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Department of Water Resources

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

Signed this 4th day of JANUARY 2008
Gay Spikman

BEFORE THE DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

* * * * *

11	IN THE MATTER OF THE)	
12)	
13	PETITION OF IDAHO POWER COMPANY)	PETITION FOR THE
14)	AMENDMENT OF RULE 5,2.
15)	OF THE WATER
16)	APPROPRIATION RULES AND
17)	REGULATIONS ADOPTED
18)	APRIL 8, 1986

* * * * *

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

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

12 Petitioner is also a party to the agreement of October
13 25, 1984, commonly referred to as the Swan Falls Settlement
14 Agreement, a copy of which is attached hereto, and by this
15 reference made a part hereof. Petitioner is also the
16 beneficiary of the trust created by the Legislature of the
17 State of Idaho in Idaho Code §42-203B, and as such is entitled
18 to defend its water rights and to insist that the Department of
19 Water Resources, as an agency of the State of Idaho, fulfill
20 the State's trust responsibilities in enforcing and
21 implementing the policies of the settlement agreement and the
22 implementing legislation.

23 2. Rule 5,2. of the rules adopted April 8, 1986, was
24 apparently intended to permit the implementation of §42-203C.
25 The legislation, which was adopted following the Swan Falls
26 Agreement, was intended to create a three step process in
27 evaluating appropriations of trust water. While the Rules
28

1 acknowledge the three step process, Rule 5,2. is in violation
2 of the statutory scheme. Therefore, Rule 5,2. as promulgated
3 should be repealed and an amended rule adopted. That amended
4 rule should read as follows:

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

9
10 5,2,1. For purposes of reallocating trust
11 water pursuant to §42-203C, Idaho Code,
12 a proposed use for irrigation purposes
13 will be presumed not to cause a
14 significant reduction within the
15 meaning of §42-203C, Idaho Code if:

16 (a) the proposed use, when fully
17 developed, and when the impact of its
18 depletion is fully felt, will reduce
19 the flow of the Snake River measured at
20 the Murphy gauge by not more than one
21 (1) acre foot per day, and

22 (b) the proposed use, cumulatively
23 with other proposed uses meeting the
24 requirements of (a) above, which are
25 reasonably likely to be fully developed
26 within the same calendar year, will
27 deplete the flow of the Snake River by
28 a total of 20 cfs or less.

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5,2,1,2. The presumption created in Rule 5,2,1,2. will be used by the Department for administrative purposes, but will cease to exist if a protest is filed and evidence contrary to the effect of the presumption is introduced.

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

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

1 history of the settlement that 450 cfs is a significant amount
2 of water and would be a significant reduction in the water
3 available for hydropower production, if the river were depleted
4 to that amount.

5 Rule 5,2. as adopted would permit proposed uses which
6 would deplete the river 2 cfs per day or less to escape any
7 economic analysis if they totalled less than 40,000 acres per
8 year. Since 2 acre feet per day of depletion would irrigate
9 365 acres if the depletion were spread over the entire year, no
10 economic analysis would be required of the great majority of
11 pending applications and permits. Thus, the 450 cfs could be
12 depleted with no meaningful economic analysis.

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

23 The proposed amended Rule 5,2. gives effect to the
24 intent of the 1986 amendment to §42-203C. As explained by the
25 parties to the agreement, and by the legislative proponent of
26 Senate Bill 1358 (Ch. 117 of the 1986 Session Laws)
27 "significant reduction" had to be applied to certain projects
28 by themselves, against the background of existing uses, without

1 also postulating full future development of the river. If full
2 future development is assumed, then all proposed uses have to
3 be processed under §42-203C, rendering the "individual" review
4 meaningless for even the first projects.

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

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

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

27 4. Rule 5,2. of the Rules adopted by the Department
28 is arbitrary and capricious and is contrary to the provisions

1 of §42-203C as amended by the 1986 Legislature and constitutes
2 an invalid and void promulgation.

3 The invalidity consists, among other things, of:

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

6 2. Applying economic standards to the significant
7 reduction question.

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

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

13 "Futhermore, properly promulgated
14 administrative rules have the force and
15 effect of law. . . Nevertheless, it is also
16 the law that administrative rules are
17 invalid which do not carry into effect the
18 legislature's intent as revealed by existing
19 statutory law, and which are not reasonably
20 related to the purposes of the enabling
21 legislation." (714 P.2d 45, at 47)
22 Rule 5,2. as adopted does not carry into effect the
23 intent of the legislature and is invalid. For that reason, it
24 should be rescinded and the amended Rule 5,2. adopted in its
25 place.

26 DATED this 28th day of April, 1986.

27 NELSON, ROSHOLT, ROBERTSON,
28 TOLMAN & TUCKER

By: 18
Thomas G. Nelson

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VERIFICATION

STATE OF IDAHO)
) ss.
County of Twin Falls)

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

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

TS/

Thomas G. Nelson

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

TS/

NOTARY PUBLIC
Residing at _____
My commission expires: _____

The foregoing is a true and certified copy of
the document on file at the department of
Water Resources
Signed this 4th day of January, 2008
Doug Packman