

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER)
RIGHT NOS. 03-2018, 03-10246,) **FINAL ORDER REGARDING**
AND 03-10247) **ADMINISTRATION**
_____)

Water right nos. 03-2018, 03-10246 and 03-10247 are power storage water rights for the Brownlee, Oxbow and Hells Canyon hydropower projects (collectively, “Hells Canyon Complex” or “HCC”) that were decreed in the Snake River Basin Adjudication (“SRBA”) in the name of Idaho Power Company. Water right no. 03-2018 authorizes storage of 1.4 million acre-feet per year at the Brownlee project, water right no. 03-10246 authorizes storage of 58,385 acre-feet per year at the Oxbow project, and water right no. 03-10247 authorizes storage of 167,720 acre-feet per year at the Hells Canyon project. “Power Storage” and “Power from Storage” are the authorized purposes of use for each right. The Partial Decrees, however, do not reference the fact that these three reservoirs are operated for flow regulation and load-following purposes at Idaho Power Company’s HCC projects. Unlike most other upstream reservoirs, the purpose of these reservoirs is not to store water for diversion for out-of-stream consumptive uses, but rather to control the timing of the storage and flow of water through the projects to optimize power production. Therefore, it is necessary for the Director to issue instructions for the administration of water right nos. 03-2018, 03-10246 and 03-10247.

ANALYSIS

The three HCC projects were proposed as an alternative to the federal government’s proposed “single massive structure to be known as the High Hells Canyon project.” Idaho Power proposed “to build three smaller dams on the same portion of the [Snake] river.”¹ Idaho Power obtained the support of state government and the agricultural irrigators for its projects, in part by “agree[ing] to subordinate its water rights at Hells Canyon” to future upstream depletions.² The Company’s proposal prevailed, and a subordination condition expressly recognizing the “backwater created by the project” was included in the unified federal license for the three HCC projects issued in 1955:

“The project shall be operated in such manner as will not conflict with the future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the

¹ *Idaho Power Co. v. State*, 104 Idaho 575, 580, 661 P.2d 741, 746 (1983).

² *Id.*

backwater created by the project, for the irrigation of lands and other beneficial consumptive uses in the Snake River waterhead. (sic).”³

As a result, “Idaho Power acquired only subordinated water rights at the Hells Canyon Complex.”⁴ The “backwaters” referenced in the subordination condition were integral to the three HCC projects, each of which as proposed and built included river-wide dams that form on-stream reservoirs. The projects’ operational plans called for the reservoirs to be operated as flow regulation structures or “fore bays,” with their water levels fluctuated to support power production and peaking operations. This was expressly recognized in the permits for the hydropower water rights at each of the three HCC projects:

Water Right Nos. 03-2020 (Hells Canyon) and 03-2019 (Oxbow): “Reservoir created by dam will be fluctuated approximately 5 feet for daily regulation of power output and power plant peaking purposes.”⁵

Water Right Nos. 03-2017 (Hells Canyon) and 03-2025 (Oxbow): “Fore bay above dam will be fluctuated a maximum of 10 feet for daily power production and peaking purposes.”⁶

Water Right No. 03-2024 (Brownlee): “Reservoir created by dam may be fluctuated a maximum of 101 feet annually to provide storage for power production, flood control and navigation.”⁷

Water Right No. 03-2023 (Brownlee): “Water will be stored in reservoir and thence diverted from the Snake River through a tunnel approximately 1300 feet long, thence through the water wheels back to the present Snake River channel. No water will be consumed.”⁸

The proof of beneficial use statements submitted in the licensing proceedings for the HCC hydropower water rights and the Brownlee storage water right (water right no. 03-2018) also identified the project reservoirs as part of the diversion and conveyance structures for the hydropower operations.⁹ Operations and water uses at the HCC projects since then have

³ *Id.* at 586, 661 P.2d at 752 (quoting Article 41 of the federal license).

⁴ *Id.* at 589, 661 P.2d at 755.

⁵ *Permit No. 24393* (Aug. 24, 1953), at 2 (“Remarks” in “Approval of State Reclamation Engineer”); *Permit No. 22442* (Oct. 23, 1951), at 2 (“Remarks” in “Approval of State Reclamation Engineer”).

⁶ *Permit No. 31990* (Jul. 17, 1964), at 2 (“Remarks” in “Approval of State Reclamation Engineer”); *Permit No. 31787* (Mar. 27, 1964), at 2 (“Remarks” in “Approval of State Reclamation Engineer”).

⁷ *Permit No. 31786* (Mar. 27, 1964), at 2 (“Remarks” in “Approval of State Reclamation Engineer”).

⁸ *Permit No. 23925* (Apr. 2, 1953), at 2 (“Remarks” in “Approval of State Reclamation Engineer”).

⁹ *Permit No. 243393, Deposition of Holder* (Jul. 10, 1968), at 1; *Permit No. 243393, Deposition of Witness* (Earl C. Reynolds) (Jul. 10, 1968), at 2; *Permit No. 31990, Deposition of Holder* (Jul. 10, 1968), at 1; *Permit No. 31990, Deposition of Witness* (Earl C. Reynolds) (Jul. 10, 1968), at 2; *Permit No. 22442, Deposition of Holder* (Feb. 21, 1962), at 1; *Permit No. 31786, Deposition of Holder* (Aug. 5, 1964), at 1; *Permit No. 23925, Deposition of Holder* (Jun. 17, 1959), at 1; *Permit No. R-905, Deposition of Holder* (Jun. 17, 1959), at 1; *Permit No. R-905, Deposition of Witness* (Myron Swendsen) (Jun. 17, 1959), at 1; *Permit No. R-905, Deposition of Witness* (Keith E. Anderson) (Jun. 17, 1959), at 1. While Idaho Power Company sought a storage water right permit and license for the Brownlee project, the Company did not file applications for storage water rights at Oxbow or Hells Canyon. (The Oxbow and Hells Canyon reservoirs, which respectively have capacities of approximately 58,385 A.F. and 167,720 A.F., are far

commonly involved fluctuating the water levels of the HCC project reservoirs for power regulation, power peaking, and load-following purposes at the HCC power plants. These flow-regulation operations are non-consumptive, and do not interfere with the exercise of water rights diverting from the Snake River within Idaho downstream from the HCC projects. “Consistent with the HCC FERC license, the Johnson Bar and Lime Point minimum stream flows” established downstream from the HCC projects “are subordinated to upstream consumptive uses above the HCC and carry no right to seek the release of water from the HCC other than that required to be released by the terms of the FERC license.” *Idaho State Water Plan* (Idaho Water Res. Bd.) (Nov. 2012), at 62.¹⁰

The partial decrees entered in the SRBA for the HCC hydropower water rights were based on the licenses, and also included the subordination provision of the original federal power license, albeit slightly modified to refer to the backwater created by “the dam” rather than the backwater created by “the project.”¹¹ The partial decrees for the storage water rights for the “backwaters” – water rights nos. 03-2018, 03-10246 and 03-10247 – also include the condition subordinating the storage water rights to upstream diversions and use for irrigation and other consumptive beneficial uses.

The record demonstrates that the HCC hydropower water rights as permitted, perfected, and exercised have always authorized and relied upon operational fluctuations of the water levels of the HCC backwaters to support power use at the HCC power plants. These operations have always been subject to the subordination condition of the original federal power license as confirmed by the Idaho Supreme Court and incorporated into the partial decrees for the HCC hydropower water rights.

The partial decrees for the three storage water rights for the HCC “backwaters” also include the subordination condition. The HCC storage water rights have been interpreted, exercised and administered in conjunction with the HCC hydropower water rights, and as allowing operational fluctuations of the water levels of the HCC backwaters to optimize power regulation and power peaking operations at the HCC projects, subject to the terms of the subordination condition.

Nothing in the partial decrees for the three power storage water rights for the HCC projects support a conclusion that the partial decrees were intended to alter historic operations or water right administration at the HCC projects. Thus, the partial decrees for storage water rights nos. 03-2018, 03-10246 and 03-10247 should be interpreted and administered consistent with the historic operation of the HCC projects.

smaller than Brownlee, which has a capacity of approximately 1.4 million A.F.) Thus, the storage water rights decreed in the SRBA for Oxbow (water right no. 03-10246) and Hells Canyon (water right no. 03-10247) were based on beneficial use claims rather than licenses.

¹⁰ Water rights nos. 3-0007 and 3-0008.

¹¹ The change may have been made to ensure the subordination condition is consistent with the “Point of Diversion” elements of the partial decrees, which include a remark recognizing that “[w]ater is diverted by a dam that spans the Snake River between Idaho and Oregon.” In any case, the modification does not change the substantive effect or interpretation of the subordination condition.

CONCLUSION

Storage water right nos. 03-2018 (Brownlee), 03-10246 (Oxbow) and 03-10247 (Hells Canyon) authorize operational fluctuations of the water levels of the backwaters or reservoirs at Brownlee, Oxbow and Hells Canyon for power regulation, power peaking, and load-following purposes. Such operations are subject to the condition in the partial decrees for storage water right nos. 03-2018, 03-10246 and 03-10247 subordinating them to future upstream depletion in flows and the diversion and use of such water for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that water right nos. 03-2018, 03-10246 and 03-10247 will be administered as authorizing operations of the HCC project backwaters or reservoirs at Brownlee, Oxbow and Hells Canyon that fluctuate their water levels for purposes of power regulation, power peaking, and load-following. Such operations are subject to the following subordination condition, which is recited in the partial decrees for storage water right nos. 03-2018, 03-10246 and 03-10247:

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

Such operations include the storage and release of quantities in excess of the annual volumes identified in storage water right nos. 03-2018, 03-10246 and 03-10247 provided such operations are subject to the subordination condition.

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

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

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

Dated this 28th day of June, 2013.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

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

Document(s) Served: FINAL ORDER REGARDING ADMINISTRATION and Explanatory Information to Accompany a Final Order

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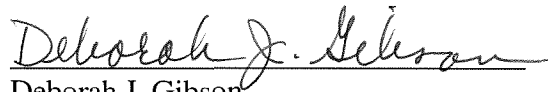
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EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

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

(Required by Rule of Procedure 740.02)

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

PETITION FOR RECONSIDERATION

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

REQUEST FOR HEARING

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

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

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