BEFORE THE DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

IN THE MATTER OF THE

PETITION OF IDAHO POWER COMPANY

PETITION FOR THE AMENDMENT OF RULE 5, 2.

OF THE WATER

APPROPRIATION RULES AND REGULATIONS ADOPTED

APRIL 8, 1986

Idaho Power Company, in support of its Petition, states:

1. Idaho Power Company is a corporation authorized to do and doing business as a public utility in the State of Idaho. Idaho Power Company owns a number of hydroelectric projects on the main stem of the Snake River below Milner Dam, being the Twin Falls, Shoshone Falls, Upper Salmon, Lower Salmon, Bliss, C. J. Strike, Swan Falls, Brownley, Oxbow and Hells Canyon projects, respectively. All of those projects have licensed water rights issued by the Department and its predecessors and all of those water rights are senior in right.
and prior in time to the applications and permits now pending which seek to appropriate water which would be tributary to the main stem of the Snake River below Milner Dam and above Swan Falls Dam. Petitioner has participated with comments in the entirety of the rule making process which preceded the adoption of the "Water Appropriation Rules and Regulations" ("Rules") adopted April 8, 1986. The electric energy produced by its hydroelectric projects is delivered to its customers at low rates, and thus the hydroelectric facilities of the Company constitute a major asset of the Company, and a major benefit to the customers of Idaho Power Company in the State of Idaho.

Petitioner is also a party to the agreement of October 25, 1984, commonly referred to as the Swan Falls Settlement Agreement, a copy of which is attached hereto, and by this reference made a part hereof. Petitioner is also the beneficiary of the trust created by the Legislature of the State of Idaho in Idaho Code §42-203B, and as such is entitled to defend its water rights and to insist that the Department of Water Resources, as an agency of the State of Idaho, fulfill the State's trust responsibilities in enforcing and implementing the policies of the settlement agreement and the implementing legislation.

2. Rule 5.2. of the rules adopted April 8, 1986, was apparently intended to permit the implementation of §42-203C. The legislation, which was adopted following the Swan Falls Agreement, was intended to create a three step process in evaluating appropriations of trust water. While the Rules
acknowledge the three step process, Rule 5,2. is in violation of the statutory scheme. Therefore, Rule 5,2. as promulgated should be repealed and an amended rule adopted. That amended rule should read as follows:

5,2. CRITERIA FOR EVALUATING WHETHER A PROPOSED USE OF TRUST WATER WILL CAUSE A SIGNIFICANT REDUCTION. REFERENCE: SECTION 42-203C(1), IDAHO CODE AND RULE 1,4,2,2.

5,2,1. For purposes of reallocating trust water pursuant to §42-203C, Idaho Code, a proposed use for irrigation purposes will be presumed not to cause a significant reduction within the meaning of §42-203C, Idaho Code if:
(a) the proposed use, when fully developed, and when the impact of its depletion is fully felt, will reduce the flow of the Snake River measured at the Murphy gauge by not more than one (1) acre foot per day, and
(b) the proposed use, cumulatively with other proposed uses meeting the requirements of (a) above, which are reasonably likely to be fully developed within the same calendar year, will deplete the flow of the Snake River by a total of 20 cfs or less.
5,2,1,2. The presumption created in Rule 5,2,1,2. will be used by the Department for administrative purposes, but will cease to exist if a protest is filed and evidence contrary to the effect of the presumption is introduced.

5,2,1. The Director will determine on a case-by-case basis from available information whether a permit to be reprocessed or an application for trust water will cause a significant reduction.

3. In resolving the Swan Falls conflict, the parties considered that there were 600 cfs of water available in a critical year at Swan Falls, over and above the 3900 cfs minimum flow established by the agreement and by amendment of the State water plan. 150 cfs were set aside for DCMI development. The remaining 450 cfs were to be developed for irrigation only upon consideration of the new public interest criteria established by §42-203C. A significant reduction in water available for hydroelectric generation first had to be found, but it is clear that the parties considered 450 cfs of water to be a significant amount of water, and that the river should be protected from non-economic depletions of that 450 cfs. Therefore, we can take it as established by the
history of the settlement that 450 cfs is a significant amount of water and would be a significant reduction in the water available for hydropower production, if the river were depleted to that amount.

Rule 5,2. as adopted would permit proposed uses which would deplete the river 2 cfs per day or less to escape any economic analysis if they totalled less than 40,000 acres per year. Since 2 acre feet per day of depletion would irrigate 365 acres if the depletion were spread over the entire year, no economic analysis would be required of the great majority of pending applications and permits. Thus, the 450 cfs could be depleted with no meaningful economic analysis.

The statutory framework created by the agreement required not only that development be spread out over a number of years (the 20,000 acre per year cap), it required that the economic benefits of the development be compared with the economic detriment. The rules as written turn the statute inside out, by making the cap, which was a limitation on otherwise viable development, a standard to measure significant reduction. This approach to significant reduction renders the entire settlement mostly ineffectual except for the very largest projects.

The proposed amended Rule 5,2. gives effect to the intent of the 1986 amendment to §42-203C. As explained by the parties to the agreement, and by the legislative proponent of Senate Bill 1358 (Ch. 117 of the 1986 Session Laws) "significant reduction" had to be applied to certain projects by themselves, against the background of existing uses, without
also postulating full future development of the river. If full future development is assumed, then all proposed uses have to be processed under §42-203C, rendering the "individual" review meaningless for even the first projects.

The 1986 amendment required that each use be viewed in a future context only as to the uses reasonably estimated to be in existence within one year. It is possible to read the statute as requiring only one 12 month look, and all later uses would be measured against existing uses including uses estimated to be production within one year. However, since the settlement agreement and the statute demonstrate a desire to spread new development over several years, it makes sense to also spread the one-year estimate of future uses over several years.

The proposed rule permits irrigation uses of up to 180 acres (365 acre feet ÷ 2 acre feet per acre) to be approved without §42-203C review up to a cumulative total of 20 cfs in any one calendar year. 20 cfs = 40 acre feet per day or a potential maximum of 7200 acres per year (40 x 180 = 7200).

The presumption disappears in the event of a protest, since the protestant already has the burden of proof. If no protest is filed, the Department can use the presumption to administer the statute. Proposed irrigation uses which do not come within the presumption are not disadvantaged, since the significant reduction decision would remain to be made as to them.

4. Rule 5,2. of the Rules adopted by the Department is arbitrary and capricious and is contrary to the provisions
of §42-203C as amended by the 1986 Legislature and constitutes
an invalid and void promulgation.

The invalidity consists, among other things, of:

1. Applying the "cap" of §42-203C(2)(a)(v) to the
   significant reduction requirement of §42-203C.

2. Applying economic standards to the significant
   reduction question.

3. Requiring review of only future uses in
   significant reduction decisions in Rule 5,2,2,1.

In the case of Holly Care Center v. State of Idaho
(Idaho, 714 P.2d 45, 1986), the Idaho Supreme Court
said, in rejecting a Department of Employment rule:

"Furthermore, properly promulgated
administrative rules have the force and
effect of law... Nevertheless, it is also
the law that administrative rules are
invalid which do not carry into effect the
legislature's intent as revealed by existing
statutory law, and which are not reasonably
related to the purposes of the enabling
legislation." (714 P.2d 45, at 47)

Rule 5,2, as adopted does not carry into effect the
intent of the legislature and is invalid. For that reason, it
should be rescinded and the amended Rule 5,2, adopted in its
place.

DATED this 11th day of April, 1986.

NELSON, ROSHOLT, ROBERTSON,
TOLMAN & TUCKER

By: /s/ Thomas G. Nelson
VERIFICATION

STATE OF IDAHO   ) ss.
County of Twin Falls)

Thomas G. Nelson, being first duly sworn, upon oath deposes and says:

That he is the attorney for the plaintiff named in the foregoing Petition, that he has read the foregoing Petition, knows the contents thereof, that the statements contained therein are true to the best of his knowledge and belief, and that he makes this verification for his client who has its principal place of business in a county other than Twin Falls, where he, the said attorney, resides.

/\[
Thomas G. Nelson

SUBSCRIBED and SWORN TO before me this 28th day of April, 1986.

/\[
NOTARY PUBLIC
Residing at
My commission expires:

The foregoing is a true and certified copy of the document on file at the department of Water Resources.

Signed this 7th day of January, 2008.

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