

RECEIVED
OCT 06 1988 POLICY AND IMPLEMENTATION PLANNING FOR PROCESSING WATER RIGHT

FILINGS IN THE SWAN FALLS AREA.

Department of Water Resources

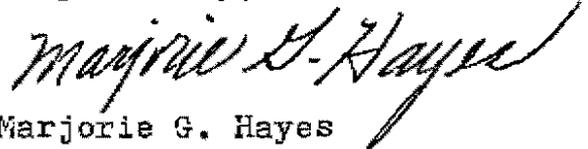
It is our opinion that the Idaho Water Resources Department should not proceed with the water filings until they take into account the possible outcome of the Fish & Wildlife Studies of May 20, 1988 which were signed by Rowland Schmitt, Regional Director of the National Marine Fisheries Service, Rolf L. Wallenstrom, Regional Director Fish & Wildlife Service, and Robert J. O'Connor, Chairman of the Board and Chief Executive Officer of the Idaho Power Company... pursuant to Public Law 100-216, signed at 2:00 P.M. at 1301 North Orchard, Boise, Idaho.

We feel that it is a very likely possibility that under the present contemplated course of action of the Water Resource Department that they could over allocate the system. This is especially true in the case of the needs of the Fish & Wildlife which were never considered in the Swan Falls agreement.

It is true that FERC does not need to be bound by this study, but there will undoubtedly be a clarification of the issue and we who are interested in the quality of life in our State, find comfort in the fact that " the criteria relating to justice and fair consideration of the Public Interest clearly states that local public interest and issuance of water rights are beyond disinterest, and that the public-trust doctrine is above legislative manipulation. Its origin in the United States lies in a United States Supreme Court case in which the Justices decided that the Illinois legislature could not give Lake Michigan to a friendly railroad. Every public trust since has involved an override of some act of the legislature or state administration alienating public property.*"

We feel that the Islands in the Snake River where the Wild Canadian Geese nest, the Peregrine Falcon soar, and the Bald Eagle fish make our State of Idaho unique and wonderful. We therefore do not feel that it is in the public interest to place them at risk with an inadequate stream flow that allows mammalian predation of their sanctity during years of low water flows... We also feel that the Indian Water Rights and the Federal Water Rights for the Deer Flat Refuge should be an integral part of the Planning procedure, since their rights precede many of the water rights that are now being considered.

Respectfully,



Marjorie G. Hayes
Idaho Consumer Affairs Energy and
Conservation Committee
IC

* Idaho Yesterday, the Quarterly Journal of the Idaho Historical Society, Other Uses for Water Scott Reid, p44, pp3. (Spring & Summer Edition 1986-87).



GOLDEN WEST IDAHO FALLS, INC.

P.O. BOX 488

356-9318

REXBURG, IDAHO 83440

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SEP 30 1988

September 28, 1988

Department of Water Resources

Mr. Keith Higginson
Director
Idaho Department of Water Resources
Statehouse
Boise, ID 83701

Dear Keith:

The delay in processing the backlog of water permit applications is serious given the fact of two years of drought. Many farmers want to drill wells this winter to have a backup water supply in the event winter snows are not adequate to replenish storage reservoirs. Now is the time to get well drillers underway. If farmers must wait till spring to receive approval it will be too late simply because there will not be enough time to drill the wells and install the pumps.

Furthermore, it is time to begin processing applications for new development. Many farmers were caught with expensive land holdings that could not be developed when the State stopped issuing permits.

When the Swan Falls Agreement was being promoted by the State there were assurances given that 20,000 acres per year could be developed above Swan Falls. It has now been several years since the Swan Falls Agreement was approved by the Legislature. More delays have been experienced in getting Federal approval of the Agreement. But those approvals have been received and it is time to proceed.

I know there are some concerns about the enormous backlog and how to process applications that date back to the 1960's and involve Desert Land Act and Carey Act applications. But the status of those applications can easily be determined by writing to the Bureau of Land Management requesting that they tell you which applications they will allow next year. If they will not allow any, which is most likely, then the application can be put on hold until a final determination can be received. Similarly all early applicants should be contacted to learn of their intent for next year. If they are unable to proceed next year, their applications can be set aside and reviewed again the following year. Following this procedure your office should be able to determine quite readily the priority applications which amount to 20,000 acres for 1989. If some procedure such as this can be followed those having applied for water would know when they can expect to have their permits considered.

I would like to know what your plans are for processing water permit applications since I'm being frequently asked by farmers about this matter.

Sincerely Yours,

A handwritten signature in cursive script, appearing to read "Bob".

Robert R. Lee

NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER

Chartered

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of

October 14, 1988

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OCT 14 1988

Department of Water Resources

R. Keith Higginson, Director
Idaho Department of Water Resources
1301 South Orchard
Boise, Idaho

Re: Swan Falls Policy and Implementation Plan

Dear Mr. Higginson:

Enclosed is the original of Idaho Power Company's comments on the Department's Policy and Implementation Plan. We appreciate being given the opportunity to comment on this important issue.

If you need any further information, please advise.

Yours very truly,



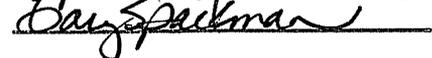
Thomas G. Nelson

06771
TGN/dj

cc: R.W. Stahman
L.E. Lanham
G.W. Panter
R.L. Hahn
J.A. Rosholt

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

Signed this 15th day of October 2008



SCANNED

JAN 05 2007

REC-11

OCT 14 1988

Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

* * * * *

IN THE MATTER OF: POLICY AND)
IMPLEMENTATION PLAN FOR)
PROCESSING WATER RIGHT FILINGS)
IN THE SWAN FALLS AREA)

* * * * *

COMMENTS OF IDAHO POWER COMPANY

Idaho Power Company submits the following comments relative to the draft Policy and Implementation Plan circulated by the Department:

General Comments

The format of the draft Policy and Implementation Plan (Plan) makes the subject matter appear more complex than it really is. Idaho Power Company (IPCO) suggests modifying the format to make it easier for a user to determine what the Department is proposing relative to the specific use or uses that the user is interested in.

In reviewing the Plan, it appears that the water rights to be dealt with generally fall into three categories:

1. Domestic, commercial, municipal and industrial uses (DCMI) no matter where located;
2. Trust water uses tributary to the Snake River below Milner Dam; and

3. Non-trust water uses tributary to the Snake River above Milner Dam.

The Department's proposed methods of handling these types of uses are intermixed in the Plan. Therefore, IPCO suggests that the policy discussion commencing on page six be separated into three separate discussions of DCMI, trust water and non-trust water, and that the subsequent implementation section be divided the same way. If the plan were divided in this fashion, a user would not have to search through the entire discussion in order to find the policy and implementation plan discussion applicable to a specific use, such as a non-trust water, undeveloped permit above Milner.

Specific Comments

IPCO has problems with two of the central features of the proposed plan. Those features are the "development fee" to be charged for the use of trust water for non-DCMI development and the use of a replacement water supply to meet required minimum flows at the Murphy gauge.

Background

During the discussions on the acceptance of the Swan Falls Agreement by the Idaho legislature, there was some concern expressed about the future of development of irrigated agriculture above Swan Falls Dam and below Milner Dam. A number of people were concerned that the Swan Falls Agreement

would block all future irrigation development that would affect flows tributary to that reach of the river. They were assured by the proponents of the legislation, including the State of Idaho, that water development, specifically irrigation development, would proceed in the same fashion as had traditionally been the case, with the exception of the new public interest criteria added in what is now Idaho Code §42-203(C). Proposed new trust water uses were to be constrained initially by the existing criteria of Idaho Code §42-203(A) and the additional public interest criteria added in §42-203(C). Ultimately, the amount of new development would be controlled by the need to meet minimum flows at the Murphy gauge. Those people were assured that, with those changes, the development of the water resource in that reach of the River would be "traditional".

There was also some discussion of the impact of a 3,900 cfs flow on instream values in the reach of the Snake River below Milner Dam. The relatively short duration of the low flow period in the summer was offered as some comfort to those who contended that the 3,900 cfs summer minimum flow was too low.

Development Fee

The imposition of a development fee on those people seeking to appropriate trust water is supported in the policy portion of the plan at page six as follows:

"6. Assure that those directly benefiting from the use of trust water support financially any necessary costs to the State of meeting commitments of the State which enable use of the trust water;"

This stated policy of the State of Idaho is simply not supported in the policy decisions of the Legislature of the State of Idaho or of the Idaho Water Resource Board. In fact, it contravenes the entire thrust of water development in the State of Idaho to this point. It certainly is contrary to the assurances given to proponents of new irrigation development during discussions on the acceptance of the Swan Falls Agreement.

The Idaho Department of Water Resources has done a number of studies attempting to determine the reliable flow of the Snake River at the Murphy gauge, given current development conditions. Based on an assumption of no further development, it appears that the river flows at that point might decline 100 cfs over the next 20 or 30 years. If we assume, solely for purposes of discussion, that the historic low flow of 4,500 cfs would still be encountered if a repeat of 1981 were to occur and that the Snake River would stabilize at approximately 100 cfs below its current flow, given no increase in depletion, it would appear then that the historic low flow under stable depletion conditions would be expected to be 4,400 cfs. Traditionally, the first appropriator of part of the 500 cfs remaining above the minimum of 3,900 cfs would be in a better

position than the last appropriator. In other words, if the estimates on which planning is based turn out to be faulty, then the water user who appropriates the first of the 500 cfs should be in a more secure position than the water user who appropriates the last of the 500 cfs. The risk of an inadequate water supply should fall on the junior appropriator.

The Department's fee schedule assumes that more development will be allowed than the water supply will support. Both the first appropriator and the last appropriator are required to pay for management efforts to address the problem. IPCO suggests that such a fee and such a change in management philosophy contravene the current water policy of the State of Idaho and is in excess of the Department's authority.

Specifically, existing water policy of the State of Idaho calls for a zero minimum flow at Milner Dam (State Water Plan, Policy 5A). The Water Resource Board's discussion of that flow says, in pertinent part:

"The establishment of a zero minimum flow at the Milner gauging station allows for existing uses to be continued and for some new uses above Milner. It also means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years. The Snake River Plain Aquifer which provides this water must therefore be managed as an integral part of the river system."

The Plan reverses the thrust of this Water Plan policy by establishing a system which supports mis-management of the

aquifer by imposing a fee to support dedicating upstream surface water storage to flows past Milner Dam.

The Plan requires leases from the Upper Snake River Water Supply Bank as a condition of allowing new irrigation uses above Swan Falls which appropriate water tributary below Milner Dam. However, the Water Resource Board Regulations on the Water Supply Bank (October, 1980) authorize appointment of a local committee to administer a water bank. One of the matters specifically committed to the discretion of the local committee is "Determining priority among competing applicants to provide stored water to the bank and to make withdrawals from the bank." (Rule 6.1.1.)

The Board has designated Water District No. 1, through the Committee of Nine, to operate the Upper Snake River Water Supply Bank. Pursuant to this delegation, and consistent with Rule 6.1.1., the Committee of Nine has established priorities for rentals from the bank. Those priorities are:

1. Owners of storage water rights for agricultural uses;
2. Other agricultural users in Water District No. 1; and
3. All other beneficial users.

As a background to the priority system established by the Committee of Nine, it should be kept in mind that the Water Bank administered by the Committee includes mostly, if not solely, stored water. That stored water comes from federal

reservoirs constructed as part of the Minidoka Reclamation Project. The Water Bank priorities have the effect of giving the first benefit of surplus water to those water users who have participated in paying for the reservoir system. The Plan apparently changes Water District No. 1's priority rules adopted pursuant to the Board's delegation, thus undoing the Board's rules and its delegation of authority to Water District No. 1.

In a dry year, such as 1988, implementation of the Plan would divest Minidoka Project water users of the cushion they have previously enjoyed and shift those benefits to new waterusers depleting the river below Milner Dam. In 1988, Twin Falls Canal Company leased in excess of 30,000 acre feet of water from the Water Bank. The new Sweden Irrigation District leased 22,500 acre feet. There were many other lessees of smaller amounts for use on existing irrigated ground. Is it really in the best interest of the State of Idaho to dry up existing flood irrigated ground in favor of new pump ground? The answer to that policy question should not be advanced in an informal plan and policy statement, but should be vigorously debated at the highest executive and legislative levels.

The Department's authority to assess fees as a condition of granting a water permit is at best questionable. Idaho Code §42-221 sets out the fees to be charged by the Department. The list goes so far as to establish a \$1.00 fee

for certifying a document. In the face of a legislative limitation of fees to be charged by the Department, the Plan proposes to assess a fee to be used to purchase storage rights or construct new storage to make up for over-draft of the aquifer. No authority has been cited for the imposition of this fee and none can be found in searching Title 42 of the Idaho Code.

Replacement Water Supply

The proposed plan contemplates using the annual fee to acquire a replacement water supply through lease or purchase of existing storage or construction of new storage. IPCO's objection to this mechanism is that it would permit additional development of ground water supplies and cause a further reduction in river flows, even though the replacement water supply was used to supply the actual deficiency during the summer low flow period. This would have the effect of extending the period of time that the Snake River is below the flow level required for other minimum uses, such as recreation and fish and wildlife. It would have an adverse effect on hydropower production for the same reason.

The basic premise of the Swan Falls Agreement was that the Snake River would be managed so as to assure that river flows would not fall below the requisite minimum flows. Use of storage from above Milner Dam to artificially augment a low

flow below 3,900 cfs permits much more development, and would be contrary to the public interest as reflected in minimum flows for recreation, fish, wildlife and hydropower production.

By regulation, the Department has established a line across southern Idaho (Figure 1 to the Plan). Water diversions from groundwater sources north and west of the line affect the Snake River below Milner Dam. This line was established based on the best technical data available to the Department. The validity of the location chosen has not been challenged on any technical ground.

The Plan now suggests that the same technical information that allows a presumption as to diversions north and west of the line does not give the Department any basis for a similar opinion south and east of the line. Thus, the Department knows all it needs to know on one side of the line, and nothing at all on the other.

Diversions south and east of the line will impact river flows above Milner Dam just as surely as those diversions on the other side will affect river flows below Milner Dam. The water rights affected by the south and east diversions are as well known to the Department as are those rights affected by depletions below Milner Dam. Integrated management of the water resource is required for protection of existing rights and the public interest. If valid reasons exist for the Department's selective knowledge of the physical attributes of the Snake River water system, they are not articulated in the Plan.

Moratorium in Trust Water Area

IPCO supports formalizing the existing moratorium in the trust water area. One addition to the Plan would clarify the situation. The moratorium order should state specifically when formal protests to permits to be reprocessed will be required in the course of the reprocessing.

Respectfully Submitted,

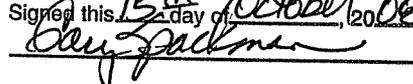
NELSON, ROSHOLT, ROBERTSON,
TOLMAN & TUCKER

Attorneys for Idaho Power Co.

By: 
Thomas G. Nelson

TGN/sj
0271m

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

Signed this 15th day of October, 2008


LAWYERS

C. BEN MARTIN
JOHN S. CHAPMAN
W. ANTHONY PARK
F. MICHAEL BURKETT
PATRICK D. COSTELLO
J. F. MARTIN (1893-1967)

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October 18, 1988

HAND DELIVERED

Mr. Norman C. Young
Administrator
Resource Administration Division
Idaho Department of Water Resources
1301 North Orchard Street
Boise, Idaho 83720

Re: City of Pocatello's Comments on
"Draft Policy and Implementation Plan --
Swan Falls Area Water Right Processing"

Dear Mr. Young:

On behalf of the City of Pocatello, I offer the following comments on the Department's "Draft Policy and Implementation Plan."

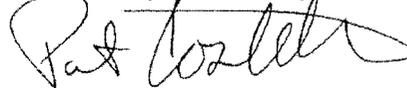
The City supports the proposal to establish a moratorium on further consumptive development in the nontrust water area above Milner Dam. This proposal is outlined on page 9 and the top of page 10 of the Draft Plan. In particular, the City supports the Department's proposal to allow development of new nonconsumptive and DCMI uses to proceed without delay or additional requirements. The City would suggest that the Department explore the possibility of going further, and creating a reservation of a block of water in the Upper Snake to meet future DCMI needs, similar to the 150 cfs. DCMI reservation contained in Policy 32-B of the State Water Plan.

It goes without saying, of course, that the City supports the proposal to continue processing DCMI use applications in the trust water area without delay or further restriction.

Thank you for the opportunity to review and comment upon this proposal.

Very truly yours,

MARTIN, CHAPMAN, PARK & BURKETT



PATRICK D. COSTELLO

PDC:sw

cc: J. Ivan Legler, Esq.
Bannock County Legislative Delegation

RECEIVED OCT 19 1988

bcc: Thomas Nelson, Esq.

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