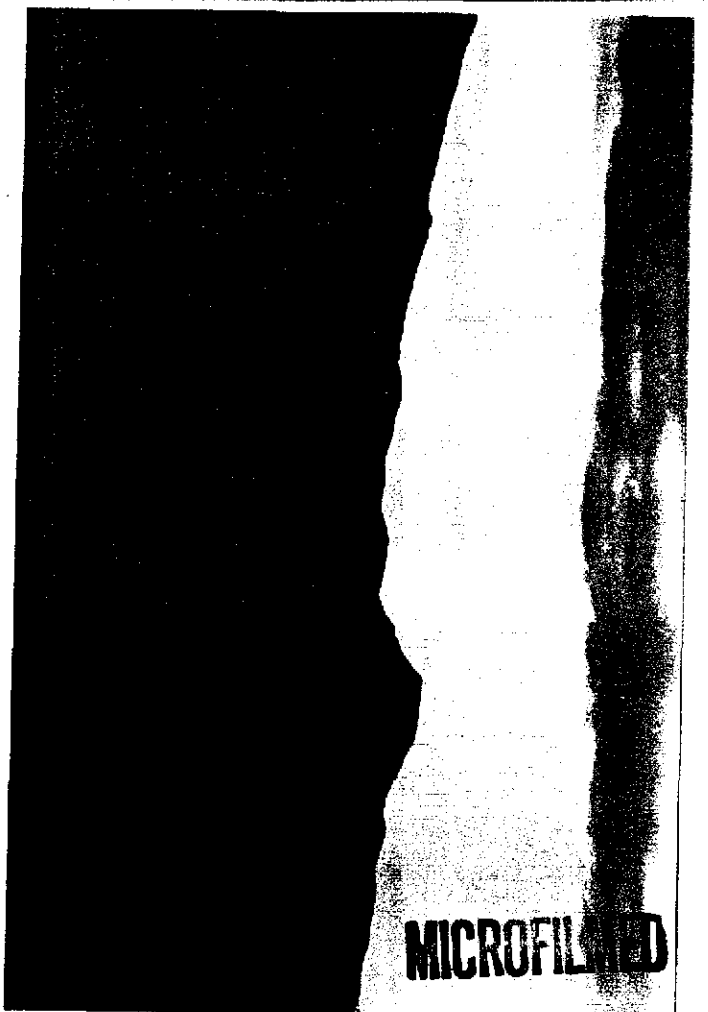


Reno Ditch

Proposed Diversion



Canal Route



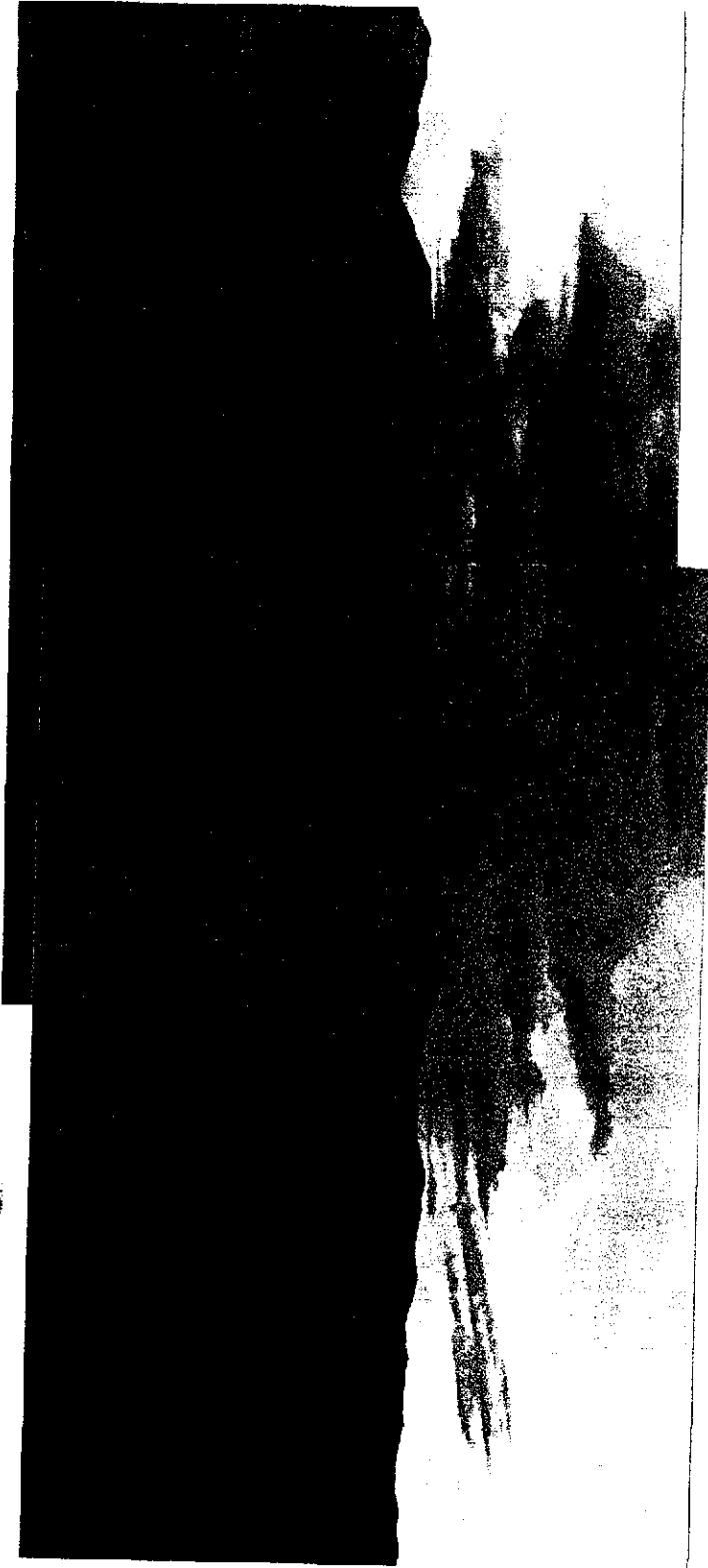
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Department of Water Administration
APPLICANT'S

Exhibit #9

Date Admitted 4-05-84 EMC

Canal Route



Birch Power Company) Project No. 7194-000

ORDER ISSUING PRELIMINARY PERMIT

(Issued September 7, 1983)

The permittee 1/ filed an application for preliminary permit under Section 4(f) of the Federal Power Act (Act), 16 U.S.C. 797(f), for the proposed water power project, as described in the attached public notice. 2/

Notice of the application was published in accordance with Section 4(f) of the Act and the Commission's regulations. All protests that have been submitted, petitions to intervene that have been granted, together with all comments filed by Federal, State, and local agencies have been fully considered in determining whether to issue this permit. No party or agency commenting on the application objected to the issuance of the permit.

Effects of This Preliminary Permit:

The purpose of any preliminary permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and to prepare an acceptable application for license. A preliminary permit does not authorize construction of any project works. This permit does

1/ In this, "permittee" refers to the applicant or applicants named in the caption for this proceeding.

2/ Authority to act on this matter is delegated to the Director, Division of Hydropower Licensing, Office of Electric Power Regulation, under §375.308 of the Commission's regulations 18 C.F.R. §375.308 (1981), FRRC Statutes and Regulations § 30,238. This order may be appealed to the Commission by any party within 30 days of its issuance pursuant to Rule 1902, 18 C.F.R. §385.1902, FRRC Statutes and Regulations § 29,052, 47 Fed. Reg. 19014 (1982). Filing an appeal and final Commission action on that appeal are prerequisites for filing an application for rehearing as provided in Section 313(a) of the Act. Filing an appeal does not operate as a stay of the effective date of this order or of any other date specified in this order, except as specifically directed by the Commission.

DC-A-10

Department of Water Administration

APPLICANTS

Exhibit #10 40584

Date Admitted Admitted 2/10/84

require the Permittee to conduct certain studies, but under conditions which will assure that those studies cause no significant adverse environmental impacts. For these reasons, the issuance of this preliminary permit is not a major Federal action significantly affecting the quality of the human environment.

Any concerns raised in the comments, protests, or petitions to intervene addressing the potential effects of actually constructing and operating the proposed project are not affected by the issuance of a preliminary permit.

The Articles of this permit provide for studies, in coordination with the appropriate agencies, to address the technical, economic, and environmental considerations related to the proposed project. Should the Permittee find the project to be feasible and file an application for a license, all interested persons and agencies will be given notice and have an opportunity to review the application, present their comments concerning the project and the effects of its construction and operation, and seek to participate in the licensing proceeding.

The named Permittee is the only party entitled to the preference and priority of application for license afforded by this preliminary permit. In order to invoke this permit-based priority and preference in any subsequent licensing competition, the named Permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and hold all proprietary rights necessary for the construction, operation and maintenance of the proposed project. Should any other parties intend to hold during the term of any license issued any of these proprietary rights necessary for project purposes, they must be included as joint applicants in any application for license filed. In such an instance where parties other than the Permittee are added as joint applicants for license, the joint application will not be eligible for any permit-based preference or priority. City of Fayetteville Public Works Commission, Project No. 3137, et al., "Order Determining Preference," Issuing Preliminary Permit and Denying Competing Application" (16 FEREC ¶ 61,209).

Term of Permit:

The proposed project is considered a small scale development. Feasibility studies for small projects are limited in scope and should not require the maximum term for a preliminary permit (36 months) permitted under the Act. Therefore, the term of this permit is limited to 24 months. Review of this project indicates that this permit term should be fully adequate to complete the necessary studies if they are pursued expeditiously. Extension of the term of this permit will not be granted, except in unusual circumstances where good cause for extension is clearly demonstrated.

MICROFILMED

It is ordered that:

(A) A preliminary permit is issued to the permittee for the proposed project as described in the attached notice, for a period effective the first day of the month in which this permit is issued, and ending either 24 months from the effective date or on the date that an application for license submitted by the permittee has been accepted for filing, whichever occurs first. This permit is subject to the terms and conditions of the Federal Power Act (Act), which is incorporated by reference as part of this permit, and subject to the regulations the Commission issues under the provisions of the Act.

(B) This permit is also subject to Articles 1 through 6 set forth in Form P-1 (revised October 1975), entitled "Terms and Conditions of Preliminary Permit," attached to (reprinted at 54 PFC 1797) and made a part of this permit, and subject to the following special conditions set forth as additional articles:

Article 7. In the interest of protecting and developing the natural resources and other environmental values of the project area, the Permittee shall consult with the appropriate Federal, State, and local agencies in their fields of responsibility and expertise, shall conduct its project investigations in a manner which protects the environmental integrity of the area, and shall fully explore all feasible alternatives to the project and alternative project designs, taking into account impacts on natural resources and other environmental values. These resources and values include, but are not limited to: forests, land management and treatment, fish, wildlife, recreation and public use, flood regulation, water and air quality (including water supply, ground-water studies, waste treatment and disposal), public health and safety, archeological, historic and cultural sites, threatened or endangered species of flora and fauna, and scenic and aesthetic values. The Permittee shall initiate and conduct, or have conducted, any studies that may be necessary to determine the impact of the construction and operation of the proposed project on these natural resources and values and measures needed to protect and develop them or to provide for their mitigation or replacement, including alternative designs and operational measures, and shall utilize the results of these studies in the preparation of the relevant exhibits or reports required to accompany any application for a license to construct and operate the project. In connection with studies pertaining to archeological and historic and cultural sites, the Permittee shall consult with the State Historic Preservation Officer for each state in which any part of the project would be located, and the National Park Service of the U.S. Department of the Interior.

Article 8. The Permittee shall submit in triplicate at the close of each six-month period from the effective date of this permit, to the Director, Office of Electric Power Regulation, with a copy to the FERC Regional Engineer for the Region in which the proposed project would be located (the Commission's authorized representative for the purposes of this permit), or to any other officer the Commission may designate, and a copy, if requested, to any agency consulted, accurate statements of the progress of all investigations, consultations, and studies accomplished during the period and of work contemplated under this permit for the ensuing period.

Article 9. The Permittee shall, for the purpose of assuring the cooperation required by the terms of the permit, designate a liaison officer to act for the Permittee in keeping appropriate Federal, State, and local agencies specified in this permit currently informed about the progress of investigations throughout the term of the permit. The liaison officer shall communicate with those agencies within 60 days from the date of issuance of this permit.

Article 10. The Permittee shall, during the initial period of the permit, consult with the U.S. Fish and Wildlife Service of the Department of the Interior, the State fish and game agencies, Shoshone-Bannock Tribes and the National Marine Fisheries Service of the U.S. Department of Commerce if the project affects anadromous fish, to obtain their views and recommendations on studies to be conducted during the term of the permit to assess the effect that the proposed project might have on fish and wildlife resources, and the facilities or measures that may be needed to conserve and develop those resources. A copy of the report on the Permittee's study shall be filed as part of the fish and wildlife exhibits or reports of any subsequent application for license.

Article 11. During the development of fish and wildlife report pursuant to Article 10, the Permittee shall take into account the regional fish and wildlife program developed pursuant to the Pacific Northwest Electric Power Planning and Conservation Act. Any inconsistencies with the regional program must be specifically addressed in any fish and wildlife report of any subsequent application for license or exemption.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Article 12. The Permittee shall consult closely during the term of the permit with the Shoshone-Bannock Tribe and Bureau of Indian Affairs as part of its study effort to determine whether the proposed project would adversely affect the Shoshone-Bannock Tribe's interests, and if so, what mitigative measures should be undertaken. The Permittee shall also keep the Shoshone-Bannock Tribe informed as to the progress of investigations throughout the term of the permit.

Quentin A. Edison
Quentin A. Edison
Director, Division of
Hydropower Licensing

SSS

Notice of Application filed with the Commission

5-20-63

Take notice that the following hydroelectric application has been filed with the Federal Energy Regulatory Commission and is available for public inspection:

MICROFILMED

- a. Type of Application: Preliminary Permit
- b. Project No: 7194-000
- c. Date Filed: April 5, 1983
- d. Applicant: Birch Power Company
- e. Name of Project: Birch Project
- f. Location: Birch Creek, Clark County, Idaho
- g. Filed Pursuant to: 16 U.S.C. §5791(a) - 8251(r)
- h. Contact Person: Ted S. Sorenson, 550 Linden Dr., Idaho Falls, Idaho 83401.
- i. Comment Date: Alt. 23 1983
- j. Description of Project: The proposed all new run-of-the-creek project would utilize lands of the United States administered by Interior's Bureau of Land Management and would consist of: (1) a concrete diversion structure with spill elevation 5,654 feet m.s.l. and having radial gate control and a fish ladder; (2) a 34,000-foot-long 5-foot-deep earthen feeder ditch; (3) a forebay having a surface area of 1/3-acre and a gross storage capacity of 2 acre-feet at surface elevation 5,626 feet m.s.l.; (4) a screened intake structure; (5) a 42-inch diameter 4,700-foot-long steel penstock; (6) a powerhouse containing a generating unit having a rated capacity of 1,100-kw operated under a 276-foot head and at a flow of 60 cfs; (7) a 0.2-mile-long transmission line; (8) an 18,900-foot-long earthen outfall ditch; and (9) appurtenant facilities.
- k. Purpose of Project: Project energy would be sold to Utah Power & Light Company. Applicant estimates that the average annual generation would be 3,000,000 kWh.
- l. This notice also consists of the following standard paragraphs: A4b, A4c, A4d, B, C and D2.
- m. Proposed Scope of Studies under Permit: A preliminary permit, if issued, does not authorize construction. Applicant seeks issuance of a preliminary permit for a period of 24 months, during which time it would perform studies and, if feasible, would prepare an application for an FERC license. Applicant estimates the cost of the work under the permit would be \$25,000.

A4b. No Existing Dam -- Anyone desiring to file a competing application for preliminary permit for a proposed project where no dam exists or there are proposed to be major modifications, must submit to the Commission on or before the specified comment date for the particular application, the competing application itself, or a notice of intent to file such an application (see 18 CFR 4.30 to 4.33 (1982)).

A4c. The Commission will accept applications for license or exemption from licensing, or a notice of intent to submit such an application in response to this notice. A notice of intent to file an application for license or exemption must be submitted to the Commission on or before the specified comment date for the particular application. Any application for license or exemption from licensing must be filed in accordance with the Commission's regulations (see 18 CFR 4.30 to 4.33 or §54.101 to 4.104 (1982), as appropriate).

UNCLASSIFIED

44d. Submission of a timely notice of intent to file an application for preliminary permit allows an interested person to file an acceptable competing application for preliminary permit no later than 60 days after the specified comment date for the particular application.

B. Comments, Protests, or Motions to Intervene. - Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of the Rules of Practice and Procedure, 18 C.F.R. 53385.210, .211, .214 (1987). In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C. Filing and Service of Responsive Documents. - Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST" or "MOTION TO INTERVENE", as applicable, and the project number of the particular application to which the filing is in response. Any of the above named documents must be filed by providing the original and the number of copies required by the Commission's regulations to: Kenneth F. Plumb, Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: Fred E. Springer, Chief, Applications Branch, Division of Hydropower Licensing, Federal Energy Regulatory Commission, Room 208 RB at the above address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. Agency Comments. - Federal, State, and local agencies are invited to file comments on the described application. (A copy of the application may be obtained by agencies directly from the Applicant.) If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

MICROFILMED

FEDERAL ENERGY REGULATORY COMMISSION
TERMS AND CONDITIONS OF
PRELIMINARY PERMIT

Article 1. The permittee shall make such engineering and other investigations, secure such data, and perform such acts as are necessary to determine the feasibility of the proposed project and, if said project is found to be feasible, to prepare an application for license for the project that will be in conformance with current rules and regulations of the Commission. In carrying out the requirements of this permit the Permittee shall:

- A. Install as soon as practicable, and thereafter maintain, such stream gages and stream-gaging stations as the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region shall designate as necessary and best adapted for the purpose of determining the stage and flow of the stream or streams affected by the proposed project, and shall provide for the required reading of such gages and for the adequate rating of such stations. The number, design, location, and time of installation of gages and stations, the rating of the affected stream or streams, shall be made under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging in the region of said project; and the Permittee shall advance to said Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Permittee shall, to the satisfaction of the Commission, keep accurate and sufficient records of the stage and flow of the affected stream or streams, and shall make such records available to the Commission at such times as the Commission may prescribe.
- B. Sink such test pits or make such borings or other foundation explorations, and make such detailed geologic studies and tests on foundations and fill materials, as are necessary to support preliminary engineering designs and cost estimates.

C. Begin the required investigations within 60 days after acceptance of the permit, and thereafter prosecute said investigations in such manner and at such rate as in the judgment of the Commission will ensure their completion within the period of the permit.

D. Furnish with any application for license subsequently filed with the Commission copies of engineering and geologic reports, results of tests and analyses, and any other information secured in connection with the investigations, examinations and surveys conducted under this permit.

E. Exercise appropriate measures at all times during field studies to prevent irreparable damage to the environment of the proposed project. All test sites shall be restored as closely as possible to their original condition, and to the satisfaction of the Commission's authorized representative, or, where Federal lands are affected, to the satisfaction of the agency administering such lands.

Article 2. A license will be issued for the proposed project only if in the judgment of the Commission said project will be best adapted to a comprehensive plan for the improvement or development of a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes. In reaching a decision on the desirability of issuing a license, the Commission will consider, among other things:

- A. Whether the maps, plans, and specifications are such:
- (1) That full, practicable utilization will be made of the water, storage possibilities, and head at the site to be developed;
 - (2) That the structures will be safe and constructed in accordance with good engineering practice; and
 - (3) That all unnecessary energy losses, whether in hydraulic works or in mechanical or electrical equipment, will be avoided.
- B. Whether in relation to existing or probable future projects upon the same or adjacent streams, the potential for the fullest practicable utilization of the available water, storage possibilities, and head will be maintained.

MICROFILMED

C. Whether said project will be in general accord with the most beneficial utilization of the water for navigation, water power, irrigation, or other public uses, and for aiding flood control, reclamation, and similar developments.

D. Whether proper provision is made for present or future electrical interconnection with other projects or systems in order to take advantage of diversity of streamflow and of power demands.

E. Whether the use to which the power will be devoted is, in general, in accord with the public interest.

F. Whether the applicant is financially able to carry out the development.

G. Whether the construction, maintenance, and operation of the proposed project works will interfere or be inconsistent with the purpose for which any reservation, as defined in the Federal Power Act, was created or acquired.

Article 3. The priority granted under the permit shall be lost if the Permittee fails to fulfill the requirements of the permit, if the permit is canceled by order of the Commission, or if the Permittee fails, on or before the expiration date of the permit, to file with the Commission or its designated agent an application for license for the proposed project in conformity with the Commission's rules and regulations then in effect.

Article 4. The Permittee shall keep accurate records of all expenditures made for the purposes authorized by the permit, together with all vouchers and other supporting data relating to such expenditures, which records and related materials shall be retained by the Permittee.

Article 5. The permit confers no authority upon the Permittee to undertake construction of the proposed project, or any part thereof, or to occupy or use lands or other property of the United States for the purposes of construction, unless specific permission is given by the Commission for such occupancy or use; and neither the granting of such authority nor the performance of construction work, whether with or without such authority, shall be deemed to have created any equities or to have established any rights with respect to issuance of a license for the proposed project, beyond what would have been created or established had such authority not been given or such work not been performed.

Article 6. The permit is not transferable and may be canceled by order of the Commission upon failure of the Permittee to begin in good faith, or to prosecute diligently, the investigations, examinations, and surveys contemplated under the permit, or to comply with any other conditions therein, or for any other good cause shown after notice and opportunity for hearing.



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

August 25, 1986

RE: Permit Nos. 32-7128/7136

Ted S. Sorenson
DBA Sorenson Engineering
2988 Tipperary Ln.
Idaho Falls, ID 83401

Dear Permit Holder:

This office acknowledges receipt of the Assignment of the above referenced permits to you.

Enclosed for your records are copies of the permits. Be sure to note the special conditions of approval on the fourth pages that identify requirements necessary for developing the permits into licensed water rights.

If you have any questions on this matter, please feel free to contact us.

Sincerely,

JIM JOHNSON
Water Rights Supervisor

JJ:sc
Enclosures

RECEIVED
AUG 27 1986
STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Permit No. 32-7136

ASSIGNMENT REVIEW CHECK LIST

1. Signature of Permit Holder? Yes - President
2. Notary? Yes -
3. a. Full Assignment? Yes
- b. Partial Assignment?
4. "No assignment" condition on permit? - NO
5. Commencement of Works received? N/A
- a. Commencement of works requested?
- b. Show Cause Order drafted & sent?
- c. Cancellation necessary?
6. Affidavit of residency required? NO
7. Extension granted due to litigation? - NO
(If yes, commencement of works is not required.)

1. Type permit summary sheet. ✓
2. Coding sheet. ✓
3. Acknowledgement letter type.
4. Copy to region. ✓

Shanla —

Shanla —

#1p (32-7128)

Shanla —

Date 8-25-86

Employee Juni



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

August 19, 1986

RE: Permit Nos. 32-7128/7136

Birch Power Co.
550 Linden Dr.
Idaho Falls, ID 83401

Gentlemen:

Enclosed are copies of the approved Applications for Amendment submitted in connection with the above referenced permits.

If you have any questions concerning this matter, please contact us.

Sincerely,

JIM JOHNSON
Water Rights Supervisor

JJ:sc

Enclosures

RECEIVED
AUG 22 1986

FROM

Ken

TO

~~Glen~~ → Gary S. G.S.

→ Jim T. J.T.

DATE 3-15-84

SUBJECT

in the ...
 ... body to kill ...
 ...

I have signed these and wrote a memo explaining the reason for not re advertising. Please have them completed and sent out

Thanks

Ken

SIGNATURE

CONVERSATION MEMORANDUM

DATE 8-15-86

FILE 32-7128

32-7136

NAME OF PARTY

EMPLOYEE Ken Dunn

RE: Change in Place of Use.

The permit holder has purchased land in Section 14 T19N R31E BM to construct power plant. The change in place of use is approximately 3 miles from original location; however there are no users of water diverting from the additional length of the Reno Canal that will be dewatered. The landowners who sold land ~~and~~ were also protestants. Gayle Sorenson told me on 8-14-86 that there is a stipulation in the purchase that the land must be used only for the power plant.

There is no adverse impact on any party and there will be additional water savings available and reduced maintenance of the Reno Canal.

Other right holders will not be affected amendment will be approved without readjusting.

Ken Dunn

State of Idaho
Department of Water Resources
AMENDMENT ANALYSIS SHEET

INITIAL REVIEW BY: _____

Right Number 32-7136/32-7128 Applicant _____

Purpose of Amendment: ☐ Change point of diversion. ☐ Add diversion point(s).

☐ Increase amount. ☒ Change place of use. ☐ Other _____

CHECK:

- N/A ☒ Description of amended point(s) of diversion. OLD
- N/A ☒ Amount, nature and period of use. If increased, delay date of priority. P/D NENW
- ☒ Description of amended places of use. If expanded, delay date of priority. S.3
- ☒ Ownership of point of diversion and place of use. T8N R 30E
- ☒ Map. OLD P/U
- ☒ Signature (must be permit holder). NENE S.17 T8N R31E
- ☒ Fee. Regent fee OK NEW P/U NENE S.14 T8N R31E
- ☐ Existing water rights from the same source, amended place of use. N/A
- ☐ Right number(s) _____
- ☐ Yes ☒ No Should amendment be advertised? - per memo by Ken D.
- ☐ Yes ☐ No Should date of priority be delayed? If yes, to what date? _____

FINAL REGIONAL PROCESSING REVIEW:

- N/A ☒ Affidavit of publication received.
- N/A ☒ Amendment published correctly.
- N/A ☒ Protests processed.
- ☒ Approve.
- ☐ Deny.

Conditions pursuant to Order

By Jim Date 8-19-86

STATE OFFICE PROCESSING:

- ☐ Amendment correct and complete. By _____ Date _____
- ☐ Approved copy sent to applicant and to Region. By _____ Date _____

POINT OF DIVERSION AND STREAM INDEX INFORMATION

TRACT	SEC	TWP	RGE	gov't lot	rediv. (R)	REACH
IDAHO STREAM CODE INDEX						

TRACT	SEC	TWP	RGE	gov't lot	rediv. (R)	REACH
IDAHO STREAM CODE INDEX						

TRACT	SEC	TWP	RGE	gov't lot	rediv. (R)	REACH
IDAHO STREAM CODE INDEX						

TRACT	SEC	TWP	RGE	gov't lot	rediv. (R)	REACH
IDAHO STREAM CODE INDEX						

TRACT	SEC	TWP	RGE	gov't lot	rediv. (R)	REACH
IDAHO STREAM CODE INDEX						



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

SEPTEMBER 1, 1985

DEAR PERMIT HOLDER:

ACCORDING TO OUR RECORDS, YOU ARE THE HOLDER OF A WATER PERMIT ON WHICH PROOF OF BENEFICIAL USE OF WATER WAS NOT SUBMITTED BEFORE JULY 1, 1985, WHICH INDICATES YOUR PROJECT IS NOT COMPLETE. THEREFORE, YOU NEED TO BE AWARE OF CHANGES IN IDAHO LAW, EFFECTIVE JULY 1, 1985, WHICH IMPACT ALL WATER PERMITS ISSUED BY THIS DEPARTMENT.

SPECIFICALLY, PURSUANT TO SECTION 42-203D, IDAHO CODE, THE DEPARTMENT MUST REVIEW ALL PERMITS FOR WHICH DEVELOPMENT OF WATER USE WAS NO COMPLETED ON OR BEFORE JULY 1, 1985, TO DETERMINE IF THEY MEET THE NEW REQUIREMENTS OF CHAPTER 2, TITLE 42, IDAHO CODE. RULES AND REGULATIONS GOVERNING THE RE-EVALUATION OF PERMITS ARE NOT YET FINALIZED. HOWEVER, IF YOU COMPLETED THE DEVELOPMENT UNDER YOUR PERMIT BEFORE JULY 1, 1985, YOU SHOULD SUBMIT A PROOF OF BENEFICIAL USE STATEMENT, STATING THAT THE PROJECT WAS COMPLETED BEFORE JULY 1, 1985 SO THAT YOUR PERMIT WILL NOT BE SUBJECT TO THE REVIEW REQUIREMENTS OF SECTION 42-203D, WHICH READS AS FOLLOWS:

42-203D. REVIEW OF PERMITS - OPPORTUNITY FOR HEARING. - (1)THE DEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THE EFFECTIVE DATE [JULY 1, 1985] OF THIS SECTION, EXCEPT TO THE EXTENT A PERMIT HAS BEEN PUT TO BENEFICIAL USE PRIOR TO JULY 1, 1985, TO DETERMINE WHETHER THEY COMPLY WITH THE PROVISIONS OF CHAPTER 2, TITLE 42, IDAHO CODE. IF THE DEPARTMENT FINDS THAT THE PROPOSED USE DOES NOT SATISFY THE CRITERIA OF CHAPTER 2, TITLE 42, IDAHO CODE, THEN THE DEPARTMENT SHALL EITHER CANCEL THE PERMIT OR IMPOSE THE CONDITIONS REQUIRED TO BRING THE PERMIT INTO COMPLIANCE WITH CHAPTER 2, TITLE 42, IDAHO CODE. IF THE DEPARTMENT FINDS THAT THE PERMIT SATISFIES THE CRITERIA ESTABLISHED IN CHAPTER 2, TITLE 42, IDAHO CODE, THEN THE DEPARTMENT SHALL ENTER AN ORDER CONTINUING THE PERMIT. (2)THE DEPARTMENT SHALL PROVIDE AN OPPORTUNITY FOR HEARING IN ACCORDANCE WITH SECTION 42-1701A, IDAHO CODE, AND SECTIONS 67-5209 THROUGH 67-5215, IDAHO CODE, FOR EACH HOLDER OF A PERMIT THAT IS PROPOSED EITHER TO BE CANCELLED OR MADE SUBJECT TO NEW CONDITIONS.

YOU MAY OBTAIN PROOF OF BENEFICIAL USE FORMS FROM THE DEPARTMENT. IF YOU HAVE ANY QUESTIONS, PLEASE LET US KNOW.

SINCERELY,

L. GLEN SAXTON
CHIEF, OPERATIONS BUREAU

MICROFILMED



IN REPLY
REFER TO:

7250

United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Idaho Falls District
940 Lincoln Road
Idaho Falls, Idaho 83401

RECEIVED

APR 24 1985

April 22, 1985

Department of Water Resources

Mr. Bobby D. Fleenor
State of Idaho
Dept. of Water Resources
Statehouse
Boise, ID 83720

Dear Mr. Fleenor:

Idaho Falls District, Bureau of Land Management has received a copy of the Order Adopting Modified Memorandum Decision and Order, and Modified Memorandum Decision and Order regarding applications for Permit No. 32-7128 and 32-7136.

We consider stipulation #4 page 10 of the Order, which ties the amount of flow to remain in the old channel of Birch Creek to the amount of water saved in the new feeder ditch, to be poorly backed by existing State codes. We feel that this decision makes a historical and existing beneficial use (Bureau of Land Management Claim #32-4062) dependent upon future action by a junior water right holder (Mr. Ted Sorenson). We do not believe, however, that Mr. Sorenson should suffer further delays on his project from a request for rehearing or from an appeal by our agency at this time.

We have made a decision to abide by the Decision Order until such time that it becomes clear that the stipulation regarding "the water saved in the new ditch" has directly impacted the beneficial stock use under Claim #32-4062. At that time, a supplemental adjudication of our historical use would be requested through the district court.

Sincerely,

O'dell A. Frandsen
District Manager

RECEIVED

March 27, 1985

Ted S. Sorenson
Birch Power Co.
550 Linden Drive
Idaho Falls, ID 83401

Dear Mr. Sorenson:

Re: Application for Permit Nos. 32-7128 and 32-7136

Enclosed is a copy of each of the approved applications for permit along with a copy of the Order Adopting Modified Memorandum Decision and Order and Modified Memorandum Decision and Order. Be sure to note the conditions of approval as set forth in the Modified Memorandum Decision and Order.

Please note the requirement that as a permit holder you must commence the excavation or construction of diverting works within one year of the date the permit was issued, and you must proceed diligently until the project is completed. The enclosed blue card must be completed and returned to this office as soon as you commence construction, no later than one year from the date the permit was approved.

Enclosed is a sheet entitled "Instructions for Proof of Beneficial Use". Please read the instructions carefully since you must take further action to develop this permit into a license.

Any person who does not agree with the decision of the Department may request a rehearing before the Director within 20 days or may appeal directly to the district court within 30 days of the date the decision is mailed.

Sincerely,

L. GLEN SAXTON
Chief, Operations Bureau

cc: Idaho Dept. of Fish and Game
William Dillon, III
James A. Esget and Robert McCardy
William T. Simmons

Ben Wilding, Watermaster
D & D Enterprises, Inc.
Ray W. Rigby, Esq.

RECEIVED



IN REPLY
REFER TO:

7250.4

United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Idaho Falls District
940 Lincoln Road
Idaho Falls, Idaho 83401

RECEIVED

JAN 25 1985

January 23, 1985 Department of Water Resources

Mr. Bobby D. Fleenor
Department of Water Resources
Statehouse
Boise, ID 83720

Dear Mr. Fleenor:

Based upon your phone conversation of January 18, 1985, with our District Hydrologist, we have again reviewed the Order Issuing Proposed Decision in the matter of applications for permit Nos. 32-7128 and 32-7136 in the name of Birch Power Company.

The BLM takes exception to portions of Section 4 of the Order which reads as follows: "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 least, shall be allowed to flow past the feeder canal diversion in the natural channel of Birch Creek."

The BLM recommends that Section 4 be modified to read as follows: "Eleven percent of any flows of Birch Creek at the diversion to the feeder ditch or 5 cubic feet per second whichever is least shall be allowed to flow past the feeder canal diversion in the natural channel of Birch Creek".

We recommend this modification because reference to water saved by the new ditch would make our well established historical stock use in the old channel dependent upon the success of a project proposed by another party. This modification is in agreement with Idaho Fish and Game recommendations dated December 17, 1984.

These exceptions supersede and modify our exceptions dated December 14, 1984.

Sincerely,

O'dell A. Frandsen
District Manager

MICROFILMED

PETERSEN, MOSS, OLSEN, MEACHAM & CARR

GEORGE C. PETERSEN, JR.
REED L. MOSS
DENNIS M. OLSEN
GREGORY P. MEACHAM
WM. CHARLES CARR
EARL BLOWER
ALAN E. BARBER
SCOTT P. ESKELSON

ATTORNEYS AT LAW
485 "E" STREET
IDAHO FALLS, IDAHO 83402

TELEPHONE
AREA CODE 208
523-4650

January 11, 1985

RECEIVED
JAN 14 1985

Department of Water Resources

Department of Water Resources
ATTN: Bobby D. Fleenor
Statehouse
Boise, Idaho 83720

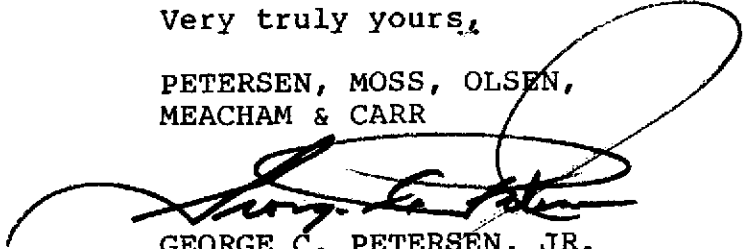
RE: In the Matter of Applications for Permit Numbers 32-7128
and 32-7136 in the Name of Birch Power Company

Dear Mr. Fleenor:

Enclosed herewith please find Response of D & D
Enterprises, Inc., to Exceptions Filed by Ben R. Wilding, BLM, and
Idaho Department of Fish and Game.

Very truly yours,

PETERSEN, MOSS, OLSEN,
MEACHAM & CARR


GEORGE C. PETERSEN, JR.

GCP/jo
Enclosure
7671a

MICROFILMED

George C. Petersen, Jr., Esq.
PETERSEN, MOSS, OLSEN, MEACHAM & CARR
485 "E" Street
Idaho Falls, Idaho 83402
(208) 523-4650

Attorneys for D & D Enterprises, Inc.

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

IN THE MATTER OF APPLICATIONS)	RESPONSE OF D & D ENTER-
FOR PERMIT NUMBERS 32-7128 and)	PRISES, INC. TO EXCEPTIONS
32-7136 in the name of BIRCH)	FILED BY BEN R. WILDING,
POWER COMPANY)	BLM, and IDAHO DEPARTMENT
_____)	OF FISH AND GAME

D & D Enterprises has reviewed the exceptions of Ben R. Wilding, the BLM and the Idaho Department of Fish and Game to the Proposed Memorandum Decision and Order in the within matter, and it agrees with some of the exceptions expressed and disagrees with others.

At page 4 of the director's Proposed Memorandum Decision and Order, the director refers to the possible decrease in water loss and indicates that it raises the question "whether the water previously lost to seepage should be used to the 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."

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D & D Enterprises agrees with the position taken in the Exception of Ben R. Wilding that the water which would be saved by the new channel should be made available to fill the decreed rights of the irrigators. Indeed, under Idaho law, such water must be used to fill the decreed rights.

The Proposed Memorandum Decision and Order provides that a minimum flow be left in the natural channel. Presumably, this provision is made under authority of Idaho Code §42-1501 et seq. In Chapter 15 of Title 42, the Idaho Legislature declared that minimum stream flows constitute beneficiary uses and are in the public interest. However, by its terms, the minimum stream flow legislation allows appropriation of minimum stream flow only out of otherwise "unappropriated" waters in a stream. Idaho Code §42-1503 provides, in relevant part:

Whenever the board desires to appropriate a minimum stream flow of the unappropriated waters of any stream, it shall submit an application to the director.

...

Approval of any such application must be based upon a finding that such appropriation of minimum stream flow:

(a) will not interfere with any vested water right, permit, or water right application with priority of right date earlier than the date of receipt in the office of the director of a complete application for appropriation of minimum stream flow filed under the provisions of this act....

(Emphasis added.)

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To the extent, then, that the proposed minimum stream flow interferes with any prior water right, the application for the minimum stream flow must be denied.

The Idaho Supreme Court has clearly established that an appropriator of water "retains his right to all the water [appropriated], including that which is lost through reasonable seepage, and thus may reclaim it, for instance, by improving his transmission system." Hidden Springs Trout Ranch v. Hagerman Water Users, Inc., 101 Idaho 677, 619 P.2d 1130, 1134. See also, Linford v. G. H. Hall & Son, 78 Idaho 49, 297 P.2d 893 (1956) and Reynolds Irrigation District v. Sproat, 70 Idaho 217, 214 P.2d 880 (1950) (seepage and waste water belong to the original appropriator, and in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing and able to put it to a beneficial use).

There was no evidence presented at the hearing that the Birch Creek irrigators have abandoned or forfeited their claims to the waters lost by seepage. A water right is tantamount to a real property right, and it is entitled to the same stringent protection as real property rights. See Idaho Code §55-101; Nettleton v. Higginson, 98 Idaho 87, 558 P.2d 1048 (1978); Roland v. Kellogg Power and Water Company, 40 Idaho 216, 233 P 869 (1925); Neilson v. Parker, 19 Idaho 727, 115 P 488 (1911); Taylor v. Huellett, 15 Idaho 265, 97 P 37 (1908). The finding of an abandonment can only be made on a clear and convincing evidence showing an intention to

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forsake or desert the right. See Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976); Wagoner v. Jeffrey, 66 Idaho 455, 162 P.2d 400 (1945); Carrington v. Crandall, 65 Idaho 532, 147 P.2d 109 (1944); Perry v. Reynolds, 63 Idaho 457, 122 P.2d 518 (1942).

Accordingly, the proposed Conclusion of Law 1) (which provides that the water that would be saved by sealing the feeder ditch is "new water" and its use for minimum flow will not injure the Reno District Irrigators), is inconsistent with existing Idaho law. Additionally, Finding of Fact 12) (which provides that "water lost to seepage has never been used for irrigation by those water users on the Reno Ditch") does not foreclose the rights of the irrigators to the water lost by seepage. To the contrary, the Idaho Supreme Court has stated that the appropriators retain their rights to water lost to seepage, and if the water can be reclaimed, it must be used to satisfy their decreed water rights.

Because of these facts, paragraph 4) of the proposed order (which provides that a portion of the water be allowed to flow in the natural channel) is in error, since it attempts to create a minimum use flow where such flow interferes with prior water rights of the irrigators. The evidence at the hearing clearly established that all of the Birch Creek waters (including water saved from loss by seepage) are needed to fill the decreed water rights.

D & D Enterprises acknowledges the importance of the natural riparian habitat and suggests that the Proposed Memorandum Decision and Order contain a new Finding of Fact that the existing

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riparian habitat will be replaced by a new riparian habitat along the new stream flow.

With regard to the provisions of the Proposed Memorandum Decision and Order allowing instream watering of livestock, D & D Enterprises suggests that Birch Power be required to create favorable conditions for watering livestock out of the new channel. This would be appropriate since a minimum stream flow is not possible under Idaho law in this situation, since all of the water in Birch Creek is required to fill the decreed rights.

D & D Enterprises specifically objects to the affidavit attached to the brief of the BLM on the grounds that the affidavit is based totally on hearsay (in fact, it is hearsay based on hearsay) and on the grounds that since it was not presented at the hearing on this matter, it should not be considered by the director.

D & D Enterprises also objects to the Idaho Fish and Game Department's exception to paragraph 11. D & D Enterprises specifically requests that the use of water under any permit issued to Birch Power Company be subject to review by the director, and that the director continue to have jurisdiction over this matter. D & D Enterprises feels that this is essential, because of the many problems which could arise in the development of the Birch Power Project.

Dated this 11th day of January, 1985.

PETERSEN, MOSS, OLSEN,
MEACHAM & CARR


George C. Petersen, Jr.

MICROFILMED

CERTIFICATE OF MAILING

I hereby certify that on this 11th day of January, 1985, true and correct copies of the foregoing document: D & D Enterprises, Inc.'s Response to Exceptions Filed by Ben R. Wilding, BLM, and Idaho Department of Fish and Game were mailed, postage prepaid to:

Ted S. Sorensen
Birch Power Company
550 Linden Drive
Idaho Falls, Idaho 83401

Steve Elle
Idaho Department of Fish & Game
1515 Lincoln Road
Idaho Falls, Idaho 83401

James A. Esget
Robert McCardy
Bureau of Land Management
920 Lincoln Road
Idaho Falls, Idaho 83401

William T. Simmons
Dubois, Idaho 83423

Ben Wilding
Water Master
Water District No. 32-D
Dubois, Idaho 83423

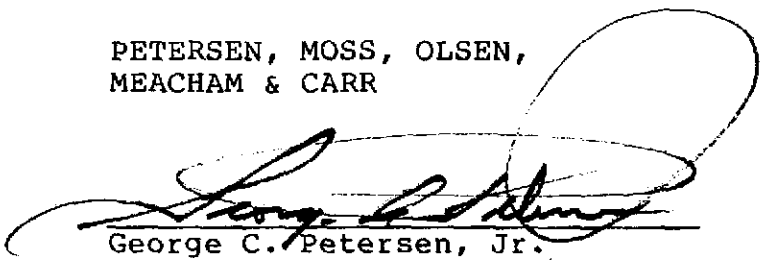
Ray W. Rigby, Esq.
Rigby, Thatcher, Andrus, Barton & Walters
25 North 2nd East
Rexburg, Idaho 83440

Virgil Moore
Idaho Department of Fish & Game
1515 Lincoln Road
Idaho Falls, Idaho 83401

MICROFILMED

William B. Dillon, III
Attorney General's Office
Statehouse Mail
Boise, Idaho 83720

PETERSEN, MOSS, OLSEN,
MEACHAM & CARR



George C. Petersen, Jr.

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MICROFILMED

December 28, 1984

Ted S. Sorensen
Birch Power Company
550 Linden Drive
Idaho Falls, ID 83401

Dear Mr. Sorensen:

Re: Permit Nos. 32-7128 and 32-7136 BIRCH POWER COMPANY

Enclosed is a copy of two exceptions submitted on the above-referenced applications for permit.

If you wish to respond to either or both exceptions, please do so within 15 days of the date of this letter.

Sincerely,

BOBBY D. FLEENOR
Chief, Regional Office Bureau

BDF:rf

Enclosures

RECEIVED

December 28, 1984

Steve Elle
Idaho Department of Fish and Game
1515 Lincoln Road
Idaho Falls, ID 83401

Dear Mr. Elle:

Re: Permit Nos. 32-7128 and 32-7136 BIRCH POWER COMPANY

Enclosed is a copy of two exceptions submitted on the above-referenced applications for permits.

If you wish to respond to either or both exceptions, please do so within 15 days of the date of this letter.

Sincerely,

BOBBY D. FLEENOR
Chief, Regional Office Bureau

BDF:rf

Enclosures

MICROFILMED

December 28, 1984

William T. Simmons
Dubois, ID 83423

Dear Mr. Simmons:

Re: Permit Nos. 32-7128 and 32-7136 BIRCH POWER COMPANY

Enclosed is a copy of two exceptions submitted on the above-referenced applications for permit.

If you wish to respond to either or both exceptions, please do so within 15 days of the date of this letter.

Sincerely,

BOBBY D. FLEENOR
Chief, Regional Office Bureau

BDF:rf

Enclosures

MICROFILMED

December 28, 1984

D & D Enterprises, Inc.
c/o George C. Petersen, Jr.
485 "E" St.
Idaho Falls, ID 83402

Gentlemen:

Re: Permit Nos. 32-7128 and 32-7136 BIRCH POWER COMPANY

Enclosed is a copy of two exceptions submitted on the above-referenced applications for permit.

If you wish to respond to either or both exceptions, please do so within 15 days of the date of this letter.

Sincerely,

BOBBY D. FLEENOR
Chief, Regional Office Bureau

BDF:rf

Enclosures

MICROFILMED

December 28, 1984

Ray W. Rigby, Esq.
RIGBY, THATCHER, ANDRUS, BARTON & WALTERS
25 North 2nd East
Rexburg, ID 83440

Dear Mr. Rigby:

Re: Permit Nos. 32-7128 and 32-7136 BIRCH POWER COMPANY

Enclosed is a copy of two exceptions submitted on the above-referenced applications for permit.

If you wish to respond to either or both exceptions, please do so within 15 days of the date of this letter.

Sincerely,

BOBBY D. FLEENOR
Chief, Regional Office Bureau

BDF:rf

Enclosures

MICROFILMED

December 28, 1984

William B. Dillon, III
Idaho Dept. of Fish and Game
P. O. Box 25
Boise, ID 83707

Dear Mr. Dillon:

Re: Permit Nos. 32-7128 and 32-7136 BIRCH POWER COMPANY

Enclosed is a copy of two exceptions submitted on the above-referenced applications for permit.

If you wish to respond to either or both exceptions, please do so within 15 days of the date of this letter.

Sincerely,

BOBBY D. FLEENOR
Chief, Regional Office Bureau

BDF:rf

Enclosures

MICROFILMED

December 28, 1984

Ben Wilding, Watermaster
Water District No. 32-D
Dubois, ID 83423

Dear Mr. Wilding:

Re: Permit Nos. 32-7128 and 32-7136 BIRCH POWER COMPANY

Enclosed is a copy of the exception submitted on the above-referenced applications for permit.

If you wish to respond to the exception, please do so within 15 days of the date of this letter.

Sincerely,

BOBBY D. FLEENOR
Chief, Regional Office Bureau

BDF:rf

Enclosures

MICROFILMED

December 28, 1984

James A. Esget and Robert McCarty
Bureau of Land Management
920 Lincoln Road
Idaho Falls, ID 83401

Gentlemen:

Re: Permit Nos. 32-7128 and 32-7136 BIRCH POWER COMPANY

Enclosed is a copy of the exception submitted on the above-referenced applications for permit.

If you wish to respond to the exception, please do so within 15 days of the date of this letter.

Sincerely,

BOBBY D. FLEENOR
Chief, Regional Office Bureau

BDF:rf

Enclosures

MICROFILMED

JIM JONES
Attorney General
State of Idaho
Statehouse, Room 210
Boise, Idaho 83720
Telephone: (208) 334-2400

WILLIAM B. DILLON, III
Deputy Attorney General
Idaho Dept. of Fish and Game
600 South Walnut
P. O. Box 25
Boise, ID 83707
Telephone: (208)334-3715

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DEC 12 1984

Department of Water Resources

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

IN THE MATTER OF APPLICATIONS FOR)
PERMIT NOS. 32-7128 AND 32-7136) EXCEPTIONS TO PROPOSED
IN THE NAME OF BIRCH POWER COMPANY) MEMORANDUM DECISION AND
ORDER

The Idaho Department of Fish and Game submits the following
exceptions to the proposed memorandum decision and order:

I.

EXCEPTION TO PARAGRAPH 4, ORDER

The Department of Fish and Game excepts to that paragraph and
believes that it should read as follows:

Eleven percent of the flow of Birch Creek at the
diversion to the feeder 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.

Fish and Game objects to "the amount of water saved by the new ditch"
being included as one of the alternative amounts of water being allowed

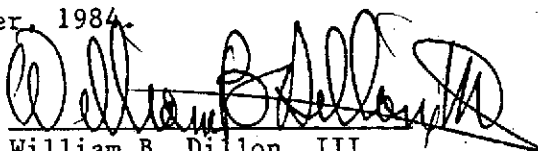
1 to flow past the feeder canal diversion. Fish and Game believes that
2 the local public interest, the Birch Creek riparian zone, and the stock
3 watering uses would be better served by insuring that some water
4 definitely be allowed to flow past the diversion. By allowing "the
5 amount of water saved by the new ditch" to be one of the alternative
6 flows, the risk of the new ditch not being able to conserve water is
7 placed on the public and the stock owners watering their stock below
8 the proposed diversion. The risk should be upon the applicant, since
9 the water savings is hypothetical and unproved.
10

11
12 II.

13 EXCEPTION TO PARAGRAPH 11, ORDER

14 The Department of Fish and Game excepts to that paragraph if
15 it means that, at any time, the Director may revise the license that
16 may be issued to the applicant. If paragraph 11 is meant to state that
17 the Director may revise the license only at the date of expiration of
18 the FERC license granted or at the end of 30 years if no FERC license
19 is issued, then Fish and Game has no objection but requests that the
20 paragraph be redrafted to more clearly indicate that the review shall
21 occur conditioned upon the events mentioned in the first sentence.

22 DATED This 12th day of December, 1984.

23 
24 William B. Dillon, III
25 Deputy Attorney General
26 Attorney for the Department
27 of Fish and Game

JIM JONES
Attorney General
State of Idaho
Statehouse, Room 210
Boise, Idaho 83720
Telephone: (208) 334-2400

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 12th day of December, 1984, true and correct copies of the foregoing EXCEPTIONS TO PROPOSED MEMORANDUM DECISION AND ORDER, were mailed, postage prepaid to:

Ted S. Sorenson
Birch Power Company
550 Linden Drive
Idaho Falls, ID 83401

Steve Elle
Idaho Department of Fish and Game
1515 Lincoln Road
Idaho Falls, ID 83401

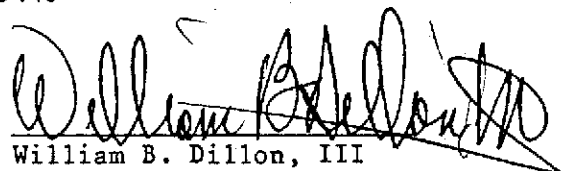
James A. Esget and Robert McCurdy
Bureau of Land Management
920 Lincoln Road
Idaho Falls, ID 83401

William T. Simmons
Dubois, ID 83423

Ben Wilding, Watermaster
Water District No. 32-D
Dubois, ID 83423

D & D Enterprises, Inc.
c/o George C. Petersen, Jr.
485 "E" St.
Idaho Falls, ID 83402

Ray W. Rigby, Esq.
RIGBY, THATCHER, ANDRUS, BARTON
& WALTERS
25 North 2nd East
Rexburg, ID 83440


William B. Dillon, III
Deputy Attorney General

R9AT039TV

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AFFIDAVIT

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DEC 14 1984

Department of Water Resources
Eastern District OfficeState of IDAHOCounty of BUTTE

I Mary Woodie LeVan moved to Spencer Idaho in 1919 and lived there until 1931 at which time I moved to Howe Idaho and have lived here to the present time. My Husband Fred Woodie worked for Wood Livestock Company for 30 years. He was born in 1879 and moved to Spencer as a young man.

Some of the earliest ranchers in the Birch Creek Valley were D.B. Hawley and ER. Hawley. They settled in the Little Lost Valley in 1875 and filed the first water right in the Little Lost Valley in 1879. They grazed large numbers of horses in Birch Creek Valley and the entire surrounding area to the Big Southern Butte.

Another original ranching operation were the Millers, David, Thomas, and his son Gene Miller. They ran large numbers of horses and cattle throughout Birch Creek Valley and established the priority water right in 1882 later acquired by Wood Livestock Co. I learned these things through association with the families of these people and in living in the area since 1919. These statements are true and factual to which I do solemnly swear and attest.

Witness:

George Woodie

Signature:

Mary Woodie LeVan

Witness:

Brent Jensen

Date:

DEC 11, 1984

On the 11 day of DECEMBER, 1984, personally came before me a notary public on and for said County and State, the within-named

MARY WOODIE LEVAN, GEORGE WOODIE, BRENT JENSEN

to me personally known to be the identical persons described in and who executed the within and foregoing instrument and acknowledge to me that THEY executed the same as THEIR free and voluntary act and deed, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this day and year in this certificate first above written.

Morte Portman
Notary Public in and for the

MICROFILMED

State of IDAHO

Residing at

940 Lincoln RdIDAHO FALLS, IDAHOMy commission expires: Jan 17, 1988

(Seal)



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Idaho Falls District
940 Lincoln Road
Idaho Falls, Idaho 83401

IN REPLY
REFER TO:

7250.4

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DEC 14 1984

Department of Water Resources
Eastern District Office

Mr. Bobby D. Fleenor
Department of Water Resources
Statehouse
Boise, ID 83720

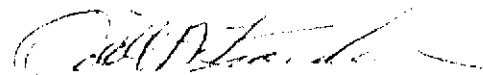
Dear Mr. Fleenor:

The Idaho Falls District Office of the Bureau of Land Management has reviewed and discussed the information contained in the "Order Issuing Proposed Decision", in the matter of applications for permit Nos. 32-7128 and 32-7136 in the name of Birch Power Company.

We have found the record of events, review of evidence, findings of fact and conclusions of law to be true and accurate. We would propose only two wording changes. Under Findings of Fact, section 15) - "no woody plants along the Reno ditch" should be changed to read, "few woody plants along the Reno Ditch". Section 16) "maintain the riparian zone along the 3000 feet of Birch Creek" should be changed to read, "maintain a riparian zone along the 3000 feet of Birch Creek".

We have specific exceptions to Sections 3) and 4) of the proposed ORDER and are filing a brief explaining these exceptions as enclosure #1 to this letter. We would be happy to meet with the Director of your Department to further explain these exceptions in detail. We appreciate the opportunity to respond to your proposed decision.

Sincerely,


O'dell A. Frandsen
District manager

Enclosure

MICROFILMED

12/14/84

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DEC 14 1984

Department of Water Resources
Eastern District Office

BRIEF - BIRCH CREEK

In the matter of applications for permit Nos. 32-7128 and 32-7136 in the name of Birch Power Co.

Order - Section 3) - Use of water under these permits is subject to control by the watermaster of State Water District No. 32-D, Birch Creek.

We have no exceptions to this section of the order as a matter of water law. As a matter of practicality under the proposed Birch Creek Hydropower Project however, we have some exception. A major water user below the proposed feeder ditch is also acting as District Watermaster. We have had problems in the past obtaining water for maintenance of riparian vegetation and stock water below the present Reno Diversion. This has been true even when flows were more than sufficient to fill all existing beneficial use rights on Reno Ditch. As a matter of practicality, we see some conflicts of interest and subsequent potential for future disputes arising from the Section 3) order.

Order - Section 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 least, shall be allowed to flow past the feeder canal diversion in the natural channel of Birch Creek.

Under the Conclusions of Law Section of the proposed decision order, subsections 5) and 6), the following conclusions of law were presented:

- 5) Stockwatering use from Birch Creek predates diversion and use of water under the two Birch Creek Power Company applications.
- 6) Water rights established for instream livestock on 3,000 feet of Birch Creek above the Reno Ditch must be satisfied.

We believe these conclusions are true and accurate under existing water law. However, we do not believe that Order - Section 4) meets these two conclusions of law.

A) If stockwatering use from Birch Creek predates the Birch Power Company applications (see claim #32-4062 Bureau of Land Management) and in fact may predate Reno Ditch irrigation uses (see exhibit #2), then the priority date for this stock use would necessarily predate at least the Birch Power Company priority date. By Idaho Code 42-106, the first in time should be the first in right, and once the Reno Ditch rights were satisfied, the next right to be fully satisfied should be the stockwatering beneficial use by BLM. This fact is independent of any action by Birch Power Company to seal or not seal their feeder ditch.

UNRECORDED

We believe that reference to the amount of water saved by the new ditch in Order - Section 4 is not in conformance with existing water law.

B) Reference to 11 percent of the flow of Birch Creek at the diversion to the feeder ditch or 5 cubic feet per second whichever is least has the net impact of damaging our existing beneficial use during irrigation season.

Average flow for the months June - September (irrigation season) at USGS gaging station 13117030 - Birch Creek at Eight-Mile Canyon Road, near Reno, ID just upstream from the proposed diversion, are 45.2 cfs for the period of record ($45.2 \text{ cfs} \times 11\% = 4.97 \text{ cfs}$). Since cattle use takes place during irrigation season 4/20 - 12/23 each year, if the BLM were allowed 11 percent of all flows, with no mention of 5 cubic feet per second whichever is least, then the BLM would average 5 cfs flow. However, with the 5 cfs maximum, at flows above the Reno Ditch right ($\approx 30 \text{ cfs}$) and below 45.2 cfs, there is an impact to BLM stock uses. The chart, exhibit #1, illustrates the net impact of the order-section 4 stipulation to the existing stock use.

As shown on the graph attached, during flows of 33 cfs - 45.2 cfs, the BLM beneficial use would be negatively impacted by the criterion of Order - Section 4. We believe this is inconsistent with existing water law.

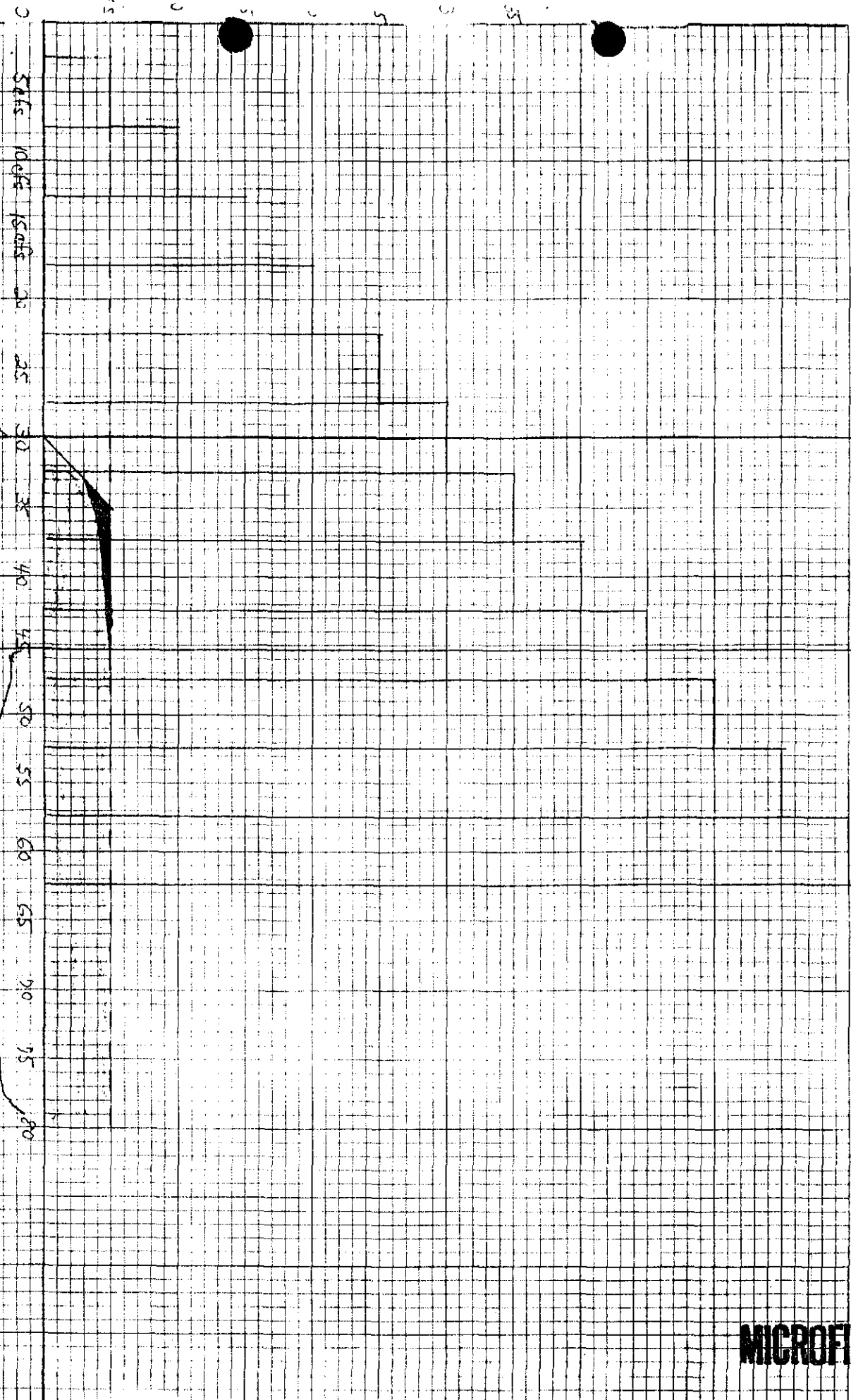
C) The Order - Section 4 as written, would require extensive monitoring by our agency to determine the water saved in the ditch, 11 percent of the flow, or 5 cfs. We do not see this as practical for our agency. The monitoring difficulty is even greater when combined with existing conflicts of interest regarding control of flows as mentioned earlier. For practical monitoring purposes, the Bureau would prefer a straight allocation of flow rather than presented as a percent of existing flows (recognizing that the allocation would be junior in right to Reno Ditch irrigation rights). A constant flow allocation would allow a diversion structure to be engineered for flows above the Reno Ditch right, which would require minimal flow monitoring.

UNCLASSIFIED

50% of time

Mean Flow

50% of time



At water taken by pond
Impacts to
ACM benefits
Beneficial use right
full flow

Impacts to
ACM benefits
USGS

Beneficial use right
full flow

EXCEPTION AGAINST ADOPTING THE DECISION PROPOSED

IN THE MATTER OF APPLICATIONS FOR PERMITS)
NOS. 32-7128 AND 32-7136 IN THE NAME OF)
BIRCH POWER COMPANY)

RECEIVED

DEC 12 1984

Department of Water Resources
Eastern District Office

The Birch Creek Water Users, having reviewed the Memorandum Decision proposed in the matter of application for permit 32-7128 and 32-7136 by hearing officer Bobby D. Fleenor and find that his conclusions of law to be without justification and not consistent with State Law and not consistent with facts presented at the hearing. It is clear from the record that the Birch Creek Water Users have made consistent and substantial efforts to get the entire flow of Birch Creek to the lands decreed water rights in the case of Agnes B. Reno, et al -vs- J. R. Richards, et al dated September 6, 1922. Every reasonable effort to prevent seepage losses in Birch Creek has been made. For the hearing officer to find that, because the water users have not been able to totally prevent seepage, the water saved by a new canal is unavailable for their use is a novel interpretation of the law to say the least. One wonders if the department would make a similar finding if a water user decided to pipe water from a decreed source in order to get the amount decreed.

It is also unique reasoning for the hearing officer to take upon himself the establishment of a minimum streamflow on the lower end of Birch Creek since the request to the Water Resources Board for an instream flow on Birch Creek has been withdrawn. Because we find no basis for the department to, at will establish an instream flow, we must assume that the five (5) cubic feet per second is available for appropriation in which case our rights must be filled first and the five (5) cfs requirement can not stand.

For these and other reasons, we object to conclusion

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DEC 26 1984

Department of Water Resources

No. 1 and 8, and request that the director remove these conclusions from his decision, and eliminate condition No. 4 in the Order approving applications for permits Nos. 32-7128 and 32-7136.

Dated this 12th day of December, 1984.

Ben R. Wilding
Watermaster for
District 32-D

Sworn to before me this 12th day of December, 1984 and appeared Ben R. Wilding, Watermaster for Water District 32-D as above subscribed.

[Signature]
Notary

Residing at: Idaho Falls

My Commission Expires: 6/15/85.

MICROFILMED

POWER CALCULATIONS FOR APPLICATION NO. 32-7128

P = ⁶⁶⁶⁶Kilowatts ⁹⁰⁰.74 X hp

Q = cfs 45

H = feet 278

e = efficiency

proposed

- ✓ 1.) Affidavit of Residency
 ✓ 2.) Ownership of Facilities
 ✓ 3.) *Financial Ability
 ✓ 4.) Feasibility of Project
 a. Plans, drawings
 b. Economic analysis

Pre. Permit →

- 5.) *Compliance w/FERC
 *only for projects of more than 25 cfs
 or more than 500 horsepower.

$$e = \frac{P(11.8)}{QH} = \frac{6666(11.8)}{45 \times 278} = \frac{7858.8}{12,510} = 0.628 \checkmark \text{ok}$$

Based on the above calculations the proposed project must have an 63 % efficiency.

OVERLAP REVIEW

P/D

P/U

BYPASSED AREA

MICROFILMED

CONVERSATION MEMORANDUM

DATE July 16, '84522-8069
529-2469FILE 32-7128/32-7136NAME OF PARTY Ted Sorenson (Applicant); ✓ Steve Elle (522-7783) IDFG;EMPLOYEE Dave Tuthill

✓ Robert McCarty (529-1020) BLM;

✓ Ben Wilding (651-2517) Wtrmaster 32-D

RE: IWRB Policy on Birch Cr.

✓ Jim De Mordaunt (356-9427) D&D

Enterprises.

Pursuant to a request from Norm Young I contacted the principle parties interested in the Birch Power hydropower apps on Birch Creek, regarding the IWRB meeting on 25 July 84, where they will discuss their policy on Birch Creek (see other info in this file and the Birch Cr minimum stream flow file No. 32-7128)

I was able to contact the following: Jim Esget for Bob McCarty of the BLM; Mrs Ben Wilding; Mr. Ben Wilding; Jim De Mordaunt; Virgil Moore; Steve Elle, IDFG; to follow-up and explain the notification of the Water Board meeting that Anita Warhtjes sent to each of the parties listed above last week. ‡ Ted Sorenson

MICROFILMED

POWER CALCULATIONS FOR APPLICATION NO. 32-7136

P = Kilowatts 518 ⁷⁰⁰
 .74 X hp

proposed

Q = cfs 30

H = feet 278'

e = efficiency

- see 32-7136
 see 32-7136
 NONE
 MUST HAVE
 BEFORE ACTION
- 1.) Affidavit of Residency
 - 2.) Ownership of Facilities
 - 3.) *Financial Ability
 - 4.) Feasibility of Project
 - a. Plans, drawings
 - b. Economic analysis
 - 5.) *Compliance w/FERC

*only for projects of more than 25 cfs
 or more than 500 horsepower.

$$e = \frac{P(11.8)}{QH} = \frac{518(11.8)}{30 \times 278} = \frac{6112.4}{8340} = 0.732 \checkmark \text{OK}$$

Based on the above calculations the proposed project must have an 43 % efficiency.

OVERLAP REVIEW

P/D

P/U

BYPASSED AREA

MICROFILMED

IDENT. NO. 32 7136

WATER RIGHT
DATA ENTRY LOG

[illegible]

State of Idaho
Department of Water Resources

APPLICATION FOR PERMIT ANALYSIS SHEET

INITIAL REVIEW BY: Ernest Carlson

APPLICATION NUMBER: 32 7136

CHECK:

- ☒ Source.
☒ Point of diversion.
☒ County.
☒ Quantity of water and period of use.
☒ Description of diverting works.
☒ Time required for beneficial use of water.
☒ Place of use or acres irrigated.
☒ Map.
☒ Signature.
☒ Fee.
☐ Yes ☒ No Field check required.
☐ Yes ☒ No Critical groundwater area.
☐ Yes ☒ No Request dam safety information. Sent by: _____ Date: _____
☒ Yes ☐ No* In form to receipt.

Field check by: _____
Date: _____
Comments: _____

*REQUEST THE FOLLOWING ADDITIONAL INFORMATION FROM THE APPLICANT:

SEND COPIES TO:

- ☐ Idaho State Health Department.
☒ Idaho Fish and Game Department.
☐ Idaho Department of Lands.
☒ U.S. Bureau of Land Management.
☐ U.S. Forest Service.
☒ Other W.D. 32-D

Copies sent by:

Date:

CW 1-12-84
" "
" "

PROCESSING:

- ☐ Yes ☐ No Platted by: _____ Map No. _____
☐ Yes ☐ No Other rights on same place of use. _____
☒ Yes ☐ No* In form for advertising. February 6, 1984
Final date for protests: February 6, 1984
☒ Yes ☐ No Protests received. If yes, record information on 4th page of application.

FINAL REGIONAL PROCESSING REVIEW:

- ☒ Affidavit of publication received. Date: 2/9/84
☒ Application published correctly. If not, record action taken: _____
☒ Fee amount, receipt date & number, recorded on application.
☒ Publication dates and paper, recorded on application.
☒ Protests, dates, withdrawal, etc., recorded on application.
☒ Recommendation & initial, recorded on application.
☒ Yes ☐ No Measuring device required.
☐ Yes ☒ No Access port required.
☒ Yes ☐ No Will water be delivered by watermaster? If yes, what district? 32-D
1-3-84 Date of priority recommended.
Special conditions of approval or cover letter. _____

PMD+0

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See Proposed Memorandum Decision and Order.

By: Ernest Carlson

Date: May 15, 1984

STATE OFFICE REVIEW:

L17a

16

08A 25 01 17G
200 05 32-D Birch Creek

- ☐ See attached sheet for more information.

By: CW

Date: 5-18-84

MAY 18 1984

Department of Water Resources

→ return receipt

POINT OF DIVERSION AND STREAM INDEX INFORMATION

TRACT	SEC	TWP	RGE	gov't lot	rediv. (R)	REACH
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IDAHO STREAM CODE INDEX

TRACT	SEC	TWP	RGE	gov't lot	rediv. (R)	REACH
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IDAHO STREAM CODE INDEX

TRACT	SEC	TWP	RGE	gov't lot	rediv. (R)	REACH
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IDAHO STREAM CODE INDEX

TRACT	SEC	TWP	RGE	gov't lot	rediv. (R)	REACH
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IDAHO STREAM CODE INDEX

TRACT	SEC	TWP	RGE	gov't lot	rediv. (R)	REACH
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IDAHO STREAM CODE INDEX



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

JIM JONES
ATTORNEY GENERAL

DEPARTMENT OF WATER RESOURCES
STATEHOUSE, BOISE, IDAHO 83720
TELEPHONE: (208) 334-4448

MEMORANDUM

TO: Donald Kramer, Chairman, Idaho Water Resource Board,
and Members of the Board

FROM: Phillip J. Rassier, Deputy Attorney General,
Department of Water Resources

RE: Policy Statement of Idaho Water Resource Board on
Birch Creek

DATE: September 10, 1984

This memorandum of legal guidance is provided at the request of Mr. Wayne Haas, Administrator of the Department of Water Resources.

QUESTION:

Does the "Policy Statement of Idaho Water Resource Board on Birch Creek" approved April 7, 1982 preclude the approval by the Director of the Department of Water Resources of any permit for the diversion of water from a specified reach of Birch Creek?

CONCLUSION:

The Board's policy statement reflects the Board's opposition to the approval of any additional permits for the diversion of water from a specified reach of Birch Creek but does not legally preclude the approval of such permits. A prohibition against further diversions could only be accomplished pursuant to the Minimum Stream Flow Act or the Board's constitutional authority to formulate a state water plan.

ANALYSIS:

The resolution portion of the Board's April 7, 1982 policy statement on Birch Creek provides as follows:

Based upon the foregoing facts, the Board resolves as follows:

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1. The Idaho Water Resource Board recognizes and declares that protection of the existing flows as identified in the application for permit received November 16, 1979 and as supported by testimony at the formal public hearing on July 8, 1980 for Birch Creek from a point below the Reno Ditch diversion upstream eight miles to the north boundary of the John Day Rest Area is in the local public interest and is compatible with and supported by the State Water Plan. The Board requests that the Director enter this statement or a summary as expressing the policy of the Idaho Water Resource Board as in opposition to any diversion for any out of stream use at any subsequent time. Nothing in this statement shall be construed as in any manner affecting any prior or present existing water right or use.

2. The Idaho Water Resource Board requests that the Director terminate and withdraw the application for a minimum stream flow on Birch Creek without prejudice.

The Board's policy statement may be summarized as (1) recognizing and declaring that the protection of existing flows on a specified reach of Birch Creek is in the local public interest and is compatible with and supported by the State Water Plan; and (2) requesting the Director to enter the Board's statement in opposition to any diversion for any out of stream use from the specified reach of Birch Creek at any subsequent time.

The wording of the policy statement does not prohibit the filing or consideration of subsequent applications for permit to appropriate water from the specified reach of Birch Creek. Neither does the Board's statement dictate to the Director the final outcome of his consideration of the local public interest criterion required to be determined by the Director before issuing a permit under Idaho Code § 42-203. Rather, the Board has requested that the Director enter the Board's statement in opposition to any future diversion of water out of the specified reach of Birch Creek.

Assuming that the Director has complied with the Board's request on an application to appropriate water from Birch Creek, the Board's policy statement will constitute a part of the agency record in that proceeding to be weighed along with other evidence on the issue of local public interest. If the Director upon

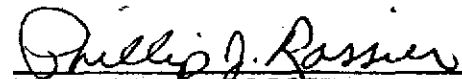
MICROFILMED

Donald Kramer
September 10, 1984
Page 3

giving due consideration to the recreational, fish and wildlife and other benefits associated with Birch Creek is convinced that the local public interest criterion and the other criteria of I.C. § 42-203 are satisfied a permit should be issued.

Procedures do exist through which the Board could act to assure that no further diversions below a certain flow be authorized from a specified reach of Birch Creek. The most obvious method available would be for the Board to obtain a minimum stream flow water right pursuant to chapter 15, title 42, Idaho Code. The Board did file and subsequently withdrew such a filing.

The second method available to the Board would be to set or propose an average daily flow for the specified reach of Birch Creek pursuant to the Board's constitutional authority to formulate a state water plan. Since, however, the Board has not acted in either of these two methods there cannot presently be considered to be a prohibition against any further diversions from Birch Creek which are determined by the Director to be in the local public interest. A Board resolution cannot effectively bind the Director in carrying out his statutory responsibility to determine the local public interest under I.C. § 42-203. Nor can a Board resolution serve to prohibit the appropriation of the unappropriated waters of the state.


PHILLIP J. RASSIER

MICROFILMED

BIRCH CREEK WATER RIGHT HEARING

Time: September 2, 1983 - 9:00 AM

- 1) Will the proposed use reduce the quantity of water under existing water rights?

Under present conditions, from the point of diversion in Birch Creek of Reno Ditch to the Reno Ranch splitter box approximately 30% of the water is lost due to bedloss.

Presented as Exhibit 1 is a tabulation of the Birch Creek/ Reno Ditch Bedloss, compiled by comparing the flow at the 8 mile canyon USGS gauging station and at a gauging station 1 mile south of the Reno Ranch established by the University of Idaho. The readings were taken by Mr. Don Shenton.

Exhibit 1 illustrates flows by day, June thru September of 1980. Please note that the average bedloss is 16 cfs.

Exhibit 1A is a map which illustrates the location of Birch Creek, the existing Reno Ditch and the proposed power feeder ditch. Exhibit 1A also prorates lineally, the bedloss from 8 mile gauging station to the University of Idaho gauging station at various points along Birch Creek and Reno Ditch, specifically the prorated bedloss from the 8 mile gauging station to the proposed diversion and also from the 8 mile gauging station to the existing diversion and from the 8 mile gauging station to the proposed irrigation splitter box, the bedloss from the 8 mile gauging station to the Reno Ranch splitter box.

Please note that the bedloss from the proposed diversion to the proposed irrigation splitter box is 11.7 cfs less 2.7 cfs at the proposed diversion which equals 9 cfs.

This data was further verified August 23, 1983 by readings taken by a Mr. Don Shenton, Dubois, Idaho. Please note that the bedloss from the proposed diversion to the Micro Wave site at Reno Ditch, which is the location of the proposed splitter box, is 43.77 cfs less 33.13cfs which equals 10.4 cfs. The data taken in 1983 correlates well with the data taken in 1980.

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Presented as Exhibit 3 are the field notes from Mr. Donald W. Shenton.

The existing Reno Ditch bedloss is due to the extremely high velocity of the ditch (i.e. in the range of 3 to 6 feet per second). The deposition of fines is not possible due to scouring. The proposed ditch will have a shallower grade with velocities in the range of 1.5 to 2.5 feet per second. In this velocity range the bed may be successfully sealed with either bentonite or a soil polymer to the extent that the 9 to 10 cfs bedloss between the proposed point of diversion and the proposed splitter box may be reduced by 1/2 to 2/3. In other words, approximately 5 cfs or 250 inches of water would be available for use - water that is now being lost due to bed seepage.

- 2) Is the proposed water supply insufficient for the purpose intended?

Presented as Exhibit 4 is a compilation of water flow data, 1970 thru 1980 at 8 Mile Gauging Station on Birch Creek. This station was maintained and the data collected according to USGS gauging standards. Please note that the average flows show sufficient flow for a power generation flow of 45 second feet.

- 3) Is the application made in good faith or for delay or speculative purposes?

Presented as Exhibit 5 is a copy of the preliminary permit from the U.S. Federal Energy Regulatory Commission which gives Birch Power Company the right to conduct the necessary feasibility studies and also to secure the necessary permits to file for either a FERC Exemption or FERC Minor License. In order to file to do further work and obtain the final permit from FERC, it is necessary to resolve the rights to the water. For this purpose we have requested that this hearing be held. The filing has not been made for speculative purposes or for delay. The applicant, if able to successfully secure the permits, intends to build the project.

- 4) Has the applicant sufficient financial resources with which to complete the project?

The power produced by this project would be sold to Utah Power and Light under regulations set forth as the Public Utilities Regulatory Policy Act of 1978 (PURPA). The applicant can secure a 35 year firm contract for the sale of power. With this contract are a number of both public and private groups who have expressed interest in providing the financing for this project. Further information will be submitted at the request of the Department of Water Resources.

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5) Will the proposed use conflict with the public interests?

By examination of the layout of the map, it becomes apparent that approximately 3,000 feet of Birch Creek fishery habitat would be lost. However, it should be noted that the proposed feeder ditch is approximately 5-1/2 miles in length. The existing Reno Ditch does not support any fishery due to prohibitively high velocities. The proposed feeder ditch velocity however, will be in the ideal range for fish production.

Presented as Exhibit 6 is a study completed by Dr. Jack Griffith of Idaho State University which shows that the feeder ditch may be constructed in such a manner that the fisheries lost in the 3,000 feet would be offset by a fisheries development in the proposed feeder ditch. This has been discussed previously with the Idaho Fish & Game Department. Dr. Griffith indicates that the fishery habitat may be increased in the feeder ditch by approximately five to six times that of the fishery habitat presently involved in the 3,000 lineal feet that would be lost.

Conclusion: It is our view that the sportsmen in the area would have a gain due to implementation of the improved fisheries in the feeder ditch. It is also our view that the local irrigators' water would not be depleted and in fact, could be increased. It is also our view that the development of this project would add to the renewable energy resources of the State of Idaho which would lower our dependence on the importation of foreign oil. This project would add to the economic development of this state and also the long term stability of the state due to the development of this resource. For this reason, your favorable consideration with respect to this water right application is sincerely appreciated.

EXHIBITS

1. Birch Creek/Reno Ditch Bedloss Analysis
 - 1A. Map Illustrating Birch Power Company General Location Map
2. 1983 Birch Creek Readings
3. Field Notes from Mr. Donald W. Shenton
 - 3A. Reno Ditch Flow Comparison
4. Water Flow Data - 1970 thru 1980
5. Preliminary FERC Permit
6. Study by Dr. Jack Griffith

MICROFILMED

EXHIBIT 1



BIRCH CREEK/RENO DITCH

BEDLOSS ANALYSIS

TED S. SORENSON, P.E.

DATE	FLOW AT* EIGHT MILE CANYON cfs	FLOW AT ** ROAD CROSSING 1 MILE SW OF RENO RANCH cfs	PRESENT LOSS cfs
June 6, 1980	49	34	15
June 12, 1980	47	27	20
June 16, 1980	48	31	17
June 20, 1980	49	33	16
June 25, 1980	48	32	16
June 28, 1980	45	27	18
July 14, 1980	45	27	18
July 18, 1980	48	33	15
July 21, 1980	46	32	14
July 24, 1980	47	32	15
August 2, 1980	42	26	16
August 14, 1980	39	24	15
August 20, 1980	39	26	13
August 25, 1980	43	25	18
August 28, 1980	43	27	16
Sept. 13, 1980	44	28	16
Sept. 22, 1980	48	33	15
AVERAGE	45.2	29.2	16.06

* USGS Gaging Station - Eight Mile Road-Birch Creek

** University of Idaho Gage Station; Data taken 1980 only - Reno Ditch
Readings taken by Don Shenton

MICROFILMED

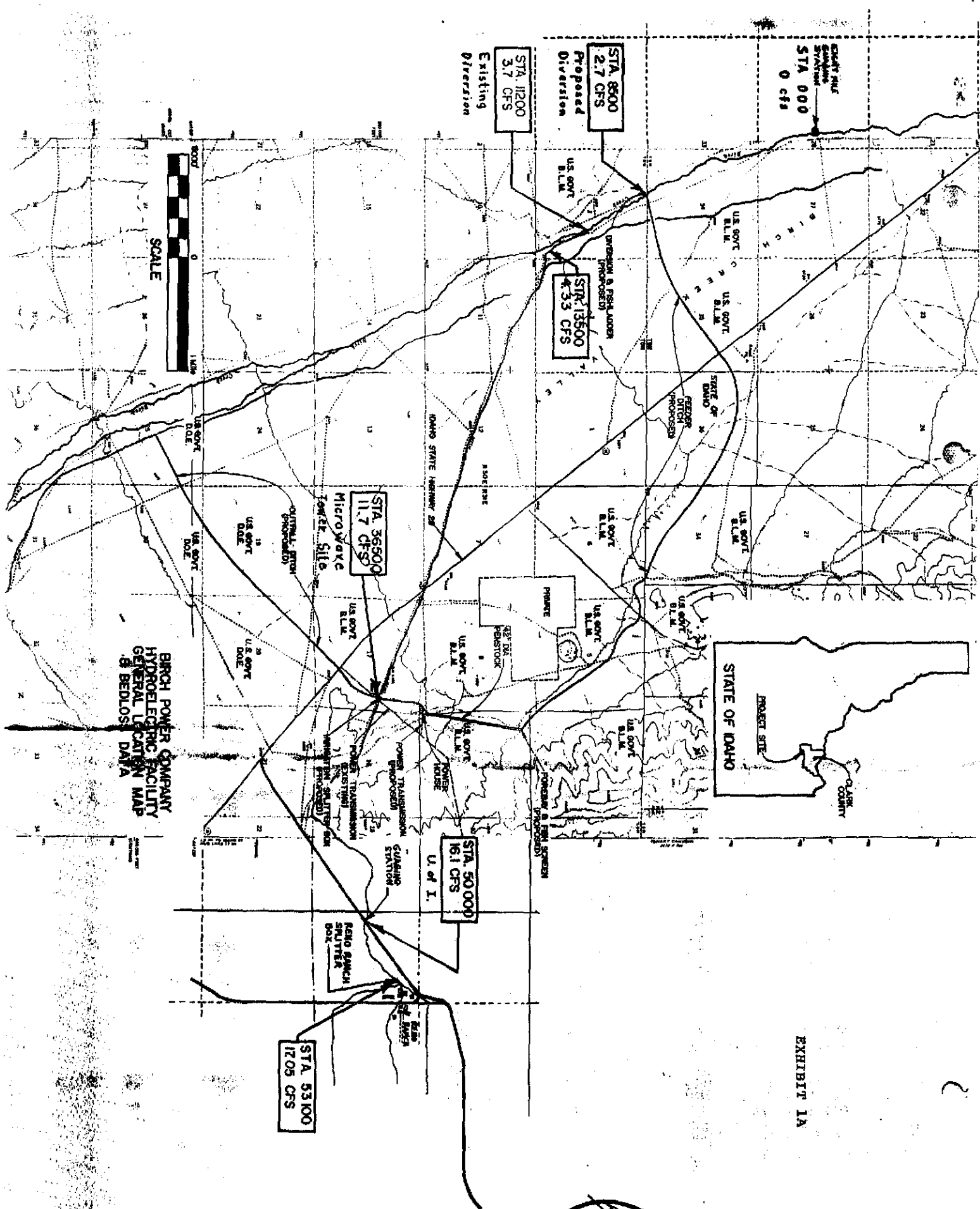


EXHIBIT 2

BIRCH CREEK READINGS *

BY: DON SHENTON

August 23, 1983

<u>Location</u>	<u>First Set</u>	<u>Second Set</u>
Proposed Diversion	44.53	43.77
Existing Diversion	42.96	42.07
Micro Wave Tower Reno Ditch		33.13
Reno Ranch Splitter Box		30.2

*Note: All flows in cfs - 1 cfs = 50 inches

MICROFILMED

Water District #31

Box 33
Dubois, Idaho 83423
(208) 374-5230

Donald W. Shenton
Watermaster

August 25, 1983

Mr. Ted Sorenson
Sorenson Engineering
550 Linden Drive
Idaho Falls, Idaho 83401

RE: Birch Creek Flow Measurements

Dear Ted;

Attached you will find the following enclosures.

1. Discharge measurement notes.
2. A map describing measurement locations, Lettered A thru D.
3. Supplementary discharge measurement notes and conditions.
4. Additional comments and observations.

I will make a follow-up measurement as we agreed as soon as possible.

Thank you.

Sincerely;

Donald W. Shenton
Donald W. Shenton

MICROFILMED

Margu Point

WATER DIST. NO. 31

Donald Shenton, Watermaster

Margu Point # B

DISCHARGE MEASUREMENT NOTES

Gauge: 150 PM DATE: 8-23 1983

Time: BEGIN 150 PM END

Birch Creek

at Point of Diversion of Reno Ditch

DIST. FROM	WIDTH	DEPTH	REVOLUTIONS	TIME IN SECONDS	VELOCITY AT POINT MEAN IN VERTICAL	ADJUSTED FOR HOR. ANGLE	AREA	DISCHARGE
6.0	1.0	.90	0	40	—		1.40	—
7.0	1.0	.90	0	40	—		1.40	—
8.0	1.0	.60	20	42	1.06		.60	6.1
9.0	1.0	.85	20	41	1.09		.85	9.3
10.0	1.0	1.00	50	44	2.50		1.00	2.50
11.0	1.0	1.05	50	40	2.74		1.05	2.88
12.0	1.0	1.00	60	44	2.99		1.00	2.99
13.0	1.0	1.15	60	44	2.90		1.15	3.40
14.0	1.0	1.20	60	44	2.90		1.20	3.59
15.0	1.0	1.25	60	40	3.00		1.25	4.11
16.0	1.0	1.15	60	42	3.00		1.15	3.60
17.0	1.0	1.08	60	40	3.00		1.08	3.55
18.0	1.0	1.15	60	42	3.00		1.15	3.60
19.0	1.0	1.20	60	44	3.00		1.20	3.59
20.0	1.0	1.20	50	43	2.95		1.20	3.06
21.0	1.0	1.00	50	40	2.90		1.00	2.74
22.0	1.0	.85	15	43	2.90		.85	6.7
23.0	.50	.55	15	50	2.90		.27	1.18
								42.07

Donald W. Shenton

TOTAL C.F.S. 42.07

MINERS INCHES

Comp. by D.S.

No. 1 of 1 Sheet.

Margu Point

WATER DIST. NO. 31

Donald Shenton, Watermaster

A

DISCHARGE MEASUREMENT NOTES

Gauge: 244 PM DATE: 8-23 1983

Time: BEGIN 244 PM END

Birch Creek at

Point of Proposed Diversion

DIST. FROM	WIDTH	DEPTH	REVOLUTIONS	TIME IN SECONDS	VELOCITY AT POINT MEAN IN VERTICAL	ADJUSTED FOR HOR. ANGLE	AREA	DISCHARGE
6.0	.50	.40	0	40	—		.20	—
7.0	1.0	.60	20	44	1.02		.60	6.1
8.0	1.0	.60	50	44	2.50		.60	1.50
9.0	1.0	.70	50	47	2.34		.70	1.64
10.0	1.0	.81	50	40	2.74		.81	2.22
11	1.0	.90	60	44	2.99		.90	2.69
12.0	1.0	1.00	60	46	3.86		1.00	2.86
13.0	1.0	1.10	50	44	2.50		1.10	2.75
14.0	1.0	1.20	60	42	3.13		1.20	3.76
15.0	1.0	1.15	60	44	2.99		1.15	3.44
16.0	1.0	1.15	60	41	3.21		1.15	3.69
17.0	1.0	1.21	60	40	3.29		1.21	3.98
18.0	1.0	1.25	60	43	3.06		1.25	3.87
19.0	1.0	1.11	80	52	3.37		1.11	3.71
20.0	1.0	.96	60	50	3.29		.96	3.16
21.0	1.0	.90	60	40	3.29		.90	2.96
22.0	1.0	.60	30	42	1.58		.60	.95
23.0	.50	.22	10	43	.53		.11	.06
								43.77

Donald W. Shenton

TOTAL C.F.S. 43.97

MINERS INCHES

Comp. by D.S.

No. 1 of 1 Sheet.

MICROFILMED

WATER DISTRICT NO. 31

Donald Shenton, Watermaster

SUPPLEMENTARY DISCHARGE MEASUREMENT NOTES

Date: 8-23-83 No. of Meas. 1
 Header Box at End of Reno Ditch

Enter on this form ample notes in regard to the following:

1. Accuracy of measurement; 2. gauge; 3. observer; 4. bench marks; 5. gauge height corrections; 6. adjustments to total discharge; 7. station equipment; 8. channel control, and point of zero flow; 9. rating, backwater; 10. diversions, regulation; 11. records; 12. cooperation.

1st measure made noon
 7 ft of opening $\times 83 \times 10'' = 17.2$ cfs.
 5 ft of opening $\times 87 \times 10.5'' = 13.0$ cfs
 total = 30.2 cfs.

2. Conditions

3. Water level

2nd measurement slightly stronger

4. Horse Power Bridge on Cutoff Road -
 V of I Staff 1:08 8:00 AM
 1:10 1:00 PM
 1:11 5:00 PM

5. Other Comments
 U.S.G.S Station at 8 mile canyon Rd.
 G.H. Between 1/12 and 1/20 (in wall)
 Dan Shenton

MICROFILMED

WATER DISTRICT NO. 31

Donald Shenton, Watermaster

SUPPLEMENTARY DISCHARGE MEASUREMENT NOTES

Date: 8-23-83 No. of Meas. 3
 Birch Creek at various locations

Enter on this form ample notes in regard to the following:

1. Accuracy of measurement; 2. gauge; 3. observer; 4. bench marks; 5. gauge height corrections; 6. adjustments to total discharge; 7. station equipment; 8. channel control, and point of zero flow; 9. rating, backwater; 10. diversions, regulation; 11. records; 12. cooperation.

MEASUREMENTS
 hatched A- fair to good -
 B- very good -
 C- fair - fast

2. Conditions other condition good -

Weir measurement good -
 Taps choppy

3. Water level

4. Horse Power Staff readings quite stable

5. Other Comments Some movement of bottom of channel on measurement hatched = C Due to velocity

Sheet No.

Donald W. Shenton



EXHIBIT 3A

RENO DITCH

FLOW COMPARISON

1980 USGS / U OF I DATA VS. 1983
(All flows in cfs, 1 cfs = 50 inches)

	<u>8/80</u>	<u>8/23/83</u>
1. Proposed Diversion (STA 85 + 00)	43.0*	43.77
2. Existing Diversion (STA 112+00)	42.0*	42.07
3. Flow - Reno Ditch near Micro Wave Tower (STA 36 + 500)	34.0*	33.13
4. Flow at Reno Ranch Splitter Box (STA 500 + 00)	28.7*	30.2
5. Bedloss Existing to Proposed Diversion	1.0	1.7
6. Bedloss - Proposed Diversion to Micro Wave Site	9.0	10.64
7. Bedloss Proposed Diversion to Reno Ranch Splitter Box	14.3	13.57

*1970 - 1980 USGS average (Eight Mile) less 1980 prorated
bedloss (U of I Gauge)

MICROFILMED

EXHIBIT 4

BIRCH CREEK AT EIGHT-MILE CANYON ROAD

USGS GAUGING STATION

Year	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept
1970-71								47.4	46.3	46.2	49.6	55.5
1971-72	64.0							59.1	50.1	51.6	51.8	52.0
1972-73								48.3	44.7	53.5	53.5	46.5
1973-74								53.1	47.1	43.7	49.3	42.5
1974-75							71.3	71.1	48.3	38.3	37.1	36.8
1975-76								41.8	41.2	36.0	45.4	50.5
1976-77									42.1	40.5	42.7	49.5
1977-78	65.7						77.2	64.8	41.1	40.7	39.7	44.0
1978-79	53.0							53.7	44.4	44.5	43.9	40.5
1979-80								49.5	47.8	45.8	40.7	45.8
Average	60.9						74.3	54.3	45.3	44.1	45.4	46.5

NOTE: All flows shown in cfs.

1 cfs = 50 inches

MICROFILMED

P-7194-000

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Notice of Application Filed with the Commission

(May 20, 1983)

Take notice that the following hydroelectric application has been filed with the Federal Energy Regulatory Commission and is available for public inspection:

- a. Type of Application: Preliminary Permit
- b. Project No: 7194-000
- c. Date Filed: April 5, 1983
- d. Applicant: Birch Power Company
- e. Name of Project: Birch Project
- f. Location: Birch Creek, Clark County, Idaho
- g. Filed Pursuant to: 16 U.S.C. §5791(a) - 825(r)
- h. Contact Person: Ted S. Sorenson, 550 Linden Dr., Idaho Falls, Idaho 83401.
- i. Comment Date: ~~May 23~~ 1983
- j. Description of Project: The proposed all new run-of-the-creek project would utilize lands of the United States administered by Interior's Bureau of Land Management and would consist of: (1) a concrete diversion structure with sill elevation 5,654 feet m.s.l. and having radial gate control and a fish ladder; (2) a 34,000-foot-long 5-foot-deep earthen feeder ditch; (3) a forebay having a surface area of 1/3-acre and a gross storage capacity of 2 acre-feet at surface elevation 5,626 feet m.s.l.; (4) a screened intake structure; (5) a 42-inch diameter 4,700-foot-long steel penstock; (6) a powerhouse containing a generating unit having a rated capacity of 1,100-kw operated under a 276-foot head and at a flow of 60 cfs; (7) a 0.2-mile-long transmission line; (8) an 18,900-foot-long earthen outfall ditch; and (9) appurtenant facilities.
- k. Purpose of Project: Project energy would be sold to Utah Power & Light Company. Applicant estimates that the average annual generation would be 3,000,000 kWh.
- l. This notice also consists of the following standard paragraphs: A4b, A4c, A4d, B, C and D2.
- m. Proposed Scope of Studies under Permit: A preliminary permit, if issued, does not authorize construction. Applicant seeks issuance of a preliminary permit for a period of 24 months, during which time it would perform studies and, if feasible, would prepare an application for an FERC license. Applicant estimates the cost of the work under the permit would be \$25,000.

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A4b. No Existing Dam -- Anyone desiring to file a competing application for preliminary permit for a proposed project where no dam exists or there are proposed to be major modifications, must submit to the Commission on or before the specified comment date for the particular application, the competing application itself, or a notice of intent to file such an application (see 18 CFR 4.30 to 4.33 (1982)).

A4c. The Commission will accept applications for license or exemption from licensing, or a notice of intent to submit such an application in response to this notice. A notice of intent to file an application for license or exemption must be submitted to the Commission on or before the specified comment date for the particular application. Any application for license or exemption from licensing must be filed in accordance with the Commission's regulations (see 18 CFR 4.30 to 4.33 or §§4.101 to 4.104 (1982), as appropriate).

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A4d.

Submission of a timely notice of intent to file an application for preliminary permit allows an interested person to file an acceptable competing application for preliminary permit no later than 60 days after the specified comment date for the particular application.

B.

Comments, Protests, or Motions to Intervene - Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of the Rules of Practice and Procedure, 18 C.F.R. §§385.210, .211, .214 (1982). In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

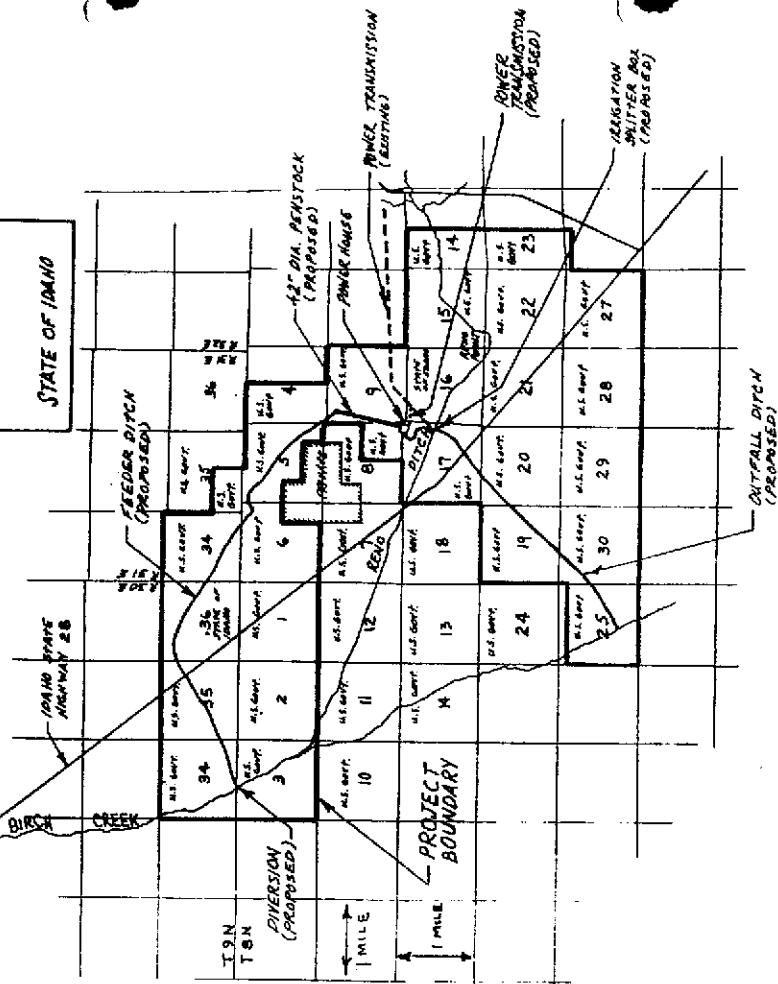
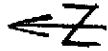
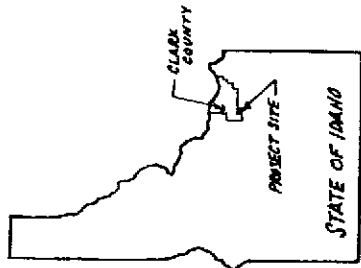
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C. Filing and Service of Responsive Documents - Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST" or "MOTION TO INTERVENE", as applicable, and the project number of the particular application to which the filing is in response. Any of the above named documents must be filed by providing the original and the number of copies required by the Commission's regulations to: Kenneth F. Plumb, Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: Fred E. Springer, Chief, Applications Branch, Division of Hydropower Licensing, Federal Energy Regulatory Commission, Room 208 RB at the above address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. Agency Comments - Federal, State, and local agencies are invited to file comments on the described application. (A copy of the application may be obtained by agencies directly from the Applicant.) If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kenneth F. Plumb
Secretary

MICROFILMED



BIRCH POWER COMPANY
HYDROELECTRIC FACILITY

P-7194

EXHIBIT 4
SHEET 2

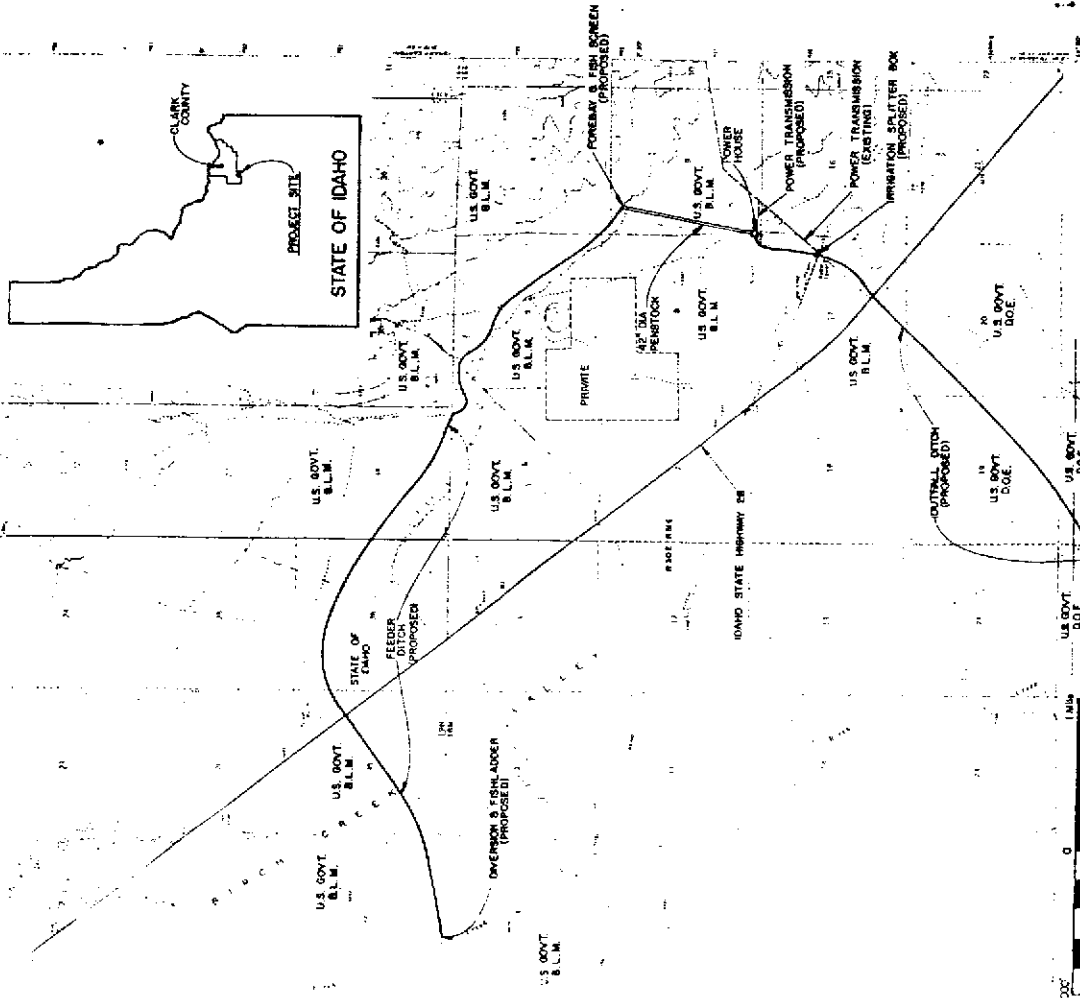


EXHIBIT 4 SHEET 1
BIRCH POWER COMPANY
HYDROELECTRIC FACILITY
GENERAL LOCATION MAP

P-7194



SCALE

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Feasibility of Developing a Trout Population in the Proposed
Birch Creek Hydroelectric Project Feeder Ditch

A report to:

Mr. Ted S. Sorenson, Consulting Engineer
550 Linden Drive
Idaho Falls, ID 83401

By:

J. S. Griffith, Ph.D.
2055 Kenneth Place
Pocatello, ID 83201

6 July 1983

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The proposed hydroelectric project would divert water from Birch Creek (Clark County, Idaho) approximately 3,000 feet upstream from the existing Reno diversion and pass it through a feeder ditch approximately 29,500 feet in length before entering a penstock and power house. The objectives of this report are to:

- a. briefly describe the existing aquatic resources in the 3,000-foot portion of Birch Creek that would be partially dewatered,
- b. examine the feasibility of developing the proposed feeder ditch as habitat suitable for sustaining a population of both wild and hatchery trout, and
- c. suggest the construction design and necessary materials to provide that habitat.

EXISTING AQUATIC RESOURCES

Birch Creek originates from springs in the upper portion of the watershed. Flows at the USGS Eightmile gauging station (elevation 5770 feet) immediately upstream from the proposed diversion have ranged from 36 to 71 cfs throughout May through September during the period 1971-1980, averaging about 45 cfs. The minimum recorded was 11 cfs in July 1967. Specific conductance of the water checked by Andrews (1972) in 1970-71 ranged from 530-650 mhos/cm, indicating a relatively high potential for biotic production. Channel gradient in the lower river is 1.6%. No systematic water temperature data are available.

Land adjoining the lower portion of Birch Creek is largely publicly owned and administered by the Bureau of Land Management. Riparian areas

and aquatic habitat in this area have been "severely abused. Channel changes, annual addition of bentonite to the stream by downstream water users, and overuse of riparian habitat by livestock have restricted aquatic improvements. These problems predominate in the lower six miles of stream on national resource lands " (BLM 1975, p.1 & 4). Objectives of the 1975 BLM Management Plan include improvement and protection of riparian areas and provision of benefits for the multiple uses of water. Specific objectives include increasing deepwater habitat by 100% with a goal of increasing the average size of rainbow trout in the lower 7 miles of stream from 8.5 to 10.5 inches.

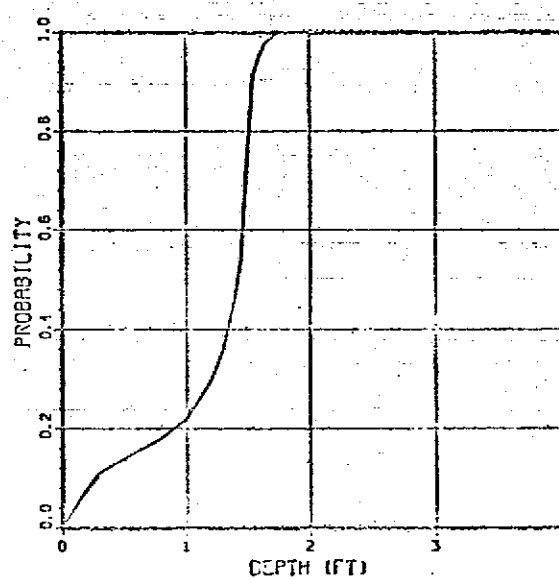
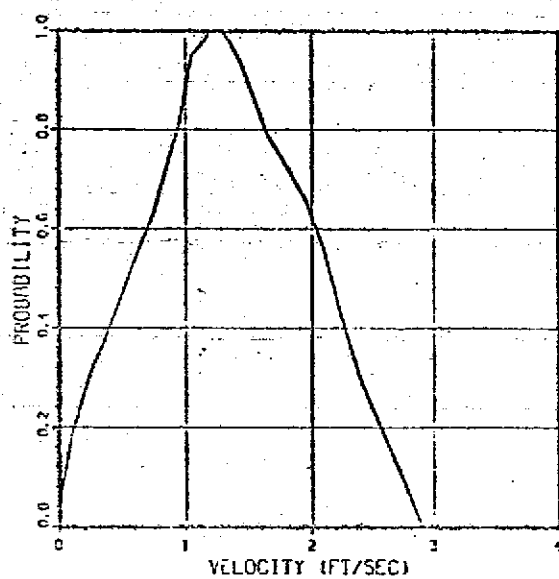
Rainbow trout (Salmo gairdneri) are essentially the only salmonid fish species present in the area, although brook trout (Salvelinus fontinalis) are reported to be present in the drainage. Fish populations were examined by Idaho Fish and Game personnel on 1 October 1982. Based on electroshocking samples taken in a 155-yard section and a 185-yard section at the point of the proposed diversion, they estimated the wild trout population to be 296 per mile and 434 per mile at the two sites, respectively. Trout size averaged approximately 8.5 inches at both sites, with a maximum of 13 inches. Approximately 20,000 catchable-sized hatchery rainbow trout are stocked annually in the lower portion of the river, with few surviving in the area after the summer of stocking. Approximately 55% of these hatchery fish are caught by anglers. The catch rate of trout is close to 1 fish per angler-hour, the objective set by the Idaho Department of Fish and Game in its current management plan.

On 14 June 1983 I electroshocked a short section of Birch Creek at the site of the proposed diversion and based upon this feel that the Idaho Fish and Game Department estimate of fish size and abundance is reasonable. I also captured shorthead sculpin (Cottus confusus) in slackwater areas, although sculpin populations are at a low level.

Rainbow trout populations in lower Birch Creek appear to be held at relatively low levels by the shallowness of the water, making it unsuitable habitat for larger trout. Probability of use curves compiled for adult rainbow trout (Bovee 1978, Figure 1) suggest that water depth of about 2 feet or greater is required.

Qualitative aquatic invertebrate samples from Birch Creek were made by Andrews (1972 and in BLM 1975), but no quantitative data were available. On 14 June 1983 I took a series of four Hess net samples (mesh size 390 μ) from a riffle at the site of the proposed diversion. A total of 20 taxa of invertebrates was collected (Table 1). Diversity and abundance were typical of the Lost Rivers, indicating a moderately high level of production and a good substrate. Some Chara comprised the only aquatic vegetation present. From these samples, it appears that the availability of invertebrates for trout food is good and fish populations are not limited by food supply.

Figure 1. Probability of use curves for utilization of water velocity and water depth by adult rainbow trout. From Bovee 1978.



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Table 1. Aquatic invertebrates collected in four Hess net samples from Birch Creek at site of proposed hydroelectric project diversion, 14 June 1983.

taxon	NUMBERS IN SAMPLE			
	1	2	3	4
EPHEMEROPTERA				
<u>Baetis tricaudatus</u>	7	6	1	10
<u>Ephemerella anemis</u>	51	55	28	194
<u>Ephemerella grandis</u>	0	4	1	3
<u>Rhithrogena hageni</u>	1	16	19	0
<u>Paraleptophlebia heteronea</u>	0	0	0	4
PLECOPTERA				
<u>Claasenia sabulosa</u>	1	6	4	0
<u>Isoperla sp.</u>	1	4	0	1
<u>Cultus sp.</u>	6	9	14	8
<u>Pteronarcella badia</u>	0	1	0	1
<u>Pteronarcys californica</u>	0	1	0	0
TRICHOPTERA				
<u>Hydropsyche sp.</u>	5	1	4	6
<u>Rhyacophila sp.</u>	2	3	2	1
COLEOPTERA				
<u>Optioservus quadrimaculatus</u>	0	2	0	1
DIPTERA				
Chironomidae - larvae	437	321	340	96
Chironomidae - pupae	8	9	6	2
<u>Atherix</u>	2	0	0	1
<u>Hexatoma</u>	0	0	0	1
NON-INSECTS				
<u>Turbellaria</u>	1	2	5	1
<u>Lumbriculus</u>	0	33	37	47
<u>Lymnea</u>	1	4	2	1
<u>Physa</u>	0	1	2	2
Total Number	523	478	465	380
Total taxa	12	17	13	17
Extrapolated number/m ²	8368	7648	7440	6080

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PROPOSED AQUATIC ENVIRONMENT

The proposed feeder ditch would originate at the point at which Birch Creek passes between Townships 8N and 9N and then extend to the east, under Highway 28, for a distance of 29,500 feet. Between the point of diversion and the head of the penstock there would be a fall of 29 feet, giving an overall gradient of 0.1%. The system would be designed to carry a normal flow of 45 cfs. Typical width of the channel bottom would be 3 feet, with bank slopes of 1:1. Channel substrate will be local alluvial gravel or, in the case of two sections 500-1,000 feet long in total, bedrock through which the channel will be blasted.

The feeder ditch should be capable of maintaining a substantial population of rainbow trout if the flow of water is continuous. For this report, the design goal is to provide habitat to sustain a minimum of 200 trout, the number estimated to be inhabiting the 3,000 feet of Birch Creek that would be partially dewatered by the project. The expected average size of fish in the feeder ditch would likely exceed both the present average of 8.5 inches and the BLM Management Plan goal of 10.5 inches.

Proposed modifications to enhance trout population

1. At the point of diversion, an impoundment should be constructed to hold downstream migrant fish and thus minimize their movements into the feeder ditch, as recommended in the BLM Management Plan. This would create deepwater habitat (10-15 foot depth) to improve overwinter survival of trout and increase angling opportunities.

Size of the impoundment would be $\frac{1}{2}$ to 1 acre. As a result, the water table in the area would be elevated, enhancing the growth of riparian vegetation.

2. Design the feeder ditch to maximize the number of channel meanders, and concentrate instream habitat improvements in these meanders.
 3. Maintain an average surface velocity of 1.5 to 2.0 feet/second to maintain an ideal range for rainbow trout (Figure 1) and for aquatic insect production.
 4. The average water depth that would result from the design gradient, flow and channel width would range from 3 to 4 feet, ideal for production of larger trout.
 5. Riffles should be constructed at intervals along the channel to enhance invertebrate production, aerate water, and provide spawning substrate for trout. Approximately 12 riffles 15 feet wide by 30 feet long would be made by introducing washed alluvial gravel.
 6. In the bedrock sections, stream banks should be essentially vertical or undercut if possible, and water depth should be 3 to 4 feet.
 7. Instream cover should be added, especially at meanders, in the form of 3-foot diameter boulders placed singly and in pairs.
- In addition, green conifers should be cut and anchored to the stream bank in strategic locations to provide cover for juvenile trout.

In some meanders, overhead cover should be added in the form of pairs of logs anchored into the bank.

8. The planting of riparian vegetation in the form of willows, birches, and russian olives should be carefully considered.

The vegetation enhances fish and wildlife production and reduces water temperature, but increases water loss due to evapotranspiration. Depending upon stand density (but regardless of tree species), water loss of 2.5 feet of water per unit area of vegetation per year can be expected. A strip of woody cover 4 feet wide along both banks for the entire length of the feeder ditch would lose about 1.3 acre-feet of water annually, about 424,000 gallons per year. It is recommended that trees be planted on the meanders initially.

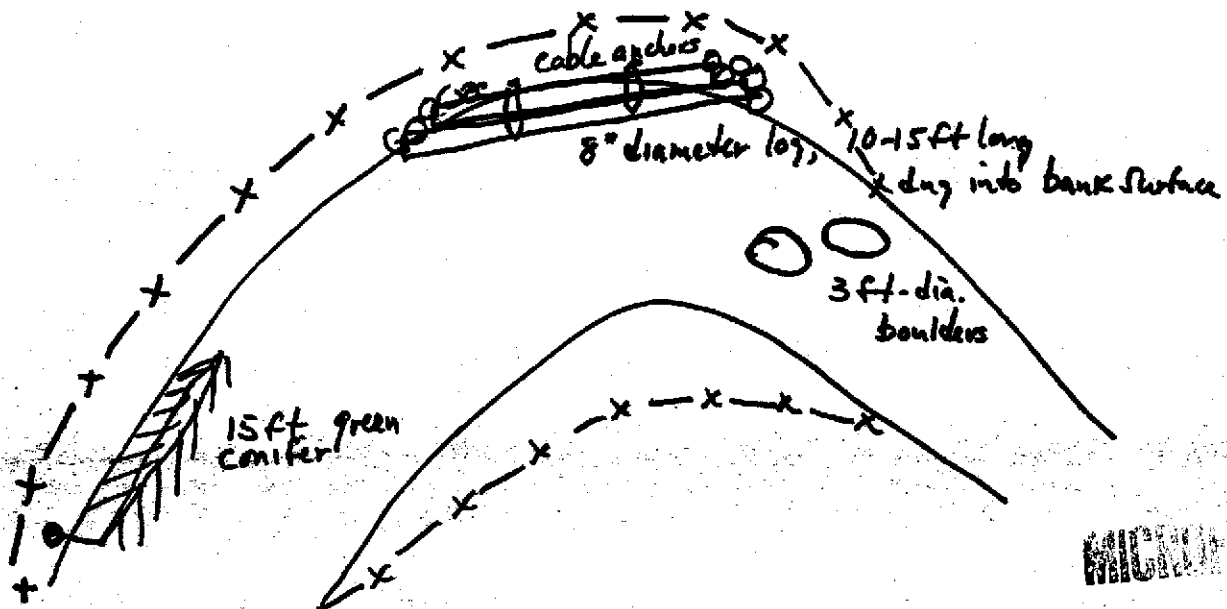
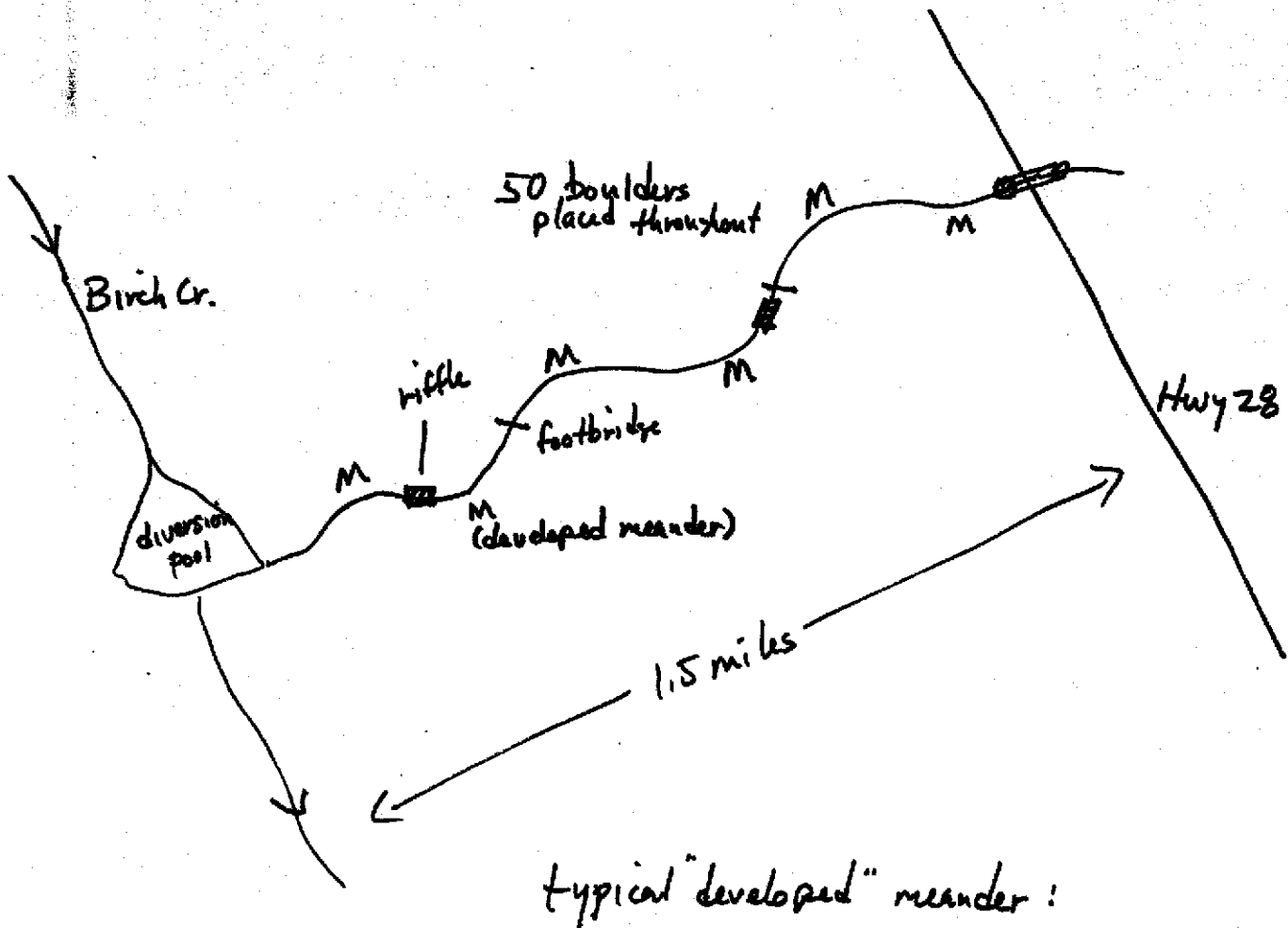
Fencing of these areas will be required to exclude livestock.

9. Footbridges could be installed at intervals along the channel for the convenience of anglers.

10. Where drywashes intersect the channel (east of Highway 28), small pools will naturally be formed. These pools will be valuable in providing winter habitat for trout.

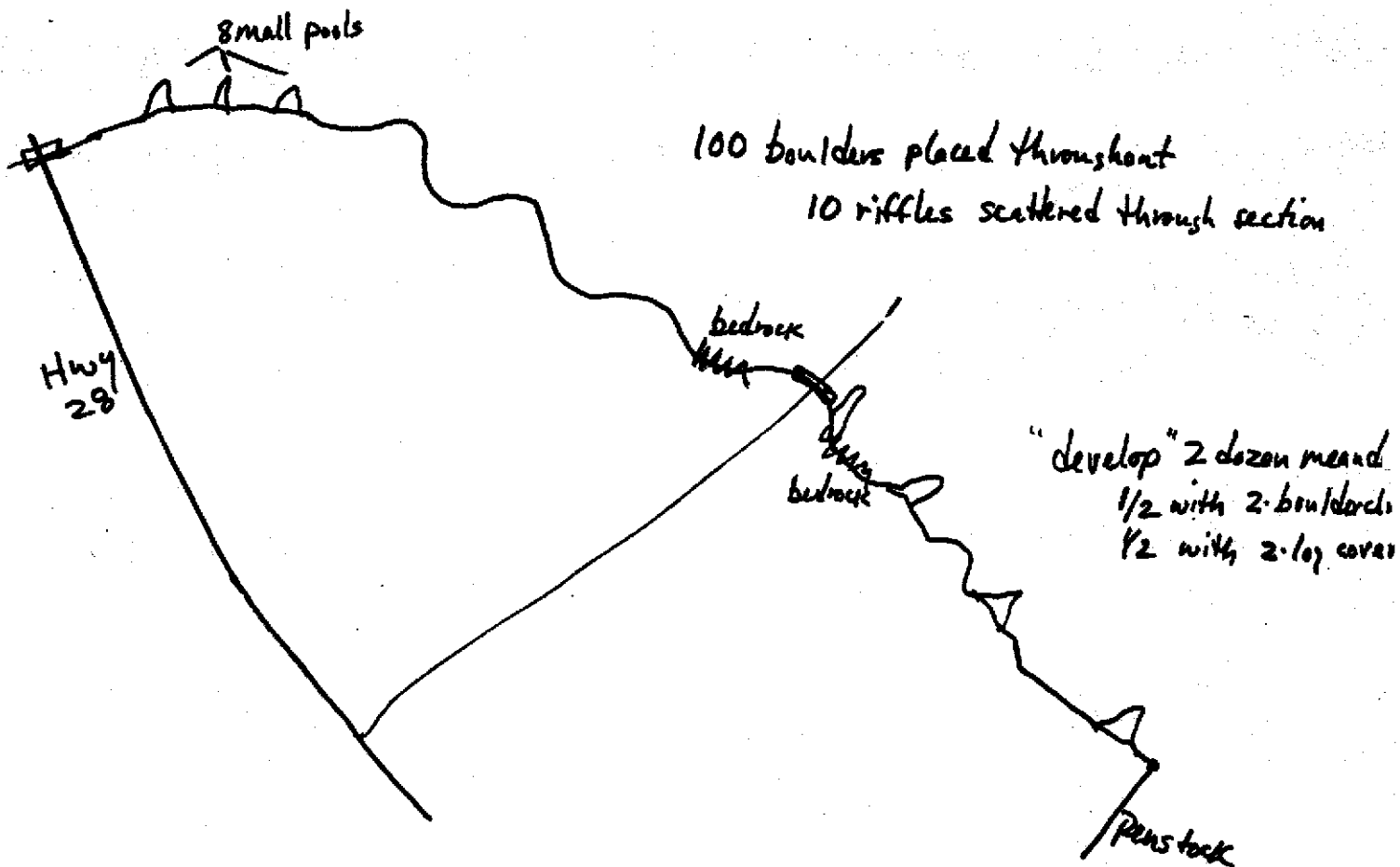
REPRODUCED FROM
FBI/DOJ

Birch Creek



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Birch Creek



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MATERIALS REQUIRED

Boulders - approx. 3 ft. diameter
150 total

washed alluvial gravel - $\frac{1}{2}$ to $1\frac{1}{2}$ in.
for 12 riffles 15 x 30 x 0.5 ft
100 yd total

logs - 8 in. x 10-15 ft.
36 total, with anchor cable and rock fill

birch/willow/ russian olive cuttings
1,000 total

green conifers - approx. 15 ft long
24 total, with anchors and cable

fencing - as needed

footbridge materials - for 4 bridges

Colonization by invertebrates and fishes

The newly-constructed stream should be partially colonized by rainbow trout from Birch Creek during the initial summer of operation. Some of the hatchery fish stocked into lower Birch Creek at present typically move downstream, occasionally leading to loss of substantial numbers into the unscreened Reno ditch (BLM 1975). This is likely due to a lack of adequate habitat in the existing channel and a tendency toward normal downstream dispersal, especially if water temperatures at time of stocking are below 10 C (Cresswell 1981). Habitat in the new feeder ditch should be more attractive for these fish, and many would be expected to take up residence. Colonization by wild rainbow trout would also be expected, but due to the low density populations upstream this would not be particularly rapid.

Colonization by aquatic invertebrates depends principally upon the quality of the source of individuals available for colonization and the distance from that source. In Summit Creek in the Little Lost drainage, areas of stream bottom were completely recolonized in one month during summer if they were immediately adjacent to a source (Griffith and Andrews 1981). In an irrigation canal leading from the Big Lost River, colonization of the upper 2.6 km was complete after four summer months (Fuller 1981). Downstream in the canal from that point, some invertebrate species declined in numbers but levels of the species most important for trout food stayed high for an additional 5 km. Flow in that canal was only 3% of that expected in the Birch Creek feeder ditch, and insect drift in the latter should be more rapid. Food organisms should develop quickly enough to support trout as they enter the feeder ditch.

Project monitoring

It is recommended that relatively intensive monitoring be conducted for a 2-year period following completion of the project. This could be carried out by an ISU fisheries graduate student supervised by myself.

Monitoring should concentrate on assessing:

1. colonization rates of fishes and aquatic invertebrates
2. distribution and size of trout in feeder ditch, especially utilization of habitat structures
3. angler effort and catch (creel census)
4. turbine mortality
5. ice formation and possible fish mortality in winter

The student would reside on the site in summer, during which time the creel census, electroshocking to assess fish populations, and sampling to monitor invertebrates would be conducted. The student would visit the site approximately monthly during the remainder of the 2-year period to collect supporting data.

For the project and fish populations to be compatible, it will be necessary to prevent dewatering of the channel due to spring washouts, mechanical breakdowns, etc. Also, it will be imperative to avoid the addition of substances (demossing agents, bentonite, etc.) in concentrations that are toxic or stressful to trout.

Some initial stocking of rainbow trout into the project area will probably be appropriate, but it would be advantageous to develop a self-sustaining population of wild rainbows that are adapted to conditions there. To do this, it may be necessary to protect wild fish from excessive angler harvest, possibly by closing a different section for 1-2 years on a rotation basis.

LITERATURE CITED

- Andrews, D.A. 1972. An ecological study of the Lost Streams in Idaho, with emphasis on the Little Lost River. Masters Thesis, Idaho State University. 57 pp.
- Bureau of Land Management. 1975. Birch Creek Aquatic Habitat Management Plan. Idaho Falls District.
- Bovee, K.D. 1978. Probability of use criteria for the family Salmonidae. Instream Flow Infor. Paper 4, FWS/OBS - 78/07. 80 pp.
- Cresswell, R.C. 1981. Post-stocking movements and recapture of hatchery-reared trout released into flowing waters - a review. J. Fish. Biol. 18: 429-442.
- Fuller, R.K. 1981. Habitat utilization, invertebrate consumption, and movement by salmonid fishes under fluctuating flow conditions in the Big Lost River, Idaho. Masters Thesis, Idaho State University. 76 pp.
- Griffith, J.S., and D.A. Andrews. 1981. Effects of a small suction dredge on fishes and aquatic invertebrates in Idaho streams. N. Amer. J. Fish. Mgt. 1: 21-28.

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4-5-84

32-7136

Applicant - Birch Power Co.

Attorney - Ray Rigby

Protestants

- Idaho Dept. F & G - Attorney: William Dillon
- U.S. Bureau of Land Management - Bob McCarty - Jane Esget
- Water District 32-D - Ben Wilding watermaster -
- D & D Enterprises - George Peterson Attorney -

Hearing Scheduled for 8:30 - Applicant arrived at 8:48 Applicant Attorney @ 8:55
Conference began at 9:37 am due to conferences between parties
Hearing began at

Ronald Ball Ball Sheep Co. - Use BLM land -

Amendment ~~in~~ delete 5 cfs - reference > taken

Approve for 40 cfs →

? = Request continuance - by F & G denied on basis that F & G showing
for need of min flow has not changed -

Rigby's Presentation of Evidence

1st Witness 9:45

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Ted Sorenson - Applicant B.S. M.E. Engineering - Licensed in 1978

Prior experience - Feasibility studies Georgetown ID, Ravenscroft, Trail Creek Sprinkler Co. for gas

Birch Power Co. - Inc. Ted Sorenson sole stockholder -

- Applicant's exhibit #1 Admitted - Report -

Project for diversion of water from Birch Ck

Option A 1 MW

Option B 2 MW

Present Vol. of Reno ditch water 5 to 8 ft. sec.

Reno ditch loses about $\frac{1}{3}$ of the water diverted.

Feeder Ditch - new ditch will be sealed so that the loss would be 3 cfs -

Less loss would occur in new ditch over the old ditch

Report - Shows effect on fishery in the feeder ditch -

Report - Feasibility and financial ability -

Water supply is sufficient

Has expended about \$50,000 to this point

Financial Ability Appendix 7

No adverse local public interest

- A. ^{Irrigators} The stream has dried Birch Ck every year at Reno Diversion
- B. Fishery will be improved in Birch Ck - by developing $1\frac{1}{2}$ miles of feeder ditch
- C. Irrigators will have more water than in the past
- D. Reno Ditch now washes out each year and effects adverse public land

Birch Creek below

Reno Ditch diversion is dry year around -

In the public interest to produce power -

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D&D Peterson
BLM Eagle
32-D Wilding
F&G Dillon

3

X-exam by Petersen D&D

→ Measuring devices at ditch beginning and end to determine ditch losses —
— Water savings are not guaranteed

X-exam by F&G

There is some importance to 3000 foot stretch of Birch Creek dried up.
Loss in 3000 feet of Birch Ck. — estimated 1.0 cfs
Irrigation District — Not contributing to cost of project to save water
Total project would still be feasible with 5 cfs min. flow —
Effect on 3000 ft.

Dry Channel —

P-1 ^{Tape 3 begin} No Fishery —
→ Protestants F&G Exhibit 1 → Admitted letter

7. ~~no work~~ — add to 2 to include bentonite lining

A-2 → Applicants Exhibits 2 — ^{Admitted} Letter From Mid State Sealing Co.

Applicants ~~Exhibit~~ Witness #2

Brian Holt. Director of Customer Service UP&L

A subsidiary to UP&L —

Project is financeable

" " feasible

Will provide financial and legal assistance

A power contract has been negotiated —

A-3. → Applicants Exhibit 3 — ^{admitted} Letter from witness to Mr. Sornsen
Giving ^{final} Approval

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4
X-exam by F&G

Applicants Witness

Dale Lyke - ~~BSEE~~ BSEE = General Electric

Will furnish the generating equipment -

Did a feasibility study -

Feasible even to the point where G.E. would help arrange financing

Letter in report Appendix 7

Generating equipment is available.

X-exam

No commitment for financing -

Applicant Witness -

Lyle Larson - Financial Consultant for Continental Bank & Trust

- Project is financible in a number of ways -

Verbal Contract presently -

- Contract is pending to secure financing > Today contract could be signed

A-4 Applicant Exhibit ^{#4 admitted} - Statement of Financial ^{Option B} Jan 6, 1984

A-5 Applicant Exhibit ^{#5 admitted} - Statement ^{Option A} [?] Oct 23, 1983

Bank is willing to finance the project

X-exam by F&G

Re-direct by Rigby

◆ Important Showing of Financial ability -

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D & D K. man
BLM Esget
32-D Wilding
F&G Dillon

5

Applicant Witness

Jack Griffith - Assoc Prof at Idaho State

Phd fisheries 1971 from U of I

Has been involved for about one year.

Contract with ISU for a graduate student.

A-6

Applicants Exhibit #6 ^{admitted} Report of Dr. Griffith April 5, 1984

Intend to have same density of Trout in the canal as in Birch Ck.

Canal twice as long as more fish.

Sorensen ~~has agreed~~ ^{supports} the recommendations of Dr Griffith

Riparian habitat

Conserve Top soil -

Cuttings planted to willow

Pools will be installed to enhance the riparian zone

2.2 cfs
7.4 6
8.8 8.8
9 70.6
79.2

→ Condition that canal must be built ~~the~~ as shown
in Exhibit #6

X-exam - Petersen -

X-exam - Esget -

Not expert in riparian vegetation -

No woody riparian vegetation along existing (Reno ditch)

X-exam - Dillon

July, Sept, Nov. → Visited the area 3 days -

Flows a fairly constant on Birch Creek -

Birch Creek is able to be fished early.

A Montana canal was modified for fisher

← There is some element of uncertainty

A dewatering of the canal would cause a major loss of Fish -
Estimated Cost of Habitat ~\$25,000

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Griffeth (cont) X-exam by Dillon

~~Riparian~~ Riparian Zone would be enhanced if 5 cfs is allowed to flow past the proposed point of diversion

F & G

X-exam

Pools 300 ft² 12 pools →

Recall - Applicant

→ Accept the recommendations of the Griffith report.

→

X-exam

Applicant Rests -

~~Test run~~
Vannoy

D & Dst Witness

Ben Wilding - Watermaster -

6 users -

20

Simmon 3 18.40 Wagg 1.8 cfs Wa Birch Creek

Total Q = 44 cfs decreed to users of ~~Reno Ditch~~ Reno Ditch

The common practice is to pre-irrigate
Consistently do not have sufficient water almost every year

X-exam BLM

2500 head livestock watered from Reno Ditch

X-exam ~~BLM~~ F & G

X-exam Birch Power

5

D&D Witness

Steve Phillips - Ranch Manager of D&D Enterprises

Almost every year the ranch is short of water.

Wells are ~500 feet to water

→ Sworn

BLM - Opening statement - Mr. Esget -

- Take Judicial notice of the acts of the Idaho Board -

- Want water diverted down the channel -

- The project design is acceptable -

B.L.M. Witness

- Robert McCarty - Wildlife biologist

Impact of Riparian Zone >

Read prepared statement -

No flow past Reno ditch usually

Wants to restore flow

5cfs would provide

Difficult to establish riparian vegetation -

X-exam D&D

There are no bald eagles

X-exam F&G

Riparian habitat 50' to 4' in width - on Birch Creek

X-exam - Birch Power

A-7

Applicants Exhibit #7 ^{not offered} Pictures

BLM. →

A-8

Applicants Exhibit #8 ^{not offered} Pictures -

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B.L.M. Witness

~~Wayne~~ Glen Devoe —

Will have a significant impact on Cattle watering

600 cattle at proposed p.d. — Basin Nov 1 Not affected

450 cattle below p.d. — Water about Jan 1 while trailing — there 2 days

4000 sheep " " — Not affected

X-exam

Period ^{Sheep} April 1 — June 30

Nov 1 — ~~Dec~~ Feb 1

" Cattle ~~to~~ Jan 1

X-exam Rigby

B.L.M. witness

Robert M. Ball

Run sheep on the 3000 feet of Birch Creek and Reno Ditch

Sheep water until

Band of about 2000,

Sheep can move a couple of miles between ~~to~~ watering.

X-exam by D & D

Problems ~~if~~ could be resolved —

B.L.M. witness

Mr. Esget — District Hydrologist —

No way for stockwater and minimum flow to be protected
except under their ^{right of way} ~~water~~ 

Losses were measured and appear to be accurate —

The providing of minimum flow would not interfere with
historic water uses of the irrigator.

They want to encourage the development of the project —

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X-exam by D&D

-The question is where this is new water

X-exam by B

F & G Witness —

Virgil Moore - Regional Fisheries Manager

Estimated fish population from study Oct 82 434 fish/mile
July 83 378 fish/mile

3,000 feet has less fishing pressure than Birch Ck upstream —
Fishing would be lost in 3000 feet with or without 5 cfs
min flow.

X-exam —

Project shouldn't be approved if the 5 cfs can't be left in the stream —

X-exam by Rigby —

Direct — Ben Wilding

Heavy fishing is above —

Has Preliminary Permit —

→ Closing of F & G —

Burden of Applicant that Application is in the public interest

#32-7128 & 32-7136.

4/05/84

Time 9:30.

Applicant

Birch Power represented by Ted Sorensen -
Ray Rigby - Attorney.

Protestants -

F & G.

B, L, M.

W, D.

D & D.

* Ball Brothers Sheep Co.

Stipulations - from both applications any reference to
Rigby - Remove stipulation for allowing 5 cfs to remain
in Creek.

Dilla - Objection - causes a significant change ~~to~~ ^{to the} intent ~~to~~ of the
application. - request continuance.

Fleener - Request for continuance denied. - reserve ruling on
whether application was for 45 or 40 cfs.

Rigby - applicant intended 45 cfs. - based on flow records.

10:00.

App. Wit.

Direct. Ted Sorensen. - Civil Engineer licensed since 1978. B.S. & M.S.
 Birch Power Co. - owned total by Ted Sorensen.
 Feasibility study on project was submitted to interested parties

Applicants exhibit #1. Feasibility study.

Option A - 1000 Kw.

Option B - 2000 Kw.

Present grade of Reno Ditch causes velocity flow around 5 ft/sec.
 scouring channel preventing sealing. bed loss 9 to 12 cfs.

Grade of feeder ditch would allow sealing of channel, but
 there would still be a bed loss of 3 cfs. but would provide
 net gain of 5 cfs and more.

Development of fishery.

There is no fishery in the Reno ditch because of high flow
 velocity. Per Reduced flow in feeder ditch
 will allow development of fishery.

Water supply is sufficient.

Has financial resources - already spent \$50,000⁺⁺.

Tape #2.

10:23.

Not adverse to public interest.

- 1- Birch Creek has historically been dewatered at Reno Ditch.
- 2- Irrigators will have more water.
3. Will increase fishery habitat.

MICROFILMED

Only 3000 ft. of Birch Creek will be affected by project.
That is the reach between the proposed project p.d. & the
Freno Ditch diversion.

Perpa & Northwest Power Planning Council direct the development
of small hydropower development.

~~R~~-Exam -

Flemer - Uses during non-irrigation season - water not needed
~~for~~ for present uses will be diverted into out fall ditch.

Peterson - Plan A - will provide an additional 5 or 6 cfs.

Plan B " " " " 10 cfs.

Sorensen will not guarantee attainment of additional
flows but technologies are existing to seal channel
and reduce losses.

- Concern of R&D. is that they receive their full
entitlement. -

Dillion - Sorensen acknowledges there is some degree of
public interest with regard to the 3000 ft. -

Bed loss in this reach is estimated at 1 cfs. - confirmed
by measurement taken by Jim Egert of BHP.

Bed loss in Freno Ditch is about 9.0 cfs.

Development requires financing from outside sources.

Project not economically feasible with only 45 cfs. need both applications
~~Not feasible to allow 5 cfs to remain in channel during summer.~~

Protestants Fish & Game Exhibit #1

Tape #3
11:10.

Stipulation #7 - Agrees not to take unilateral action that may ~~take~~ damage fishery.
Did not agree to Stipulation #8.

Re-direct -

Applicant's Exhibit #2 - letter from sealing company.
Author of letter not available at hearing.

App. Wit.

Direct - Bryan Holt - Employed by Utah Power & Light.
Director of Customer Service & Research Dev.

Reviewed project.

- Engineering is sound.
- Is financially
- U.P. & L. subsidiary will jointly develop project.
- Contract for sale of power has been negotiated.

Applicant's Exhibit #3. Letter by Mr. Holt to Ted Sorensen.

X-Exam - Dillion - Negotiations have not been finalized.

App. Wit.

Direct - Dayle Lyke - Electrical Engineer with General Electric.
Has examined data related to power production.

General Electric has evaluated project and determined it to be financially. will assist in obtaining financing.
Letter from Mr. Lyke to Ted Sorensen in appendix 7 of Applicant's Exhibit #1.

MICROFILMED

X-Exam - Dillion - G.E. has not committed to financing of project.
App. Wit.

Direct - Lyle Larson - ~~Finan~~ Continental Bank.

- There will be no problem securing funding from various sources.

1- Tax Exempt - Mirror Bonding -

2- Joint venture private financing.

Contract is pending to secure financing.

Applicant's Exhibit #4 letter from Larson addressing
financiability of option B.

Applicant's Exhibit #5 letter from Larson addressing
financiability of option A.

Continental bank is willing to finance project or be
financial advisor.

Tape #4.

X-Exam - Dillion -

Financing is contingent upon -

- Issuance of a permit.

- Financing at current market interest rate or 1% more.

Fleener - Moral contract should be signed today.
can be submitted for review.

MICROFILMED

App. Wt.
Direct.

~~Jack~~ John ("Jack") Griffith - Private Fisheries Consultant.

M.A. in

PhD in Fisheries from U of I in 1971.

Concerned with development of fisheries habitat in the feeder canal.

Applicants exhibit #6 - Report by Dr. Griffith dated 4-5-84.
supports previous report.

Fisheries habitat -

twice the linear distance,
better habitat.

Velocity & channel configuration is more
conducive to trout habitat than present
3000 ft of Birch Creek below proposed p.d.

Riparian habitat - proposal.

1 construction procedures -

- Stock pile top soil for distribution along feeder ditch.
- Seed stream banks with native riparian grasses, birch & willow.
- 24 meanders.
- Fencel.
- Narrow riparian zone,

X-Exam - Peterson - Dr. Griffith will be targeting the 1st mile
and $\frac{1}{2}$ for intensive riparian development.

MICROFILMED

X-exam -

Esgot - Dr. Griffith is not an expert on riparian habitat.
Channel configuration will have 1 to 1 slopes.

Dillon - Dr. Griffith - spent 3 full days - in July, Sept & Nov.
Development of fishery habitat is a promising proposal.
with some elements of uncertainty.

- Denaturing of channel would have substantial effects.
to aquatic environment.

- \$25,000 is the estimated cost of establishing
habitat.

- Riparian habitat would be extended if 5 cfs were
left in the stream channel.

- Over all stipulation in F&G exhibit #1 are conducive
to fish habitat.

- Riparian Pools - 300 sq ft., 12 each,

Recall App. - Sorensen -

Accepted applicants exhibit #6.

Stipulate to conditions recommended by Dr. Griffith.

X-exam - Dillon - Mr. Sorensen will comply with Dr. Griffith's
riparian pools if conditioned by permit.

Applicant Rests.

MICROFILMED

Prot. Wit.

Direct. - Ben Wilding - Farmer & Watermaster.

- 6 users on Birch Creek.
- William Simmons - 18.4 cfs.
- Wagner 74. inches
- Mack Wagner - 200 inches.
- Judy. 5 inches
- P&D, - 2200 inches.

Tape. 6.

- Are periods of the year when more than 2200 inches diverted through Reno Ditch.
- This ~~year~~ past winter Reno Ditch froze over ^{in Dec.} and is still dry. Last year water ran ~~for~~ the entire year.

X-exam-

~~Esgat~~ - Runs ~~2200~~ 2200 stock.

Dillon - 1300 inches of loss from head of creek down to Reno diversion.

Rigby - Feels project would save water user substantial amounts of water.

MICROFILMED

Protect. Wit.

Direct. Steve Phillips - manager for D.V. Enterprises.
 Needs heavy spring flows to carry crop through summer.
 Could irrigate an additional 250 acres with 5 cfs

B.L.M. - Opening statement -

Direct - Jim Esqot -

BLM wants complete mitigation of resource damages
 consistent with policy & statement of Idaho
 Water Resource Board on minimum flows in Birch
 Creek.

Project design is acceptable if 10 stipulation outlined
 in F&G Exhibit #1 are implemented.

Direct. Robert McCarty - Wildlife Biologist. With BLM for 8 yr.

- Has background in riparian ecosystem evaluation.
- Read statement.

- Riparian vegetation below Reno Ditch is minimal.
- Minimum flow below diversion is need to preserve
- public values in riparian vegetation.

X-Exam -

Peterson - No eagle roosts on reach of Birch Creek between proposed
 p.d. & Reno Ditch.

MICROFILMED

Dillon - Both sheep & cattle water from 3000 ft. section of
 Birch Creek.

- Existing riparian vegetation varies from 30 to 50 ft. to 2 ft.

Rigby -

tape #7.

Applicant's exhibit #7 photos. of Birch Creek.
Applicant's " #8 " of Reno Ditch.

- McCarty - is supportive of project but contends 5 cfs is needed to be consistent with management plan of B.L.M.
- There has been no attempt to inspire riparian vegetation along Reno Ditch.

~~Peterson~~

Prot. Wit.

- Direct. - Glen Devon - Range Conservationist. with B.L.M.,
Dewatering below existing diversion with significant impact on use patterns by livestock.
- 4 livestock operations involving 4000 sheep & approximately 1000 hd. cattle.
 - Sheep - 4-1 to 6-30
Cattle - 11-1 - 12-30-
 - Mr. Woodie's Cattle trail off of allotment in January.

MICROFILMED

Direct - Robert Ball - Sheep herder.

Has sheep allotment that relies on Birch Creek &
Reno Ditch for water.
Allotment used in the spring.
Herds 2000 Sheep.

Tape #8

Could get water from stock troughs.

James Esqut - District Hydrologist. with B.L.M.

- Easement will require protection of existing riparian habitat. under executive order - ~~it~~
- Is concerned that ~~when~~ present law ~~states~~ the right for stockwatering & public interest to maintain riparian habitat can no be secured under historical and traditional methods of use on the open range.

X-exam -

Peterson - Esqut - ~~is~~ new water developed over ~~city~~ traditional flows over 44 cfs are no subject to existing water rights.

Rigby - BLM advisory board has ordered project.

Protest wit
Direct.

Urgal Moore - F&G Fisheries Biologist.
Regional Fisheries Biologists

Conducted fish population research using electro-fish techniques.

434 / mi

Lower fishing pressure on lower 3000 ft of Bait Creek.

- 5 cfs would not maintain a fishable population of trout below proposed diversion.
- 5 cfs is not a fisheries minimum flow.
- Riparian zones have been shown to provide the best wildlife habitat.

X-exam - Petersen - F&G respects existing water rights.

Type 9

400 fish in 3000 ft. below proposed p.d.

Rigby -

Redirect - Ben Wilding - lower 3000 ft. is not heavily fished.

Dillion - Loss of fishery is mitigated by proposal.
Loss of riparian habitat is not.

32-7128 & 32-7136 - Birch Power Company

3rd Floor Conference Room, IDWR, Idaho Falls, Idaho
Thursday, April 5, 1984 (8:30 a.m.)

ROSTER OF ATTENDANCE

Hearing Officer Bob Fleenor & Ernest Carlson

Name	Address	Representing
Robert McCarty	940 Lincoln Rd. J.F. Id.	BLM
James A. Esget	740 Lincoln Rd. I.F. Id.	BLM
William Billon, III	████ P.O. Box 25, Boise 83707	Fish & Game
George C. Peterson	485 E. Street / 83402	ATTY DAD Enterprise
in R. McDonald	294 Apache, REXBURG,	DAD Enterprise
Steve Phillips	Star Post Box 15 Dubois	" "
Lee Wilding	Dubois Idaho	Wilding Ranch
James J. Hall	Sevensville Idaho Box 69	Ball Bros. Shop Co
Robert M. Ball	HC 69 Box 1370 Hower Id.	" "
Len R. Wilding	Watermaster - 32-0 -	Dubois Idaho
Ted S. Sorenson P.E.	550 Linden Drive Idaho Falls, Idaho	Birch Power Company
Doyle Lyke	General Electric Co 1111 Brinkley and 17th Salt Lake City	
Jack Griffith	Box 8007 Pocatello ID 83209	Idaho State Univ. Biology Dept
John Peterson	2005 Main SLC, UT 84111	Continental Bank Trust
Dean S. Holt	1231 E. 3700 So, SIC UT 84106	UP&L
Ray W. Higby	P.O. Box 250 Rexburg, Id.	Applicant
Mr. Moore	515 Lincoln Rd Idaho Falls	Idaho Fish & Game

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9. SENDER: Complete items 1, 2, 3, and 4. Add your address in the "RETURN TO" space on reverse.		(CONSULT POSTMASTER FOR FEES)	
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☒ Show to whom and date delivered ☐ Show to whom, date, and address of delivery ☐ RESTRICTED DELIVERY (The restricted delivery fee is charged in addition to the return receipt fee.)		3. ARTICLE ADDRESSED TO <i>Odell Frandsen</i> <i>BLM</i> <i>940 Lincoln Toronto Falls Id</i>	
4. TYPE OF SERVICE.		ARTICLE NUMBER	
☐ REGISTERED ☒ CERTIFIED ☐ EXPRESS MAIL		☐ INSURED ☐ COO <i>13196</i>	
(Always obtain signature of addressee or agent)			
I have received the article described above.			
SIGNATURE		☐ Addressee ☐ Authorized agent	
5. DATE OF DELIVERY <i>Kathy J mcl...</i> <i>3-22-84</i>		POSTMASTER May be an agent <i>222</i> <i>1984</i> USPO	
6. ADDRESSEE'S ADDRESS (Only if requested)		7a. EMPLOYEE'S INITIALS	
7. UNABLE TO DELIVER BECAUSE:			

* GPO: 1982-378-583

RETURN RECEIPT

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3. ARTICLE ADDRESSED TO: Tom Remecker F4G 1515 Linggall Ln. Tomball Falls, Tex. 77661	ARTICLE NUMBER 13199
4. TYPE OF SERVICE: ☐ REGISTERED ☒ CERTIFIED ☐ EXPRESS MAIL ☐ INSURED ☐ COD	
(Always obtain signature of addressee or agent)	
I have received the article described above. SIGNATURE ☐ Addressee ☐ Authorized agent V. Vense	
5. DATE OF DELIVERY 3-22-84	POSTMARK (Stamp to be in reverse only) 22 1984 USPO
6. ADDRESSEE'S ADDRESS (only if requested)	
7. UNABLE TO DELIVER BECAUSE:	
7a. EMPLOYEE'S INITIALS	

800-633-2861 • 2060

RETURN RECEIPT

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☐ Show to whom, date, and address of delivery ..	
2. ☐ RESTRICTED DELIVERY	
(The restricted delivery fee is charged in addition to the return receipt fee.)	
3. ARTICLE ADDRESSED TO:	TOTAL \$
<i>Ed Larson 550 Broadway Waco, Texas</i>	
4. TYPE OF SERVICE:	ARTICLE NUMBER
☐ REGISTERED	13192
☐ INSURED	
☐ CERTIFIED	
☐ COD	
☐ EXPRESS MAIL	
(Always obtain signature of addressee or agent)	
I have received the article described above.	
SIGNATURE ☐ Addressee ☐ Authorized agent	
5. DATE OF DELIVERY	POSTMARK (May be on reverse side)
3-23-84	LS 10
6. ADDRESSEE'S ADDRESS (Only if registered)	
7. UNABLE TO DELIVER BECAUSE:	
7a. EMPLOYER'S INITIALS	

4 000 1000 730 500

RETURN RECEIPT

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1. The following service is requested (check one). ☒ Show to whom and date delivered \$ ☐ Show to whom, date, and address of delivery. \$ ☐ RESTRICTED DELIVERY \$ (The restricted delivery fee is charged in addition to the return receipt fee.)	3. ARTICLE ADDRESSED TO: <i>George Peterson</i> <i>485 E. Street</i> <i>Glendale, Cal. 91</i>
2. TYPE OF SERVICE: ☒ REGISTERED ☐ INSURED ☒ CERTIFIED ☐ COD ☐ EXPRESS MAIL	ARTICLE NUMBER <i>13195</i>
(Always obtain signature of addressee or agent) I have received the article described above. SIGNATURE ☐ Addressee ☒ Authorized agent	
5. DATE OF DELIVERY <i>January 13, 1945</i>	POSTMARK (may be on reverse side)
6. ADDRESSEE'S ADDRESS (only if requested)	7a. BACK COVER'S INITIALS
7. UNABLE TO DELIVER BECAUSE:	
TOTAL \$ _____	

32-7128 & 32-7136

● SENDER: Complete items 1, 2, 3, and 4.
Add your address in the "RETURN TO" space on reverse.

(CONSULT POSTMASTER FOR FEES)

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☐ Show to whom, date, and address of delivery
☐ RESTRICTED DELIVERY
 (The restricted delivery fee is charged in addition to the return receipt fee.)

2. TOTAL \$

3. ARTICLE ADDRESSED TO:
C. A. Wagner
Box 14
Dubois, Id. 83423

4. TYPE OF SERVICE: ARTICLE NUMBER
☐ REGISTERED ☐ INSURED
☒ CERTIFIED ☐ COD
☐ EXPRESS MAIL
 13198

(Always obtain signature of addressee or agent)

1. I have received the article described above.
 SIGNATURE ☐ Addressee ☒ Authorized agent
C. A. Wagner

5. DATE OF DELIVERY
 MAR 20 1984
 POSTMARK
 MAR 20 1984

6. ADDRESSEE'S ADDRESS (Only if requested)

7. UNABLE TO DELIVER BECAUSE: 7a. EMPLOYEE'S INITIALS

* GPO: 1982-379-553

Form 3811, July 1982

RETURN RECEIPT

● SENDER: Complete items 1, 2, 3, and 4.
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☐ RESTRICTED DELIVERY
 (The restricted delivery fee is charged in addition to the return receipt fee.)

2. TOTAL \$

3. ARTICLE ADDRESSED TO:
Kay Riegley
25 N 2nd St
Dubois, Id. 83440

4. TYPE OF SERVICE: ARTICLE NUMBER
☐ REGISTERED ☐ INSURED
☒ CERTIFIED ☐ COD
☐ EXPRESS MAIL
 13193

(Always obtain signature of addressee or agent)

1. I have received the article described above.
 SIGNATURE ☐ Addressee ☒ Authorized agent
Kay Riegley

5. DATE OF DELIVERY
 3/22/84
 POSTMARK
 (may be on reverse side)

6. ADDRESSEE'S ADDRESS (Only if requested)

7. UNABLE TO DELIVER BECAUSE: 7a. EMPLOYEE'S INITIALS

* GPO: 1982-379-553

Form 3811, July 1982

RETURN RECEIPT

● SENDER: Complete items 1, 2, 3, and 4.
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☐ Show to whom, date, and address of delivery
☐ RESTRICTED DELIVERY
 (The restricted delivery fee is charged in addition to the return receipt fee.)

2. TOTAL \$

3. ARTICLE ADDRESSED TO:
Wm T. Simmons
Dubois, Id. 83423

4. TYPE OF SERVICE: ARTICLE NUMBER
☐ REGISTERED ☐ INSURED
☒ CERTIFIED ☐ COD
☐ EXPRESS MAIL
 13194

(Always obtain signature of addressee or agent)

1. I have received the article described above.
 SIGNATURE ☐ Addressee ☒ Authorized agent
Wm T. Simmons

5. DATE OF DELIVERY
 3-23-84
 POSTMARK
 (may be on reverse side)

6. ADDRESSEE'S ADDRESS (Only if requested)

7. UNABLE TO DELIVER BECAUSE: 7a. EMPLOYEE'S INITIALS

* GPO: 1982-379-553

Form 3811, July 1982

RETURN RECEIPT

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☐ RESTRICTED DELIVERY
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2. TOTAL \$

3. ARTICLE ADDRESSED TO:
Ben Wilding
Seac Route
Dubois, Id. 83423

4. TYPE OF SERVICE: ARTICLE NUMBER
☐ REGISTERED ☐ INSURED
☒ CERTIFIED ☐ COD
☐ EXPRESS MAIL
 13197

(Always obtain signature of addressee or agent)

1. I have received the article described above.
 SIGNATURE ☐ Addressee ☒ Authorized agent
Ben Wilding

5. DATE OF DELIVERY
 MAR 23 1984
 POSTMARK
 MAR 23 1984

6. ADDRESSEE'S ADDRESS (Only if requested)

7. UNABLE TO DELIVER BECAUSE: 7a. EMPLOYEE'S INITIALS

* GPO: 1982-379-553

MICROFILMED

DEPARTMENT OF WATER RESOURCES

EASTERN DISTRICT OFFICE

150 SHoup AVE.

IDAHO FALLS, IDAHO 83401

NAME AND ADDRESS OF SENDER

☐ Registered
☐ Insured
☐ COD
☒ Certified

☐ Commercial Insurance
☐ A deductible clause of \$

Affix stamp here if issued as certificate of mailing or for additional copies of this bill.

POSTMARK AND DATE OF RECEIPT

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1	13193	Postmaster Polky 129 IE	20	75								53-0215
2	13191	Thomas A. Madonia Skamuel										"
3	13192	Madison 550 kinden I. F.										53-0136 58-713
4	13193	Ray W. H. 25 102nd E. St. H. H.										"
5	13194	Wm. T. 1000 S. Dubois, 210										"
6	13195	Large 485 E. St. I. F.										"
7	13196	Wm. 3000 S. Blm 900 kinden I. F.										"
8	13197	Wm. 1000 S. St. Dubois										"
9	13198	Wm. 1000 S. St. Dubois										"
10	13199	Wm. 1000 S. St. Dubois										"
11	13200	Wm. 1000 S. St. Dubois										"
12	13201	Wm. 1000 S. St. Dubois										"
13	13202	Wm. 1000 S. St. Dubois										"
14	13203	Wm. 1000 S. St. Dubois										"
15	13204	Wm. 1000 S. St. Dubois										"
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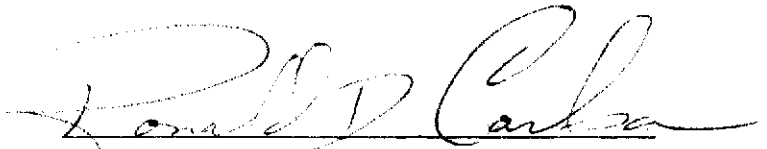
BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMITS)
NO. 32-7128 AND 32-7136 IN THE NAME OF)
BIRCH POWER COMPANY) NOTICE OF HEARING
AND/OR CONFERENCE

Notice is hereby given that the Department of Water Resources has rescheduled the hearing and/or conference concerning the above referenced applications for permits for Thursday, April 5, 1984, at 8:30 a.m. in the Third Floor Conference Room, Idaho State Office Building, 150 Shoup, Idaho Falls, Idaho.

Any hearing will be held in accordance with the Rules and Regulations of the Idaho Code and adopted Rules of Practice and Procedure as previously indicated in the hearing and/or conference notice dated February 23, 1984.

Dated this 21st day of March, 1984.



RONALD D. CARLSON

Eastern Regional Supervisor

RECEIVED

PETERSEN, MOSS, OLSEN, MEACHAM & CARR

GEORGE C. PETERSEN, JR.
REED L. MOSS
DENNIS M. OLSEN
GREGORY P. MEACHAM
WM. CHARLES CARR
EARL BLOWER
ALAN E. BARBER
SCOTT P. ESKELSON
KENT A. HIGGINS

ATTORNEYS AT LAW
485 WEST STREET
IDAHO FALLS, IDAHO 83402

TELEPHONE
AREA CODE 208
523-4650

March 5, 1984

RECEIVED

MAR 7 1984

Department of Water Resources
Eastern District Office

Ray W. Rigby, Esq.
Rigby, Thatcher, Andrus, Barton & Walters
Attorneys at Law
25 North 2nd East
Rexburg, Idaho 83440

RE: Request for Cancellation of Scheduled Notice of Hearing and/or
Conference on Permit Nos. 32-7128 and 32-7136 - Birch Power
Company - D & D Enterprises, Inc.

Dear Ray:

I most sincerely appreciate your consideration and
courtesies in agreeing to continue the Notice of Hearing, the
subject of the above captioned, scheduled for hearing before the
Department of Reclamation this coming Thursday, March 8, 1984.

For the purpose of supplementing your file, together with
the file of the Department of Water Resources, as to the reasons
and justification for our client's requested continuance, I hereby
submit on behalf of D & D Enterprises, Inc., in writing, the
following:

1. D & D Enterprises, Inc. was not permitted to intervene
in the above entitled matter until February 23, 1984 (see Order
granting Request for Intervention).
2. Department of Water Resources set up a final hearing
of the pending protests, filed in the above entitled matter, for
March 8, 1984, said Notice of Hearing being dated February 23, 1984.
3. The two documents referred to in Paragraph 1. and 2.
above were received by counsel for D & D Enterprises, Inc. at
approximately 11:40 a.m., Monday, February 27, 1984.
4. Immediately upon notice of D & D's permitted
intervention D & D retained a Water Engineer, Mr. Ray Michener,

MICROFILMED

Ray W. Rigby
Page 2
March 5, 1984

Michener Associates, Inc., Tri-Cities, Washington 99302, telephone (509) 545-8561, as its consulting engineer for the purpose of defending and supporting the protest of D & D Enterprises, Inc.

5. According to my calculations there is a total of ten days (8 working days) of actual notice dating from the date notice was actually received up to the date of hearing, including a weekend. For the purpose of preparing and responding to the two applications, the subject of the above captioned, ten days is not an adequate period of time for allowing D & D's retained engineer to complete his investigation, make a recommendation to D & D Enterprises, Inc. and thereafter prepare for defense to applicants pending applications.

6. In addition to the above, the retained engineer of D & D Enterprises, Inc., Mr. Ray Michener, is scheduled to testify in a Federal Water case on the same date and at the same time that the above captioned has been set for hearing of applicant's applications, and protestants protests.

As discussed in our recent telephone conference, our clients are desirous of an early meeting, as suggested by you and your client, for the purpose of exchanging information, and for the further purpose of making every effort to resolve the questions, differences, and disputes, of D & D Enterprises, Inc. and your client, to the end and for the purpose of hopefully resolving said differences short of the necessity of a formal hearing.

~~I will be in contact with your within the next couple of~~ days, as to an available date and/or dates for the purpose of scheduling the meeting discussed in the previous paragraph.

Following our telephone discussion on the above captioned, and pursuant to my suggestion to you, I contact Mr. Ron Carlson, of the Department of Reclamation, informed him of our oral discussion, and in response to said report he volunteered to send out notes to all parties concerned, ordering a continuance, without the necessity of a formal hearing.

Your cooperation and consideration on the above caption has been most sincerely appreciated.

MICROFILMED

Ray W. Rigby
Page 3
March 5, 1984

Very truly yours,

PETERSEN, MOSS, OLSEN,
MEACHAM & CARR

GEORGE C. PETERSEN, JR.

GCP/tr
8523k

cc: Mr. Ron Carlson
William B. Dillon, III
Jim DeMordaunt

MICROFILMED

SORENSEN ENGINEERING, P.A.

CONSULTING ENGINEERS

550 LINDEN DRIVE

IDAHO FALLS, IDAHO 83401

208-522-8069

March 6, 1984

RECEIVED

MAR 7 1984

Department of Water Resources
Eastern District Office

Mr. Ron Carlson
Eastern Regional Supervisor
Idaho Dept. of Water Resources
150 Shoup Ave.
Idaho Falls, ID 83401

RE: BIRCH CREEK HYDRO - HEARING FOR APPLICATIONS 327128 and 327136

Dear Mr. Carlson,

The notice of cancellation for the March 8, 1984 meeting I received indicates this was per the agreement of the applicant. I did not agree to cancellation.

I also contacted my attorney, Mr. Ray Rigby in Rexburg, Idaho concerning this matter and asked him if he'd agreed to the cancellation of this meeting. He indicated he had not agreed to the cancellation of this meeting.

The cancellation of this hearing not only delays the progress of the project but is very costly to me in that I had arranged for an engineer to fly from Denver, Colorado and had also arranged for a banker to come from Salt Lake City, Utah, as well as a fisheries biologist from Pocatello, Idaho.

Very truly yours,



Ted S. Sorenson, P.E.
Project Engineer

TSS:kw

cc: Ray Rigby

MICROFILMED

Told George that I
would not continue
the hearing unless
request comes from
Ted Sorenson.

Peterson called back
said Ray Rigby
approved continuation
of hearing.

MICROFILMED

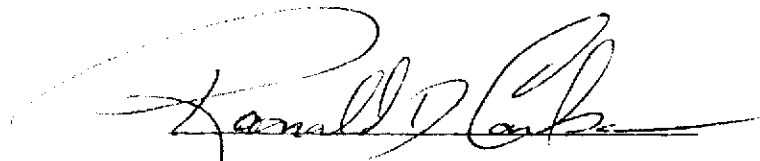
BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF PROTESTS AGAINST
APPROVAL OF APPLICATIONS FOR PERMITS
NO. 32-7128 AND 32-7136 IN THE NAME
OF BIRCH CREEK POWER

NOTICE OF CANCELLATION

Notice is hereby given that the Department of Water Resources has cancelled the hearing concerning the above referenced applications scheduled for 11:00 a.m., Thursday, March 8, 1984 at the request of the protestant, D & D Enterprises, and the agreement of the applicant.

Dated this 2nd day of March, 1984.



RONALD D. CARLSON
Eastern Regional Supervisor

MICROFILMED

NAME AND ADDRESS OF SENDER

DEPARTMENT OF WATER RESOURCES
EASTERN DISTRICT OFFICE
150 SHOUP AVE.
BALTIMORE, MARYLAND 21201Indicate type of mail:
☐ Registered
☐ Insured
☐ C.O.D.
☒ CertifiedI certify that we have:
☐ Commercial Insurance
☐ A deductible clause of \$

Affix stamp here if issued as certificate of mailing or for additional copies of this bill.

POSTMARK AND DATE OF RECEIPT

1 2	NUMBER OF ARTICLE	NAME OF ADDRESSEE, STREET, AND POST OFFICE ADDRESS	POSTAGE	FEE	Handling Charge	Actual Value (if Registered)	DUE SENDER IF C.O.D.	R. R. FEE	S.D. FEE	S. H. FEE	REST. DEL. FEE	REMARKS
1	1/3180 X	22/Stan Shunkline Rd/367 21000	20	15				60				25-7308
2	1/3181 X	874 B 1515 Duncan St. Fall	30									25-7308
3	1/3182 X	2d Avenue, 550 Dundas, S. Fall										25-7308
4	1/3183 X	O'Fallon Dundas 87m 940 Dundas, S. Fall										25-7308
5	1/3184 X	2nd Avenue, 550 Dundas, S. Fall										25-7308
6	1/3185 X	11m. T. Hammond, Dundas										"
7	1/3186	O. A. Higgins, 8014 N. Dundas										"
8	1/3187 X	Mary Pittman 440 East 485 E 1st S. F.										"
9						25.65						
10												
11												
12												
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14												
15												
TOTAL NUMBER OF PIECES LISTED BY SENDER		TOTAL NUMBER OF PIECES RECEIVED AT POST OFFICE		POSTMASTER, PER (Name of receiving employee)		The full declaration of value is required on all domestic and international registered mail. Commercial Insurance—Payment of the full registry fee is required on articles valued up to \$1,000 or the full amount of the deductible if the deductible exceeds \$1,000. The maximum indemnity payable is \$25,000 for registered mail, \$400 for C.O.D. and \$400 for insured mail. Special handling charges apply only to third- and fourth-class parcels. Special delivery service also includes special handling service.						

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

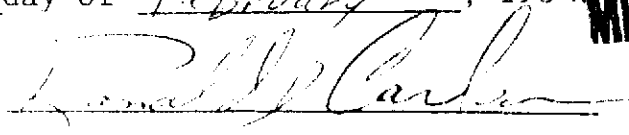
IN THE MATTER OF APPLICATION FOR PERMIT)
NO. 32-7128 AND 32-7136 IN THE NAME OF) NOTICE OF HEARING
BIRCH POWER COMPANY) AND/OR CONFERENCE

On September 8, 1982, Birch Power Company filed with the Department of Water Resources application No. 32-7128 to appropriate the public waters of the State of Idaho. On September 23, 1982, the Department received a protest against approval of said application from Idaho Department of Fish and Game. On October 12, 1982, additional protests were received from the Bureau of Land Management, and from Wm. T. Simmons, C.A. Wagoner, and Ben R. Wilding. On February 23, 1984 the Department issued an order allowing D & D Enterprises to intervene in the matter.

On January 3, 1984, a second application No. 32-7136 was filed by Birch Power Company. On February 1, 1984, the Department received a protest from the Bureau of Land Management; on February 2, 1984 a protest was received from Idaho Department of Fish & Game; and on February 3, 1984 an additional protest was received from Ben Wilding, Watermaster of Water District No. 32-D.

The Department has set the matter of protest for hearing for Thursday, March 8, 1984, at 11:00 a.m. in the Third Floor Conference Room, State Office Building, 150 Shoup, Idaho Falls, Idaho. Because of the similarity of the issues involved this hearing has been combined. The hearing will be held in accordance with provisions of Chapter 2, Title 42, of the Idaho Code and adopted Rules of Practice and Procedure of the Department of Water Resources. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

Dated this 23rd day of February, 1984.


RONALD D. CARLSON

MICROFILMED

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF REQUEST FOR LEAVE)	
TO INTERVENE IN THE MATTER OF)	
PROTESTS AGAINST APPLICATION FOR)	ORDER GRANTING
PERMIT NO. 32-7128 IN THE NAME OF)	INTERVENTION
BIRCH POWER COMPANY FILED BY GEORGE)	
C. PETERSEN, ATTORNEY, IN BEHALF OF)	
D & D ENTERPRISES)	

WHEREAS, a petition to intervene in the matter of protests against application for permit No. 32-7128 was filed by the above-named party with the Department of Water Resources on September 18, 1983; and,

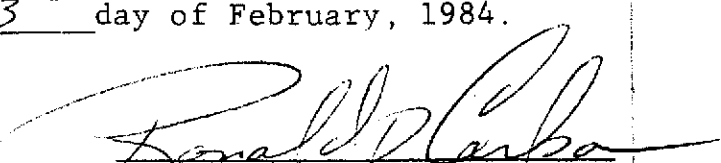
WHEREAS, D & D Enterprises was represented at the conference held on September 2, 1983 and the applicant stated he had no objection to their intervention in the matter; and,

WHEREAS, The Director of the Department of Water Resources finds that the petition to intervene alleges that the petitioners could be affected by the approval of application for permit No. 32-7128 through possible adverse impacts; and,

WHEREAS, it is the determination of the Director that the petitioners have satisfied the requirements for intervention in accordance with Rule 6 of the Department of Water Resources Rules of Practice and Procedure;

NOW, THEREFORE, IT IS HEREBY ORDERED that the above-named petitioners shall be allowed to intervene in the matter of application for permit No. 32-7128. The granting of leave to intervene shall not be construed to be a finding by the Director that the intervenors will or may be parties aggrieved by any ruling, order or decision of the Director for purposes of court review of appeal.

Dated this 23rd day of February, 1984.


RONALD D. CARLSON
Eastern Regional Supervisor

MICROFILMED

February 7, 1984

RE: Application for Permit No. 32-7136 BIRCH POWER COMPANY

Standard Journal
P.O. Box 10
Rexburg, ID 83440

Gentlemen:

Would you please submit an affidavit of publication and certified bill in connection with the above referenced application(s). The legal notice was to have been published in your paper on January 19 and 26, 1984.

Your cooperation in this matter is greatly appreciated.

Very truly yours,

COLLEEN WRAY
Adm. Secretary

AMEROFILMED

February 7, 1984

RE: Application for Permit No. 32-7136

Birch Power Company
550 Linden
Idaho Falls, ID 83401

Gentlemen:

Enclosed is a copy of a protest filed against the issuance of a permit pursuant to your Application No. 32-7136. The Department suggests you contact the protestant directly in an effort to determine the nature of the protest and to attempt to resolve the protest.

If you do not advise us within twenty (20) days that the protest has been resolved, the matter will be scheduled for conference and/or hearing. At such a conference and/or hearing, the following are the principle items the Department can consider in either approving or denying the application for permit (Section 42-203, Idaho Code):

1. Will the proposed use reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purpose intended?
3. Is the application made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?
5. Will the proposed use under this permit conflict with the local public interest?

If this office can be of further assistance, please contact us.

Very truly yours,

RONALD D. CARLSON
Eastern Regional Supervisor

RDC:cw

Enclosure

cc: IDWR - State Office

MICROFILMED

February 7, 1984

RE: Application for Permit No. 32-7136 BIRCH POWER COMPANY

O'dell A. Frandsen
District Manager
Bureau of Land Management
940 Lincoln Road
Idaho Falls, ID 83401

Dear Mr. Frandsen:

Your protest against the approval of the above referenced application has been received and a copy has been sent to the applicant. The Department suggests you contact the applicant directly in an effort to determine what is proposed by the application and to attempt to resolve the protest.

If you do not advise us within twenty (20) days that the protest has been resolved, the matter will be scheduled for conference and/or hearing. At such a conference and/or hearing, the following are the principle items the Department can consider in either approving or denying an application for permit (Section 42-203, Idaho Code):

1. Will the proposed use reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purpose intended?
3. Is the application made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?
5. Will the proposed use under this permit conflict with the local public interest?

If this office can be of further assistance, please contact us.

Very truly yours,

RONALD D. CARLSON
Eastern Regional Supervisor

RDC:cw

cc: IDWR - State Office

MICROFILMED

February 7, 1984

RE: Application for Permit No. 32-7136 BIRCH POWER COMPANY

Mr. Tom Reinecker
Regional Supervisor
Department of Fish & Game
1515 Lincoln Road
Idaho Falls, ID 83401

Dear Tom:

Your protest against the approval of the above referenced application has been received and a copy has been sent to the applicant. The Department suggests you contact the applicant directly in an effort to determine what is proposed by the application and to attempt to resolve the protest.

If you do not advise us within twenty (20) days that the protest has been resolved, the matter will be scheduled for conference and/or hearing. At such a conference and/or hearing, the following are the principle items the Department can consider in either approving or denying an application for permit (Section 42-203, Idaho Code):

1. Will the proposed use reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purpose intended?
3. Is the application made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?
5. Will the proposed use under this permit conflict with the local public interest?

If this office can be of further assistance, please contact us.

Very truly yours,

RONALD D. CARLSON
Eastern Regional Supervisor

RDC:cw

cc: IDWR - State Office

RECORDED

February 7, 1984

RE: Application for Permit No. 32-7136 BIRCH POWER COMPANY

Ben R. Wilding, Watermaster
Water District No. 32-D
Star Route
Dubois, ID 83423

Dear Mr. Wilding:

Your protest against the approval of the above referenced application has been received and a copy has been sent to the applicant. The Department suggests you contact the applicant directly in an effort to determine what is proposed by the application and to attempt to resolve the protest.

If you do not advise us within twenty (20) days that the protest has been resolved, the matter will be scheduled for conference and/or hearing. At such a conference and/or hearing, the following are the principle items the Department can consider in either approving or denying an application for permit (Section 42-203, Idaho Code):

1. Will the proposed use reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purpose intended?
3. Is the application made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?
5. Will the proposed use under this permit conflict with the local public interest?

If this office can be of further assistance, please contact us.

Very truly yours,

RONALD D. CARLSON
Eastern Regional Supervisor

RDC:cw

cc: IDWR - State Office

RECEIVED
FEB 10 1984
IDWR

Feb. 3, 1984

RECEIVED

FEB 3 1984

Department of Water Resources
Eastern District Office

Dept. Water Resources
150 Sharp Ave
Idaho Falls, ID.

Gentlemen,

I as the Watermaster of Water District 32-D wish to enter a protest against application 32-7136. As of this date I have seen no engineering specifications which demonstrate that the proposed ditch will have the capacity to conduct 30 cfs for this application and 45 cfs for application 35-7128.

We feel it is essential that the ditch capacity be established to carry at least this total amount (75 cfs) to conduct water to downstream users in WD # 32-D.

Sincerely,

Bern R. Willing



RECEIVED
FEB 2 1984
Department of Water Resources
Eastern District Office

February 1, 1984

Mr. Ernest Carlsen
Assistant Regional Supervisor
Department of Water Resources
150 Shoup - Suite 15
Idaho Falls, ID 83402

Re: Application for Permit No. 32-7136 - Birch Power Company

Dear Ernie:

We have reviewed the above application for an additional 30 cfs of water from Birch Creek for hydropower production and would like to enter a protest.

We presently have under protest the application for 45 cfs (No. 32-7128) for this same project. The major reason for the original protest was differences over minimum flows. This request for an additional 30 cfs would totally preclude any minimum flow on the 3000 feet of Birch Creek affected above Reno Diversion. If both applications are approved, then 75 cfs could be diverted which would result in total dewatering of this segment at least eleven months of the year, and in many years no flows would pass the diversion. This would result in a total loss of fishery resources and management options in this segment.

We would like the protest on Application No. 32-7128 for 45 cfs settled first since those decisions will affect this application.

Thank you for the opportunity to comment on this application.

Sincerely,

Tom Reinecker for

Tom Reinecker
Regional Supervisor
Region 6

cc: US Fish & Wildlife Service
Bureau of Fisheries
Ted Sorenson



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Idaho Falls District
940 Lincoln Road
Idaho Falls, Idaho 83401

JAN 31 1984

IN REPLY
REFER TO: 7250.4

Mr. Ernest Carlson
Assistant Regional Supervisor
150 Shoup - Suite 15
Idaho Falls, ID 83402

RE: Application for Permit No. 32-7136 Birch Power Company

Dear Mr. Carlson:

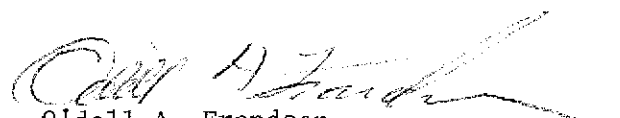
The Bureau of Land Management has on file with your office a protest on water right application for permit #32-7128 Birch Power Company, for 45 cfs on Birch Creek. The basis of this protest was: (1) conflicting opinion over flow requirements between the proposed diversion and Reno Ditch diversion (approximately 3,000 ft. of channel); and (2) the feasibility of maintaining a quality fishery in the feeder canal.

Application #32-7136 requests an additional 30 cfs flow for a total of 75 cfs for the two applications. We do not believe this flow would be available except for short periods of time during spring runoff. Enclosed is research originally provided to us by Mr. Sorenson showing average flows by month at the Eight Mile Canyon Gage and estimated flows at the proposed diversion.

The consequences of an approval of these applications would be to dry the channel below the proposed diversion for well over 11 months on high water years and would dewater the channel year-around for most water years. This would mean a total loss of fisheries and wildlife riparian habitat below the diversion. Thus BLM would be left with no management options below the point of diversion. We do not believe this to be in the best public interest.

We would recommend that action on application 32-7136 be suspended until after application 32-7128 is resolved through the hearing process. We feel application 32-7136 should be considered as a separate action.

Sincerely,


O'dell A. Frandsen
District Manager

Enclosure:
March 14, 1983 letter with attached flow table

cc: Idaho Department of Fish & Game

Ted S. Sorenson P.E.-L.S.
CONSULTING ENGINEER
550 LINDEN DRIVE
IDAHO FALLS, IDAHO 83401

JIM - I made
Brent a
copy
4B

March 14, 1983

Bus: 208-522-8069
Res: 208-529-2469

Mr. Brent D. Jensen, Area Mgr.
Big Butte Resource Area, BLM
Idaho Falls Dist.
940 Lincoln Road
Idaho Falls, ID 83401

Mr. Virgil Moore
Idaho Department of Fish & Game
1515 Lincoln Road
Idaho Falls, ID 83401

RE: Birch Creek Hydroelectric Proposal

Asst. D.M.		Asst. Dir.	
Resource Mgmt.		✓	4B
Operations			
Administration			
RECEIVED - Idaho Falls D.O.			
USDI		MAR 16 1983	BLM
Planning			
Public Affairs			
Big Butte RA			
McCall RA			
Soda Springs RA			

Dear Mr. Jensen and Mr. Moore,

I have met with the Reno Ditch users with respect to your requirement that I secure permission for permanent closure of Reno Ditch. To that end I have met with irrigators using Reno Ditch to discuss the situation. The group raised the following questions which I could not answer and am therefore, requesting your written response:

1. Would the closure of Reno Ditch be merely an earthen blockade at the diversion which could be easily reopened until such time as the ability of the new ditch to deliver irrigation flows could be relied upon?
2. Would your agency protest Reno Ditch Irrigators filing with the Idaho Department of Water Resources to move their point of diversion to coincide with the intake of the power feeder canal? Further would your agency protest the irrigators' diversion of existing decreed irrigational water to the extent that 5 cfs bypass flow was reduced, depending upon year, to zero?

Table One (attached) shows the average flow May thru October as tabulated from ten years (1970 thru 1980) of USGS data (Eight-Mile Canyon Road). Also shown is the estimated average flow at the proposed new point of diversion approximately 8500 feet downstream. The flows shown were calculated via linear extrapolation of bedloss between Eight-Mile USGS station and University of Idaho Gauging Station (operated in 1980 only) near Reno Ranch on Reno Ditch.

3. During early spring and fall months the Reno Ditch Irrigators utilize upstream water owned by upstream irrigators near Blue Dome through a "quasi" lease arrangement. Would your agency protest the Reno Ditch Irrigators transfer of this water through the proposed diversion to the extent that 45 cfs was exceeded to the maximum decreed irrigational diversion of Birch Creek which is 69.8 cfs?

Your prompt response is sincerely appreciated.

Very truly yours,

Ted S. Sorenson

Ted S. Sorenson, P.E.
Consulting Engineer

MICROFILMED

FILE COPY

TSS:kw

enc

cc: Reno Ditch Irrigators

TABLE ONE

	Average Flow* at USGS Station - Eight Mile Canyon (cfs)	Number of Years Average Flow Exceeded	Estimated Flow at Proposed Power Canal Diver. (cfs)
April	74.3	1 of 2	71.6
May June	54.3	4 of 9	51.6
June	45.3	5 of 10	42.6
July August	44.1	5 of 10	41.4
August September	45.7	3 of 10	43.0
September October	46.4	4 of 10	43.7
October	60.9	2 of 3	57.2

* 1970 thru 1980 average

January 12, 1984

RE: Application for Permit No. 32-7136 BIRCH POWER COMPANY

Bureau of Land Management
940 Lincoln Road
Idaho Falls, ID 83401

Gentlemen:

We are enclosing a copy of an application that may be of interest to your agency. Please review the application and submit any comments you may have to our Department as soon as possible. The last date of protest is February 6, 1984, and we are required to take final action shortly thereafter.

If we may be of further assistance, please feel free to contact us.

Respectfully submitted,

ERNEST CARLSEN
Assistant Regional Supervisor

EC:cw

Enclosure

RECEIVED

January 12, 1984

RE: Application for Permit No. 32-7136 BIRCH POWER COMPANY

Mr. Ben Wilding, Watermaster
Water District No. 32-D
Route 8
Dubois, ID 83423

Dear Mr. Wilding:

We are enclosing a copy of an application that may be of interest to your agency. Please review the application and submit any comments you may have to our Department as soon as possible. The last date of protest is February 6, 1984, and we are required to take final action shortly thereafter.

If we may be of further assistance, please feel free to contact us.

Respectfully submitted,

ERNEST CARLSEN
Assistant Regional Supervisor

EC:cw

Enclosure

RECEIVED
JAN 17 1984

January 12, 1984

RE: Application for Permit No. 32-7136 BIRCH POWER COMPANY

Mr. Tom Reinecker
Regional Supervisor
Department of Fish & Game
1515 Lincoln Road
Idaho Falls, ID 83401

Dear Mr. Reinecker:

We are enclosing a copy of an application that may be of interest to your agency. Please review the application and submit any comments you may have to our Department as soon as possible. The last date of protest is February 6, 1984, and we are required to take final action shortly thereafter.

If we may be of further assistance, please feel free to contact us.

Respectfully submitted,

ERNEST CARLSEN
Assistant Regional Supervisor

EC:cw

Enclosure

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
Eastern Region

150 Shoup Ave., Suite 15
Idaho Falls, Idaho 83402
(208) 525-7161

JANUARY 11, 1984

The Standard Journal
P. O. Box 10
Rexburg, Idaho 83440

Gentlemen:

Enclosed you will find a legal notice which we wish to have published on the dates indicated (once a week for two consecutive weekly issues) in your newspaper. We have allowed ample time for you to submit a galley proof to this office for review before the first publication date. If you cannot publish the notice on the proposed dates, please contact us immediately.

An affidavit of publication must be submitted to the Department along with the publication bill. Your cooperation is appreciated.

Please send the affidavit of publication and publication billing to this office before FEBRUARY 6, 1984.

Yours truly,

RONALD D. CARLSON
Supervisor
Eastern Region

Encl.

MICROFILMED

NOTICE OF APPLICATION FOR WATER RIGHT

The following application(s) have been filed to appropriate the public waters of the State of Idaho:

The permit(s) will be subject to all prior water rights. Protests must be filed with the Director, Dept. of Water Resources, 150 Shoup Ave., Suite 15, Idaho Falls, Idaho 83402 on or before FEBRUARY 6, 1984.

KEN DUNN, Dir.

Published 1/19 & 1/26/84.

MICROFILMED

32-7136-

BIRCH POWER CO.

550 LINDEN, IDAHO FALLS, ID 83401

Source: BIRCH CREEK trib. to SINKS

Date Filed: 01/03/1984

Diversion Pt: NENW Sec 03 T 08N R 30E

Use: POWER (30.00 CFS)

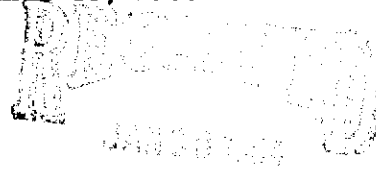
In: NENE Sec 17 T 08N R 31E

MICROFILMED

Ted S. Sorenson P.E.-L.S.
CONSULTING ENGINEER
550 LINDEN DRIVE
IDAHO FALLS, IDAHO 83401

Bus: 208-522-8069
Res: 208-529-2469

December 30, 1983



Mr. Ron Carlson
Idaho Department of Water Resources
State Office Building
150 Shoup
Idaho Falls, ID 83402

Department of Water Resources
Eastern District Office

RE: BIRCH POWER COMPANY APPLICATION FOR PERMIT #32-7128

Dear Mr. Carlson,

Here is an additional application for this permit. This application applies for an additional 30 second feet over and above the 45 second feet which was previously applied for. This additional filing is consistent with the Birch Power Company Preliminary Engineering Design and Plan Report previously submitted to you.

If at all possible, I'd appreciate this filing being considered with permit #32-7128.

Your consideration is appreciated.

Very truly yours,

Ted S. Sorenson, P.E.
Consulting Engineer

TSS:kw

enc.

cc: Mr. Bobby Fleenor
Idaho Dept. of Water Resources
Boise, ID

Ray Ribgy, Attorney
Rexburg, ID

MICROFILMED