

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF)
WATER RIGHT NO. 02-2080) **FINAL ORDER REGARDING**
) **INSTRUCTIONS TO WATER**
) **DISTRICT 02 WATERMASTER**
_____)

Water right no. 02-2080 was decreed in the Snake River Basin Adjudication (“SRBA”) in the name of Idaho Power Company for 15,420 c.f.s. for power use at the C.J. Strike hydropower project on the Snake River (the “Project”), with a priority date of June 21, 1950. *Partial Decree Pursuant to I.R.C.P. 54(b) For Water Right 02-02080* (Mar. 31, 2011) (“*Partial Decree*”). The Project includes a pond or backwater area that is integral to the use of water for power purposes under water right no. 02-2080, but the pond is not referenced in the *Partial Decree*. Therefore it is necessary for the Director to provide the Water District 02 Watermaster with instructions for administration of water right no. 02-2080.

ANALYSIS

The Project as originally proposed included a dam across the Snake River that would form “pondage.” The water right permit for the Project as approved by the State Reclamation Engineer on August 31, 1950, included “Remarks” authorizing operational “fluctuations” of the proposed pond:

Pondage formed by dam will be used only for daily and weekly fluctuations of load. Top area of pond will be approximately 7,000 acres. Dam will elevate river level at the dam site 88 feet and will affect the river upstream for a distance of approximately 28 miles. Maximum draw down of pond, 2 feet.¹

This condition distinguishes the Project pond from upstream Snake River reservoirs, which historically have been authorized primarily to store winter and spring flows for irrigation use later in the year, when the natural flow supply is insufficient to satisfy irrigation needs. The Project pond, in contrast, was intended and approved as a means of regulating flow to support power generation.

The permit included a subordination condition, which was added to the permit through an amendment authorized by Idaho Power Company on March 14, 1952, and approved by the State Reclamation Engineer and the Governor. The subordination condition recognized that the reservoir was integral to the Project:

¹ See Permit No. 21671 (Aug. 31, 1950), at 2 (“Remarks” in “Approval of State Reclamation Engineer”).

The rights herein granted for the use of the waters, stream bed and other lands of the State of Idaho, necessary for the construction and operation of the dam and reservoir, are subject to the condition that the project shall be operated in such manner as will not conflict with future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such waters, for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.²

Idaho Power Company submitted proof of beneficial use in December 1952 that asserted 15,420 c.f.s. had been beneficially used at the Project for power purposes. This proof included testimony that the dam formed a “backwater area” in which water was stored and released “as needed in full plant capacity,” with a “[m]aximum reservoir fluctuation [of] approximately 5 feet.”³

The Project’s water right license was issued in 1953 for the quantity claimed in the proof of beneficial use (15,420 c.f.s.). In contrast to the permit, the license unlike the permit did not expressly refer to the reservoir.⁴ The existence of the pond or backwater area and operational fluctuations of its level were integral to perfecting water right no. 02-2080 and proving the full extent of the licensed beneficial use. The Project’s operations and water uses since licensing have continued to involve fluctuating the level of the backwater for power regulation and load-following purposes.

The record confirms that water right no. 02-2080 as permitted, perfected, and exercised has always included the C.J. Strike “pond,” and authorized operational fluctuations of the level of the pond for power use at the Project. These operations have always been subject to the “unrestricted subordination language”⁵ of water right no. 02-2080, just as the use of water for power generation at the Project has always been so subordinated.

The *Partial Decree* is based upon the license and includes the subordination condition of the license. Nothing in the *Partial Decree* or the SRBA record for water right no. 02-2080 supports a conclusion that the *Partial Decree* was intended to alter historic operations at the Project. As discussed above, the licensing proof was based upon subordinated operational fluctuations of the Project pond or backwater for power regulation and load-following purposes, and the license was historically interpreted and administered as authorizing such subordinated pond operations. It follows that the *Partial Decree* also should be so interpreted and administered.

² See *Permit No. 21671* (Aug. 31, 1950), at 2 (“Remarks” in “Approval of State Reclamation Engineer”).

³ *Permit No. 21671, Proof of Beneficial Use And Completion of Work, Deposition Of Witness* (Henry L. Senger) (Dec. 9, 1952), at 2; *Permit No. 21671, Proof of Beneficial Use And Completion of Work, Deposition Of Witness* (Myron Swendsen) (Dec. 9, 1952), at 2 see also *Permit No. 21671, Proof of Beneficial Use And Completion of Work, Deposition Of Holder* (B.C. Russell, General Superintendent, Idaho Power Company) (Dec. 9, 1952), at 2 (“Reservoir to be fluctuated up to approximately 5 feet in top elevation daily, for regulation of power production in accordance with load requirements.”).

⁴ The license included a subordination condition. *State of Idaho, License And Certificate Of Water Right, Water License No. 21671* (Apr. 9, 1953); see also *Idaho Power Co. v. State*, 104 Idaho 575, 580, 661 P.2d 741, 746 (1983) (“That water license was issued in 1953 and contained the first unrestricted subordination language on record.”).

⁵ *Idaho Power Co. v. State*, 104 Idaho 575, 580, 661 P.2d 741, 746 (1983).

CONCLUSION

Water right no. 02-2080 is based upon and necessarily authorizes operational fluctuations of the Project pond or backwater for power regulation and load-following purposes. Such operations are subject to the express subordination condition in the *Partial Decree*.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that the Watermaster for Water District 02 is instructed to administer water right no. 02-2080 as authorizing operations at the Project that fluctuate the pond or backwater level for purposes of power regulation and load-following. Such operations are subject to the following subordination condition, which is recited in the *Partial Decree*:

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

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 INSTRUCTIONS TO WATER DISTRICT 02 WATERMASTER and Explanatory Information to Accompany a Final Order

James C. Tucker
Idaho Power Company
P.O. Box 70
Boise, Idaho 83707

Dana Hofstetter
HOFSTETTER LAW OFFICE
608 West Franklin Street
Boise, ID 83702

John Simpson
BARKER ROSHOLT & SIMPSON LLP
P.O. Box 2139
Boise, ID 83701-2139

Randy Budge
TJ Budge
RACINE OLSON NYE BUDGE
P.O. Box 1391
Pocatello, ID 83204-1391

Jerry Rigby
RIGBY ANDRUS & RIGBY CHTD
P.O. Box 250
Rexburg, ID 83440-0250

Candice McHugh
CANDICE MCHUGH LAW OFFICE PC
P.O. Box 554
Meridian, ID 83680

Jo Beeman
BEEMAN & ASSOCIATES PC
409 W. Jefferson
Boise, ID 83702

Tim Luke
Corbin Knowles
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

A. Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, ID 83205

Clive Strong
Office of Attorney General
Natural Resource Division
P.O. Box 83720
Boise, ID 83720-0010


Deborah J. Gibson
Administrative Assistant to the Director

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.