NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER
Chartered
ATTORNEYS AT LAW
142 3RD AVE NO.
MAILING ADDRESS: P.O. BOX 1906
TWIN FALLS, ID 83303-1906
TELEPHONE (208) 734-0700

THOMAS G. NELSON
JOHN A. ROSHOLT
J. EVAN ROBERTSON
STEVEN K. TOLMAN
JAMES C. TUCKER

TERRY T. UHLING
F. BRUCE COVINGTON
LAIRD B. STONE
GARY D. SLETTE

January 15, 1986

Mr. A. Kenneth Dunn, Director
Department of Water Resources
Statehouse
Boise, Idaho 83724

Re: Proposed Rules - Water Allocation

Dear Ken:

In a letter dated October 30, 1985, I commented on several facets of the rules. In summary, my testimony was as follows:

1. The numbering system was unworkable.
2. There is trust water above Milner.
3. Non-consumptive undeveloped permits should not be reviewed.
4. The rules for review of hydropower permits are too complicated in light of the State's policy to subordinate all such future permits.
5. Ground water recharge was given an unnecessary presumption.
6. Reservoir permits ought to be grandfathered.

Non-Consumptive Uses

I commend the Department for addressing the non-consumptive use problem I previously pointed out by the amendment of Rule 4,2,3,2,2.

Reservior Sites

As I would understand Rule 1,5,2. and 5,3,7. are designed to protect existing applications for surface water storage.

Ground Water Recharge

I presume that the deletion of ground water recharge "from 5,3,7." eliminates the exclusion of ground water recharge projects from evaluation under the public interest criteria.

Trust Water

By way of additional comment on the December edition of the Rules, I would suggest that Rule 1,5,1,1. defining trust water flows as everything upstream from Swan Falls be amended to just that those flows exist only between Swan Falls and Milner. I think the statute is susceptible of two interpretations and certainly it was the perception of those who participated in the Swan Falls Settlement Agreement and the resulting legislation that trust water does not exist above Milner.

Evaluation Criteria

It's apparent that something new can be learned every time that the rules are read. Upon my most recent reading, I come up with a question involving Rule 5 entitled "Evaluation Criteria". A possibility would exist that converting to sprinkler could be termed a reasonable modification for an existing right holder to operate at the same level of production. Obviously, converting to sprinkler would free up water which then would be available for diversion by an applicant. It has been my understanding that with the exception of the reasonable pumping level provision of Idaho Code §42-226, Idaho case law has consistently protected a prior right holder in this method of diversion and of use even though it may be more inefficient than some methods that are available. This places a lot of discretion in the hands of a director in determining what is "reasonable" or "unreasonable".

Rule 5,1,3,1. provides a catch 22. If an applicant has eminent domain authority, generally he could not exercise it without first obtaining a permit from the Department. It is difficult for the applicant to be "exercising eminent domain authority to obtain such access," until such time as the water permit is issued. The defendant in a condemnation action could be able to successfully argue that there's no "necessity" to allow the action to proceed since the applicant has not demonstrated the ability to divert the water if he had the right-of-way.

Local Public Interest

Historically I'm told that the "local public interest" criteria now found in 42-203A(5) was inserted so as to provide

a barrier to an application filed for a diversion "in state" for a use "out of state". I've always thought that "local public interest" must necessarily be whatever the State's interest is as determined by the Idaho Water Resource Board insofar as water matters are concerned. It would seem logical that those interests are synonymous. On the other hand, if we can develop a statute that deals with out-of-state diversions in accordance with the recent New Mexico cases, perhaps we ought to eliminate the word "local" in 42-203A. This obviously isn't a matter for discussion as a part of your regulations. It is a matter of concern because local public interest has been construed to mean the interest of those in a given neighborhood as opposed to those in another neighborhood.

Again, I commend you for the amount of time and work in the re-do of the regulations since the first round of hearings. I suspect that we could improve the regulations every three months for the next ten years if we put ourselves through a continuing review process. While I'm certain that the APA sets out methods for amending rules, I would encourage the Department's continual review so as to make the rules less complicated.

Respectfully submitted,

John A. Rosholt

JOHN A. ROSHOLT

JAR:tpk

TO: Director
Idaho Department of Water Resources
450 W. State St.
Boise, Idaho 83720

Attention: Water Allocation Rules

RE: Comments on Proposed Water Allocation Rules
of December, 1985

Before the specific rules are addressed in these comments, it seems appropriate to review certain legal principles involved. Section 42-203, Idaho Code, must be interpreted to be consistent with Article 15, §3 of the Constitution of the State of Idaho which provides, in part, the following:

(a) The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the State may regulate and limit the use thereof for power purposes.

(b) When the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

It must also be remembered that the Director of the Department of Water Resources of the State of Idaho has no authority to adopt rules and regulations which exceed the powers and duties of the Department of Water Resources granted to it by the Legislature of the State of Idaho, or impose criteria that is inconsistent with the clear legislative intent of those legislative enactments. The Legislature of the State of Idaho has made it clear that it is in the public interest to regulate and limit the use of water for power purposes to extent such right exceeds an established minimum stream flow. The Legislature also made it clear that the subordination of water rights of Idaho Power Company to the minimum stream flow provisions will make a significant amount of water available for appropriation to promote family farming tradition, and to create jobs and

beneficial development. The Legislature did not determine that mitigation would be required in the appropriation of trust waters. The Legislature also made it clear that until a finding is made that a proposed use would significantly reduce the amount of water available to the holder of a water right used for power production, it would not be necessary to determine whether or not the proposed reduction is in "the public interest." Section 42-203C(1). In making these determinations, the Legislature determined that the burden of proof shall be on the protestant to determine whether or not the proposed use would significantly reduce the amount of water available to the holder of a water right used for power production and whether the proposed reduction is in the public interest. Section 42-203C(2)(b). It is respectfully submitted that the Director of the Department of Water Resources has ignored these legal principles.

Rule 1,4,2,2. - The first sentence of this proposed rule accurately states the law. Section 42-203C, Idaho Code, if applicable, requires a determination of whether the proposed use will signficantly reduce, individually or cumulative with other uses, the amount of water available to the holder of a water right used for power production whose rights are held in trust by the State and are subject to subordination depletion by future beneficial users whose rights are acquired pursuant to State law. Unfortunately, the Director has gone beyond this legislative enactment, and determined, without a hearing, court determination, or explanation of the criteria used, that any application proposing a consumptive use will significantly reduce the flows available to downstream hydropower rights. Not only does such a declaration lack any semblance of fair play, the error is further perpetuated by the arbitrary designation of all surface and ground waters in the Snake River Drainage above the Murphy Gauge as trust waters. This rule is absolute, goes beyond a mere presumption, and makes all proposed water uses, except those exempted, subject to the criteria of Section 42-203C, Idaho Code.

Rule 1,4,2,3. - This rule provides that unprotested applications proposing DCMI uses are determined to satisfy the public interest criteria. This rule is in conflict with Article 15, §3 of the Idaho Constitution which provides that domestic and agricultural purposes have a preference over commercial and industrial uses. It is respectfully submitted that a designation of waters as "trust waters" does not negate this Consitutional provision of our Constitution. It should also be pointed out that the definition of DCMI in Proposed Rule 2,8. and Rule 5,3,10. make it clear that a proposed industrial use would be exempt if its total

consumption is less than 730 acre feet per year, which is the amount of water that might be consumed in the irrigation of 300 acres.

Rule 1,5,1,2. - This Proposed Rule establishes a presumption that ground water existing within the geographic area described in the rules as tributary to the Snake River upstream from the Swan Falls Dam unless the Director determines otherwise. This area is further described as the entire surface water drainage to the Snake River in Idaho upstream from the Swan Falls Dam. If there is no evidence to establish that ground water is tributary to the Snake River or is not tributary to the Snake River, the presumption will prevail. It is respectfully submitted that no such presumption should exist and no determination made without the opportunity for a hearing on the matter.

Rule 1,5,1,3. - This Proposed Rule provides in essence that all flows in the Snake River and its tributaries above Milner Dam which would pass Milner Dam and are less than the water rights for hydropower generating facilities between Milner Dam and Swan Falls, are trust waters. Such a determination was not contemplated by the Swan Falls Agreement or any legislative enactments. Such a determination could foreclose all future instream storage above Milner.

Rule 3,2,1. - This rule again imposes a presumption based upon a presumption against the applicant who seeks to appropriate water. This rule incorporates the presumption that all waters in the Snake River and its tributaries above Swan Falls not previously appropriated are trust waters, that all ground waters within the Snake River drainage above Swan Falls that have not been previously appropriated are trust waters, and that all proposals to appropirate water from these sources will significantly reduce the amount of water available to Idaho Power Company under its Swan Falls water right used for power production. It is therefore necessary for the applicant to overcome these presumptions or he must meet the public interest criteria, whether or not the application is protested. Again, the Director has effectively negated the legislative standards of "significant reduction" and "the burden of proof shall be on the protestant" as found in Section 42-203C, Idaho Code.

Rule 5,1. - This criteria to be used to evaluate all applications to appropriate water contains a misstatement of law when it includes this criteria for the application to appropriate trust water. This rule allows the Director to deny an application if the proposed use will be determined to reduce the quantity of water under an existing water

right. Rule 5,1,1. This is not the standard for the appropriation of trust waters, as the very definition of trust waters anticipates that these are waters subject to an existing water right that has been subordinated. Rule 5,1,1,1. also allows the Director to deny an application for the appropriation of trust water when the holder of an existing water right will be unable to continue to operate at the same level of production. The legislative enactments in regard to trust waters make it clear that the present level of production will be reduced to the extent the water right for hydropower purposes has been subordinated.

Rule 5,2,1. - As has been previously mentioned, this rule again creates a presumption that all permits being reprocessed and all applications which propose a use that will deplete trust water, as those waters are defined by the Director, will cause a significant reduction in water available to hydropower rights.

Rule 5,3. - Criteria for evaluating public interest. The Director, in proposing criteria, has far exceeded his authority and the intent of the Legislature of the State of Idaho. First, the rule provides that this criteria will apply if the Director determines that a proposed use of trust water will significantly reduce water available to the holder of a power right. This is indeed an interesting provision when the other rules proposed create presumptions as to which waters are trust waters and a presumption that any use of such trust water will significantly reduce water available to the holder of a power right. It is therefore clear that the Director has made his determinations without the benefit of a hearing or the presentation of facts upon which his determination may be based.

Rule 5,3,1,1. - Direct project benefits. The Legislature has mandated that the potential benefits, both direct and indirect, that the proposed use would provide to the State and local economy must be considered. The Director, in his proposed rules, goes beyond that criteria and under Rules 5,3,1,3. and 5,3,1,4. will consider direct and indirect project costs, including verifiable reductions in net revenue resulting from losses to other existing instream uses and the cost of replacement hydropower generation. This is an attempt to give the Director a second opportunity to consider the economic impact of the proposed use. Section 42-203C(2)(a)(ii) sets out the economic impact as a single factor to be weighed in arriving at a determination of whether or not the proposed use is in the public interest. Proposed Rule 5,3,2. then sets out the economic impact factor in the criteria, which is a restatement in part of Rule 5,3,1,4., indirect project costs.

Rule 5,3,2,2. - This rule imposes mitigation as a factor to be considered in determining economic impact, which then becomes a stepping stone for the establishment of mitigation as a factor in determining the promotion of full economic and multiple use development of the water resources of the State of Idaho under Rule 5,3,4.

Rule 5,3,6. - This rule is consistent with the legislative enactment in Section 42-203C which provides that no single public interest criteria as set out by the Legislature will be entitled to greater weight than any other public interest criteria. However, this rule has been negated by these Proposed Rules which have imposed mitigation as a factor to determine three of the five factors identified by the Legislature. It is respectfully submitted that this was neither contemplated nor intended by the Legislature.

Rule 5,3,9. - Again establishes an arbitrary presumption that a proposed diversion of water for irrigation purposes from the Snake River between Milner Dam and Swan Falls Dam or from tributaries, including ground water, within four miles of the nearest edge of the Snake River are not in the public interest. This presumption apparently is based on a conclusion that such proposed diversions would not promote full economic and multiple use development of the water resources of the State of Idaho, one of the five criteria set forth by the Legislature. This rule would allow the Director to unilaterally reject such applications without considering the other factors enumerated by the Legislature, all of which are to be given equal weight. It is respectfully submitted that this rule is arbitrary and capricious and if enacted will deny due process to an applicant to whom this rule applies.

Rule 5,3,10. - This rule presumes that a commercial or industrial use that has a maximum consumptive use of up to 730 acre feet per year is presumed to be in the public interest whereas the same amount of water that may be appropriated for the irrigation of more than 300 acres would not be in the public interest. It is again respectfully submitted that this rule is arbitrary and capricious.

Rule 6,2. - This rule again arbitrarily requires mitigation for the approval of any proposal to appropriate trust water between Milner and Murphy to off-stream storage during the period of November 1 to March 31. It is respectfully submitted that there is no statutory authority for the Director to impose mitigation as a requirement for such applications. It is further submitted that this rule imposes a requirement of mitigation for the impact of flow

depletions on all downstream generation of hydropower, including the Hells Canyon complex of Idaho Power Company which the Idaho Supreme Court has held is fully subordinated without condition. It would appear that the Director is attempting, by proposing this rule, to protect a hydropower water right that has since its inception been considered fully subordinated to any future stream depletions upstream.

It is respectfully submitted that these comments be made a part of the public record of the Idaho Department of Water Resources under its rulemaking authority, and that if the rules are adopted as proposed, that a written response be provided, explaining in writing the facts and authority relied upon by the Department is proposing these rules.

Respectfully submitted,

Roger D. Ling
Attorney at Law

Address: 615 "H" Street
P.O. Box 396
Rupert, Idaho 83350

NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER
Chartered
ATTORNEYS AT LAW
142 3RD AVE NO.
MAILING ADDRESS: P.O. BOX 1906
TWIN FALLS, ID 83303-1906
TELEPHONE (208) 734-0700

THOMAS G. NELSON
JOHN A. ROSHOLT
J. EVAN ROBERTSON
STEVEN K. TOLMAN
JAMES C. TUCKER

TERRY T. UHLING
F. BRUCE COVINGTON
LAIRD B. STONE
GARY D. SLETTE

January 27, 1986

HAND DELIVERED

A. Kenneth Dunn
Idaho Department of Water Resources
450 W. State Street
Boise, ID 83702

Dear Mr. Dunn:

Enclosed please find Idaho Power Company's comments on proposed Water Allocation Rules.

Yours very truly,

Thomas J. Nelson
SAR

Thomas G. Nelson

TGN:bar

Enclosure

COMMENTS OF IDAHO POWER COMPANY
ON PROPOSED WATER ALLOCATION RULES

Idaho Power Company submits these comments in response to the proposed Water Allocation Rules published in the December, 1985 issue of "Currents". If required for understanding, the rule is summarized in order to put the comment in context.

Rule 1,5,1. states that the October, 1984 agreement places certain water in trust. This is not correct. The agreement did not place any waters in trust. The trust was created by an act of the Legislature. This is more than a technical distinction, since the agreement itself defines the extent of the Company's water rights above the Murphy Gage and below Milner Dam, as unsubordinated, subject to subordination. The legislation has the effect of placing these "subordinatable" water rights in trust pending their actual subordination to other uses. However, only the statute has that effect, not the agreement.

Rule 1,5,1,1, by implication, provides that trust waters are located in the Snake River above Milner Dam. As pointed out above, the trust was technically created by the statute, not by the agreement. However, if the intent of the rules is to implement the Swan Falls agreement, then the surface water flows above Milner should be considered not to be trust waters. The agreement is clear in its limitations on its impact above Milner. The only effect which the agreement was intended to have on development of surface waters above Milner was to be the review of uses of existing storage before new storage is authorized. Therefore, the regulations should be limited if the intent really is to implement the agreement.

Rule 1,5 1,2 presumes water in the described area to be tributary to the Snake upstream from Swan Falls Dam. This presumption is consistent with the facts known to the Department and to responsible technical opinion. The presumption should be retained to avoid expenditure of time and effort on contests of basically undisputable circumstances.

Rule 4 3,1,3 provides that blanket protests will not be considered by the Department. There are approximately 2,500 remaining defendants in the second Swan Falls suit as to whom the Department considers there to be valid existing protests, on a blanket basis. This rule should recognize those protests as being valid to avoid the necessity of filing new protests when the rules become effective.

Rule 4,5,3 designates the additional information to be submitted on the criteria established under Section 42-203, Idaho Code. Rule 4,5,3,7 waives the additional information requirements for applications appropriating less than 10 cfs or less than 1,000 acre feet unless the Director requests information. The purpose of the additional information requirement is to permit potential protestants to judge the impact of the proposed use and determine whether a protest is required. Of the approximately 2,500 remaining defendants in Idaho Power Company vs. IDWR, 89% of those filings involve less than 10 cfs. The bulk of trust water allocations will probably go to uses under 10 cfs and it is clear that uses under 10 cfs are the great majority of all applications. Exemption of the most common applications from the review emasculates the process.

Rule 5,3,3,1 creates a presumption that a family farm is as defined by the Bureau of Reclamation 960 acre regulations. However, those regulations basically were written to cover certain extraordinarily large situations in the State of California. 960 acres is much too large to constitute a family farm, or at least a presumption of a family farm, as that term is understood and as a family farm exists in Idaho today. Even considering that recently developed pump ground tends to perhaps have larger family units involved, a 300 acre per family member presumption would be more rational. At least the Department should find out what the pattern is before adopting a federal regulation based on a national concern and not on the actual family farming tradition in the State of Idaho.

1-22-86

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

January 27, 1986

Mr. A. Kenneth Dunn
Director
Idaho Department of Water Resources
STATEHOUSE MAIL

Dear Ken:

Enclosed are my comments with respect to the Department's proposed water allocation rules under Idaho Code § 42-203. Please make these comments a part of the record in this proceeding.

Thanks!

With best wishes, I am,

Sincerely,

JIM JONES
ATTORNEY GENERAL

JTJ/tg

Enclosure

COMMENTS OF THE ATTORNEY GENERAL ON THE PROPOSED WATER ALLOCATION RULES OF THE IDAHO DEPARTMENT OF WATER RESOURCES

A. General Comments: The proposed regulations generally reflect a great deal of thought and consideration about some very difficult policy issues. Nonetheless, the proposed regulations include some fundamental policy determinations for which no legal or factual basis exists. These comments point out these fundamental problems. Also, some minor editorial and substantive changes would improve the regulations. These suggested changes also follow. Finally, these regulations are not broad enough in scope. The regulations do not cover in a comprehensive manner transfers, extensions of time, etc. At some point in time, the Department should adopt comprehensive regulations.

B. Specific Comments:

1. Rule 1,4,2,2. Proposed Rule 1,4,2,2 contains a misstatement of law. Proposed Rule 1,4,2,2 states in part:

> Second, if the proposed use satisfies the criteria of Section 42-203A, Idaho Code, then Section 42-203C, Idaho Code, requires a determination . . . .

If a proposed use satisfies the criteria of Idaho Code § 42-203A, Idaho Code, no evaluation under Idaho Code § 42-203C should ever take place! If a proposed use satisfies the criteria of Idaho Code § 203A (Supp. 1985), the Department necessarily determined that the proposed use will not reduce the quantity of water under existing water rights or in other words that unappropriated water exists in the amount and during the

season of use requested by the applicant. Accordingly, Idaho Code § 42-203C (Supp. 1985) only applies when the Department determines under Idaho Code § 42-203A (Supp. 1985) that the proposed use will reduce the quantity of water under existing water rights. If the applicant's proposed use would only reduce a hydropower use subject to appropriation under Idaho Code § 42-203C (Supp. 1985), then the Department should evaluate that use in accordance with Idaho Code § 203C (Supp. 1985) including whether the proposed use constitutes a significant reduction.

Idaho Code §§ 42-203A and 42-203C (Supp. 1985) were added to the Idaho Code to implement, in part, the Swan Falls agreement. The parties to the Swan Falls agreement intended that the substantive criteria contained in Idaho Code § 42-203C were to apply only after the department concluded the proposed use would cause a significant reduction, individually or cumulatively. The Department in proposed Rule 1,4,2,2 has focused on and interpreted literally the word "cumulative." While the Department's interpretation certainly results in a rule that promotes ease of administration, this fact does not justify a rule inconsistent with the legislative history of Idaho Code § 42-203C. The Legislature intended that Idaho Code § 42-203C allow some consumptive users of water to proceed with their project, if otherwise acceptable, without the necessity of the evidentiary demonstration required in other cases by Idaho Code § 42-203C (Supp. 1985). The Department should redraft Rule

1,4,2,2 to recognize this common understanding of Idaho Code § 42-203C (Supp. 1985).

2. Rules 1,5,1,1; 1,5,1,2; 1,5,1,3. The definition of trust water flows is too broad. A review of the Swan Falls agreement indicates that the parties did not intend ground waters or surface waters tributary to the Snake River above Milner Dam to be included within the definition of trust water flows. The reason for this conclusion is that the parties retained the minimum stream flow at Milner Dam at zero. Furthermore, the Swan Falls agreement is silent on the issue of whether ground waters tributary to the Snake River downstream of Milner Dam are trust waters. Each party took their chances on successfully litigating this issue. The Department should not predetermine this issue in the regulations adverse to ground water users but should allow a court to determine this issue as the parties originally intended.

3. Rule 1,5,3. Proposed Rule 1,5,3 states that water rights subordinated pursuant to Idaho Code § 42-203B(6) (Supp. 1985) are trust waters. This is in conflict with the Swan Falls agreement that only provided for the creation of trust waters pursuant to subsections (3) and (5) of Idaho Code § 42-203B (Supp. 1985). There was no intent to unsubordinate any existing licenses, such as Hells Canyon, or to extend the concept of trust waters to newly issued subordinated permits or licenses.

4. Rule 2. Rule 2 should contain definitions of irrigation, commercial, municipal, and power uses. For example, irrigation and power uses could be defined as follows:

> Irrigation use means the application of water to the production of irrigated agricultural crops or commercial nurseries.
>
> Power use means using water for hydroelectric or hydromechanical power.

5. Rule 2,16. The phrase "subordinated water right," is defined too broadly. Rule 2,16 should be amended to read as follows:

> Subordinated water right means a water right used for hydropower generation purposes that is subject to depletion without compensation by upstream water rights, which are initiated later in time and which are for a purpose other than hydropower generation purposes.

These amendments address two concerns. First, a subordinated water right for hydropower generation purposes should retain a priority as against water rights for other hydropower generation purposes. Second, the date of development is not the critical date. Rather, the date of initiation of the water right by filing an application is the critical date.

6. Rule 3,1,1 states in part as follows:

> No person shall commence the construction of any project works . . . of the public water or trust water of the State of Idaho . . . without first having filed an application for permit to appropriate water.

While proposed Rule 3,1,1 makes good sense, the Department does not have authority to preclude construction of the project prior to filing an application for a permit under Chapter 2, Title 14,

Idaho Code. Other statutory authority of the Department may require a filing of an application for an entitlement for use, e.g., a stream channel alteration permit under the provisions of the Act of March 30, 1971, Ch. 337, 1971 Idaho Sess. Laws 1304 (codified as amended at Idaho Code §§ 42-3801 to 42-3812.

7. Rule 3,2,1. Generally, an application for permit under chapter 2, title 42, Idaho Code, is filed for the appropriation of unappropriated water. In the event unappropriated water is not available to supply the applicant, Idaho Code § 42-203A (Supp. 1985) would normally require the Department to deny the application. The enactment of Idaho Code § 42-203B (Supp. 1985) which created a trust for some water for hydropower purposes would allow the Department to approve some applications that otherwise would be denied. Only the approval of these latter applications for trust water require review under Idaho Code § 42-203C (Supp. 1985). Proposed Rule 3,2,1 attempts to reverse this process and creates a presumption that all applications from a source of trust water is an application to appropriate trust water. Again, while proposed Rule 3,2,1 promotes ease of administration, no basis exists for its adoption. The chapter 2, title 42, Idaho Code requires the department to make the determination of availability of unappropriated water under Idaho Code § 42-203A (Supp. 1985) prior to proceeding to a consideration of the requirements under Idaho Code § 42-203C (Supp. 1985). See also the comments to proposed Rule 1,4,2,2.

8. Rule 3,2,4. A rebuttable presumption may be created for a variety of reasons. See generally McCormick on Evidence § 343 (E. Cleary 1984). However, the primary reason for a presumption is that it expresses a factual relationship commonly found to be true by a judge or other adjudicatory body. For example, if proof of fact A makes more likely than not that fact B exists, then the creation of a rebuttable presumption that reflects this relationship for use in an adjudicatory proceeding may assist in promoting an efficient adjudicatory process.

Here, proposed Rule 3,2,4 concludes that if an application is assigned, the application was filed for speculative purposes. No factual basis exists for this relationship and the inclusion of such a presumption is arbitrary.

9. Rule 3,3,2,5 would allow an applicant to describe a plan of operation for filling a reservoir more than once a year and thereby more fully utilize the storage capacity of an impoundment structure. This proposed rule would change the Department's past administrative practice and is an excellent change!

10. Rule 4,4. Proposed Rule 4,4 is ambiguous and fails to state accepted rules concerning burden of proof, also commonly called the burden of persuasion, in civil actions. Generally, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that the party is asserting. See 9 Wigmore, Evidence §§ 2485-2486 (Chadbourn rev. 1981). The burden of coming forward with evidence, also commonly called the burden of

producing evidence, as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence. 9 Wigmore, Evidence § 2487 (Chadbourn rev. 1981). The burden of coming forward with evidence is initially on the party with the burden of persuasion as to that fact. The burden of persuasion remains the same throughout a proceeding. The burden of coming forward with evidence may shift from party to party throughout the proceeding. 9 Wigmore, Evidence §§ 2488-2489 (Chadbourn rev. 1981).

Specifically, Rule 4,4,1 states in part as follows:

> first, the burden of coming forward with evidence to present a prima facie case, and second, the ultimate burden of persuasion. * * * The person who has the burden of presenting a prima facie case has the responsibility of making the initial evidentiary showing;

The problem with this rule is that it appears to equate the burden of coming forward with evidence as being a burden of presenting a prima facie case. The burden of coming forward with evidence is not so limited.

In McCormick on Evidence § 338 (E. Cleary 1984) the burden of coming forward with evidence is discussed as follows:

> We have seen something of the mechanics of the process of "proceeding" or "going forward" with evidence, viewed from the point of view of the first party who is stimulated to produce proof under threat of a ruling foreclosing a finding in his favor. He may in respect to a particular issue pass through three states of judicial hospitality: (a) where if he stops he will be thrown out of court; (b) where if he stops and his adversary does nothing, his reception will be left to the jury; and (c) where if he stops

> and his adversary does nothing, his victory (so far as it depends on having the inference he desires drawn) is at once proclaimed. Whenever the first producer has presented evidence sufficient to get him to the third stage and the burden of producing evidence can truly be said to have shifted, his adversary may in turn pass through the same three states. His evidence again may be (a) insufficient to warrant a finding in his favor, (b) sufficient to warrant a finding, or (c) irresistible, if unrebutted.

IBID, at § 338.

Accordingly, in the cited example above, the first party has the burden of coming forward with evidence sufficient to pass from subdivision (a) to subdivision (b). When this happens, neither party has the burden of coming forward with evidence. If the first party comes forward with sufficient evidence to pass from subdivision (b) to subdivision (c), then the burden of coming forward with evidence shifts to the second party. In this circumstance, the second party does not come forward with evidence regarding a prima facie case. Rather, the second party would have to come forward with enough evidence to preclude entry of a directed verdict against the second party.

While these comments are technical, the issue is an important one and the Department should be careful to adopt a regulation in conformance with accepted rules of evidence.

11. Rule 4,5, and 4,5,3,6. Proposed Rule 4,5 contains a list of detailed information that an applicant must submit for all applications, and proposed Rule 4,5,3,6 contains a second list of detailed information for applications to appropriate trust waters. A regulatory agency must balance the agency's

need for information necessary to make a reasoned decision with the cost of supplying the information by the regulated industry. The marginal benefit of the need for the information should at least equal or exceed the marginal cost of supplying the information.

Proposed Rules 4,5 and 4,5,3,6 do not achieve an equitable balance of this need and the costs of providing the requested information. For example, proposed Rules 4,5,3,6,3 and 4,5,3,6,4 would require substantial socio-economic studies be prepared by all applicants of trust water. Such studies are not needed for a small irrigation project. Such requirements preclude a small family farm from appropriating trust water because of the cost of the application process. Proposed Rule 4,5 appears to inappropriately shift the burden of proof under Idaho Code § 42-203C (Supp. 1985) to the applicant from the protestant.

The Office recommends a two-step submittal of information under both Idaho Code §§ 42-203A and 42-203C. In the first step the Department should require just enough information to allow a reconnaissance review of the proposed project. If a protest to the approval of the application is filed, then the Department should require a further submittal of information to assist in evaluating the application and the protest. This two-step procedure minimizes the cost to the applicant and yet assures sufficient information to resolve the dispute before the agency.

12. Rule 4,5,3,3,2. Rule 4,5,3,3,2 defines speculation as follows:

> Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use.

This definition is not in accordance with applicable law.

Idaho Code § 42-203A (Supp. 1985) provides in part as follows:

> [I]n all applications, whether protestant or not protestant . . . (c) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, . . . the director of the Department of Water Resources may reject such application.

The issues of good faith, delay and speculation are all interrelated. The proposed definition in Rule 4,5,3,3,2 does not recognize this interrelationship. The proposed definition should be amended by adding the phrase "with reasonable diligence" at the end of the sentence from Rule 4,5,3,3,2 quoted above.

13. Rule 5,1. This proposed rule should be limited to applications to appropriate unappropriated water and should not apply to applications to appropriate trust water. If this proposed rule remains applicable to trust water, then it contains a misstatement of law. Proposed Rule 5,1 states in part:

> If the director determines that a proposed use will not comply with one or more of the criteria of Section 42-203A(5), Idaho Code, the application will be denied.

If the proposed use will reduce the quantity of water under an existing hydropower water right, the Department should not automatically deny the application. Rather, the Department should evaluate whether the application satisfies the criteria of Idaho Code § 42-203C (Supp. 1985).

14. Rule 5,2,1. Proposed Rule 5,2,1 creates a presumption that all uses of water that deplete trust water are presumed to require an evaluation under Idaho Code § 42-203C. As stated earlier, such a presumption is contrary to the legislative history of this legislation. See the comments to proposed Rule 1,4,2,2.

15. Rules 5,3 and 5,3,4,6. Idaho Code § 42-203C (Supp. 1985) constitutes a legislative determination that it is in the public interest for certain kinds of development to occur in the Snake River drainage basin above the Murphy gauge even though the proposed use depletes trust waters. The public interest criteria contained in Idaho Code § 42-203C(2) are narrow in scope. They are intended to answer the question: Is this the type of development that the legislature concluded should be allowed to deplete trust water? The public interest criteria of Idaho Code § 42-203C(2) (Supp. 1985) are much narrower than the public interest criterion of Idaho Code § 42-203A(2)(5) (Supp. 1985).

Proposed Rule 5,3 and its components do not recognize this distinction. Proposed Rule 5,3 expressly provides for a much broader evaluation than contemplated by Idaho Code § 42-203C

(Supp. 1985) by determining whether an application "will provide the greater benefit to the people of the state of Idaho." Proposed Rule 5,3,4,6 requires a review of impacts on water quality, fish, wildlife, recreation and aesthetic values, which is also much broader than contemplated by Idaho Code § 42-203C (Supp. 1985).

These comments are not intended to imply that these concerns are not important. The point is solely that such broad public interest concerns should be determined solely under Idaho Code § 42-203A. The public interest determination under Idaho Code § 42-203C (Supp. 1985) is much narrower than provided for in proposed Rule 5,3.

16. Rule 5,3,3,1. Rule 5,3,3,1 states as follows:

> If the total land to be irrigated by the applicant, including currently owned and leased irrigated land and land proposed to be irrigated in the application and other applications and permits of the applicant, do not exceed 960 acres of Class 1 equivalency as defined by U.S. Bureau of Reclamation regulations; the application will be presumed to promote the family farming tradition;

Rule 5,3,3,1 purports to incorporate certain regulations of the Bureau of Reclamation, U.S. Department of the Interior. The Department should state specific code sections of the Code of Federal Regulations to be incorporated. Then the Department should assure that it follows the procedures outlined in Idaho Code § 67-5203A (1980), regarding incorporation of federal regulations.

17. Rules 5,3,2,2 and 5,3,4,2. Proposed Rules 5,3,2,2 and 5,3,4,2 both use the term mitigation. Neither the Swan Falls agreement nor the implementing legislation intended an applicant to mitigate the power reduction impacts of their applications. The only limited exception concerns the limited mitigation requirements from Exhibit 6 of the Swan Falls agreement, which was implemented in Policy 32I of the State Water Plan. Furthermore, Exhibit 6 of the Swan Falls agreement was neutral on the question of which Idaho Power Company facilities should be considered in mitigation decisions. The Department's regulations should not predetermine this issue adverse to the irrigation interests within the State of Idaho.

18. Rule 5,3,9. Idaho Code § 42-203C(2) (Supp. 1985) requires the director to balance the competing interests of new development proposing a consumptive use of water with the potential adverse impact on hydropower operations. The burden of proof is explicitly placed on a protestant. Proposed Rule 5,3,9 essentially attempts to reverse this burden of proof rule for applications with a point of diversion within four miles of the mainstem of the Snake River contrary to the provisions of Idaho Code § 42-203C(2) (Supp. 1985). Moreover, proposed Rule 5,3,9 focuses on the impact of the proposed diversion on hydropower, when that provision of law also provides that none of the criteria are entitled to greater weight.

19. Rule 6,2. The Swan Falls agreement addressed the issue of offstream storage in Exhibit 6, which was implemented

in Policy 32I of the State Water Plan. Exhibit 6 specifically provided the proposed policy was neutral on the question of which facilities of the Idaho Power Company should be considered in mitigation decisions. Here proposed Rule 6,2 would require mitigation even if the water right were already subject to a subordination provision for the benefit of upstream depletionary uses. For example, the C.J. Strike project is one such facility and the Department has no basis for removing the subordination provision for future applications by the adoption of proposed Rule 6,2.

20. The regulations should contain general applicable duties of water for different uses of water which are presently contained in an administrative memorandum on this subject. This administrative memorandum should be converted into administrative regulations.

21. Section 42-203B(6), Idaho Code, provides that the director shall also have the authority to limit a permit or license for power purposes to a specific term. While this provision is a specific grant of authority, it also operates as a limitation of authority in accordance with accepted rules of statutory construction. The Department does not have the authority to limit a permit or license for purposes other than power to a specific term.

The Department's present practice is to accept applications with a power use combined with other beneficial uses. However, the Department would not be authorized to include a general

permit condition with a specific term in any permit or license with a power use combined with other uses. If the Department desires to implement this portion of section 42-203b(6), the Department should require an application for any power use be separate from an application for other beneficial uses.

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 10th day of October, 2008
Gary Spackman

Representing Over 2,500,000 Acres of Irrigated Land

Idaho Water Users Association, Inc.

AFFILIATED WITH NATIONAL WATER RESOURCES ASSOCIATION
410 S. ORCHARD SUITE 144 BOISE, IDAHO 83705
TELEPHONE 344-6690

SHERL L. CHAPMAN
Executive Director

TO: Mr. Ken Dunn, Director
Idaho Department of Water Resources

FROM: Sherl L. Chapman, Executive Director

DATE: January 27, 1986

SUBJECT: Comments on Proposed Rules for Water Allocation Published December, 1985

The comments contained herein are those submitted by Sherl L. Chapman, Executive Director of the Idaho Water Users Association. The Idaho Water Users Association represents the owners and operators of nearly 2 million acres of irrigated land within the boundaries of the State of Idaho and over 80 agri-businesses and business associates. The proposed rules for water allocation have been reviewed and the following comments are respectfully submitted for the public hearing record.

At the outset, it is important that the Department understand that the position of the Association is that there are no trust waters above Milner Dam on the Snake River. This understanding was included in discussions before the Legislature in 1985 and is the subject of presently proposed legislation. Additionally, the Association supports the statements provided to the Department on these rules by Roger D. Ling and John R. Rosholt regarding proposed changes and objections to the proposed rules. The additional comments made herein are designed to supplement those statements.

Rule 1,4,2,2. This rule makes the presumption that all applications proposing consumptive uses within the Snake River drainage above Swan Falls do, in fact, cause a "significant reduction" in flows available for hydropower generation. This would appear to allow the Director to go beyond his statutory authority and determine without hearing or due process that all applications fall under the trust water concept and must be reviewed fully within the concept of the trust water rule. We submit that all applications do not necessarily cause a significant reduction in flows available to hydropower generation and an individual determination should be made on each application.

Rule 1,5,1,2. It is inappropriate to claim all ground waters existing within the geographic area above Swan Falls Dam do, in fact, contribute to flows at Swan Falls. As earlier stated, it is our position that trust waters do not exist above Milner Dam and therefore, ground waters specifically tributary to the Snake River above Milner should not be considered trust waters nor should they fall under the allocation rules for such. While there is indeed a gray area that defies specific boundary description above which ground water enters the Snake River above Milner, there is, in fact, a significant area where data do exist which would allow a definitive determination that ground water discharges into the Snake River above Milner Dam. Those boundary determinations should be made and a declaration that ground waters above that point are not to be considered as trust waters.

Rule 3,2,1. Again the presumption is made that all waters which have been filed upon are trust waters and that an applicant must overcome these presumptions or meet the public interest criteria. By establishing this presumption, the director has eliminated the standard of "significant reduction" and circumvented the statement that the "burden of proof shall be on the protestant" as found in Section 42-203c, Idaho Code. If a presumption is to be made, it should be made in such a manner so as to assume the application is for non-trust waters unless those waters are not available under the conditions of the application.

Rule 4,5,3,6,2. While the reasoning for this request is understood, many applicants may not be able to commit to long term farm operations including acreages for lands and crop rotations. The economy dictates which crops will be grown each year and as new crops and new markets become available, individual farm plans change rapidly. Nearly every farm plan is dynamic and defies long term description. If the Department desires such data, it should be requested with the understanding that such plans and data may change very rapidly and above all should not be used as conditions for permit approval.

Rule 5,1,1,1. A literal reading of this rule would lead one to believe that the Department could order another water right holder to implement water conservation methods such as canal linings, modification of operation, or other techniques to save water in order that a new applicant might be able to appropriate it. Such authority was not contemplated by the Legislature or the negotiating team for the Swan Falls settlement and this rule should be reworded if this is not the intent.

Rule 5,3. This rule appears to be contradictory to the presumptions made in earlier sections which presume that all applications will significantly reduce water available to holders of hydropower water rights. The earlier presumptions should be removed as indicated which would then make this rule valid.

Rule 5,3,3,1. The intent to comply with the family farming tradition as described by the Legislature is understood but the technique to be utilized is inappropriate. Those of us involved in the reclamation law reform of the past few years settled on the criteria outlined in this rule under strenuous objection and most feel it is still inappropriate. Additionally, the language of the rule would require that individual applicants determine Class I equivalency on private lands which will require a significant investment for a study effort which appears unnecessary. Other criteria, rather than the Reclamation Reform Act numbers, should be used to help determine whether or not the application promotes the family farming tradition.

Rule 5,3,6. The legislative intent relating to this rule is clear but with the introduction of "mitigation" throughout these rules, it appears that the Director is giving greater weight to some of the criteria over others. By providing mitigation as a means by which certain criteria can either be circumvented or achieved, greater weight is, in fact, given to them.

Rule 5,3,9. This rule is totally inappropriate. This concept was not contemplated by the Legislature and is merely an interpretation by the Department relating to public interest. If this rule is implemented, the net result will be that development will be forced from areas of longer growing season and more fertile lands to areas with higher elevation, shorter growing season, and limited crop diversity. By forcing development of cropland from west to east in Idaho, certainly more acres will be able to be irrigated but the public interest will probably not be served. We submit that there are many developments along the main stem Snake River that are in the public interest and that will be of greater public benefit due to better economics and crop diversity than development of several times their acreage at higher elevations where crop diversity is less. This rule should be stricken.

Rule 6,2. Again we see a requirement of mitigation for efforts to develop off-stream storage and the presumption that such off-stream storage will impact downstream generation of hydropower at facilities located in Idaho. Additionally, a literal reading of the rule would indicate that the mitigation would be required not only for unsubordinated hydropower water rights and trust waters but also for those facilities subordinated prior to July 1, 1985. This rule should either be stricken or significantly modified so as to eliminate the mitigation clause and clarify which hydropower facilities may be affected by off-stream storage.

It is understood that the Department of Water Resources has made a reasonable effort to comply with the negotiated Swan Falls settlement. However, because of the complexity of the settlement and ensuing legislation, and the desire of the Department to make efficient use of water in Idaho, it is our position that the proposed rules go further than legislative intent and adopted statutues and

should be carefully restructured so as to clearly reflect that intent as well as the adopted statutues. We appreciate the opoortunity to comment on the rules and would be happy to provide any information or additional comment as necessary.

Respectfully submitted,

Sherl L. Chapman
Executive Director

SLC:kje

United States Department of the Interior

BUREAU OF RECLAMATION
PACIFIC NORTHWEST REGION
FEDERAL BUILDING & U.S. COURTHOUSE
BOX 043-550 WEST FORT STREET
BOISE, IDAHO 83724

IN REPLY
REFER TO:
PN 760
832.

JAN 27 1986

A. Kenneth Dunn, Director
Idaho Department of Water Resources
450 West State Street
Boise, Idaho 83720

Dear Ken:

Subject: Water Allocation Rules

We appreciate the opportunity to comment on the proposed rules and regulations. Even though we have disagreed with some of the interpretations of Idaho Code, we commend the Department in their effort to clarify and enlarge upon areas of interpretation and definition. Through our review of these rules we find differing opinions on certain points, even among our experts in the field. We would recommend anything that can be done to clarify, simplify, and condense these rules should be undertaken by the Department. We would further encourage regular review of the rules to evaluate their effectiveness as tools in the permitting process.

Our specific comments that follow deal with sections in the rules and regulations that from our viewpoint lack definition, clarity, proper interpretation, or have implied incorrect presumptions:

Rule 1,4,2,2--This rule considers all permits using trust water as having a significant impact on hydropower generation. The generality of this presumption is questionable since it may be impossible to prove hydrologically the basis of this premise.

Rule 1,4,2,3--This rule places DCMI uses in advance of irrigation rights which is inconsistent with Idaho Constitution stating the hierarchy of uses.

Rule 1,5,1,1--The rule extends trust water to include surface waters upstream of Milner. The Idaho Statute containing this information may be interpreted in two ways. However, since it is further stated that the minimum flow at Milner is zero, meaning no surface flow is required past Milner for any downstream uses, it would appear to be a misinterpretation to include surface water above Milner. The presumption that all ground water above Swan Falls is tributary to the Snake may be challenged on the issue of significance. The

demarcation of travel time between ground and surface water and the accurate description of travel time within the aquifer may well place ground-water effects beyond the scope of reasonableness. Permits for ground water must be evaluated on an individual basis prior to making the determination of being tributary in a reasonable timeframe or nontributary.

Rule 1,5,2--This rule covers diversions to storage and it would be our understanding that the same public interest would apply to diversions from storage.

Rule 3,2,1--The rule presumes, that all unappropriated water (surface and ground) are trust waters. A further presumption that all proposals to appropriate trust waters would constitute a significant reduction in water available for power production is without hydrologic basis as it affects hydrogeneration facilities upstream from Swan Falls.

Rule 4,4,2,2--This rule places additional burdens upon the applicant, which could very easily discourage the use of a resource now made available for upstream users.

Rule 5,1,1,1--This rule might easily undermine the security of senior right holders and would place the determination of "reasonableness" without any specific direction on the director. It is conceivable that an existing right holder could be forced to change from existing methods to new ones simply by a challenge from an applicant seeking a new permit. There are serious overtones on instability of rights which have historically been preserved by the Department.

Rule 5,3--The presumption of a significant reduction of water available for power production must be analyzed on a case-by-case basis before making such a statement. Each application should be analyzed for individual, measurable or estimated, effects before being determined to reduce water available for power production.

Rule 5,3,2,2--The implied mitigation may be in direct conflict with the statute promoting the continuation of the family farming practice. The value of water for hydrogeneration is generally higher than for irrigation uses so future agricultural uses may be severely curtailed.

Rule 5,3,7--It is our understanding that this rule would insure no reprocessing of permits for our Teton storage project.

Rule 5,3,9--This rule seems highly discriminatory since there are no hydrologic or geologic reasons for the arbitrary selection of the 4 mile limit. This should be analyzed in future studies.

Rule 6,2--This rule appears to direct its focus on hydro facilities downstream of Swan Falls. To be consistent with other rules it should be limited to the Swan Falls reaches.

It is hoped that these comments will be of help to you. If we can be of assistance to the Department as they proceed with this effort please advise.

Sincerely yours,

John W. Keys, III

Assistant
Regional Director

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 10th day of October, 2008

NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER
Chartered
ATTORNEYS AT LAW
142 3RD AVE NO.
MAILING ADDRESS: P.O. Box 1906
TWIN FALLS, ID 83303-1906
TELEPHONE (208) 734-0700
SUN VALLEY (208) 726-4661

THOMAS G. NELSON
JOHN A. ROSHOLT
J. EVAN ROBERTSON
STEVEN K. TOLMAN
JAMES C. TUCKER

TERRY T. UHLING
LAIRD B. STONE
GARY D. SLETTE

October 30, 1985

Mr. Kenneth Dunn
Director
Department of Water Resources
Statehouse
Boise, ID 83724

RE: Proposed Rules

Dear Ken:

You have asked for comments by November 8th, on the draft rules which were published in the October, 1985 issue of "Currents".

While I recognize that Norm Young's comment at the Burley Public Hearing was that the numbering system was required by law, it seems to me generally incomprehensible. First of all, I am not certain what law requires the numbering system. Secondly, even if it is required by some other administrative agency of the State government, it seems to me it could be made more usable by different indentation, darker numbers as opposed to lighter numbers for differentiation, and perhaps indentation of different parts of the rule itself when it is supposed to be in outline form.

Trust Water. Under the Swan Falls Agreement, and the statutes and regulations, its been my understanding all along that trust water flows can only exist between the Swan Falls Dam and the Milner Dam. We have always thought that subterranean flows which come to the surface and surface flows above Milner which are tributary to the river above Milner cannot be within the definition of trust water for the reason that the minimum stream flow at Milner is zero. Subterranean flows above Milner, which are tributary to the river below Milner are within the definition of trust water. Reflecting this limitation in the definition of trust water flows found in 1, 5, 1, 1. would clear up 90% of the present questions about trust water.

Non-Consumptive Uses. At the recent hearings, the Director indicated that in his opinion there was no such thing

as a true non-consumptive use because every use facilitated some consumption, e. g., an impoundment behind a hydropower facility that provides more surface area for evaporation, etc. Yet in promulgating rules as to existing permits under 4, 2, 3., the Department is willing to exempt from rehearing permits which are non-consumptive or insignificant water uses in the context of the river basin. I submit that non-consumptive uses such as hydropower and fish propagation ought to be included as excepted under Rule 4, 2, 3, 2, 2. as well as " permits for DCMI uses." Such an exception would also then eliminate consideration of those permits from the provision of Idaho Code §42-203c.

Subordination. Since all hydropower permits will hereafter be subordinated in accordance with state policy, the state's and public's interest is generally protected. It seems unnecessary to both require and allow the Department of Water Resources to become the protector of the streambed, the zoning authority, the water quality authority, air quality authority, the economic development agency, and the employment office. To allow this type of subjective evaluation could result in another tier of bureaucracy being thrown up against an applicant. The person seeking permission to build a hydropower plant and use Idaho's water non-consumptively, must obtain permission from the Federal Energy Regulatory Commission. All of the criteria laid out in Rule 5.2, and 5.3, are really accomplished and determined in the federal proceeding, whether it be for license or for exemption. To superimpose another layer of questions means that an applicant is going to end up arguing at the local, state and federal level as to what the public interest really is when in fact it must be the same at all levels of government.

Public Interest - Groundwater Recharge Upstream From Milner Dam. I have trouble with the exemption to the public interet criteria of proposed Rule 5, 3, 7. as to groundwater recharge. Proposed groundwater recharges in the State of Idaho for the most part benefit only spring flows in the Hagerman Valley which supply the trout industry and directly benefit the power plants which lie below the Hagerman spring inflows on the Snake River.

Proposed Rule 5, 3, 7. places groundwater recharge on a plateau which is far above most other water uses in Idaho. In a physical sense, this preference would operate to prefer

Lower Snake River hydropower as opposed to Upper Snake River hydropower. It would also prefer the non-consumptive use of water for trout propagation as opposed to irrigation when you contrast Rule 5, 3, 7. with 5, 3, 9.. The latter rule would prohibit irrigation diversion within four miles of the Snake River between Milner Dam and Swan Falls, even though recharge would have benefitted the water table. At the same time, we place a preferred status around trout facilities by reason of their very location. The irrigator who also participates in financing a groundwater recharge district who has land within four miles of the Snake River between Milner and Swan Falls is paying assessments to benefit the trout industry, but he cannot partake of the benefits.

Review of Permits for Non-Consumptive Uses. The blame cannot be laid upon the Department of Water Resources for the passage of Idaho Code §42-203D, which mandates a review of all permits whether or not they involve "trust water." The logical and sensible answer would have been to review only undeveloped permits which contemplate a consumptive use of trust water, and then only if the original permit was not issued under the pre-1985 public interest criteria of Idaho Code §42-203. Perhaps this should be accomplished by regulation. If the reason for not excluding non-consumptive uses from the re-evaluation process of Idaho Code §42-203D is so as to insure that a subordination provision and a limitation of water right provision were imposed upon hydropower permits, it seems to me that it may still be consistent to do that without a re-evaluation of permit under the authority granted in Idaho Code §42-203B. However, any such limitation should conform directly to any similar limitations imposed by existing federal law or federal law agency both for licensed hydropower projects and exempt hydropower projects. To have dissimiliar rights from FERC and DWR may well cause consternation for permit holders in both the financing and operation of large and small hydro projects in the future.

Review of Reservoir Permits. Several permits for major projects are presently outstanding. Two are held by the United States Bureau of Reclamation for the Teton Project and for the Lynn Crandall Dam Project. It is my hope that proposed Rule 5, 3, 7. will facilitate an automatic order continuing the permit. Re-evaluation becomes totally unnecessary for Teton and Crandall if the rules limited re-evaluation to only those consumptive permits involving trust water, since there can be

no surface trust water above Milner Dam. Re-evaluating Salmon Falls and other federal projects may rock the boat somewhat. I think Rule 5, 3, 7. should also be expanded to include non-consumptive permits. If it is not, then it belongs in 4, 2, 3, 1. as part of the exemption.

General. I commend the Department for their effort in attempting to deal with a very complex subject in a very comprehensive manner. We appreciate the proposed definitive rules as to application requirements, public notice requirements, and all of the general information which has always existed but never has been written down.

We would appreciate the opportunity to talk with you further about our comments, if you have any questions.

Respectfully submitted,

John A. Rosholt

JOHN A. ROSHOLT

JAR:kk

January 24, 1986

Idaho Department of Water Resources
450 West State Street
Boise, Idaho 83720

Attention: Water Allocation Rules

As a lifetime resident and farmer in the State of Idaho, who uses surface water and ground waters in the irrigation of my lands, I am very much opposed to the rules now being proposed for adoption by the Department of Water Resources to implement Section 42-203, Idaho Code and the Swan Falls Agreement. If the proposed rules are consistent with the Swan Falls Agreement and the legislative enactments under that agreement, which I do not believe they are, then it is my opinion that the State of Idaho, the Legislature of the State of Idaho and the Department of Water Resources has sold out to Idaho Power Company. If the proposed rules are adopted in their present form, the Director of the Idaho Department of Water Resources can effectively eliminate any future irrigated agriculture development in Southern Idaho.

My primary concerns with the proposed rules are that the Director of the Idaho Department of Water Resources is attempting to create presumptions by the adoption of these rules that were not contemplated by the Legislature of the State of Idaho or the Swan Falls Agreement, and are arbitrary to the extent that there is not sufficient data to support or disprove said presumptions. The first presumption is found in Proposed Rule 1,4,2,2. which provides that any application proposing a consumptive use of water which is tributary to the Snake River above Swan Falls will significantly reduce the flows available to downstream hydropower rights. By proposing such a rule with this presumption, the modifying word "significantly" adopted by the Legislature becomes meaningless and the Director is in effect eliminating that word from Section 42-203C, Idaho Code. This proposed rule becomes even more objectionable by the adoption of Rule 1,5. which creates presumptions that

all flows in the Snake River upstream from Swan Falls Dam and all surface and ground water sources tributary to the Snake River upstream from Swan Falls Dam are trust waters, and that ground waters are presumed to be tributary to the Snake River upstream from Swan Falls Dam if they are found within the Snake River drainage above Swan Falls. It is respectfully submitted that these presumptions are arbitrary and go far beyond any comtemplation of the Idaho State Legislature or the individuals involved in the Swan Falls controversy. Although the rules do acknowledge that waters previously appropriated are not trust waters for the purposes of the rules, a close reading of the proposed rules would indicate that any waters previously appropriated and ultimately abandoned would become trust waters. This certainly was not within the contemplation of the people of the State of Idaho when the Swan Falls Agreement and the legislative enactments were consummated.

The above proposed rules become particularly significant if the proposed rules in regard to the public interest criteria are adopted. As provided under Rule 5,3. The Legislature, in adopting Section 42-203C made it clear that certain factors would be considered to determine whether or not a proposed appropriation of waters of the State of Idaho would meet the public interest criteria. The Legislature also made it clear that no one factor would be given greater weight than another factor. The proposed rules abrogate this legislative enactment by imposing the "economic impact" factor in determining direct project benefits, indirect project costs and then sets "economic impact" as a separate factor to be considered. Under the proposed rules, the "economic impact" thereby becomes the controlling factor. Under the proposed rules, the criteria set forth to determine the "economic impact" are such that it would be impossible to establish that the project benefits would exceed the "economic impact." The proposed rules then go another step to insure that "economic impact" is the dominating factor by setting forth provisions for mitigation. Such provisions were neither contemplated by the Legislature nor do they appear in any of the legislative enactments. If these proposed rules are adopted, the Director of the Department of Water Resources has in effect placed any future agricultural development in the same position as it would have been had there been no Swan Falls Agreement and future appropriators would have been required to condemn any hydropower rights affected by the proposed appropriation of water.

Proposed Rule 6,2., if adopted, would grant Idaho Power Company protection for its Hells Canyon power plants that it

does not presently have under the decisions of the Idaho Supreme Court. This rule would require mitigation for the impact of flow depletions by diversions for offstream storage between November 1 and March 31 between Milner and Murphy Gauging Stations. This rule is being adopted notwithstanding the clear decision of the Idaho Supreme Court that the hydropower water rights of Idaho Power Company at its Hells Canyon Complex are subordinate to all upstream depletions, without mitigation. It is respectfully submitted that the Legislature of the State of Idaho has not granted Idaho Power Company this additional protection. It would also appear that Rule 6,2. negates the provisions of Rule 5,3,7. which creates a presumption that a proposal to divert water to surface storage from the Snake River and surface tributaries upstream from Murphy Gauging Station satisfies the public interest criteria. As has been previously noted, the Director has imposed "economic impact" as a primary consideration to determine whether or not the public interest criteria has been met and the requirement of mitigation alone would normally negate any other factors in determining the public interest. Likewise, Proposed Rule 1,5,2. becomes meaningless as a result of Proposed Rule 6,2.

Finally, Rule 5,3,9. is a clear example of how the Director of the Department of Water Resources desires to proceed in an arbitrary and capricious manner. It was the understanding of the general public in the State of Idaho that only those waters between Milner Dam and Swan Falls would be considered trust waters in the Snake River, and that those waters, to be appropriated for other uses, would be required to meet the public interest criteria. The Director has gone far beyond this position and has provided under this proposed rule that any direct diversion of these trust waters and ground waters within four miles of the nearest edge of the Snake River are presumed not to be in the public interest. There is absolutely no basis by which this arbitrary decision should be made by the Director in the rules.

RESPECTFULLY SUBMITTED this 24th day of January, 1986.

Donald G. Suchan

Donald G. Suchan

Address: Route #2, Box 2466
Paul, Idaho 83347