

Attachment J

December 9, 1993

Twin Falls Canal Co. and
North Side Canal Co.
P.O. Box 326
Twin Falls, ID 83303-0326

RE: Permit No. 01-07011

PROOF ACKNOWLEDGEMENT LETTER

Dear Permit Holder:

The department acknowledges receipt of the proof of beneficial use form submitted for this permit.

Enclosed is an order reinstating your water right permit. Please note that the priority date has not been penalized.

Since your use has been examined by a certified water right examiner, the Department will review the examination for the future issuance of a water right license.

If you have any questions or if we can be of any further assistance, please feel free to contact me.

Sincerely,

JULIE L. YARBROUGH
Senior Secretary

Enclosure

C: IDWR - Regional Office

RECEIVED

JAN 10 1994

ANALYSIS SHEET
FOR
PROOF OF BENEFICIAL USE

Permit No. 01-07011

Reviewed by [Signature] Date 11-08

GENERAL CONSIDERATIONS

TYPES OF USE

yes Name same as permit? _____
NO Address same as permit? _____
yes Proof timely received? Correct Uses? _____
If not, complete calculation below.

SOURCE OF WATER

Surface water source
 Ground water source
 Drilling permit required?
 Copy in the file? Drilling Permit No. _____
 Amount paid for permit _____ Correct?
 Well log in the file?

LICENSE EXAMINATION FEE

MEASURING DEVICE

N/A Required? _____ Required?
X Amount Submitted _____ Installed?
X Correct? _____ Waiver requested?
Exam conducted by certif water net examiner

PRIORITY CALCULATION

Date proof received _____
Date proof due _____ - _____
No. of days late _____ = _____
Priority Date _____ + _____
New Priority Date _____

DEFICIENCIES OR ACTION ITEMS

- need to reinstate w/ no lapse in priority
- need to do data entry.
- need to send spl acknowl letter
Since exam was conducted by cert water net examiner

DATA ENTRY
New Address

P.O. Box 326
Twins Falls, Id 83303-0326 Proof Made 10-29-93

Attachment K



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov

July 27, 2006

JAMES E. RISCH
Governor

KARL J. DREHER
Director

Senator Charles H. Coiner
Idaho State Senate
2138 Hillcrest Drive
Twin Falls, ID 83301

VIA EMAIL AND FIRST CLASS MAIL

Re: Diversions of Natural Flow from the Snake River Under Water Rights for Recharge

Dear Senator Coiner:

I am writing in response to your inquiry regarding whether water diverted from the Snake River for aquifer recharge in 2006 pursuant to a water right permit held by the Idaho Water Resource Board was properly allowed. You initially raised this issue on July 12, 2006, at a meeting of the Idaho Legislature's Natural Resources Interim Committee in Boise.

During his presentation before the Natural Resources Interim Committee, David Blew, the Department of Water Resources Aquifer Recharge Coordinator, stated that water was diverted from the Snake River under the water right permit held by the Water Resource Board from about mid-April until July 21, 2006. You questioned whether the diversions to recharge were improperly out-of-priority, since the water right permit held by the Water Resource Board (right no. 01-07054 having the priority of August 25, 1980) is junior in priority to the water right held by the North Side Canal Company and the Twin Falls Canal Company for power production at the Milner Power Plant (right no. 01-07011 having the priority date of March 30, 1977), which was curtailed on May 16, 2006. You again expressed considerable concern that natural flow may have been diverted out-of-priority for recharge when you telephoned me on July 13.

In response to your concerns, my staff and I have investigated whether the diversions that were made for recharge under the water right permit held by the Water Resource Board were authorized. Based on those investigations, I have determined that the diversions to recharge were made properly in accordance with the water right permit held by the Water Resource Board and the water right permit for power production held by the North Side Canal Company and the Twin Falls Canal Company, as described in the following paragraphs.

Senator Charles H. Coimer
July 27, 2006
Page 2 of 4

Permit No. 01-07011 Held by the North Side and Twin Falls Canal Companies

Application for permit to appropriate water no. 01-07011, as subsequently amended, was first filed on March 30, 1977. The proposed beneficial use was year-round power production using water diverted from the Snake River at a rate of up to 12,000 cfs. The application for permit was approved on June 29, 1977, with proof of beneficial use due on or before June 1, 1982. The due date for submitting proof of beneficial use was extended four times at the request of the North Side and the Twin Falls canal companies, primarily because of delays in the FERC licensing process. The canal companies filed proof of beneficial use of 5,714.7 cfs for power production on October 29, 1993, and the issuance of a license for the water right is pending.

In April of 1987, when the Department was processing the second request for extension of time to submit proof of beneficial use, the Department determined that water right no. 01-07011 should be subordinated pursuant to Idaho Code § 42-203B. The attorney for the North Side and Twin Falls canal companies had concerns with the subordination condition proposed by the Department and suggested alternate language, which was subsequently accepted in its entirety. On December 16, 1987, the second request for extension of time to submit proof of beneficial use was approved with the subordination language proposed by the attorney for the canal companies added as a condition to the permit. That condition states as follows:

The rights for use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge[,] within the the Snake River Basin of the state of Idaho that are initiated later-in-time than the priority of this permit and shall not give rise to any right or claim against any future rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge[,] within the Snake River Basin of the state of Idaho initiated later-in-time than the priority of this permit.

Permit No. 01-07054 Held by the Idaho Water Resource Board

Application for permit to appropriate water no. 01-07054 was filed on June 30, 1980, by Earl Hardy, Thorleif Rangen, John LeMoyné, and John Jones, Jr. The proposed use was year-round ground water recharge using water diverted from the Snake River through the Milner Gooding Canal at a rate of up to 1,200 cfs. On January 15, 1982, the application for permit was assigned to the Lower Snake River Aquifer Recharge District. The application for permit was approved on June 2, 1982, with proof of beneficial use due on or before June 1, 1987. The due date for submitting proof of beneficial use was extended at the request of the Aquifer Recharge District until June 1, 1992, primarily because of ongoing negotiations to obtain access to lands for all of the contemplated recharge sites. Proof of beneficial use for partial development under the permit of 300 cfs for ground water recharge was filed on July 27, 1992, which was 57 days after proof of beneficial use was due. Prior to the submittal of proof of beneficial use, permit no. 01-07054 was lapsed. After proof of beneficial use was submitted, the permit was reinstated, but the priority date was advanced 57 days to August 25, 1980.

Senator Charles H. Coiner
July 27, 2006
Page 3 of 4

On February 16, 1994, the Aquifer Recharge District filed an application to amend permit no. 01-07054 to add the North Side Canal facilities as an additional point of diversion and conveyance system, which application was approved on April 7, 1994. On March 19, 1999, permit no. 01-07054 was assigned to the Idaho Water Resource Board, and the Board has subsequently requested two extensions of time to submit proof of beneficial use for the undeveloped portion of permit no. 01-07054. Proof of beneficial use for the undeveloped portion of the permit is currently due on or before June 1, 2009. There are no subordination conditions associated with permit no. 01-07054.

On March 13, 2006, the Water Resource Board filed an application to place 900 cfs of permit no. 01-07054 into the water bank for the purpose of adding the Aberdeen Springfield Canal facilities as a point of diversion and place of use for ground water recharge. On April 18, 2006, the Water Resource Board amended its water bank application to add numerous other points of diversion and places of use for ground water recharge, including the City of Blackfoot's Jensen Grove.

Distribution of Water to Permit Nos. 01-07011 and 01-07054 During 2006

Water was diverted through the Milner Power Plant under permit no. 01-07011 in calendar year 2006 through May 16. Although preliminary flow records from Idaho Power Company indicate that there was sufficient water available to divert 5,714.7 cfs through the Milner Power Plant and provide a bypass flow of 200 cfs from April 12 through May 12, 2006, preliminary records of diversions through the power plant from the U. S. Bureau of Reclamation indicate that approximately 350± cfs less than 5,714.7 cfs was diverted for power generation.

On May 16, 2006, the U. S. Bureau of Reclamation determined that it was no longer necessary to allow spills past Milner Dam because water from the Snake River could be fully utilized above Milner Dam for the purposes of: (1) supplying all water rights to natural flow above Milner Dam for consumptive demands; (2) continuing to fill reservoir storage space that had not yet filled (e.g., Henrys Lake and Ririe Reservoir); and (3) refill reservoir storage space that had filled but been subsequently evacuated due to flood control releases (e.g., Jackson Lake and Palisades Reservoir). Because permit no. 01-07011 is subordinated to these upstream consumptive uses pursuant to the subordination condition cited on the previous page, the water right for the Milner Power Plant was curtailed until June 27, 2006, when storage releases for uses below Milner Dam began.

During March and April of 2006, canal companies along the Snake River began to divert natural flow pursuant to their various water rights for irrigation. Once those systems were charged for irrigation deliveries, then diversions for recharge were allowed under permit no. 01-07054 at the heading of the North Side Canal and other points of diversion for canals added through the Water Board's lease of the water right permit through the water bank. Diversions for recharge through a canal under permit no. 01-07054 were only allowed to the extent there were no deliveries of water for irrigation along the canal. Based on our analysis of preliminary diversion records, no water was diverted for recharge under permit no. 01-07054 until there was

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Page 4 of 4

at least 5,714.7 cfs available for diversion through the Milner Power Plant pursuant to permit no. 01-07011. Diversions for recharge at Jensen Grove did not begin until April 18, 2006, when there was a combined total flow at the Milner Power Plant of 12,700 cfs, based on the preliminary flow records of Idaho Power.

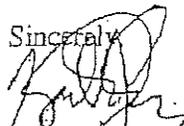
When diversions for power production under permit no. 01-07011 were curtailed on May 16, 2006, pursuant to the previously described subordination condition, diversions for recharge under permit no. 01-07054 were allowed to continue because that permit is not subordinated to any upstream consumptive beneficial uses. Had diversions of water for recharge not occurred after May 16, no additional water would have been available for diversion through the Milner Power Plant because of the subordination provision. Had diversions of water for recharge not occurred after May 16, some additional water would have accrued to storage space that had filled but subsequently evacuated for flood control and filled again. However, permit no. 01-07054 is not subordinated to that second fill of storage.

Distribution of Water to Permit Nos. 01-07011 and 01-07054 in Prior Years

The diversion of water for recharge under permit no. 01-07054 when permit no. 01-07011 is curtailed is in accordance with the subordination condition for permit no. 01-07011. The same situation occurred in at least one other year. In 1995, permit no. 01-07011 was curtailed from March 9 through May 6, while recharge through the Milner Gooding Canal was allowed beginning on April 3 under permit no. 01-07054. Use of the Milner Gooding Canal for recharge was allowed in 1995 pursuant to an interim agreement with the U. S. Bureau of Reclamation providing for use of the canal.

Based on the analysis described above, there is presently no information indicating that the diversions to recharge were not in accordance with the water right permit held by the Water Resource Board and the water right permit for power production held by the North Side Canal Company and the Twin Falls Canal Company*.

Sincerely,



Karl J. Dreher
Director

c: Vince Alberdi – Twin Falls Canal Company
Ted Diehl – North Side Canal Company
Water District 01

* Nothing in this letter should be construed to affect the review of permits no. 01-07011 or no. 01-07054 when such permits are licensed.

Attachment L

HOUSE BILL NO. 800

[View Bill Status](#)

[View Bill Text](#)

[View Statement of Purpose / Fiscal Impact](#)

Text to be added within a bill has been marked with Bold and Underline. Text to be removed has been marked with Strikethrough and Italic. How these codes are actually displayed will vary based on the browser software you are using.

This sentence is marked with bold and underline to show added text.

~~This sentence is marked with strikethrough and italic, indicating text to be removed.~~

Bill Status

H0800.....by WAYS AND MEANS
WATER RIGHTS - Amends existing law relating to water to revise provisions regarding rights associated with permits and licenses relating to ground water recharge.

- 03/13 House intro - 1st rdg - to printing
- 03/14 Rpt prt - to Res/Con
- 03/16 Rpt out - rec d/p - to 2nd rdg
- 03/17 Rls susp - PASSED - 43-22-5

AYES -- Anderson, Andrus, Barraclough, Bastian, Bedke, Bell, Bilbao, Block, Bolz, Bradford, Cannon, Chadderdon, Clark, Collins, Deal, Denney, Eskridge, Field(18), Field(23), Harwood, Henderson, Jaquet, Lake, Loertscher, Mathews, McKague, Moyle, Nielsen, Nonini, Pence, Raybould, Ring, Roberts, Rydalch, Sayler, Schaefer, Shepherd(8), Shirley, Smith(24), Stevenson, Trail, Wills, Mr. Speaker

NAYS -- Barrett, Bayer, Black, Boe, Brackett, Edmunson, Garrett, Hart, Henbest, Kemp, LeFavour, Martinez, Miller, Mitchell, Pasley-Stuart, Ringo, Rusche, Shepherd(2), Skippen, Smith(30), Smylie, Snodgrass

Absent and excused -- Crow, Ellsworth, McGeachin, Sali, Wood

Floor Sponsors - Mr. Speaker & Raybould

Title apvd - to Senate

- 03/20 Senate intro - 1st rdg - to Res/Env
- 03/28 Rpt out - rec d/p - to 2nd rdg
- 03/29 2nd rdg - to 3rd rdg
- 03/30 3rd rdg - FAILED - 14-21-0

AYES -- Burtenshaw, Cameron, Corder, Darrington, Davis, Geddes, Hill, Keough, Marley, Pearce, Richardson, Stegner, Stennett, Williams

NAYS -- Andreason, Brandt, Broadsword, Bunderson, Burkett, Coiner, Compton, Fulcher, Gannon, Goedde, Jorgenson, Kelly, Langhorst, Little, Lodge, Malepeai, McGee, McKenzie, Schroeder, Sweet, Werk

Absent and excused -- None

Floor Sponsors - Burtenshaw & Williams

Ret'd to House

Filed in Office of the Chief Clerk

Bill Text

]]]]
Fifty-eighth Legislature

LEGISLATURE OF THE STATE OF IDAHO

]]]]
Second Regular Session - 2006

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 800

BY WAYS AND MEANS COMMITTEE

1 AN ACT
2 RELATING TO WATER; AMENDING SECTION 42-234, IDAHO CODE, TO REVISE PRIORITY
3 PROVISIONS REGARDING RIGHTS ASSOCIATED WITH PERMITS AND LICENSES RELATING
4 TO GROUND WATER RECHARGE; AND AMENDING SECTION 42-4201A, IDAHO CODE, TO
5 REVISE PRIORITY PROVISIONS REGARDING RIGHTS ASSOCIATED WITH PERMITS AND
6 LICENSES RELATING TO GROUND WATER RECHARGE AND TO MAKE TECHNICAL CORREC-
7 TIONS.

8 Be It Enacted by the Legislature of the State of Idaho:

9 SECTION 1. That Section 42-234, Idaho Code, be, and the same is hereby
10 amended to read as follows:

11 42-234. GROUND WATER RECHARGE PROJECTS -- AUTHORITY OF DEPARTMENT TO
12 GRANT PERMIT. (1) It is the policy of the state of Idaho to promote and
13 encourage the optimum development and augmentation of the water resources of
14 this state. The legislature deems it essential, therefore, that water projects
15 designed to advance this policy be given maximum support. The legislature
16 finds that the projects to recharge ground water basins in Idaho, may enhance
17 the full realization of our water resource potential by furthering water con-
18 servation and increasing the water available for beneficial use.

19 (2) The legislature hereby declares that the appropriation and under-
20 ground storage of water for purposes of ground water recharge shall constitute
21 a beneficial use and hereby authorizes the department of water resources to
22 issue a permit for the appropriation and underground storage of unappropriated
23 waters in an area of recharge. The rights acquired pursuant to any permit and
24 license obtained as herein authorized shall be secondary to all prior per-
25 fected water rights, ~~including those water rights for power purposes that may~~
26 ~~otherwise be subordinated by contract entered into by the governor and Idaho~~
27 ~~power company on October 25, 1964, and ratified by the legislature pursuant to~~
28 ~~section 42-203B, Idaho Code.~~ Any right so granted shall be subject to deple-
29 tion for surface storage or direct uses after a period of years sufficient to
30 amortize the investment of the appropriator.

31 (3) The legislature further recognizes that incidental ground water
32 recharge benefits are often obtained from the diversion and use of water for
33 various beneficial purposes. However, such incidental recharge may not be used
34 as the basis for claim of a separate or expanded water right. Incidental
35 recharge of aquifers which occurs as a result of water diversion and use that
36 does not exceed the vested water right of water right holders is in the public
37 interest. The values of such incidental recharge shall be considered in the
38 management of the state's water resources.

39 SECTION 2. That Section 42-4201A, Idaho Code, be, and the same is hereby
40 amended to read as follows:

41 42-4201A. RECHARGE OF GROUND WATER BASINS -- DIRECTOR'S AUTHORITY TO

1 ISSUE PERMIT. (1) The welfare of the people of the state of Idaho is dependent
2 upon the conservation, development, augmentation and optimum use of the water

3 resources of this state. The legislature deems it essential therefore that
 4 every effort be made to foster and encourage water projects and water use that
 5 will augment ground water basin recharge. The legislature hereby acknowledges
 6 that certain water uses and proposed projects to recharge water basins in the
 7 state by means of the storage of unappropriated waters of the public waters of
 8 the state in underground aquifers represents a unique and innovative endeavor
 9 to further water conservation and increase the water available for beneficial
 10 use.

11 (2) In view of the public betterment to be achieved by the completion of
 12 aquifer recharge projects, the legislature hereby declares that the appropri-
 13 ation and underground storage of water by any person, aquifer recharge dis-
 14 trict, irrigation district, canal company or water district for purposes of
 15 ground water recharge shall constitute a beneficial use and hereby authorizes
 16 the department of water resources to issue a permit, pursuant to section
 17 42-203A, Idaho Code, for the appropriation and underground storage of the
 18 unappropriated waters of the state. The department of water resources is fur-
 19 ther authorized to issue a license confirming the right to appropriate such
 20 waters for the beneficial use herein established upon compliance with the
 21 requirements specified in chapter 2, title 42, Idaho Code. The rights acquired
 22 pursuant to any permit and license obtained as herein authorized shall be sec-
 23 ondary to all prior perfected water rights, ~~including those water rights for~~
 24 ~~power purposes that may otherwise be subordinated by contract entered into by~~
 25 ~~the governor and Idaho power company on October 25, 1904, and ratified by the~~
 26 ~~legislature pursuant to section 42-203D, Idaho Code.~~

27 (3) The director of the department of water resources may regulate the
 28 amount of water which may be diverted for recharge purposes and may reduce
 29 such amount, even though there is sufficient water to supply the entire amount
 30 originally authorized by permit or license. To facilitate necessary financing
 31 of an aquifer recharge project, the director may fix a term of years in the
 32 permit or license during which the amount of water authorized to be diverted
 33 shall not be reduced by the director under the provisions of this subsection.

34 (4) To ~~insure~~ ensure that other water rights are not injured by the oper-
 35 ations of an aquifer recharge project, the director of the department of water
 36 resources shall have the authority to approve, disapprove, or require altera-
 37 tions in the methods employed to achieve ground water recharge. In the event
 38 that the director determines that the methods of operation are adversely
 39 affecting existing water rights or are creating conditions adverse to the ben-
 40 efiticial use of water under existing water rights, the director shall order the
 41 cessation of operations until such alterations as may be ordered by the direc-
 42 tor have been accomplished or such adverse effects otherwise have been cor-
 43 rected.

Statement of Purpose / Fiscal Impact

REPRINT REPRINT REPRINT REPRINT REPRINT REPRINT

STATEMENT OF PURPOSE

RS 15985C1

The purpose of the legislation is to facilitate diversion of expected flood flows in the spring of 2006 in the upper Snake River Basin into existing canal structures to recharge the Eastern Snake Plain Aquifer. The legislation would make recharge a primary use of water.

As part of the 1984 Swan Falls Agreement, Idaho Power Company agreed to subordinate its hydropower water rights "to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law" subject to maintenance of a 3,900 c.f.s. average daily flow from April 1 to October 31, and

5,600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls Dam. The Swan Falls Agreement did not impose any limitations on the type of beneficial uses to which the subordination applied.

In 1994, the Legislature enacted recharge legislation that provided use of water for recharge would be secondary to the use of water to satisfy the hydropower water rights subordinated by the Swan Falls Agreement. This legislation would remove this limitation on the use of water for recharge.

FISCAL NOTE

This legislation imposes no fiscal burden on any agency or unit of government.

Contact

Name: Speaker of the House of Representatives Bruce Newcomb
Phone: (208) 332-1000
Representative Dell Raybould
Representative John A. Stevenson
Senator Bart Davis
Senator Don Burtenshaw
Senator J. Stanley Williams

STATEMENT OF PURPOSE/FISCAL NOTE

H 800

Attachment M

RECEIVED

APR 11 2006

DEPARTMENT OF
WATER RESOURCES

April 11, 2006

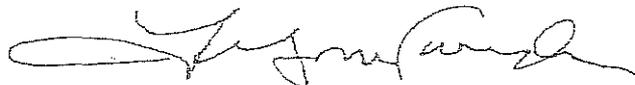
Karl Dreher, Director
Idaho Department of Water Resources
322 E Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: Water Right Permit Nos. 01-7054, 37-7842, and Water Right Licenses
enumerated in the Swan Falls Water Right Agreement, dated October 25, 1984
and ratified by Idaho Code § 42-203B(5)

Dear Director Dreher:

The State of Idaho and Idaho Power Company have entered into the attached Stipulation dated April 11, 2006, which recognizes that the hydropower water rights listed in the Swan Falls Agreement are subordinate to Water Right Permit Nos. 01-7054 and 37-7842. We request that this Stipulation be filed in each of the relevant water right files and that you take such action as is necessary to reflect the Stipulation in each of the enumerated water rights.

Sincerely,



LAWRENCE G. WASDEN,
Attorney General
State of Idaho



JAMES C. TUCKER
Attorney for Idaho Power Company

Attachment

STIPULATION

The Idaho Power Company and the State of Idaho ("State") hereby stipulate and agree, by and through their respective undersigned counsel, as follows:

- 1) Stipulation Regarding Water Right Permit Nos. 01-7054 and 37-7842: Recognizing that Water Right Permit Nos. 01-7054 and 37-7842 are subject to the Swan Falls Settlement –
 - a) The Company agrees that its water rights are subordinated to water rights nos. 01-7054 and 37-7842 pursuant to the terms of the Swan Falls Agreement and will neither contest nor otherwise oppose the exercise of those water rights on the basis of priority, the Swan Falls Agreement, or I.C. §§ 42-234, 42-4201 and 42-4201A. The Company further agrees that those water rights may be exercised in a manner consistent with state law.
 - b) The parties agree that all provisions of the Swan Falls Agreement and the implementing legislation shall continue to apply to Water Right Permit Nos. 01-7054 and 37-7842, including I.C. §§ 61-539 and 61-540 for the benefit of Idaho Power Company.
 - c) The parties further agree that in the event that the Idaho Water Resource Board (IWRB) seeks to have said permits licensed or decreed, that the Company will not file a protest or objection in such proceedings, but that the State, in recognition of its obligations under the Swan Falls Agreement and state law, through the Idaho Department of Water Resources (IDWR), will appropriately investigate such permits to ensure that they meet applicable requirements and that the licensed or decreed water rights fully comply with state law.
- 2) Further Proceedings Relating to the Swan Falls Agreement. The parties agree that in the event that there are disagreements or disputes between the parties as to the interpretation or application of the Swan Falls Agreement that they will endeavor to resolve those disagreements through informal discussions and negotiation. In the event that the parties are unable to resolve

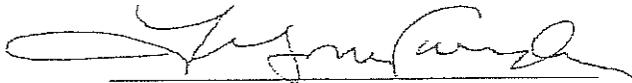
any such disagreements to their mutual satisfaction, either party, after notice to the other, may file a petition for declaratory relief with a court of appropriate jurisdiction to have the disagreement resolved and the Swan Falls Agreement interpreted and neither this Stipulation nor I.C. §§ 42-234, 42-4201, or 42-4201A shall act as a bar to the filing of such action.

- 3) Request for Recognition of the Stipulation. The parties agree to submit this Stipulation in all administrative and judicial proceedings involving the recognition of Water Right Permit Nos. 01-7054 and 37-7842 and to jointly present affidavits and such other evidence as may be required for the recognition of the Stipulation.
- 4) Defense of Stipulation. The parties agree to jointly support and defend the terms of the Stipulation against any and all objections or other challenges that may arise against the terms of the Stipulation in any administrative or judicial proceeding.
- 5) Stipulation Does Not Affect Statutory or Regulatory Authority. The parties agree that nothing in this Stipulation shall be construed or interpreted to affect the authority of the State as provided by constitution, statute or regulation. Nor shall this Stipulation be construed or interpreted to affect the rights of any person not a party to the Stipulation.
- 6) Stipulation Not to be Used Against Parties. Except as provided herein, neither party by entry into this Stipulation waives any legal position or arguments it may have regarding any legal disputes that may exist between the parties. Nothing in this Stipulation shall be construed as an admission against interest or tendered or used as evidence to support or oppose any party's claims or objections in any administrative or judicial proceeding, other than those seeking approval of the Stipulation, for interpretation, enforcement or administration of this Stipulation or for a purpose contemplated by Idaho Rule of Evidence 408.

- 7) Stipulation is Binding. The terms of this Stipulation shall bind and inure to the benefit of the respective successors of the parties.
- 8) Mutual Covenants of Authority. The parties represent and acknowledge that each of the undersigned is authorized to execute this Stipulation on behalf of the party they represent.
- 9) Non-Severability. The provisions of this Stipulation are not severable.
- 10) Triplicate Originals. This Stipulation is executed in triplicate. Each of the three Stipulations with an original signature of each party shall be an original.

The parties have executed this Stipulation on the date following their respective signatures.

FOR THE STATE OF IDAHO, including THE IDAHO WATER RESOURCE BOARD:



LAWRENCE G. WASDEN,
Attorney General
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449
(208) 334-4126

Date: 4/11/06

FOR IDAHO POWER COMPANY:



JAMES C. TUCKER
Idaho Power Company
P.O. Box 70
Boise, ID 83707
(208) 388-2112

Date: 4/11/06

Attachment N

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Permit Report

08/17/2007

WATER RIGHT NO. 37-7842

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	STATE OF IDAHO IDAHO WATER RESOURCE BOARD 322 E FRONT ST PO BOX 83720 BOISE, ID 83720-0098 (208)287-4800
Original Owner	EARL HARDY
Original Owner	THORLEIF RANGEN , ID
Original Owner	JOHN R LE MOYNE 901A GRIDLEY ISLAND HAGERMAN, ID 83332 (208)837-4887
Original Owner	JOHN W JONES JR PO BOX 265 HAGERMAN, ID 83332 (208)837-4580

Priority Date: 08/25/1980

Status: Active

<u>Source</u>	<u>Tributary</u>
BIG WOOD RIVER	MALAD RIVER
LITTLE WOOD RIVER	MALAD RIVER

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
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GROUND WATER RECHARGE	01/01	12/31	800 CFS	
Total Diversion			800 CFS	

Location of Point(s) of Diversion:

LITTLE WOOD RIVER	SWSE	Sec. 24	Township 04S	Range 19E	LINCOLN County
BIG WOOD RIVER	SWSE	Sec. 24	Township 04S	Range 19E	LINCOLN County

Place(s) of use: No POUs found for this right

Conditions of Approval:

1.	026	Permit holder shall commence the excavation or construction of diverting works within one year of the date this permit is issued and shall proceed diligently until the project is complete.
2.	007	The right holder shall not assign or sell the permit without first securing the written approval of the Department of Water Resources.
3.	005	Use of water under this right is subject to control by the watermaster of State Water District No. 37 .
4.	001	A measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works.
5.	004	The issuance of this right does not grant any right-of-way or easement across the land of another.
6.		See file for complete place of use descriptions. This permit shall be secondary to all prior water rights including rights held by any privately owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversion for purposes of hydroelectric power generation. Water may not be diverted under this permit until the Board of Directors of the District establish and implement a procedure acceptable to the Director for assuring that the water quality of the Lower Snake Aquifer will not be impaired. Plans for recharge facilities and any conveyance works needed shall be submitted to the department for approval prior to construction.

Dates:

Proof Due Date: 06/01/2009

Proof Made Date:

Approved Date: 06/02/1982

Moratorium Expiration Date:

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Application Received Date: 07/02/1980

Protest Deadline Date:

Number of Protests: 0

Field Exam Date:
Date Sent to State Off:
Date Received at State Off:

Other Information:
State or Federal:
Owner Name Connector:
Water District Number: 37
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Permit Report

08/17/2007

WATER RIGHT NO. I-7054

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	STATE OF IDAHO IDAHO WATER RESOURCE BOARD 322 E FRONT ST PO BOX 83720 BOISE, ID 83720-0098 (208)287-4800
Original Owner	EARL HARDY
Original Owner	THORLEIF RANGEN , ID
Original Owner	JOHN R LE MOYNE 901A GRIDLEY ISLAND HAGERMAN, ID 83332 (208)837-4887
Original Owner	JOHN W JONES JR PO BOX 265 HAGERMAN, ID 83332 (208)837-4580

Priority Date: 08/25/1980

Status: Active

Water Supply Bank Status: Active

<u>Source</u>	<u>Tributary</u>
SNAKE RIVER	COLUMBIA RIVER

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
-----------------------	-------------	-----------	-----------------------	---------------

GROUND WATER RECHARGE	1/01	12/31	1200 CFS	
Total Diversion			1200 CFS	

Location of Point(s) of Diversion:

SNAKE RIVER	SWNW	Sec. 28	Township 10S	Range 21E	JEROME County
SNAKE RIVER	SWNW	Sec. 29	Township 10S	Range 21E	JEROME County

Place(s) of use: No POUs found for this right

Conditions of Approval:

1.	<p>The Lower Snake Aquifer Recharge District may not utilize the Milner Gooding Canal until and unless a valid contract is in place with the U.S. Dept. of Interior, Bureau of Reclamation. The permit shall be secondary to all prior water rights including rights held by any privately owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversion for purposes of hydroelectric power generation. The Director may regulate or reduce the rate of diversion under this permit pursuant to requirements of Section 42-04201, Idaho Code. The permit shall not be assigned or sold without first securing the written approval of the Department of Water Resources. The Board of Directors of the District shall establish and implement a procedure acceptable to the Director for assuring that the water quality of the Lower Snake Aquifer will not be impaired. The right holder shall submit plans for recharge facilities and any conveyance works needed to the Department for approval prior to construction. Place of use is within the boundaries of the Lower Snake Plains Aquifer Recharge District.</p>
----	--

Dates:

Proof Due Date: 06/01/2009

Proof Made Date:

Approved Date: 06/02/1982

Moratorium Expiration Date:

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Application Received Date: 06/30/1980

Protest Deadline Date:

Number of Protests: 0

Field Exam Date:

Date Sent to State Off:

Date Received at State Off:

Other Information:

State or Federal:

Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Water Supply Bank:
Lessor Name(s):STATE OF IDAHO
Lease Status: Active
Lease Amount: Part
Rental Availability: None
Date Received: 3/19/2007
Lease Begin Date: 3/19/2007
Expiration Date: 12/31/2007

Amt. of Fee \$ N/A

Date _____

Receipt No. _____

Receipt by _____

RECEIVED

JUL 27 1992

No ✓

Department of Water Resources

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

PROOF OF BENEFICIAL USE

The Idaho Department of Water Resources considers this form a statement that the permit holder(s) has/have completed all development that will occur under this permit and that water has been applied according to the provisions of the permit for the beneficial use(s) described below. This form must be accompanied by a license examination fee, when necessary, or a completed field examination report prepared by a certified water right examiner who has been appointed by the department.

- 1. Permit No. and 01-07054A
37-07842A Telephone No. 837-4887
- 2. Name(s) of Permit Holder(s): Lower Snake River Recharge District
- 3. Mailing Address: Box 487 HASELTON, IDAHO
- 4. Source of Water: Snake River

If GROUNDWATER, Well Driller's Name: NA Date Drilled: _____

OPTIONAL:

Pump horsepower: NA Pressure (psi): _____ Dynamic pumping level (ft.): _____

- 5. Extent of Use (as authorized by the permit):

Domestic _____ (No. of households) Stockwater _____ (No. and type of stock)

Irrigation _____ (No. of acres) Other Groundwater Recharge

- 6. Total rate and/or volume for which proof is submitted 300 cfs OR _____ acre/feet

- 7. Refer to the approval conditions on your permit and respond accordingly:

Measuring device: Required? Yes No Installed? Yes No

OR

Flow Measurement Port: Required? NA Yes No Installed? NA Yes No

- 8. Fee Enclosed: \$ _____ (See License Fee Schedule on back of Instruction Sheet)

- 9. Person to contact to accompany the Department representative during field examination of the water system.

Charles Martin
Name

209-734-4888
Telephone No.

APR 18 1994

1139 Falls Ave. East, Twin Falls Idaho
Address

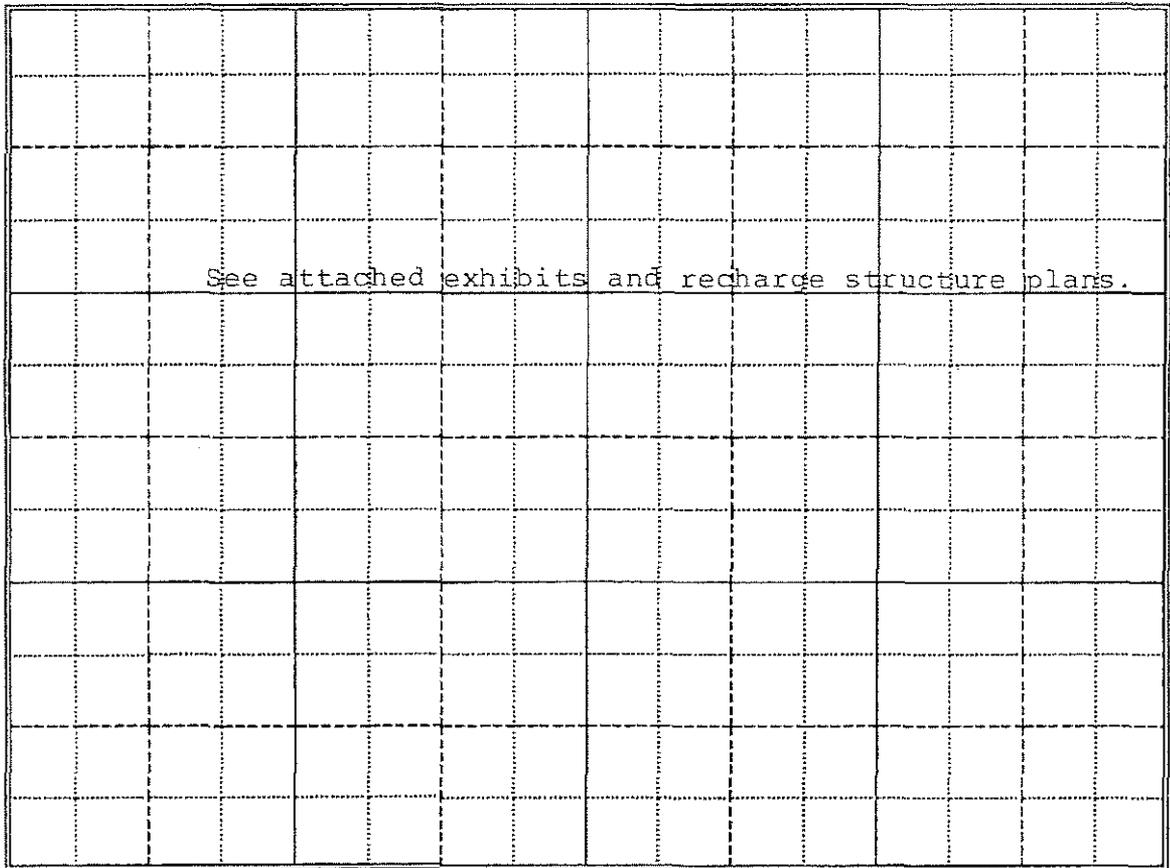
- 10. The above information is my true statement of the extent to which the above numbered permit has been developed and I relinquish any undeveloped portion of the permit to the state of Idaho.

6/12/92
Date

Charles Martin project engineer CWRE # 001
Signature (and title, if on behalf of a company or organization)

JUL 29 1992

3. Delivery System Diagram: Indicate all major components and distances between components. Indicate weir size/ditch size/pipe I.d. as applicable.



Scale: 1" = _____

_____ Copy of USGS Quadrangle Attached Showing location(s) of point(s) of diversion and place(s) of use (required).

_____ Aerial Photo Attached (required for irrigation of 10+ acres)

_____ Photo of Diversion and System Attached

4.

Well or Diversion Identification No.*	Motor Make	Hp	Motor Serial No.	Pump Make	Pump Serial No. or Discharge Size
N/A					

*Code to correspond with No. on map and aerial photo

D. FLOW MEASUREMENTS

1.

Measurement Equipment	Type	Make	Model No.	Serial No.	Size	Calib. Date
Milner Gooding Canal Measuring Stations 56 and 57						

2. Measurements water measured in concrete flume above and below diversion.
Diversion quantity is mathematical difference. Upstream flow measured
at Milner Gooding Canal Diversion Structure 56. Downstream measurement
at Milner Gooding Canal Structure No. 57. Rating curves have been
established for both stations. See attached le...

E. NARRATIVE/REMARKS/COMMENTS

Measurement flow records for April 1986, as prepared by Big Wood Canal Company. Attached are flow records.

The Big Wood Canal Co-mingles water from Snake River and Bigwood River upstream of diversion. District routinely replaces water from one source with water from other sources. At time of proof of Beneficial Use Report the Bigwood water was supplementing Snake River flows to facilitate flows measured at diversion.

Division agreement between Lower Snake River Recharge District and Bureau of Land Management attached for your information.

Attached is a flow summary sheet that tabulates the recharge rate of flow and the maximum potential contribution to total recharge from each potential source.

↑
this document
already in file
below

Have conditions of permit approval been met? yes no

F. FLOW CALCULATIONS

_____ Additional Computation Sheets Attached

Measured Method:

See Section E.

G. VOLUME CALCULATIONS N/A

1. Volume Calculations for Irrigation:

$V_{I.R.} = (\text{Acres Irrigated}) \times (\text{Irrigation Requirement}) =$ _____

$V_{D.R.} = [\text{Diversion Rate (cfs)}] \times (\text{Days in Irrigation Season}) \times 1.9835 =$ _____

$V = \text{Smaller of } V_{I.R.} \text{ and } V_{D.R.} =$ _____

2. Volume Calculations for Other Uses:

H. RECOMMENDATIONS

1. Recommended Amounts

Beneficial Use	Period of Use		Rate of Diversion Q (cfs)	Annual Volume V (ata)
	From	To		
Groundwater Recharge	1-1	12-31	300 CFS	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
Totals:			300 CFS	_____

2. Recommended Amendments

Change P.D. as reflected above
 Add P.D. as reflected above
 None
 Change P.U. as reflected above
 Add P.U. as reflected above
 Other

I. AUTHENTICATION

Field Examiner's Name Gerald Martens Date 11/24/93

Reviewer _____ Date _____



STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
WATER SUPPLY BANK LEASE ACCEPTANCE

This is to certify that: STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
322 E FRONT ST
PO BOX 83720
BOISE, ID 83720-0098
(208)287-4800

has requested to lease the water right(s) listed below to the Water Supply Bank ("bank"). The Idaho Water Resource Board ("Board") being authorized to operate a bank and to contract by and through the Director of the Idaho Department of Water Resources ("Director", department") the acquisition of water rights for the Board's bank, agrees to lease the water right to the bank as follows:

Summary of Water Rights or Portions Leased to the Bank

	<u>Right</u>	<u>Lease Rate</u>	<u>Lease Volume</u>	<u>Total Leased Acres</u>
	37-7842	800.0 cfs	NA	NA
COMBINED LEASE TOTALS		800.0 cfs	NA	NA

TERM OF LEASE:

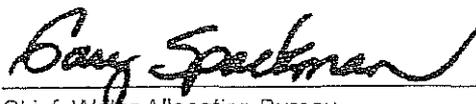
Lease Begin Date: April 11, 2006
Expiration Date: December 31, 2006

MINIMUM PAYMENT ACCEPTABLE:

NA

Detailed Lease Acceptance attached.

Dated this 12TH day of APRIL, 2006



Chief, Water Allocation Bureau

**WATER RIGHT NO. 37-7842
WATER SUPPLY BANK LEASE ACCEPTANCE**

The water right or portion thereof leased to the bank is described as follows:

Lessor: STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
322 E FRONT ST
PO BOX 83720
BOISE, ID 83720-0098
(208)287-4800

Priority Date: 08/25/1980

Source: BIG WOOD RIVER
LITTLE WOOD RIVER

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
GROUND WATER RECHARGE	1/01	12/31	800.00 CFS	NA
			Total: 800.00 CFS	

LOCATION OF POINT(S) OF DIVERSION:
GROUND WATER RECHARGE

BIG WOOD RIVER	SW1/4SE1/4	Sec. 24,	Twp 04S,	Rge 19E,	LINCOLN County
LITTLE WOOD RIVER	SW1/4SE1/4	Sec. 24,	Twp 04S,	Rge 19E,	LINCOLN County

PLACE OF USE TO BE IDLED UNDER THIS LEASE:

Place of use defined under permit

CONDITIONS OF ACCEPTANCE

1. The water right(s) referenced above is accepted into the bank and rented by the Idaho Water Resource Board. There is no rental fee for rental of this right by the Board.
2. A right accepted into the bank stays in the bank until the Board releases it, the lease term expires, or upon request from the lessor to change the term of the lease.
3. While a water right is in the bank, forfeiture provisions are stayed.
4. Rental of water under this right is subject to the limitations and conditions of approval of the water right.
5. Failure of the right holder to comply with the conditions of acceptance is cause for the Director to rescind acceptance of the lease.

WATER RIGHT NO. 37-7842
WATER SUPPLY BANK LEASE ACCEPTANCE

CONDITIONS OF ACCEPTANCE

- 6 Acceptance of a right into the bank does not, in itself, confirm the validity, extent of development, or any elements of the water right permit, or improve the status of the water right permit including the notion of resumption of use. It does not preclude the opportunity for review of the validity of this water right permit in any other department application process.
- 7 In accordance with Sections 42-248 and 42-1409(6), Idaho Code, all owners of water rights are required to notify the department of any changes in mailing address or change in ownership of all or part of a water right. Notice must be provided within 120 days of the change.
- 8 Upon acceptance of a water right into the Board's water supply bank, the owner of the right may withdraw the right within thirty (30) days of acceptance into the bank if the owner does not agree with the conditions of acceptance.

The water right(s) is leased to the bank subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources.

Dated this 12TH day of APRIL, 2006



Chief, Water Allocation Bureau

AMENDED

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
WATER SUPPLY BANK RENTAL AGREEMENT

This is to certify that: STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
322 E FRONT ST
PO BOX 83720
BOISE, ID 83720-0098
(208)287-4800

filed an application to rent water from the Water Supply Bank ("bank") The Idaho Water Resource Board ("Board") being authorized to operate a bank and to contract by and through the Director of the Idaho Department of Water Resources ("Director, department") for rental of water from the bank agrees to rent water as follows:

Summary of Water Rights or Portions Rented from the Bank

<u>Right</u>	<u>Rented Rate</u>	<u>Rented Volume</u>	<u>Total Rented Acres</u>
1-7054	900.0 cfs	NA	NA

COMBINED RENTAL TOTALS: 900.00 cfs NA NA

TERM OF RENTAL: 03/15/06 to 12/31/06

TOTAL RENTAL FEE: NA

Detailed water right specific limitations and conditions attached

The undersigned renter agrees to use the water rented under this agreement in accordance with the Water Supply Bank rules and in compliance with the limitations and conditions of use described in this agreement:

Dated this 18 day of April 2006

by JERRY R RIGBY (Print Name)

(Signature)

CHAIRMAN, IWEB (Title if on behalf of company or organization)

Having determined that this agreement satisfies the provisions of Section 42-1763, Idaho Code, and, IDAPA 37.02.03030 (Water Supply Bank Rule 30), for the rental and use of water under the terms and conditions herein provided, and none other, I hereby execute this Rental Agreement on behalf of the Idaho Water Resource Board this 18th day of April, 2006

KARL J BREHER, Director
Department of Water Resources

**WATER RIGHT NO(S). 1-7054
WATER SUPPLY BANK RENTAL AGREEMENT**

The renter agrees to use the water rented under this agreement in accordance with the Water Supply Bank rules and in compliance with the limitations and conditions of use described below:

Renter: STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
322 E FRONT ST
PO BOX 83720
BOISE, ID 83720-0098
(208)287-4800

Priority Date: 08/25/1980

Source: SNAKE RIVER

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
GROUND WATER RECHARGE	3/15	12/31	900.00 CFS	NA
			Total: 900.00 CFS	

LOCATION OF POINT(S) OF DIVERSION:

SNAKE RIVER	NW1/4NW1/4	Sec 4,	Twp 02S, Rge 36E, B M.	BINGHAM County
SNAKE RIVER	SW1/4NW1/4	Sec. 28,	Twp 10S, Rge 21E, B.M	JEROME County
SNAKE RIVER	SW1/4NW1/4	Sec 29,	Twp 10S, Rge 21E, B.M	JEROME County
SNAKE RIVER	SW1/4NE1/4	Sec 26,	Twp 01S Rge 36E, B.M	BINGHAM County
SNAKE RIVER	SW1/4NW1/4	Sec 15,	Twp 1N, Rge 37E, B M.	BINGHAM County
SNAKE RIVER	SE1/4SE1/4	Sec 36,	Twp 4N, Rge 40E, B.M	JEFFERSON County
SNAKE RIVER	SE1/4SW1/4	Sec 20,	Twp 4N, Rge 40E, B M	JEFFERSON County
SNAKE RIVER	NE1/4NW1/4	Sec 29,	Twp 4N, Rge 40E, B M.	JEFFERSON County
SNAKE RIVER	NW1/4SW1/4	Sec 27,	Twp 4N, Rge 40E, B M	JEFFERSON County
SNAKE RIVER	SW1/4SE1/4	Sec 36,	Twp 4N, Rge 40E, B M.	JEFFERSON County
SNAKE RIVER	NE1/4NE1/4	Sec 35,	Twp 4N, Rge 37E, B.M	BONNEVILLE County
SNAKE RIVER	NE1/4NW1/4	Sec 12,	Twp 2N, Rge 37E, B M	BONNEVILLE County
SNAKE RIVER	NW1/4NE1/4	Sec 15,	Twp 4N, Rge 39E, B M	JEFFERSON County
SNAKE RIVER	NW1/4W1/4	Sec 5,	Twp 3N, Rge 41E, B M	BONNEVILLE County
SNAKE RIVER	NW1/4NW1/4	Sec 31,	Twp 4N, Rge 41E, B M.	JEFFERSON County
SNAKE RIVER	NE1/4SW1/4	Sec 27,	Twp 2S, Rge 36E, B M.	BINGHAM County
SNAKE RIVER	NE1/4SW1/4	Sec 27,	Twp 2S, Rge 35E B.M.	BINGHAM County
SNAKE RIVER	SE1/4NE1/4	Sec 26,	Twp 1S, Rge 36E B M.	BINGHAM County
SNAKE RIVER	NE1/4NE1/4	Sec 27,	Twp 2S, Rge 35E B M.	BINGHAM County
SNAKE RIVER	NE1/4NE1/4	Sec 27,	Twp 2S, Rge 35E B M.	BINGHAM County
SNAKE RIVER	NE1/4NE1/4	Sec 21,	Twp 5N, Rge 38E B.M	JEFFERSON County
SNAKE RIVER	NW1/4NW1/4	Sec 22,	Twp 5N, Rge 38E B.M	JEFFERSON County
SNAKE RIVER	SE1/4NW1/4	Sec 36,	Twp 4N, Rge 37E B.M	JEFFERSON County
SNAKE RIVER	SW1/4SE1/4	Sec 6,	Twp 2S, Rge 36E B M	BINGHAM County

**WATER RIGHT NO(S). 1-7054
WATER SUPPLY BANK RENTAL AGREEMENT**

RENTER'S PLACE OF USE:

PLACE OF USE OF GROUND WATER RECHARGE IS WITHIN THE FOLLOWING CANAL SYSTEMS:

ABERDEEN SPRINGFIELD CANAL, NORTHSIDE CANAL, PEOPLES CANAL, SNAKE RIVER VALLEY CANAL SYSTEM, ENTERPRISE CANAL, BURGESS CANAL, RUDY CANAL, HARRISON CANAL, FARMERS FRIEND IRRIGATION CANAL, GREAT WESTER CANAL, PORTER CANAL, RIGBY CANAL, PROGRESSIVE CANAL, JENSEN GROVE LAKE, NEW LAVASIDE CANAL, DANSKIN CANAL, TREGO DITCH, BUTTE AND MARKET LAKE CANAL, IDAHO CANAL, RIVERSIDE CANAL

CONDITIONS OF WATER USE

1. The use of water under this agreement shall be subject to the provisions of Section 42-1766, Idaho Code
2. The water right(s) referenced above is accepted into the bank and rented in accordance with a Resolution from the Idaho Water Resource Board dated March 13, 2006. There is no rental fee for rental of this right by the Idaho Water Resource Board
3. Rental of the specified right from the bank does not, in itself, confirm the validity, extent of development, or any elements of the water right permit, or improve the status of the water right permit including the notion of resumption of use. It does not preclude the opportunity for review of the validity of this water right permit in any other department application process
4. The right holder shall record the quantity of water diverted and report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code
5. Use of water under this agreement does not constitute a dedication of the water to renter's land and upon expiration of this agreement, the points of diversion and place of use of the water shall revert to those authorized under the water right and/or again be available to rent from the bank
6. This rental does not grant any right-of-way or easement to use the diversion works or conveyance works of another party
7. Renter agrees to comply with all applicable state and federal laws while using water under this agreement
8. Renter agrees to hold the Board, the Director and the state of Idaho harmless from all liability on account of negligent acts of the renter while using water
9. Renter acknowledges and agrees that the Director may terminate diversion of water if the Director determines there is not a sufficient water supply for the priority of the right or portion thereof being rented
10. Failure of the right holder to comply with the conditions of this agreement is cause for the Director to rescind approval of the rental agreement

Attachment O

Westlaw

45 FERC P 61423, 1988 WL 246992 (F.E.R.C.)

Page 1

▷

45 FERC P 61423, 1988 WL 246992 (F.E.R.C.)

**1

Commission Opinions, Orders and Notices

Twin Falls Canal Company, North Side Canal Company, Ltd.

Project No. 2899-003

Order Issuing License (Major Project)

(Issued December 15, 1988)

*62303 Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On July 27, 1984, the Twin Falls Canal Company and the North Side Canal Company, Ltd. (CC) filed a joint application for license under Part I of the Federal Power Act (FPA) to construct, operate, and maintain the Milner Hydroelectric Project No. 2899, to be located at the existing Milner Dam and Twin Falls Main Canal on the Snake River in Twin Falls, Cassia, Jerome, and Minidoka Counties, Idaho. Parts of the project would occupy lands of the United States managed by the Bureau of Land Management (BLM) of the Department of the Interior. The project would consist of the Milner Dam and Reservoir, modifications to 6,500 feet of the Twin Falls Main Canal to increase its capacity, a control structure on the canal that would divert the additional flow into a forebay, a penstock, a powerhouse located on the irrigation canal 1.6 miles downstream of the dam and containing a single generating unit rated at 43,650 kilowatts, and a 1.4-mile-long transmission line.

Notice of the application has been published. The Idaho Department of Fish and Game (IDFG) and the Idaho Department of Water Resources (IDWR) became intervenors in the proceeding. The motions to intervene and comments filed by agencies and individuals have been fully considered in determining whether to issue this license. The issues raised by the intervenors are discussed below.

I. Dam Safety and National Environmental Policy Act Compliance

The Commission currently is in the process of preparing an environmental impact statement (EIS) assessing, *inter alia*, the potential cumulative impacts of the Milner Project No. 2899 and three other proposed hydroelectric projects on the environmental resources of the Snake River Basin. A draft EIS (DEIS) was issued in November 1987.^(FWS) Due to new circumstances and new information received after the DEIS was issued, a Notice of Intent to Prepare *62304 a Supplement to the DEIS and to hold public meetings was issued on July 15, 1988; public meetings were held in Twin Falls, Idaho, on August 19, 1988. At these meetings, CC informed the Commission that there was a serious concern for the structural integrity of the 85-year-old Milner Dam and that failure of the dam during the irrigation season

III. Environmental Impacts

A. Erosion, Sedimentation, and Slope Stability

Rehabilitation of Milner Dam would involve excavation of rock materials, construction of access roads leading from the excavations to the dam, associated staging areas, and a cofferdam to dewater a small area in the reservoir when reconstructing the spillway. These activities would cause minor erosion, sedimentation, localized movement of loose rock materials, and temporary increases in suspended sediment in Milner Reservoir during placement and removal of cofferdams. In order to ensure that impacts on soils and geologic resources are minimized, Article 402 requires CC to include measures to minimize erosion and sedimentation and to control slope stability when submitting final design specifications for rehabilitation of Milner Dam.

During project construction, localized erosion, sedimentation, and temporary increases in turbidity and suspended sediments would occur until disturbed land surfaces are stabilized. Blasting for the powerhouse and tailrace excavation and construction of the access road could cause localized rockfall and mass movement of loose materials, and placement and removal of cofferdams would temporarily increase suspended sediments and turbidity within the Snake River.

**4 With implementation of a detailed, site-specific erosion, sediment, and slope stability control plan that incorporates CC's proposed mitigation and the mitigation measures recommended in the DEIS, the effects on soil and geologic resources would be minor.^(F17) Article 402 requires CC to prepare a detailed, site-specific plan to control erosion, sedimentation, and slope stability that includes control measures proposed by CC and recommended in the DEIS.

B. Water Quality

1. Water Quality Certification

In a letter dated January 27, 1984, CC requested water quality certification pursuant to Section 401(A)(1) of the Clean Water Act from the Idaho Department of Health and Welfare (IDHW). IDHW granted water quality certification for the Milner Project on September 30, 1985. Since IDHW did not act on the certification request within one year from the date it received the request, water quality certification was deemed waived by Order No. 464.^(F18) However, since we believe the three conditions contained in the water quality certificate,*62306 which address erosion control, spoil disposal, and storage of fuels and chemicals are necessary, we are including them as part of Article 402 of the license.

2. Milner Reservoir and the Snake River below Milner Dam

The water quality in the Upper Snake River Basin is generally good, and is categorized as Class A by IDHW. Water uses to be protected include domestic and industrial water supply, irrigation, livestock watering, and salmonid fish spawning and rearing.

In the 1960's, Milner Reservoir had poor water quality conditions resulting from municipal and industrial point source discharges. During periods of reduced discharges, low dissolved oxygen concentrations (DO) in Milner Reservoir resulted in major fish kills. Substantial reductions in these point source discharges in the 1970's, however, have contributed to better water quality conditions in the reservoir.

Temperature and DO sampling conducted by CC's consultant in June to September 1983 and in August to December 1987 indicate that Milner Reservoir does not thermally or chemically stratify and that DO and temperature levels in the river below Milner Dam are similar to those in Milner Reservoir. These levels met the state water quality standards at all depths sampled in Milner Reservoir and in the Snake River below Milner Dam.

The Environmental Protection Agency (EPA) reports that in past years the surface waters of Milner Reservoir contained high concentrations of heavy metals. Since 1979, EPA reports that concentrations of zinc, cadmium, and copper in Milner Reservoir and in the Snake River below Milner Dam have ranged from 0 to 50 micrograms per liter (ug/l), from .2 to 2 ug/l, and from 1 to 8 ug/l, respectively. However, these concentrations are below levels reported by EPA that adversely affect fresh water aquatic organisms. ^{(7)(D)}

(A) Project Construction

Construction activities in Milner Reservoir and in the Snake River below Milner Dam would disturb sediments and other unconsolidated deposits that likely contain heavy metals or other toxic substances. Improper removal and disposal of sediments or unconsolidated deposits could disperse heavy metals or other toxic substances into the water column and would adversely affect the aquatic resources downstream. Although the entire project area need not be tested, Article 403 requires CC to test any sediment or unconsolidated materials within the Snake River and Milner Reservoir that would be dredged or excavated in conjunction with project construction for the presence of any heavy metals or other toxic substances, so that any contaminated materials would be identified, safely removed, and disposed of with minimal adverse effects on water quality and aquatic organisms.

***5 (B) Project Operation*

The proposed powerhouse would have the capacity to use flows of from 900 to 4,000 cubic-feet-per-second (cfs). Typically, the flows that pass Milner Dam in the summer are low, not generally exceeding 500 cfs, and the proposed powerhouse would not be expected to operate from approximately mid-June through mid-September.

Operation of the proposed project would not affect the water quality in Milner Reservoir; however, CC's proposed minimum flow of 58 cfs in summer during the irrigation season would likely result in substantial adverse impacts on water temperature and DO within the 1.6-mile-long bypassed reach. The DO and temperature of the water released from Milner Dam during summer would likely change as it flows downstream through the bypassed reach. The magnitude of these changes would depend on a number of factors, with the major controlling factor being the rate of stream

discharge through the bypassed reach.

A reduction in the volume of water flowing through the bypassed reach would reduce water velocity and depth and increase the travel time. Consequently, the effect of solar radiation would be intensified and water temperature would increase in summer. Much slower velocities in the bypassed reach could also contribute to the growth of the already abundant aquatic plants. Increased plant respiration and decomposition would cause DO reductions.

Based on the cross-sectional and longitudinal profiles of the river channel below Milner Dam and the available data relating discharge to DO and water temperature, a flow of 200 to 300 cfs would likely have minimal impact on water temperature and DO in the bypassed reach. Flows within this range would likely provide sufficient water velocity and depth, and in turn reduce the travel time through the bypassed reach, thus minimizing the effect of solar radiation on water temperature. A target flow established within this range would likely provide water quality conditions that are suitable for maintaining a put-and-grow trout fishery.^[FR10] The target flows required by Articles 407 *62307 and 415 during project operation for the maintenance of the fish and recreational resources, respectively, would minimize the impacts of project operation on water temperature, DO, and sedimentation in the bypassed reach.

The DEIS recommended that CC implement a water quality monitoring plan that should include provisions for discharging sufficient water to the bypassed reach to minimize the effects of the proposed project on the water quality of the Snake River during project operation. Water quality impacts would be most critical during low water years and during summer months that coincide with low flows, high nutrient levels, and elevated water temperatures.

CC should implement a water quality monitoring plan along the bypassed reach. Therefore, Article 404 of the license requires CC to monitor the water quality of the Snake River to determine if water temperatures and DO necessary for the survival of a trout fishery within the bypassed reach are being maintained by the target flow released from Milner Dam. If the results of the monitoring required by Articles 404 and 409 show that levels of DO and temperature in the bypassed reach are not sufficient for maintaining a put-and-grow trout fishery, Article 409 requires CC to implement other fishery mitigation.

C. Fishery Resources

**6 1. Existing Environment

(A) Milner Reservoir

Milner reservoir supports both warmwater and coldwater fisheries. The warmwater species include smallmouth bass, largemouth bass, yellow perch, channel catfish, brown bullhead, and black crappie. The coldwater species are rainbow trout, cutthroat trout, brown trout, and mountain whitefish. Also, numerous non game species inhabit the reservoir. The coldwater species occur primarily at the headwaters of

the reservoir. IDFG stocks catchable rainbow trout in the headwaters of Milner Reservoir near Burley, Idaho.

Milner reservoir has a sandy substrate and is devoid of three dimensional structure such as rocks or boulders. The sandy substrate probably limits the production of aquatic invertebrates typically fed upon by fish. Further, the lack of structure limits warmwater fish production because structure is used by warmwater fish for spawning and for cover. ^(FMS)

The Idaho Fisheries Management Plan^(FMS) states that warmwater fish such as smallmouth bass, and channel and blue catfish will be stocked in the reservoir to meet the demand for the warmwater fishing in Milner Reservoir. The Fisheries Management Plan states that the management direction for Milner Reservoir include improving warmwater fish habitat.

(B) Snake River Bypassed Reach

Game fish use below Milner Dam is seasonal and depends on flow levels. Rainbow trout, cutthroat trout, brown trout, rainbow-cut throat trout hybrids, mountain whitefish, channel catfish, largemouth and smallmouth bass, and yellow perch have been collected in the Snake River below Milner Dam. Nongame fish such as Utah dace, redbreast shiners, and mottled sculpins dominated the catch during the low flow period. ^(FMS)

Water diversions for irrigation limits trout use of the proposed bypassed reach primarily to the non-irrigation season. Water diversions from April through October for irrigation deliveries significantly reduce the amount of water flowing downstream of Milner Dam. These flow reductions during the irrigation season, along with the likely changes to water quality, increased water temperature and decreased DO concentration, decreases the suitability of the downstream area for trout.

The Fisheries Management Plan for the Snake River below Milner Dam calls for a "yield trout fishery" with an approximate catch rate of 0.5 fish per hour. According to the Fisheries Management Plan, rainbow trout consisting of wild and hatchery fish would support the yield fishery.

2. Impacts

(A) Project Construction

Constructing the Milner Project and upgrading the dam would cause short-term increases in suspended and dissolved solids which would ultimately be deposited in downstream areas. The siltation could negatively affect mountain whitefish spawning in the bypassed reach, but would have actual little effect, due to the fact that so few fish occur or spawn in the bypassed reach. Siltation from construction activities would have little effect on other aquatic resources, because the siltation would be flushed out during the next high flow period. Further, implementing the erosion control and sedimentation plan required by Article 402 would limit sources of sediment. The potential for toxic substances affecting the downstream

*62308 aquatic resources would be low because of the sediment testing and sediment removal requirements of Article 403.

***7 (B) Project Operation*

Operating the Milner Project would increase the time period for diverting water from the reservoir to the Twin Falls Main Canal. Typically, CC now diverts water during the irrigation season from April through October. With the project operating, CC would divert water all year and would reduce the frequency of spillage over Milner Dam. Fish passing over Milner Dam with the high spillage flows is probably the primary mechanism by which trout populate the bypassed reach. Project operation would substantially increase the number of fish diverted to the canal, where they would enter the project intake and would be killed or injured by the turbines or would no longer be recruited to the bypassed reach or downstream areas.

CC proposes to mitigate for adverse project impacts by enhancing the fish habitat in Milner Reservoir instead of installing a fish screen to mitigate the turbine-induced fish losses. The DEIS agreed with CC's reservoir enhancement proposal, but expressed reservations about the probability for success.¹⁷⁰³⁴⁾ In its motion to intervene, IDFG stated that enhancing the habitat in Milner Reservoir would partially mitigate for turbine-induced fish mortality.

Enhancing the warmwater fish habitat by providing structures for holding and rearing habitat or increasing spawning areas and stocking warmwater fish in Milner Reservoir as described in the Fishery Management Plan, would adequately mitigate turbine-induced fish losses. Therefore, CC should finance the development of the Milner Reservoir warmwater fishery as described in the Fisheries Management Plan. In addition, CC should fund stocking of warmwater fish species in the reservoir in cooperation with the IDFG. Stocking warmwater fish in the reservoir in cooperation with the IDFG and enhancing the reservoir habitat would be consistent with the Fisheries Management Plan. Article 405 requires CC, after consultation with IDFG, to develop, implement, and finance a warmwater fish stocking program and a habitat enhancement plan that is consistent with the Fisheries Management Plan for Milner Reservoir to mitigate the adverse effects of the project on the fishery resources.

CC should consult with IDFG and develop a plan to monitor the effectiveness of the reservoir enhancement structures and the fish stocking program. Specifically, CC should determine if additional warmwater fish stocking is necessary to meet the objectives of the Fisheries Management Plan for Milner Reservoir. The monitoring would also assist in determining the length of time the structures would remain in place and provide fish habitat. We conclude that a five-year monitoring program would provide sufficient information to determine if the mitigative measures are adequate. The monitoring also allows for correcting those that are not working. Therefore, Article 406 requires CC to conduct a reservoir fish habitat and fishery study for at least five years to determine if the fish habitat enhancement structures have remained in place and are functioning as desired and to determine if additional warmwater fish need to be stocked.

****8 3. Instream Flow**

CC proposes to release 58 cfs during the irrigation season and 150 cfs during the non-irrigation season. However, CC did not provide a biological rationale for these flow proposals or for the seasonal difference in the flows. The DEIS found that 58 cfs would prevent fish movement in the bypassed reach and would degrade fish food production by increasing channel sedimentation.^(FN15) The proposed 58 cfs minimum flow would provide slightly improved instream flow conditions, because it would prevent the extreme low flow events that occasionally occur.

Operating the project during the non-irrigation season with the proposed 150 cfs minimum flow would significantly reduce the amount of trout habitat in the 1.6-mile-long bypassed reach according to conventional instream flow methodologies, would severely reduce trout recruitment and use of the bypassed reach during the non-irrigation season, and would reduce invertebrate production.^(FN16) Proposed project operation would reduce the amount of trout habitat and eliminate spillage over the dam much of the time and, therefore, preclude trout movement over the dam to the bypassed reach. Thus, the proposed non-irrigation season minimum flow would conflict with the management direction of the yield fishery, because trout recruitment and suitable trout habitat would not be maintained in the bypassed reach.

The DEIS recommended that CC maintain minimum flows of 58 cfs and 1,260 cfs in the irrigation and non-irrigation seasons, respectively, to protect the downstream fishery resources.^(FN17) The DEIS also recommended a minimum flow of 300 cfs in the irrigation season to partially mitigate the cumulative adverse impacts to the resident trout and other *62309 resources.^(FN18) Since the DEIS' 300 cfs recommendation to mitigate cumulative impacts superseded the 58 cfs minimum flow for fishery resource protection, the DEIS concluded that minimum flows of 300 cfs in the irrigation season and 1,260 cfs in the non-irrigation season were needed. Flows derived by the Tennant Methodology,^(FN19) the stream resource maintenance flow study,^(FN20) and the minimum flows recommended in the DEIS to protect the fishery resources in the bypassed reach during the non-irrigation season range from 720 cfs to 2,190 cfs.

Release of the above flows for fishery protection purposes during the irrigation season would interfere with irrigation and thus could have a severe impact on the farm-based economy of the area. Furthermore, the release of the flows recommended for the non-irrigation season would reduce generation and hence the revenues necessary to repair Milner Dam. We believe that the need to protect irrigation usage and provide sufficient generation outweigh the need to protect the fishery resources. Accordingly, we will not require CC to release the flows referenced above. However, we are requiring CC, by Article 407, to release a target flow of 200 cfs.

The loss of trout habitat in the non-irrigation season is offset somewhat by eliminating the extreme low flows that have occurred during the irrigation season, thus allowing trout to use the bypassed reach more consistently. A stable flow of

200 cfs would slightly enhance the fishery resources by continually maintaining a limited amount of habitat that would occasionally be eliminated by the low flow events. Therefore, 200 cfs would probably maintain sufficient water quality to maintain a put-and-grow trout fishery in the bypassed reach. As just indicated, Article 407 requires CC to maintain a target flow of 200 cfs below Milner Dam. [FN21]

**9 The Snake River downstream of the proposed powerhouse would benefit from the 200 cfs target flow. Releases from Milner Dam would prevent the extreme low flow periods. In addition to the releases from Milner Dam, the incentive to operate the powerhouse would provide water to downstream areas that would not typically have occurred during the irrigation season. Therefore, the fishery resources downstream of the bypassed reach would benefit more than those in the bypassed reach.

4. Trout Fishery Enhancement

The primary source of trout to the bypassed reach is recruitment from upstream areas. As mentioned above, proposed operation would reduce spill from Milner Dam and eliminate much of this recruitment.

In order to mitigate for the decreased recruitment to the downstream Snake River fishery and the loss of trout habitat in the Snake River in the non-irrigation season, CC should institute a put-and-grow trout fishery^[FN22] in the 1.6-mile-long bypassed reach of the Snake River. CC should consult with IDFG to determine the sizes and numbers of trout to stock and to determine the area or areas in which to stock the trout. CC should stock the trout in areas that provide easy and safe access for anglers. This would provide a high value recreational fishery in this area.

Article 408 requires CC to develop and to implement a put-and-grow trout fishery in the 1.6-mile-long bypassed reach of the Snake River. We conclude that developing this trout fishery would mitigate the lost trout habitat in the Snake River resulting from reduced flows and would mitigate the reduced fish recruitment to the bypassed reach. Enhancing the trout fishery in the bypassed reach through hatchery supplementation would not conflict with the management direction for this section of the Snake River as described in the Fisheries Management Plan.

There is the possibility that the stocked fish would move downstream with the current where they would no longer be available to the anglers or where they could perish due to insufficient habitat or poor water quality. Therefore, CC should conduct a study to determine if the trout move downstream and if the trout are surviving long enough, depending on water temperature and DO concentration, to remain available to anglers.

CC should file annual reports about the survival, growth, and movement of the trout and how the water quality at 200 cfs affects their survival, growth, and movement. If it is determined that the trout stocked in the bypassed reach are not surviving, are not growing sufficiently, or are moving out immediately,

then CC should consider stocking trout in other areas of the Snake River such as the head of Milner Reservoir near Burley, Idaho. In conjunction with this study, the results from the water quality monitoring required by Article 404, particularly water temperature and DO, will provide valuable information to determine if 200 cfs provides conditions conducive for establishing a year round trout fishery.

We conclude that a five-year monitoring program would provide sufficient information to determine if the trout stocking program is successful. If the results indicate that the trout stocking program is not successful, the monitoring allows for changing the stocking rates, the size and species of trout stocked, and the stocking location. Article 409 requires CC to conduct a five-year trout monitoring study and to file annual reports on the results of each years studies.

D. Ramping Rate

**10 Rapid alteration of streamflows during project startup would strand fish in the bypassed reach when submerged areas quickly drain, because of rapid decreases in the amount of water available to maintain existing habitat. To protect the fish and other aquatic resources from rapid, project-induced flow reductions, the DEIS recommended that CC limit the maximum rate of change in the flow in the Snake River. [FN23]

The ramping rate of one foot per hour recommended to protect whitewater boaters would also provide a measure of protection for fish and invertebrates inhabiting the bypassed reach. We believe that a one foot per hour ramping rate would adequately protect the fishery resources of the bypassed reach during project startup. Article 410 requires CC to implement a ramping rate of one foot per hour and to determine if this rate would adequately prevent stranding of fish and would protect the recreationists using the bypassed reach and downstream areas based on a site specific study. CC should consider structural measures during the design of the powerhouse(s) to facilitate implementing the ramping rate.

E. Raptor Protection

Transmission lines, particularly those in open, relatively treeless areas with few perching sites, may pose an electrocution hazard to raptors and other large birds. [FN24] Collisions with the lines may be an additional source of mortality. The U.S. Department of the Interior recommends that the project transmission line be designed and constructed to minimize these sources of avian mortality. CC has agreed to use an appropriate design to prevent electrocution of raptors. To ensure the protection of raptors and other large birds in the project area, Article 411 requires CC, after consultation with the fish and wildlife agencies, to design and construct the transmission line according to accepted guidelines for raptor protection.

F. Revegetation of Disturbed Upland Habitat

During construction of the proposed project, approximately 22 acres of upland

shrub-grass land habitat would be disturbed.^(FN25) CC proposes to reseed the disturbed areas with a mixture of grasses and native shrubs, but does not provide a detailed revegetation plan. As discussed in the DEIS, CC should develop and implement a detailed plan to revegetate disturbed upland areas, with the goal of establishing high quality wildlife habitat.^(FN26) The plan, required by Article 412, should be developed in consultation with the appropriate agencies, and should contain, at a minimum, a description of plant species to be used, an implementation schedule, a description of planting methods, fertilization and irrigation requirements, and a monitoring program.

G. Wildlife Habitat Enhancement Structures

To enhance the project area for wildlife, CC proposes to: (1) construct two osprey nesting platforms in Milner reservoir; (2) develop artificial burrows for use by burrowing owls; and (3) construct an unspecified number of nesting structures for Canada geese in the project vicinity. CC does not, however, provide final designs, locations, and monitoring plans for these enhancement measures. The proposed measures, if successfully implemented, could enhance wildlife use of the project area. Therefore, Article 413 requires CC to provide a detailed plan for providing the proposed wild life enhancement measures, including, at a minimum: (1) the final design of the goose nesting structures, osprey-nesting platforms, and burrowing owl burrows; (2) the location of the enhancement features; (3) a schedule for providing the enhancement features; and (4) a description of a program to monitor and maintain the enhancement features.

*62311 H. Replacement of Riparian Wetlands and Upland Habitat

**11 Approximately 6.1 acres of riparian wetlands will be eliminated by project development.^(FN27) CC has identified four sites totalling 18.2 acres along the project canal where wetlands could be created. Of those 18.2 acres, CC proposes to create 10.2 acres to satisfy the wildlife agencies' recommended 1.0 to 1.5 loss to replacement ratio for riparian wetlands. Construction would also result in the permanent loss of 26.6 acres of upland shrub-grassland, including 2.0 acres of BLM's isolated tract No. 23. The IDFG recommends that 26.6 acres of upland habitat, off-site if necessary, be developed and donated to IDFG as mitigation for upland losses. CC has agreed to replace lost upland habitat according to accepted IDFG guide lines.

Rather than develop another mitigative plan using upland habitat, possibly at an off-site location, we believe that it would be more beneficial to wildlife, as well as more practical, to provide additional riparian habitat in the immediate project area. Sufficient mitigation for both upland and wetland losses would be provided by adding 5.3 acres of riparian wet land habitat to the 18.2 acres of potential replacement habitat already identified by CC. This total of 23.5 acres of riparian wetland replacement habitat would include 13.3 acres for replacing 26.6 acres of lost upland habitat. This 1.0 for 2.0 ratio seems reasonable considering the much greater wildlife value of riparian wetlands, the wetlands comparative scarcity in the project area, and the high priority given to the protection of

wetlands compared to upland habitat.

IDFG agrees with this approach for replacing upland habitat with riparian habitat[FN28] CC should have little difficulty providing the additional 5.3 acres by either enlarging the four sites already identified or by developing additional nearby sites along the canals or adjacent to Milner Reservoir. Article 414 requires CC to develop and maintain 23.5 acres of riparian wetland habitat to replace riparian wetlands and upland habitats lost to project development.

I. Socio-economic Considerations

The operation of the 85-year-old Milner Dam is essential for the diversion of Snake River flows to the three gravity canals that provide water to irrigate approximately 440,000 acres of agricultural land in south-central Idaho.^[FN29] If Milner Dam were to fail during the yearly irrigation season, from April 1 through October 31, area farms that rely on the continuous delivery of water from the three canals would experience a major crop failure, because they would not be able to develop alternative irrigation systems in time to save their cultivated acreage.

Based on 1982 data collected by the Census of Agriculture, irrigated and harvested cropland in Twin Falls and Jerome Counties in Idaho produced agricultural sales of \$270 per acre. Thus, the loss of irrigation water for 440,000 acres would result in a \$118,800,000 revenue loss for the area's farm sector. Food processing establishments in south central Idaho, such as Universal Frozen Foods, Ore-Ida Foods, and Amalgamated Sugar Company, also would be adversely affected, since they would be unlikely to locate alternative economic sources of potatoes, beans, and sugar beets. Consequently, these companies would decrease their production and local employment. More over, employment cutbacks by the area's farms and food processing establishments would cause subsequent reductions in spending at area retail trade and service establishments, with a commensurate decline in their sales, employment, and profits.

J. Whitewater for Boaters

****12 1. Flows**

In the 1.6-mile-long reach of the Snake River immediately below Milner Dam, expert white water boaters run continuous Class V rapids during high flows that occur in early spring and late fall. In 1986, about 200 visitor days of whitewater boating occurred in the Milner reach. Much of this use occurs in April and May when the weather is relatively warm and spring runoff is at its peak. The vast majority of boating use consists of kayaking; however, some rafting does occur. Boaters typically put in at a bridge located 0.5 miles downstream of Milner Dam and take out either 1.1 miles below the bridge where the Class V rapids end, or continue 7.0 miles downstream to a take-out point above Star Falls. Most boaters, however, choose to take out at the first location, since the stretch of river below this point is relatively calm, with only a few widely-spaced rapids.

Since the Milner reach has only become known to whitewater boaters within the past few years, the minimum flow needed to maintain the unique Class V experience has not been firmly established, although boaters generally prefer flows between 5,000 and 15,000 *62312 cfs. According to the BLM, at flows below 7,500 cfs, the reach is not runnable by rafts, but can be successfully run at flows of 3,000 cfs, or perhaps below, in a kayak.^[FN30] The Class V experience is apparently completely changed at flows below 3,000 cfs, because many rocks are exposed, creating a whitewater run that can be negotiated only by kayakers skilled at technical maneuvering.^[FN31]

Because of the short length of the Milner reach, the whitewater experience found at certain flows at the Milner Project can be found in greater amounts on other sections of the Snake River and other Idaho rivers. For instance, the North Fork of the Payette River, near Boise, Idaho, provides several miles of continuous Class V rapids. In addition, the 14-mile Murtaugh reach of the Snake River, between Star Falls and Twin Falls Reservoir, provides a day-long Class IV-to-V whitewater run which has been compared favorably to the Colorado River. The Milner reach does not become a unique whitewater resource until very high flows occur (generally 10,000 cfs or above). The large volume of water at these high flows, concentrated in the narrow gorge below Milner Dam, creates Class V waves that are internationally known among expert kayakers.

The DEIS recommended that bypass flows between 5,000 and 15,000 cfs, when available, be released on as many as 10 weekend days during May and June for whitewater boaters.^[FN32] Such flows would provide opportunities for expert kayakers to run the 1.6-mile-long Class V rapids below Milner Dam. Based on comments received on the DEIS from the IDWR and CC, and information gathered by the staff during a project site visit and public meetings held in August 1988, we agree that providing these flows at times when such flows are not made available by normal regulation of the storage and release patterns governing flows at Milner Dam would not be feasible.

**13 Between April and October all water at Milner Dam appropriated for use by CC is diverted for irrigation. Providing flows between 5,000 and 15,000 cfs in May and June would require the entire irrigation system for the North Side Canal Company and Twin Falls Canal Company to be readjusted after each flow release. This would adversely affect water delivery to crops in the area. However, when flows exceed system requirements by the magnitude that would allow customary boating use below Milner Dam, such flows could be maintained when available to allow boaters to continue using this unique resource.

Table 1 below shows the occurrence of various whitewater flows both with and without project operation based on IDWR 56-year flow record for the Milner reach. Assuming that the minimum flow needed to boat the Milner reach is approximately 2,000 cfs, whitewater boating opportunities at Milner occur approximately 96 days per year during the boating season. However, project operation would reduce these opportunities by 60 percent, leaving approximately 38 days a year for whitewater

boating.

Table 1. Average percent of Occurrence of Flows Below Milner Dam for March, April, May, June, October, and November, with average number of days at flow or greater.

Flow at least (cfs)	6-month percentage of occurrence	Number of days per year	With project 6-month project percentage of occurrence	With project number of days per year
15,000	2.9	5.3	0.5	0.9
14,000	4.7	8.6	0.8	0.9
13,000	5.1	9.3	1.3	2.4
12,000	6.5	11.9	1.9	3.5
11,000	8.4	15.4	2.9	5.3
10,000	9.5	17.4	4.7	8.6
9,000	10.6	19.4	5.1	9.3
8,000	12.9	23.6	6.5	11.9
7,000	17.0	31.1	8.4	15.4
6,000	21.0	38.4	9.5	17.4
5,000	24.0	43.9	10.6	19.4
4,000	33.6	61.5	12.9	23.6
3,000	38.4	70.3	17.0	31.1
2,000	52.8	96.6	21.0	38.4

Although project operation would have an adverse effect on the total continuum of white water boating opportunities offered at Milner, from low flow technical kayaking to high flow *62313 Class V boating, it is important to note the impacts that project operation would have on the unique high flows (10,000 cfs and above). Flows of 10,000 cfs and above occur on the average about 17.4 days. With project operation, the occurrence of these flows would be reduced by almost half (49 percent), leaving about 8.6 days for boating at high flows. This represents a loss to boaters of approximately eight days (8.8 days).

Since these rare high flows are what make the Milner reach important to whitewater boaters, these flows should be preserved. This could be accomplished by requiring CC to stop operating the project on eight days when flows at 10,000 cfs or above are available. To ensure that these flows are available when boaters use the reach, they should be released during April and May for eight hours during daylight hours. Flows below 10,000 cfs, however, would be reduced during project operation. To help mitigate these impacts, when flow conditions avail able make it impossible for CC to meet

their obligation of providing eight days of flows of 10,000 cfs or more, they should release flows between 4,000 and 10,000 cfs until their obligation is met. This would reduce project impacts on mid-range flows and ensure that whitewater flows would be available during years when high flows do not occur.

Article 415 requires CC, upon starting project operation, and in consultation with the appropriate agencies and whitewater boaters, to stop operating the project for eight hours on eight days in April and May when flows of 10,000 cfs or above occur. Article 415 also requires CC to release flows between 4,000 and 10,000 cfs, when available, to meet its eight-day obligation when eight days of flows of 10,000 cfs or above do not occur during April and May.

**14 Ceasing project operation at the above-mentioned times would result in a yearly loss to irrigators of \$8,400 in revenues generated by the project. To determine whether a better arrangement of flow could be provided to more closely match whitewater boater needs and to reduce the impact on project generation, Article 418 requires CC to conduct a study in consultation with the Idaho Whitewater Association (IWA), the National Park Service (NPS), BLM, the U.S. Bureau of Reclamation (BR), IDWR, and the Idaho Department of Parks and Recreation (IDPR). Since boaters may not spend an entire day on the river, it is possible that higher whitewater flows could be maintained in the bypassed reach for less than eight hours according to boaters needs as long as CC meet their obligation for providing the equivalent of eight eight-hour days of project shutdown at flows of 10,000 cfs or above.

To protect downstream recreationists from sudden increases in water level and streamflow, water levels in the project bypassed reach should not increase by more than one foot per hour when providing releases for whitewater boating. In addition, a warning system must be implemented in order to alert recreationists of hazardous situation created by increases in flow. A ramping rate and a warning system would allow fishermen and other recreationists below the dam to have enough time to leave the area before water levels and velocities become unsafe. Article 410 requires CC to file for Commission approval a plan for implementing ramping rates that would ensure the protection of fish resources and downstream recreationists. Article 416 requires CC to file a plan for Commission approval to warn recreationists of increases in water level and stream flow downstream of the dam.

2. Communication Network for Whitewater Boaters

In their March 30, 1988 response to the DEIS, CC proposed to develop a communication network that would quickly inform recreationists of anticipated flow conditions below Milner Dam. Under existing conditions, high flows occur rarely and are unpredictable for boaters. A communication network would partially mitigate for the loss of whitewater boating days caused by project operation by giving boaters more opportunity to plan boating trips to coincide with desirable flows. Article 418 requires CC, after consultation with BR, IDWR, IDPR, BLM, NPS, and IWA, to file for Commission approval a plan to provide a communication network to inform whitewater boaters of available whitewater flows.

K. Fishing Access to the Bypassed Reach

We believe that CC should study the feasibility of stocking the project bypassed reach with trout to provide new opportunities for fishing at the project site. A program to inform the public of fishing opportunities at the project site would be needed since presently the Milner reach receives minimal fishing use. Also, access to be provided at the powerhouse and at the bridge below Milner Dam could attract additional fishing use to the project bypassed reach. To ensure that anglers are adequately informed of fishing opportunities in the bypassed reach, Article 408 requires CC to file for Commission approval a plan that includes notification of anglers of fishing opportunities.

L. Recreation Facilities

**15 CC initially proposed to construct the following recreational facilities: (1) a parking area to accommodate 10 vehicles at the powerhouse; (2) kayaker access at the powerhouse; and (3) a *62314 boat dock near the existing boat

dock at the BLM's Bicentennial Site on Milner Reservoir. In their March 30, 1988 filing, however, CC proposed for consideration additional facilities. These include: (1) an interpretive center with associated picnic facilities at or near Milner Dam, or an alternate location; (2) an additional water ski dock or docks in Milner Reservoir near Milner Dam; (3) further development of public facilities at the BLM Wildlife Habitat Management area; or (4) other better suited public facilities selected as a result of the consultation process.

Since the construction of the project would provide an opportunity to enhance recreation near Milner Dam, some additional facilities should be provided to allow access for whitewater boaters and fishermen. Other facilities mentioned above, however, may not be needed at this time.

Article 419 requires CC to file for Commission approval a recreation plan prepared in consultation with the IDPR, BLM, NPS, and IWA, that includes, but is not limited to: (1) provisions for a kayaker put-in area at the bridge below Milner Dam and a take-out area below the powerhouse with parking facilities; (2) tailwater fishing facilities; (3) design drawings of the proposed facilities; (4) a construction schedule for the facilities; (5) a plan for monitoring recreational use in the project area to determine if additional recreational facilities will be needed in the future; and (6) documentation of agency consultation. Article 419 also requires that CC, in designing these facilities, consider providing the whitewater take-out area below the final Class V rapid below the powerhouse area and away from tailwater fishing facilities. This would avoid boater interference with fishermen and allow boaters to run an additional Class V rapid.

M. Visual Resource Mitigation

Milner Dam and its associated proposed facilities are visible to visitors to the dam site interpretive area as well as from water users on the river and reservoir. The proposed dam and canal modifications would blend with the existing landscape.

The power generating facilities would be located in an area out of view of Milner Dam and in a visually natural setting within the canyon. The naturalness of the canyon walls is a great asset that should be maintained throughout the installation and operation of the proposed project. The proposed access road to the powerhouse site would cross steep canyon side slopes and its construction would entail earth and rock cuts and fills that would create a linear element in the natural appearing landscape. The proposed penstock would cross over the canyon rim and drop nearly vertical to the powerhouse at the river's edge. This large pipe, with its smooth surfaces, would reflect light and contrast in color, texture, and line, with the existing natural appearing landscape. The proposed powerhouse, substation, transmission line, gantry crane, and tailrace would also contrast with the natural appearing landscape because of their geometric forms. In particular, the transmission line from the powerhouse to the forebay would create a linear element contrasting with the canyon walls.

**16 CC should study the feasibility of placing the transmission line either underground or in a conduit attached to the penstock from the powerhouse to the forebay area. Therefore, to ensure that the proposed facilities are designed to minimize visual impacts, Article 420 requires CC to submit final construction plans and specifications prior to the commencement of any project-related land-disturbing activities.

N. Cultural Resources

Three historic sites listed or considered eligible for inclusion in the *National Register of Historic Places* are located within or near the impact areas of the project. The listed site is Milner Dam. The eligible sites are the South Side Main Canal and Milner Townsite. Six archeological sites have also been identified in the project vicinity. Based on a review of the archeological report for the project, and a site visit to the project area, the Idaho State Historic Preservation Officer (SHPO) has stated that the sites either are not eligible for inclusion in the *National Register* or lie outside the area of potential impacts.^[FN33] Project construction and rehabilitation of the Dam would require modifications to the dam and the

canal. No construction or rehabilitation work would occur in the area of the Townsite.

CC has filed a cultural resources management plan, prepared in cooperation with the SHPO, to mitigate the project's effects on the dam and the canal and to ensure that the townsite would not be affected by construction or rehabilitation work. The plan proposes to document in photographs, drawings, and in a report, according to the standards of the Historic American Engineering Record (HAER), the portions of the dam and the canal that would be altered by the project. The plan proposes to fence portions of the townsite and to *62315 prohibit construction activities in the vicinity of the townsite to ensure that no impacts to this site would occur.^[FN34]

The SHPO reviewed the plan and stated the following: (1) the plan minimizes impacts to the dam and the canal and ensures that the townsite would not be impacted; (2) rehabilitation work would not affect the original historical fabric of the dam; (3) this work would not significantly affect the appearance of the dam; and (4) the plan satisfies the historic preservation requirements for consultation with the Advisory Council on Historic Preservation, as required by the National Historic Preservation Act.^[FN35]

The U.S. Department of the Interior (Interior) also reviewed the cultural resources management plan and the cultural resources documentation contained in the application for license, and generally concurs with the plan and the findings of the SHPO. Interior recommends certain revisions to the plan and the cultural resources documentation to ensure that the plan is implemented in a satisfactory manner and that the documentation is complete. Specifically, Interior recommends these actions: (1) completing documentation of the dam, canal, and townsite in accordance with National Register *eligibility criteria before determining the specific HAER documentation or avoidance procedures that should be implemented, to ensure that documentation and procedures are directed at the significant historical attributes of these sites*; (2) *surveying the townsite to precisely determine the boundaries of the site, to ensure that the site is not impacted*; (3) *avoiding the use of fencing at the townsite so as not to draw the attention of artifact collectors or vandals*; and (4) *providing further documentation on one archeological site (10-TF-641) to clearly establish that the site is not eligible for inclusion in the National Register.*^[FN36]

**17 To ensure that the dam, canal, and townsite are documented and protected in an adequate manner and that the cultural resources documentation of site 10-TF-461 is complete, CC should consult with the SHPO, and also the HAER in the case of the dam and canal, to determine the specific procedures that should be implemented, and should implement the plan with Interior's recommended revisions before beginning land-disturbing or land-clearing activities that would impact these sites. The documentation should be filed in a report or in separate reports, if the documentation or avoidance procedures are undertaken at different times, and filed with the Commission for approval. The reports must contain a letter from the SHPO accepting the documentation and procedures for avoiding impacts. In the case of the dam and the canal, letters from the HAER accepting the documentation must also be included. No rehabilitation work or other construction work at the dam or canal or within the vicinity of the townsite and the archeological site may commence until CC are notified by the Commission that the filing has been approved. Article 421 requires implementation of the revised plan.

The project has the potential to impact archeological and historic sites not previously identified at the project. Buried sites may be encountered during construction. Also, project facilities may be relocated or added to the project at some future date in areas not previously inventoried for sites. Any such archeological or historic sites should be afforded protection in accordance with the National Historic Preservation Act. Article 422 requires the implementation of cultural resources protection measures to avoid or minimize impacts to any such sites that may be impacted by the project. Article 421 requires CC to finalize and implement its cultural resources management plan in a manner acceptable to the Advisory Council on Historic Preservation.

O. Cumulative Impacts

Cumulative impacts of the four proposed projects, including the Milner Project No. 2899, will be fully assessed in the Supplement and FEIS to take into consideration any changes that occur between the DEIS and the FEIS in configuration, operation, and mitigative measures associated with the other three projects. Standard Articles 15 and 17 of the license^[FN37] reserve sufficient authority for the Commission to order reasonable modifications of the project structures and operations to take into account recommendations made in accordance with the NEPA process.

IV. Recommendations of Federal and State Fish and Wildlife Agencies

Section 10(j) of the FPA, as amended by the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, requires the Commission^{*62316} to include license conditions, based on recommendations of federal and state fish and wildlife agencies, for the protection, mitigation, and enhancement of fish and wildlife. The concerns raised by the federal and state fish and wildlife agencies have been fully addressed in the DEIS, and the conditions contained in this license are consistent with the recommendations made by those agencies.

V. Comprehensive Plans

^{**18} Section 10(a)(2)(A) of the FPA, as amended by ECPA, requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans (where they exist) for improving, developing, or conserving a waterway or waterways affected by the project. The Commission's interpretation of "comprehensive plan" under Section 10(a)(2)(A)^[FN38] was revised on rehearing by order issued April 27, 1988.^[FN39] On rehearing, the Commission instructed the Director, Office of Hydropower Licensing, to request the state and federal agencies to file plans they believe meet the revised guidelines.

The Commission reviewed five plans that address various aspects of waterway management in relation to the proposed project.^[FN40] With one exception, the proposed project, as conditioned herein, is consistent with those plans.

The Idaho State Water Plan (ISWP) is a Section 10(a)(2)(A) comprehensive plan. In its September 25, 1985 motion to intervene in this proceeding, IDWR indicated that the ISWP specifies that the use of water by hydroelectric projects must be subordinated to future upstream depletionary uses and requested that such a provision be included in any license issued for Project No. 2899. IDWR did not, however, provide any information regarding the timing and extent of those future depletionary uses or how such uses would affect the operation of Project No. 2899.

As we explained in *Horseshoe Bend Hydroelectric Company*,^[FN41] in determining whether, and under what conditions, a license should issue, we are required by the comprehensive planning provision of Section 10(a)(1) of the FPA, 16 U.S.C. §803(a)(1), to consider and balance all aspects of the public interest, including the need to protect environmental and irrigation interests and the need for the power to be produced by the project. In so doing, we prescribe conditions that we believe will provide the appropriate level of energy generation and protection for the environment and irrigation and will not issue a license if the conditions we deem necessary to protect environmental and other resources would render a project financially infeasible.

Inclusion in the license of the unsupported open-ended water subordination clause requested by IDWR would in essence vest in IDWR, rather than the Commission, ultimate control over the operation and continued viability of the project. In other words, the subordination clause, which would reserve to IDWR the right to permit unlimited diversion upstream of the project, could nullify the balance struck by us under the comprehensive planning provisions of Section 10(a)(1) of the FPA in issuing the license. Consequently, inclusion of the open-ended water subordination clause in the license as requested by IDWR would interfere with the exercise of our comprehensive planning responsibilities under Section 10(a)(1) of the FPA and thus would be inconsistent with the scheme of regulation established by the FPA, which vests in the Commission the exclusive authority to determine whether, and under what conditions, a license should issue.^[FN42]

**19 In light of the above, we will not add the requested open-ended subordination clause to the license for Project No. 2899. However, as we explained in *Horseshoe Bend*, should IDWR in the future determine that it would be desirable for CC to reduce their use of water for generation to accommodate a specific future upstream water use, IDWR can petition the Commission to have us exercise our reserved authority under Standard Article 12 of the license to require such a reduction. We will provide CC with notice of the request and an opportunity to respond and will act on the request after considering all supporting documents and information submitted by IDWR and CC.

The proposed project is otherwise consistent with the ISWP. The ISWP provides for a zero minimum flow below Milner Dam. The license as conditioned herein is consistent with the zero minimum flow provision of the ISWP, since the license would not require that minimum*62317 flows be provided below Milner Dam. Instead, it requires CC to provide any additional water needed to meet the environmentally desirable target flows by leasing water that is in excess of irrigation requirements from the Water Bank, but only if available, and in accordance with the rules of the Water Bank operation.

The Columbia River Basin Fish and Wildlife Program (Program), developed by the Northwest Power Planning Council (Council) to protect, mitigate, and enhance fish and wildlife resources associated with the development and operation of hydroelectric projects within the Columbia River Basin is a Section 10(a)(2)(A) comprehensive plan.^{17FN431} Responsible federal agencies are required to provide equitable treatment for fish and wildlife resources, consistent with the other purposes for which hydropower is developed and to take into account to the fullest extent practicable the Program.

The Program directs agencies to consult with federal and state fish and wildlife agencies, appropriate Indian Tribes, and the Council during the study, design, construction, and operation of any hydroelectric development in the Basin. At the time the application for Project No. 2988 was filed, the Commission's regulations required applicants to initiate pre-filing consultation with the appropriate federal and state fish and wildlife agencies and the Tribes and provided these groups with post-filing opportunities to review and to comment on the application. This consultation process has occurred.

The Program states that authorization of new hydroelectric projects should include conditions of development that would mitigate the impacts of the project on fish and wildlife resources. The relevant federal and state fish and wildlife agencies have reviewed and commented on the application. In addition, this license provides for mitigative measures to protect and enhance fish and wildlife resources and is therefore consistent with Section 1200 of the Program. Further, Article 423 of this license reserves to the Commission the authority to require future alterations in project structures and operation in order to take into account to the fullest extent practicable the applicable provisions of the Program.

VI. Project Economics and Need for Power

**20 Commission studies show that the proposed project, operating under its proposed mitigation requirements, would produce approximately 144,300 MWh of energy annually at a levelized cost of about 61.5 mills/kWh. When compared to the levelized cost of alternative energy in the region of about 85 mills/kWh, the levelized net annual benefits of the project power would be approximately \$3.4 million. CC's levelized revenues under the terms of their power sales contract are expected to be about \$452,000 annually, which would be a significant contribution to their projected financing obligation for the Milner Dam rehabilitation.

The project is financially feasible, because CC have executed a contract for the sale of the project power which obligates the power purchaser to pay the total costs plus two mills/kWh for the project generation, to be escalated by 20 percent every five years.

As discussed in the attached S&DA, a need for power could exist in the region any time from the early 1990s to late 1990s, and that the Milner Project could be useful in meeting a small part of that need for power.

VII. Summary of Findings

The design of this project is consistent with the engineering standards governing dam safety. The project will be safe if constructed, operated, and maintained in accordance with the requirements of this license. Analysis of related issues is provided in the S&DA attached to this order.

As discussed previously and in the attached S&DA, the 200 cfs target flow required by Article 407 would: (1) not jeopardize the feasibility of the project development; (2) provide flows below Milner Dam without sacrificing irrigation water requirements; and (3) reduce CC's annual power revenues, which will be used to help offset the cost of the Milner Dam rehabilitation, by only \$13,300 (less than four percent). Thus, the requirement to lease water in excess of irrigation requirements to meet mitigation flow requirements is reasonable, because water is projected to be available for purchase from the Water Bank at a reasonable price that would not eliminate the economic benefits of the project or jeopardize CC's ability to secure financing for the project. Additionally, the target flow may be necessary for the maintenance of a marginal cold-water fishery in the river reach below Milner Dam.

Based on our independent analysis, we conclude that the Milner Project No. 2899 as conditioned herein would not conflict with any planned or authorized development and would be best adapted to comprehensive development of the waterway for the beneficial public uses *62318 specified in Sections 4(e) and 10(a)(1) of the FPA.

The Commission orders:

(A) This license is issued to the Twin Falls Canal Company and the North Side Canal Company, Ltd. (licensees), for a period of 50 years, effective the first day of the month in which this order is issued, to construct, operate, and maintain the Milner Hydroelectric Project No. 2899. This license is subject to the terms and conditions of the FPA, which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the FPA.

**21 (B) The project consists of:

(1) All lands, to the extent of the licensees' interests in those lands, enclosed by the project boundary shown by Exhibit G:

Exhibit G - FERC No. - Showing

General Map - 2899-1 - 13

Project Boundary Map - 2899-2 - 14

Project Boundary Map - 2899-3 - 15

Project Boundary Map - 2899-4 - 16

Project Boundary Map - 2899-5 - 17

(2) Project works consisting of: (a) the existing Milner Dam, constructed with a trapezoidal-shaped rockfill section at elevation 4,138 feet, the north embankment with a crest length of 480 feet, the middle embankment with a crest length of 404 feet, and the south embankment with a crest length of 462 feet, proposed 15-foot-wide rockfill berms on the downstream slope of the dam, eleven 12-foot-high, 30-foot-wide radial gates proposed for the southern island, and an ungated emergency spillway on the northern island; (b) the existing 1,100-acre reservoir with a gross storage capacity of 26,000 acre-feet at an elevation of 4,130.05 feet; (c) a canal control structure, consisting of six manually-operated gates,

12-foot-wide by 15-foot-high, and one hydraulically operated bascule gate, 24-foot-long by 11-foot-high; (d) new stoplog slots, replacing the existing head works; (e) a 6,500-foot-long, earth and riprap-lined excavated rock canal, modified to increase the canal capacity from 3,200 cfs to 7,000 cfs; (f) an existing bridge on the Twin Falls Main Canal, raised to an elevation of 4,137.5 feet and lengthened by 60 feet; (g) a new concrete wasteway, providing a water passageway through the right canal embankment of the Twin Falls Main Canal, having a 39-foot-long, 10.5-foot-high, hydraulically operated bascule gate; (h) a forebay, having a maximum capacity of 4,000 cfs; (i) an intake structure at the end of the forebay, consisting of steel trashracks and a 14-foot-wide, 17-foot-high, cable-operated, fixed-wheel gate; (j) a 17-foot-diameter, 385-foot-long steel penstock; (k) an 89-foot-long, 56-foot-wide, 83-foot-deep, semi-outdoor, reinforced concrete powerhouse, containing a single generating unit with a rated capacity of 43.65 megawatts, operating under a head of 151.6 feet; (l) a 170-foot-long tailrace; (m) a 2,300-foot-long access road; (n) a 1.4-mile-long, 138-kilovolt transmission line, tying into the existing Milner substation; (o) 600 feet of river bottom excavation; and (p) appurtenant facilities.

The project works generally described above are more specifically shown and described by those portions of Exhibits A and F recommended for approval in the S&DA.

(3) All of the structures, fixtures, equipment, or facilities used to operate or maintain the project and located within the project boundary, all portable property that may be employed in connection with the project and located within or outside the project boundary, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) The Exhibit G described above and those sections of Exhibits A and F recommended for approval in the S&DA are approved and made part of the license.

**22 (D) This license is subject to the Articles set forth in Form L-2 [54 FPC 1808] (October 1975), entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Lands of the United States," except Article 20, and the following additional Articles:

Article 201. The licensees shall pay the United States the following annual charges, effective the first day of the month in which this license is issued.

(a) For the purpose of reimbursing the United States for the cost of administration of Part I of the FPA, a reasonable amount, as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 58,200 horsepower.

(b) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands, other than for transmission line right-of-way, a reasonable amount, as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

(c) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands for transmission line right-of-way, a reasonable amount, as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

*62319 *Article 202.* Pursuant to Section 10(d) of the FPA, after the first 20 years of operation of the project under license, a specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. One-half of the project surplus earnings, if any, accumulated after the first 20 years of operations under the license, in excess of the specified rate of return per annum on the net investment, shall be set aside in a project amortization reserve account at the end of each fiscal year. To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year after the first 20 years of operation under the license, the amount of that deficiency shall be deducted from the

amount of any surplus earnings subsequently accumulated, until absorbed. One-half of the remaining surplus earnings, if any, cumulatively computed, shall be set aside in the project amortization reserve account. The amounts established in the project amortization reserve account shall be maintained until further order of the Commission.

The annual specified reasonable rate of return shall be the sum of the annual weighted costs of long-term debt, preferred stock, and common equity, as defined below. The annual weighted cost for each component of the reasonable rate of return is the product of its capital ratio and cost rate. The annual capital ratio for each component of the rate of return shall be calculated based on an average of 13 monthly balances of amounts properly includable in the licensees' long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rates for long-term debt and preferred stock shall be their respective weighted average costs for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10-year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

****23 Article 203.** The licensees shall clear and keep clear to an adequate width all lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which result from maintenance, operation, or alteration of the project works. In addition, all trees along the periphery of project reservoirs that may die during operations of the project shall be removed. All clearing of lands and disposal of unnecessary material shall be done with due diligence to the satisfaction of the authorized representative of the Commission and in accordance with appropriate federal, state, and local statutes and regulations.

Article 301. The licensees shall begin construction of the project works within two years from the issuance date of the license and shall complete construction of the project within four years from the issuance date of the license.

Article 302. To ensure completion of construction of the dam safety modifications during the 1989 construction season, the licensees shall file a plan and schedule for the design and construction of the dam safety modifications within 30 days from the issuance date of the license. The plan shall include specific items for activities that are necessary before beginning construction activities.

Article 303. Within 90 days after completion of construction, the licensees shall file for the Commission's approval, revised Exhibits A, F, and G, to describe and show the project as-built, including all facilities determined by the Commission to be necessary and convenient for transmitting all of the project power to the interconnected system.

Article 304. Before the start of construction, the licensees shall review and approve the design of contractor-designed cofferdams and deep excavations and shall ensure that construction of the cofferdams and deep excavations is consistent with the approved design. At least 30 days before starting construction of the cofferdam, the licensees shall submit to the Commission's Regional Director and to the Director, Division of Dam Safety and Inspections, one copy of the approved cofferdam construction drawings and specifications and a copy of the letter(s) of approval.

Article 305. The licensees shall retain a board of two or more qualified, independent, engineering consultants to review the design, specifications, and construction of the project for safety and adequacy. The names and qualifications of the board members shall be submitted for approval to the Director, Division of Dam Safety and Inspections, with a copy to the Commission's Regional Director. Among other things, the board shall assess the following: the geology of the project site and surroundings, the design, specifications, and construction of the reinforcement berms, canal embankments, spillway, powerhouse, electrical and mechanical equipment, and emergency power supply; instrumentation; and construction procedures and progress. Before each meeting, allowing sufficient time for review, the licensees shall furnish to the board, with a copy to the Regional Director and two copies to the Director, Division of Dam Safety and Inspections, the following: documentation showing details and analyses of design and ***62320** construction features to be discussed; significant events in design and construction that have occurred since the last board of consultants' meeting; drawings; ques-

tions to be asked; a list of items for discussion; an agenda; and a statement showing the specific level of review to be performed by the board. Within 30 days after each board of consultants meeting, the licensees shall submit to the Commission copies of the board's report, including the board's recommendations and the licensee's plans for addressing the recommendations.

****24 Article 306.** At least 60 days before the start of construction of each major component of the project, such as the dam rehabilitation, spill way reconstruction, all necessary transmission facilities, powerhouse, and water conveyance structures, the licensees shall submit for that component, one copy to the Commission's Regional Director and two copies to the Director, Division of Dam Safety and Inspections, of the final design report, contract drawings and specifications. The Director, Division of Dam Safety and Inspections, may require changes in the plans and specifications to assure a safe and adequate project.

Article 307. The licensees shall develop procedures for the repair of the earthfill sections of Milner Dam in the event there is excessive leakage. The licensees shall include procedures for the following items: inspection; reservoir draw-down; cofferdam construction; earth embankment repair methods; and other pertinent items. The repair procedure shall be reviewed and approved by the board of consultants required in Article 305. Within one year of issuance of the license, the licensees shall submit one copy to the Commission's Regional Director and two copies to the Director, Division of Dam Safety and Inspections, of a report detailing the procedures. The Director, Division of Dam Safety and Inspections, may require changes in the procedures to assure a safe and adequate project.

Article 308. Within one year of issuance of this license, the licensees shall submit a report evaluating the feasibility of constructing a power plant at Milner Dam to utilize the power potential of the flows released to the bypass reach of the river below the dam and therefore not usable by the proposed power plant to be located approximately 1.6 miles downstream. If the feasibility study shows that developing a power plant at the dam would be economically beneficial, the licensees shall submit a schedule and plans for developing a power plant at the dam in accordance with Article 301.

Article 401. The licensees shall acquire at the earliest possible date each year, by rental on an annual basis from the Upper Snake Water Supply Bank, stored water, to the extent that it is available in excess of irrigation demand, to be released as necessary to meet the target flows specified in Article 407. The licensees may, and are encouraged to, formulate an agreement with any and all of the licensees for projects which, in the future, are licensed to be constructed and operated on the Snake River below American Falls Dam and which have similar requirements to meet recommended flows from short-term water acquisition.

Article 402. The licensees, after consultation with the Soil Conservation Service, the Bureau of Land Management, and the Idaho Department of Fish and Game, and at least 90 days before beginning any project-related land-clearing, land-disturbing, or spoil-producing activities, except for activities specifically required for safety modifications to Milner Dam, shall prepare and file for Commission approval a plan to control erosion, slope stability, and to minimize the quantity of sediment resulting from project construction and operation. The Commission reserves the authority to require changes to the plan.

****25** The plan shall be based on actual-site geological, soil, and groundwater conditions and final project design, and shall include the following: (1) a description of the actual-site conditions; (2) cofferdams, perimeter control measures, measures to divert runoff around disturbed land surfaces and to collect and filter runoff, provisions for energy dissipation, riprap, measures to stabilize rock cuts, and permanent drainage for access roads; (3) detailed descriptions, functional design drawings, and specific topographic locations of all control measures; (4) specific details of the revegetation plan, including species composition, planting or seeding rates, fertilizer, and mulch; (5) provisions to dispose of spoil materials above the high water mark and store fuels and chemicals used in construction away from the river and reservoir; (6) a specific implementation schedule and details of monitoring and maintenance programs for project construction

and operation; and (7) a schedule for periodic review of the plan and for making any necessary revisions to the plan.

The licensees shall include in the filing documentation of consultation with the agencies, copies of agency comments or recommendations on the plan, and specific descriptions of how all of the agency comments and recommendations are accommodated by the plan. The licensees shall allow a reasonable time frame, in no case less than 30 days, for agencies to comment and make recommendations prior to filing the plan.

No project-related land-disturbing, land-clearing, or spoil-producing activities shall *62321 begin until the licensees are notified that the plan complies with the requirements of this article, except for activities specifically required for safety modifications to Milner Dam. The licensees shall submit with the plans and specifications required by Article 306 for safety modifications to Milner dam, measures to minimize erosion, sedimentation, and control slope stability.

Article 403. The licensees, after consultation with the Environmental Protection Agency, the Idaho Department of Health and Welfare, the U.S. Fish and Wildlife Service, and the Idaho Department of Fish and Game, and at least 90 days before commencing any project related land-clearing, land-disturbing, or spoil-producing activities within the Snake River and Milner reservoir, shall file for Commission approval, a monitoring plan to conduct tests for heavy metals and other toxic substances in any sediments or other unconsolidated deposits in the Snake River and in Milner reservoir that would be removed or otherwise disturbed by dredging, constructing, or operating project facilities and to safely remove and dispose of any sediment and unconsolidated deposits containing heavy metals or toxic substances. The plan also should include an implementation schedule for the monitoring and comments of the consulted agencies on the monitoring plan and implementation schedule. The filing shall include documentation of agency consultation and any agency comments and recommendations on the plan. The Commission reserves the right to require changes to the plan. The licensees shall not commence any land-clearing or land-disturbing activities within the Snake River and Milner reservoir until the Commission approves the plan.

***26 Article 404.* The licensees, after consultation with the Environmental Protection Agency, the Idaho Department of Health and Welfare, the U.S. Fish and Wildlife Service, and the Idaho Department of Fish and Game, and at least 90 days before beginning project operation, shall file for Commission approval, a water quality monitoring plan that would characterize levels of dissolved oxygen (DO) and water temperature in the bypassed reach from immediately below Milner dam to immediately above the powerhouse discharge during project operation. The plan shall describe in detail the methods and shall identify the time periods and locations for collecting water temperature and DO data, and shall include a schedule for providing the data to the consulted agencies and to the Commission. Further, the plan shall include a provision to determine if water temperature and DO necessary for the survival of a trout fishery within the bypassed reach are being maintained by the target flow required by Article 407. The filing shall include documentation of agency consultation and agency comments on the plan. The Commission reserves the right to require changes to the plan. The licensees shall not begin project operation until the Commission approves the plan.

Article 405. The licensees, after consultation with the Idaho Department of Fish and Game, shall develop, implement, and finance a warmwater fish stocking and habitat enhancement plan consistent with the Idaho Fisheries Management Plan 1986-1990 for Milner reservoir. The plan shall include the species of warmwater fish, numbers and sizes to be stocked, a description of specific enhancement structures, and a map showing the proposed locations of these structures in the reservoir. The licensees shall file the plan with the Commission for approval at least 90 days before beginning commercial operation. The licensees shall give the Idaho Department of Fish and Game at least 30 days to comment on the stocking and habitat enhancement program plan. The filing shall include documentation of agency consultation and any agency comments and recommendations. The Commission reserves the right to require modifications to the plan. The licensees shall not commence commercial operation until the Commission approves the plan.

Article 406. The licensees, after consultation with the Idaho Department of Fish and Game, shall develop a monitoring

plan to determine if the habitat enhancement structures placed in Milner reservoir have remained in place and are functioning as desired and to determine if additional warmwater fish need to be stocked in Milner reservoir, required by Article 405, to meet the Fisheries Management Plan goal. The licensees shall conduct the monitoring plan for at least five years. The monitoring plan shall include a schedule for filing the results of the monitoring and the comments of the Idaho Department of Fish and Game on the results and shall include recommendations for incorporating additional enhancement measures or stocking additional warmwater fish if needed. The licensees shall file the plan with the Commission for approval at least 90 days before beginning commercial operation. The filing shall include documentation of agency consultation and any agency comments and recommendations. The Commission reserves the right to require modifications to the plan. The licensees shall not commence commercial operation until the Commission approves the plan.

****27 Article 407.** The licensees shall discharge from Milner Dam a target flow of 200 cubic feet per second as measured at the Milner gage located in the bypass reach. The target flow may be temporarily reduced if required by ***62322** operating emergencies beyond the control of the licensees or for short periods upon mutual agreement between the licensees and the Idaho Department of Fish and Game. Further, the target flow may be reduced if necessary during any periods where sufficient water is not available through lease from the Upper Snake Water Supply Bank in accordance with Article 401, or from water surplus to irrigation needs.

Article 408. The licensees, after consultation with the Idaho Department of Fish and Game, shall develop a plan to stock trout in the 1.6-mile-long bypassed reach of the Snake River. The plan must include the following: (1) stocking location(s); (2) the number, species, and size of trout to be stocked each year; (3) the estimated annual cost of implementing the program; (4) a communication network to inform anglers of the stocking dates and locations; and (5) the comments of the Idaho Department of Fish and Game on the program. The licensees shall file the plan with the Commission for approval at least 90 days prior to commencing commercial operation. The Commission reserves the right to require modifications to the plan. The licensees shall not commence commercial operation until the Commission approves the plan.

Article 409. The licensees, after consultation with the Idaho Department of Fish and Game, shall file a study plan for Commission approval, at least 90 days prior to commencing commercial operations, to determine if the put- and-grow trout fishery in the bypassed reach, required by Article 408, is successful. The plan shall include provisions for filing annual reports by December 31 of each year on the put-and-grow trout stocking program. The annual report shall include information on the growth, movement, and survival of the trout planted in the bypassed reach, water temperature and DO data collected pursuant to Article 404, and an evaluation of the effects of water temperature and DO on the stocking program and the comments of the Idaho Department of Fish and Game on the results. The licensees shall give the Idaho Department of Fish and Game at least 30 days to comment on the results of the stocking program prior to filing the annual report. The licensees shall conduct the monitoring program for at least five years and file a final comprehensive report on the success of the stocking program and any recommendations for changing the stocking program, including at a minimum stocking new locations or changing the stocking rate. The Commission reserves the right to require modifications to the trout program based on the monitoring results. The licensees shall not begin commercial operation until the Commission approves the plan.

If the results of the annual monitoring or after the five-year study period show that changes to the stocking program are needed, the licensees also shall file for Commission approval a schedule for implementing the changes to the program along with the comments of the Idaho Department of Fish and Game on the recommended changes. The Commission reserves the right to require modifications to the recommendations for changing the stocking program.

****28 Article 410.** The licensees shall limit the maximum rate of change in river elevation (ramping rate) to one foot per hour or less for the protection of aquatic resources and down stream recreationists. Further, the licensees, after consultation with the Idaho Department of Fish and Game and the Idaho Department of Parks and Recreation, shall conduct a ramping rate study after the project is operational. The study shall determine if the one foot per hour rate of change in the

Snake River's elevation provides adequate protection for the aquatic resources in the bypassed reach during project start-up and to protect downstream recreationists when increasing and decreasing flows. The licensees shall file the results of the study along with any recommendations for changing the ramping rate for Commission approval within one year after the project is operational. Agency comments on the study and any proposed changes to the ramping rate shall be included with the filing. The Commission reserves the right to require modifications to the proposed ramping rate.

Article 411. The licensees shall design and construct the transmission line in accordance with guidelines set forth in "Suggested Practices for Raptor Protection on Power Lines- the State of the Art in 1981," by Raptor Research Foundation, Inc. The licensees after consultation with the U.S. Fish and Wildlife Service, the Idaho Department of Fish and Game, and the Bureau of Land Management in adopting these guidelines shall develop and implement a design that will provide adequate separation of energized conductors, groundwires, and other metal hardware, adequate insulation, and any other measures necessary to protect raptors from electrocution hazards. Within 90 days after completion of construction of the transmission line, the licensees shall file as-built drawings of the transmission line design with the Commission.

Article 412. The licensees, after consultation with the U.S. Fish and Wildlife Service, the Idaho Department of Fish and Game, the Bureau of Land Management, and the Soil Conservation Service, and at least 90 days prior to commencing any land-disturbing, land-clearing, or spoil-producing activities not specifically*62323 required for safety modifications to Milner Dam, shall file for Commission approval a plan to revegetate all disturbed areas with native plant species beneficial to wildlife. The plan shall include at a minimum: (1) a description of the plant species to be used, an indication of each species habitat value and food value, and planting densities; (2) planting methods; (3) fertilization and irrigation requirements; (4) a monitoring program to evaluate the effectiveness of the plantings; (5) a description of procedures to be followed if monitoring reveals that the revegetation is not successful; and (6) an implementation schedule that provides for the revegetation as soon as practicable after completion at a particular site and the filing of periodic monitoring reports. Agency comments shall be included on the filing. The Commission reserves the right to require changes to the plan. The licensees shall not begin any land-clearing or land-disturbing activities not specifically required for safety modifications to Milner Dam until the plan is approved by the Commission.

***29 Article 413.* The licensees, after consultation with the U.S. Fish and Wildlife Service, the Idaho Department of Fish and Game, and the Bureau of Land Management, and at least 90 days before beginning any project-related land-clearing or land-disturbing activities not specifically required for safety modifications to Milner Dam, shall file for Commission approval a plan for constructing, maintaining, and monitoring osprey nesting platforms, Canada goose- nesting structures, and artificial burrows for burrowing owls (wildlife enhancement features) in the project area. The plan shall include at a minimum: (1) the final designs for the wildlife enhancement features; (2) the number and location of the wildlife enhancement features; (3) a schedule for providing the wildlife enhancement features; (4) and a program for maintenance and monitoring. Agency comments on the adequacy of the plan shall be included in the filing. The Commission reserves the right to require changes to the plan. The licensees shall not commence any land-clearing or land-disturbing activities not specifically required for safety modifications to Milner Dam, until the plan is approved by the Commission.

Article 414. The licensees, after consultation with the U.S. Fish and Wildlife Service, the Idaho Department of Fish and Game, the Bureau of Land Management, and the Environmental Protection Agency, and at least 90 days before beginning any project related land-disturbing or land-clearing activities not specifically required for safety modifications to Milner Dam, shall file for Commission approval a plan for developing at least 23.5 acres of riparian wetland habitat to mitigate for the loss of 6.8 acres of riparian wetlands and 26.6 acres of upland habitat. The plan shall include, but shall not be limited to: (1) maps showing the location of all replacement habitat, site boundaries, size of each site, and physical and habitat features; (2) a description of planting methods, fertilization and irrigation requirements, and a planting schedule; (3) a description of the soil and substrate conditions at the replacement sites; (4) a monitoring program that includes

goals and criteria for successful establishment of wetland vegetation, sampling procedures, and reporting requirements; (5) procedures to implement if monitoring reveals that establishment of vegetation is not successful; (6) an implementation schedule that provides for habitat replacement as soon as practicable; and (7) a description of the program for the long-term ownership, management, and maintenance of the replacement habitat. Agency comments shall be included in the filing. The Commission reserves the right to require changes to the plan. The licensees shall not commence any land-clearing or land-disturbing activities not specifically required for safety modifications to Milner Dam until the plan is approved by the Commission.

Article 415. The licensees, for a total period of eight days for eight daylight hours each day (64 daylight hours) between April 1 and May 31, shall not operate the main powerhouse, to be located 1.6 miles downstream of Milner dam, when inflow to Milner Reservoir, less irrigation withdrawals from Milner Reservoir, is 10,000 cubic feet per second (cfs) or more. When projections of available flows indicate that the flows in April and May will not reach 10,000 cfs, the licensees shall shut down the main powerhouse for eight daylight hours per day for up to eight days, when inflow to Milner reservoir, less irrigation withdrawals from Milner reservoir is between 4,000 and 10,000 cfs. The licensees do not have to shut down the project in the April-May period if the flows do not exceed 4,000 cfs in the period. The timing of the 64-daylight-hour project shutdown to meet the above obligation may be modified by the Commission, based on the results of the whitewater boating study required by article 418.

****30 Article 416.** The licensees, after consultation with the Bureau of Land Management, the National Park Service, the Idaho Department of Parks and Recreation, and the Idaho White water Association, and 90 days before starting project operation, shall file for Commission approval, a plan to warn downstream recreationists of increases in flow downstream of the dam for whitewater boating. The plan, at a minimum shall include provisions for a warning*62324 system (e.g., lights, alarms, warning signs) to alert downstream recreationists of increases in water level and streamflow. Documentation of agency consultation shall be included in the filing. The Commission reserves the right to require changes to the plan.

Article 417. The licensees, after consultation with the Bureau of Reclamation, Bureau of Land Management, the National Park Service, the Idaho Department of Water Resources, the Idaho Department of Parks and Recreation, and the Idaho Whitewater Association, and 90 days before starting project operation, shall file for Commission approval, a plan for a communication network to inform whitewater boaters of available whitewater flows. The plan shall include documentation of agency consultation. The Commission reserves the right to require changes to the plan.

Article 418. The licensees, after consultation with the Bureau of Land Management, the National Park Service, the Bureau of Reclamation, the Idaho Department of Parks and Recreation, the Idaho Department of Water Resources, and the Idaho Whitewater Association, shall conduct a study to determine whether flows required by Article 415 could be modified to more closely match whitewater boater needs and reduce the effects of whitewater releases on project economics. Within six months from the issuance date of this license, the licensees shall file for Commission approval a plan for conducting the whitewater boating study. The licensees shall conduct the study as approved by the Commission and, within 90 days before the start of project operation, the licensee shall file with the Commission, results of the study. Study results must include: (1) an analysis of the range of whitewater flows necessary to maintain the Class V whitewater experience preferred by boaters running the Milner reach; (2) the time of day and week when boaters put in and take out of the Milner reach; (3) the average number of runs boaters make in a given day; (4) a proposed schedule for releasing flows for whitewater boating that describes the range of flows to be provided, the duration of the flows, and time of day and week these flows will be provided; (5) a discussion of recommendations provided by the consulted agencies and entities; and (6) documentation of consultation with the above-named entities. The Commission reserves the right to require changes to the plan.

Article 419. The licensees, after consultation with the Bureau of Land Management, the National Park Service, the Idaho

Department of Parks and Recreation, and the Idaho White water Association, and 90 days before starting any project-related land-clearing, land-disturbing, or spoil-producing activities (except rehabilitation of Milner Dam), shall file for Commission approval a recreation plan that includes, but is not limited to: (1) provisions for a whitewater boater put-in area at the bridge below Milner Dam and a take-out area below the project powerhouse with parking facilities; (2) provisions for a tailwater fishing area below the powerhouse; (3) final design drawings showing the type and location of the proposed facilities; (4) a construction schedule for proposed recreational facilities; (5) a plan for monitoring recreational use in the project area to determine the need for additional recreational facilities in the future; and (6) documentation of agency consultation. In the plan, the licensees shall also consider the feasibility of (1) providing the whitewater take-out area below the final Class V rapid below the powerhouse area and (2) locating the take-out area in a location where it does not interfere with tailwater fishing facilities. The Commission reserves the right to require changes to the plan.

****31 Article 420.** The licensees, at least 90 days before the start of any land-clearing, land-disturbing, or spoil-producing activities for each segment of the project shall file for Commission approval, either separately or in combination, the following plans to blend all project features and project related areas of land disturbance with the surrounding landscape:

1. detailed site-grading and revegetation design plans for each soil, gravel, or rock borrow site, and spoil disposal site;
2. a design for eliminating the visual impact of the transmission line from the powerhouse to the forebay area;
3. detailed design drawings which describe the planned vegetation clearing, the specific tower or pole locations and design, and the specifications for the materials to be used in each transmission line facility;
4. designs, alignments, profiles, construction limits, planned vegetation clearing, proposed surfacing, and the construction specifications for all access roads, parking lots, construction laydown areas, canals, and surface or buried penstock routes, including the required rights-of-way; and
5. detailed design drawings which describe the planned architectural features, colors, surface textures, site grading, and landscape plantings for each structure.

The licensee shall include with the filing documentation of consultation with Bureau of Land Management (BLM) and copies of BLM comments and recommendations. The Commission may require changes to the plans. No land-clearing, land-disturbing, or spoil-producing activities shall begin until the licensees are *62325 notified that the above plans comply with the requirements of this article.

Article 421. The licensees, after consultation with the Idaho State Historic Preservation Officer (SHPO), the Advisory Council on Historic Preservation (Council), and the Historic American Engineering Record (HAER) of the Department of the Interior, shall finalize and implement the cultural resources management plan as filed by letter dated February 11, 1986, and shall include the revisions recommended by the National Park Service by letter dated February 4, 1986. Within one year from the date of this license, the licensees shall file for Commission approval a report containing the HAER documentation of Milner Dam and the South Side Canal, the procedures for avoiding impacts to Milner Townsite, and the documentation of archeological site 10-TF-461. The documentation and avoidance procedures at these sites may be filed in separate reports as the items are completed. The reports must contain letters from the SHPO, the Council, and in the case of the dam and the canal, also from the HAER, accepting the documentation. No rehabilitation work or land-disturbing or land-clearing work may begin at the historic or archeological sites addressed in the report until the licensees are notified that the filing or filings have been approved. The licensees shall make funds available in a reasonable amount for implementation of the plan. If the licensees, the SHPO, the Council, and the HAER cannot agree on the amount of money to be spent for implementation of the plan, the Commission reserves the right to require the licensees to conduct the necessary work at the licensees' own expense.

****32 Article 422.** The licensees, before starting any land-clearing or land-disturbing activities within the project boundaries, other than those specifically authorized in this license, shall consult with the Idaho State Historic Preservation Officer (SHPO), shall conduct a cultural resources survey of the area that will be impacted, and shall file for Commission approval a cultural resources management plan, prepared by a qualified cultural resources specialist. If the licensees discover any previously unidentified archeological or historic sites during the course of construction or developing project works or other facilities at the project, the licensees shall stop all land-clearing and land-disturbing activities in the vicinity of the sites, shall consult with the SHPO, and shall file for Commission approval a new cultural resources management plan, prepared by a qualified cultural resources specialist.

Either management plan shall include the following: (1) a description of each discovered site, indicating whether it is listed or eligible to be listed on the *National Register of Historic Places*; (2) a description of the potential effect on each discovered site; (3) proposed measures for avoiding or mitigating effects; (4) documentation of the nature and extent of consultation; (5) a schedule for mitigating effects and conducting additional studies, and (6) a copy of a letter from the SHPO accepting the plan. The Commission may require changes to the plan.

The licensees shall not begin land-clearing or land-disturbing activities, other than those specifically authorized in this license, or resume such activities in the vicinity of a site discovered during construction, until informed by the Commission that the requirements of this article have been fulfilled.

Article 423. The Commission, upon its own motion or upon the recommendation of federal or state fish and wildlife agencies or affected Indian Tribes, reserves the authority to order alterations of project structures and operations to take into account to the fullest extent practicable at each stage of the decision-making process the Columbia River Basin Fish and Wildlife Program developed and amended in accordance with the Pacific Northwest Electric Power Planning and Conservation Act.

Article 424. (a) In accordance with the provisions of this article, the licensees shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensees may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensees also shall have continuing responsibility to supervise and control the use and occupancies for which they grant permission and to monitor the use of and to ensure compliance with the covenants of the instrument of conveyance for any interests that they convey under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensees for the protection and enhancement of the project's scenic, recreational, or other environmental values or if a covenant of a conveyance made under the authority of this article is violated, the licensees shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, cancelling the permission to use and occupy the project lands and waters and requiring the removal of any noncomplying structures and facilities.

****33 *62326 (b)** The types of use and occupancy of project lands and water for which the licensees may grant permission without prior Commission approval are these: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 watercraft at a time and where the facility is intended to serve single-family dwellings; and (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensees shall require multiple use and occupancy of facilities for access to project lands or waters. The licensees also shall ensure to the satisfaction of the Commission's authorized representative that the use and occupancies for which they grant permission are maintained in good repair and comply with applicable state and local health and safety requirements. Before granting permission for construction of bulkheads

or retaining walls, the licensees shall do the following: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shore line. To implement this paragraph (b), the licensees, among other things, may establish a program for issuing permits for the specified types of use and occupancy of project lands and waters that may be subject to the payment of a reasonable fee to cover the licensees' costs of administering the permit program. The Commission reserves the right to require the licensees to file a description of their standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensees may convey easements or rights-of-way across or leases of project lands for these purposes: (1) replacement, expansion, realignment, or maintenance of bridges and roads for which all necessary state and federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) nonproject overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or under ground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than 1 million gallons per day from a project reservoir. No later than January 31 of each year, the licensees shall file three copies of a report that briefly describes for each conveyance made under this paragraph (c) during the prior calendar year the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

****34** (d) The licensees may convey fee title to, easements or rights-of-way across, or leases of project lands for the following: (1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary federal and state water quality certification or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) nonproject overhead electric transmission lines requiring erection of support structures within the project boundary for which all necessary federal and state approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile from any other private or public marina; (6) recreational development consistent with an approved exhibit R or an approved report on recreational resources of an exhibit E; and (7) other uses, if these conditions exist: (i) the amount of land conveyed for a particular use is 5 acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from the edge of the project reservoir at normal maximum surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 45 days before conveying any interest in project lands under this paragraph (d), the licensees shall submit a letter to the Director, Office of Hydro-power Licensing, stating the licensees' intent to convey the interest and briefly describing the type of interest and the location of the lands to be conveyed (a marked exhibit G or K map may be used), the nature of the proposed use, the identity of any federal or state agency official consulted, and any federal or state approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the licensee to file an application for prior approval, the licensees may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

(1) Before conveying the interest, the licensees shall consult with appropriate federal and state fish and wildlife or recreational agencies and with the State Historic Preservation Officer.

***62327** (2) Before conveying the interest, the licensees shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved exhibit R or an approved report on recreational resources of an exhibit E or if the project does not have an approved exhibit R or an approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance shall include covenants running with the land adequate to ensure the following: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands occur in a manner that protects the scenic, recreational, and environmental values of the project.

**35 (4) The Commission reserves the right to require the licensees to take reasonable remedial action to correct any violation of the terms and conditions of this article for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article shall be excluded from the project only on a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including the preservation of shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised exhibit G or K drawings are filed for approval for other purposes.

(g) The authority granted to the licensees under this article shall not apply to any part of the public lands and reservations of the United States included within the project boundary.

(E) The licensees shall serve copies of any Commission filing required by this order on any entity specified in this order to be consulted on matters related to that filing. Proof of service on these entities must accompany the filing with the Commission.

(F) Within 60 days of the issuance of this order, the licensees shall submit the following information for each county in which federal lands, utilized by the project, are included: (1) the number of nontransmission line acres of U.S. lands; and (2) the number of transmission line right-of-way acres of U.S. lands.

(G) This order is final unless an application for rehearing is filed within 30 days from the date of its issuance, as provided in Section 313 of the FPA. The filing of an application for rehearing does not operate as a stay of the effective date of its issuance or of any other date specified in this order, except as specifically ordered by the Commission. The licensees' failure to file an application for rehearing shall constitute acceptance of this license.

Commissioner Moler *concurred* with a separate statement attached.

FN1. Draft Environmental Impact Statement for the Twin Falls (FERC No. 18), Milner (FERC No. 2899), Auger Falls (FERC No. 4797), and Star Falls (FERC No. 5797) Hydroelectric Projects on the Mainstem Snake River, Idaho, Federal Energy Regulatory Commission, Washington, D.C., November 1987.

FN2. See attached Safety and Design Assessment (S&DA) for a more detailed description of the dam safety concerns regarding this project.

FN3. See Y40 C.F.R. §1506.11 (1988).

FN4. Letter from Martha O. Hesse, Chairman, Federal Energy Regulatory Commission, October 25, 1988.

FN5. Letter from A. Alan Hill, Chairman, CEQ, October 27, 1988.

FN6. Information regarding the Supplement was published in the *Federal Register* on October 15, 1988. See 53 *Fed. Reg.* 42,997. *Scoping meetings on the Supplement were held in Boise and Twin Falls, Idaho on November 2, 1988.*

FN7. *See* section 4.1.1.1 of the DEIS.

FN8. 52 *Fed. Reg.* 5446 (February 23, 1987), *FERC Statutes and Regulations* ¶ 30,730 (effective May 11, 1987); *reh'g denied*, 52 *Fed. Reg.* 13,234 (April 22, 1987), 39 *FERC* ¶61,021 (Order No. 464-A), *petitions for reconsideration dismissed*, 41 *FERC* ¶61,206 (1987) (Order No. 464-B).

FN9. *e generally* Section 4.2.1 of the DEIS.

FN10. This fishery resource is discussed in Part II C 4, *infra*.

FN11. *See* Section 3.3.2.1.1 of the DEIS.

FN12. Idaho Department of Fish and Game, 1986, *Fisheries Management Plan 1986-1990*, Boise, Idaho, 274 pp.

FN13. *See* Section 3.3.2.1.2 of the DEIS.

FN14. *See* Section 4.2.2.1.2 of the DEIS.

FN15. *See* Section 4.2.2.1.1.3.1 of the DEIS.

FN16. *Id.*

FN17. *See* Section 4.2.2.1.2 of the DEIS.

FN18. *See* Section 5.1.2 of the DEIS.

FN19. D. L. Tennant, 1976, *Instream flow regimes for fish, wildlife, recreation, and related environmental resources*, Pages 359-373. In Orsborn, J. F., and C. H. Allman, (ed.), *Proceedings of the Specialty Conference on Instream Flow Needs*, Volume II, American Fisheries Society, Bethesda, Maryland.

FN20. T. Cochnauer, 1976, *Stream Flow Investigation, Project F-9-R-1, Job I, evaluation of applicability of water surface profile predictive modeling in reference to stream resource maintenance flow (SRMF) determinations, Job II, stream resource maintenance flow determinations on the Snake River*, Idaho Department of Fish and Game, Boise, Idaho, 44 pp.

FN21. The 200 cfs target flow is not a minimum flow, and CC does not have to release the flow unless water is available.

FN22. The Idaho Fisheries Management Plan defines a put-and-grow fishery as one where the fish are expected to survive and grow and contribute to the fishery for an extended period of time.

FN23. *See* Section 4.2.2.1.2 of the DEIS.

FN24. *See* Section 4.3.1.1 of the DEIS.

FN25. *Id.*

FN26. *See generally* Section 4.3 of the DEIS.

FN27. *See* Section 4.3.1.1 of the DEIS.

- FN28. Personal communication, Dale TurnipSeed, IDFG, Jerome, Idaho, November 28, 1988.
- FN29. Twin Falls Canal Company and North Side Canal Company, Ltd., Response to DEIS, March 30, 1988.
- FN30. Personal communication, Jeff Jarvis, Outdoor Recreation Planner, BLM, Boise, Idaho, December 1, 1988; letter from Todd Graeff, Director, Idaho Department of Parks and Recreation, Boise, Idaho, October 10, 1985.
- FN31. Letter from Delmar D. Vail, State Director, BLM, Boise, Idaho, January 20, 1987; personal communication, Jeff Jarvis, Outdoor Recreation Planner, BLM, Boise, Idaho, December 1, 1988.
- FN32. See Section 4.5.1.2 of the DEIS.
- FN33. Letters from Dr. Thomas Green, State Archeologist, Idaho State Historical Society, Boise, Idaho, May 17, 1984; and John A. Rosholt, Attorney for Twin Falls Canal Company and North Side Canal Company, Ltd., Nelson, Rosholt, Robertson, Tolman & Tucker, Twin Falls, Idaho, February 11, 1986.
- FN34. Letter from John A. Rosholt, Attorney for Twin Falls Canal Company and North Side Canal Company, Ltd., Nelson, Rosholt, Robertson, Tolman & Tucker, Twin Falls, Idaho, February 11, 1986.
- FN35. Letter from Dr. Merle W. Wells, State Historic Preservation Officer, Idaho State Historical Society, Boise, Idaho, February 4, 1986.
- FN36. Letters from Bruce Blanchard, Director, Environmental Review, Department of the Interior, Washington, D.C., December 17, 1985; and Helene Dunbar, Acting Chief, Interagency Archeological Services, National Park Service, San Francisco, California, February 4, 1986.
- FN37. See Ordering Paragraph (D) hereof.
- FN38. Order No. 481, 52 Fed. Reg. 39,905 (October 26, 1987), *FERC Statutes and Regulations* ¶30,773 (1987).
- FN39. Order No. 481-A, [*FERC Statutes and Regulations* ¶30,811] (April 27, 1988).
- FN40. Idaho Statewide Comprehensive Outdoor Recreation Plan, 1983, IDPR; Idaho State Water Plan, 1986, IDWR; Idaho Fisheries Management Plan, 1986, IDFG; and Northwest Conservation and Electric Power Plan, 1986; and Columbia River Basin Fish and Wildlife Program, 1987.
- FN41. 42 FERC ¶61,072 (1988), *appeal pending sub nom. Idaho Power Company v. FERC*, No. 88-1078 (D.C. Cir. filed Feb. 3, 1988).
- FN42. See *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946).
- FN43. See [*FERC Statutes and Regulations* ¶30,811] (1988).

Safety and Design Assessment

Milner Hydroelectric Project

FERC Project No. 2899-001, ID

Project Design

Milner Dam is located at a site on the Snake River where the river divides into three channels, separated by two islands. Before the dam was built, the north channel carried the main flow of the river, the south channel carried water only during extreme flood events, and the middle channel was dry, except during periods of high water. Milner reservoir provides water to three canals, the Twin Falls, North Side Main, and Milner Gooding Canals, and to three pumping stations, Milner Low Lift, A and B Irrigation, and North Side Pumping Company. Cumulatively, the canals and the pumping plants serve approximately 500,000 acres.

**36 Construction of Milner Dam started in 1903 and was completed in 1905. The dam has three embankments (north, middle, and south); each embankment is constructed with a trapezoidal shaped rockfill section with a vertical wood cutoff wall in the center of each embankment. The rockfill sections consist primarily of angular boulder and cobble-size blocks of olivine basalt rock. The cutoff walls were damaged during construction, and when the builder first tried to fill the reservoir, the dam leaked; on the upstream side of the embankments, non plastic sandy silt was sluiced into the rockfill to stop the leakage. Each embankment was built with a horizontal-to-vertical downstream slope of 1.5 to 1 (1.5:1) and an upstream slope of 4:1. The north embankment has a crest length of 280 feet and a crest elevation of 4,138 feet;^[FN1] the middle embankment has a crest length of 404 feet and a crest elevation of 4,138 feet; and *62328 the south embankment has a crest length of 462 feet and a crest elevation of 4,138 feet.

Presently, flows are released from the dam by a gated spillway located on the southern island. The spillway is a concrete structure, 487 feet long, with a crest elevation of 4,122.5 feet and with 99 wood slide gates, each 4 feet wide by 12 feet high, which are individually lifted by a hydraulic mechanism. An ungated emergency spillway with a concrete-core cutoff wall is located on the north island; the emergency spillway is 290 feet long and has a crest elevation of 4,134 feet. The dam has no operable low-level outlet or reservoir drain.

Flows from Milner Lake to Twin Falls Main Canal are controlled by a concrete structure with seven manually operated radial gates. The headworks is located on the south abutment.

The applicants propose to construct rockfill berms on the downstream slopes of the three existing dam embankments. The top of each berm would be 15 feet wide and 10 feet below the crest of the existing embankments, and the downstream slope of each berm would be 3.75:1.

The applicants would replace the existing gated spillway with a new spillway that would have 11 radial gates, each 12 feet high and 30 feet wide. One gate would have a hinged gate flap at its crest to provide for passing floating debris. The crest elevation would remain at 4122.5 feet. The spillway outlet channel, which would be lined with concrete to prevent erosion, would have a capacity of 58,000 cubic feet per second (cfs) at a reservoir elevation of 4,133.5 feet.

The Twin Falls Main Canal has a maximum design hydraulic capacity of 3,200 cfs. The applicants propose to do the following: increase the canal capacity; modify the headworks; build a wasteway; and build a new control structure. The applicants would increase the canal's capacity to 7,000 cfs, raise the right embankment of the canal near Milner Dam to elevation 4,137.5 feet to provide four feet of freeboard and widen the crest to 20 feet. The applicants would modify the existing canal headworks structure to install stoplogs for dewatering the canal and forebay area when needed. The applicants would build a wasteway for sluicing ice from the canal and for removing flows in the canal if there is a power plant load rejection. The concrete wasteway would control flows with one hydraulically operated bascule gate designed to pass the maximum powerhouse flow of 4,000 cfs and would return flows to the Snake River. To control irrigation releases to the canal, the applicants would build a new control structure, approximately 1,600 feet downstream from the wasteway. The concrete structure would have six manually operated radial gates, each 12-foot-wide by 15-foot-high and one hydraulically operated bascule gate, 24-foot-long by 11-foot-high.

**37 The applicants would build a forebay to convey flows from the canal to the project intake and a concrete intake

structure to convey flows to the penstock. A cable-operated, fixed-wheel gate, 14-foot-wide by 17-foot-high, would permit closing the penstock for emergency shut down or maintenance of the penstock and turbine. The penstock would be a 17-foot-diameter steel pipe, approximately 385 feet long.

The powerhouse would be a semi-outdoor, reinforced-concrete structure, approximately 89-feet-long by 56-feet-wide, housing one generating unit, rated at 43.65 megawatts (MW). The powerhouse would be located near the bottom of the Snake River Canyon. The generator would be connected to a Kaplan turbine, rated at 59,650 horsepower under a net head of 151.6 feet and a discharge of 4,000 cfs. Flows from the powerhouse would be returned to the Snake River through a 170-foot-long tailrace channel. The tailrace would have a 46-foot-wide base with side slopes of 0.25:1.

Project Safety

The hazard potential of a dam is the potential for loss of human life or property damage that would result from failure of the dam.

Starting at Milner Dam, the Snake River flows into the Snake River Gorge, a narrow, practically inaccessible, steep-walled canyon. Development downstream of Milner Dam includes four hydroelectric projects, two golf courses and a sewage treatment plant. The four hydroelectric projects do not have full time operators, and the sewage treatment plant is located 25 miles downstream of the dam. The poor access and ruggedness of the canyon limit recreational use of the Snake River below Milner Dam. Failure of the project, therefore, would result in minimal downstream impacts.

Milner Dam was inspected by the Portland Regional Office on October 13, 1988. The inspector determined that even though it poses only a minimal threat to downstream life and property, failure of Milner Dam would have the potential to cause catastrophic damage to the economy of the area, "the Magic Valley of Idaho." Approximately 500,000 acres of farm land is dependent upon irrigation water diverted at Milner Dam, and the economy of the Magic Valley depends on the agricultural production of the 500,000 acres of farmland.

Because the Regional Office rates Milner Dam as having a significant hazard potential, the dam should be modified to make it safe against failure under earthquake loading and *62329 under one-half probable maximum flood (PMF) loading (58,000 cfs) conditions.

Each of the three dam embankments, discussed earlier, consists of a large, trapezoidal rockfill section with a zone of hydraulic-fill earth material, placed directly against the upstream face, as the water barrier. Each embankment has a vertical wooden core in the center of the rockfill section. The wooden cores were damaged during construction and are assumed to be an ineffective barrier to seepage. Because there is no filter between the rockfill and the upstream earthen barrier, the upstream hydraulic-fill material, when disturbed, can be washed into and through the rockfill (piping leak or piping failure). Engineering studies performed by the consultant for the applicant show that the upstream hydraulic-fill material is comprised of very loose to loose nonplastic sandy silts and silty sands that are susceptible to liquefaction (complete loss of strength) under seismic loading conditions. The slumping of the upstream fill could open a path for water from the reservoir to pass through the earthen barrier and to enter the rockfill in the embankments. Analysis, by the applicants' consultant, of flows through the rockfill sections of the embankments, shows that a large leak could release enough water to destabilize the downstream slopes of the rockfill zones. If this happens, progressive raveling of the down stream face could breach an embankment.

**38 According to the applicants' records, since 1905, Milner Dam has experienced 10 piping leaks, the first occurring in 1905 with the initial filling of the reservoir and the last in March 1983. All of the piping leaks were repaired soon after they occurred with little disruption to irrigation service. To reduce the needed time to begin leak repairs, the applicants currently stockpile earthen repair material on both banks of the river.

To stabilize the slopes if an earthquake causes a piping failure, the applicants' consultant proposes to construct a rockfill berm on the downstream slope of each embankment. The berms would increase the downstream slope of the embankment from 1.5:1 to 3.75:1; the major portion of the berms would consist of rock averaging 24 inches in size, while the lower portion would be faced with rock averaging 48 inches in size or larger. This repair approach would still require the applicants to maintain stockpiles of material to repair any leaks which could develop in the earthfill section.

Since the license would authorize major modifications of a dam with a significant hazard potential, the staff recommends the inclusion of special license Article 305 requiring the licensees to retain a board of consultants to review the design and construction of the project for safety and adequacy.

Because the water diverted by Milner Dam is critical to the wellbeing of the Magic Valley, the staff recommends the inclusion of special license Article 307, requiring the licensees, in consultation with the board of consultants, to develop a detailed manual of procedures for repairing Milner Dam if there is excessive leakage.

Based on an inspection of the project and on discussions with the applicants, the staff finds the project to be satisfactorily maintained. The staff found minor seepage areas on the north, middle, and south embankments. These areas will continue to be monitored in the future. The staff had trouble inspecting the toe of the dam because it is covered with vegetation. The Director of the Portland Regional Office will direct the licensees, if a license is issued, to remove the vegetation that interferes with the Commission's dam safety inspection programs.

To improve winter operations, the applicants propose to replace the existing spillway. The 99 wooden gates of the spillway now have to be raised individually. The process is slow, because the applicants have only two hoisting mechanisms. The 11 new gates would greatly improve operation and would reduce the time needed to adjust the spillage under flood conditions. The new spillway would be designed to pass an inflow design flood (IDF) of 58,000 cfs; the IDF represents a spillway capacity of one-half of the PMF. An IDF that is less than the full PMF is acceptable because the failure of Milner Dam would not threaten downstream life.

The proposed project would be safe and adequate if constructed and/or rehabilitated according to sound engineering practice, and the requirements of a license.

Primary Transmission Facilities

**39 The primary transmission line segment would include the 1.4-mile-long 138-kilovolt (kV) transmission line connecting the project generator to the interconnected transmission system at the Milner substation 138-kV bus and its support facilities.

Water Resource Planning

As stated earlier, the applicants propose to use the existing Twin Falls main irrigation canal to convey water left over from irrigation requirements to the proposed power facilities, 1.6 miles downstream of the existing Milner Dam. Any flows used for generation in the proposed powerhouse thus would bypass the 1.6 miles of river channel below Milner Dam.

The proposed powerhouse would have the capacity to use flows of from 900 to 4,000 cfs. *62330 Typically, the flows that pass Milner Dam in the summer are low, not generally exceeding 500 cfs, and the proposed powerhouse would not be expected to operate from about mid-June through mid-September.

The staff, on page 5-3 of its Snake River Draft Environmental Impact Statement (DEIS) for the Twin Falls, Milner, Auger Falls, and Star Falls projects, recommended that any license issued for the Milner Project require a minimum by-

pass flow in the 1.6 mile reach below Milner Dam. The public, irrigators, the applicant, and the Idaho Department of Water Resources (IDWR) apprised the staff that requiring the licensees to maintain minimum flows below Milner Dam would be inconsistent with state requirements. All of the reservoir storage available above Milner Dam is committed and the minimum flow specified by Idaho State Water Plan (Water Plan) for the river immediately below Milner Dam is zero cfs. Because the applicants, the Northside and Twin Falls Canal Companies, are only service companies, which distribute the irrigation water to their shareholders, who hold the water rights, requiring them to maintain a minimum flow below Milner Dam other than zero would require that they release water that Idaho water law has appropriated to others.

After issuing the DEIS, the staff evaluated the feasibility of requiring any licensees of the proposed Snake River projects to rent or lease water on a short-term basis from upstream water rights holders in order to provide flows in the bypass reaches of the projects. Such flows could reduce impacts of the projects and/or improve conditions by providing flows that are greater than those that now exist. The staff uses the term Comprehensive Water Block (CWB) to refer to the volume of water that a licensee would have to rent to supplement the available river flow in order to meet the recommended target flows.

The staff identified the Upper Snake Water Supply Bank (Water Bank) as a possible source for acquiring flows for environmental mitigation and enhancement purposes. The state established the Water Bank as a convenient means to allow and account for the rental of water by those irrigators in need of additional water from those who have excess water. Irrigators who estimate that their water storage rights would be in excess of their requirements in any year may place a portion of their storage right in the Water Bank, to be leased by others, with irrigators receiving first priority. Any water that is not leased in any year is lost if all of the upstream storage is refilled in the following year.

**40 In a letter filed with the Commission on September 30, 1988, IDWR commented on the staff's proposal, stating: "Notwithstanding the applicant's increased costs in obtaining the water, it appears that structured reliance on the Water Bank through the Comprehensive Water Block mechanism can be successful in meeting prescribed mitigative flows on the mainstem of the Snake River."

The staff discussed the operation of the Water Bank with Alan Robertson, Supervisor, Hydrology Section, IDWR. It is the staff's understanding from those discussions that water has been available for lease from the Water Bank in all years since its creation and that, because of increased irrigation efficiencies, future water availability likely will increase. Idaho Power Company (IPC) has leased water for power generation from the Water Bank in every year since its creation. It is highly probable that in the future, water will be available in the Water Bank in excess of irrigation demand, except in very bad water years.

It is the staff's opinion that the short-term leasing or rental of water that is in excess of the irrigation demand each year for purposes such as environmental mitigation and enhancement, would be in the public interest, would not commit water storage to a non-agricultural use, and therefore would not violate the intent for which the Water Bank was created or the purposes for which the upstream storage projects were authorized.

The staff evaluated numerous scenarios for requiring in any license issued that mitigation and enhancement flows should be provided in the bypass reach below Milner Dam. In addition, the staff, recognizing that it might be economically beneficial to develop the hydro power potential of the target flows that may be recommended to be released at Milner Dam, performed reconnaissance-level economic analyses of the benefits of developing a powerhouse at Milner Dam, in addition to the powerhouse proposed by the applicants to be located 1.6 miles downstream. The preliminary studies showed that depending on the magnitude of target flows specified in a license for the Milner Project, it may be economically beneficial to construct a power plant at the dam. The staff, therefore, recommends the inclusion of special license Article 308, requiring the licensees to study the feasibility of constructing such a power plant, and if it is found to be feasible and economically beneficial, to submit a plan for constructing the power plant. The staff's economic analyses are discussed in

the Economic Evaluation section of this assessment.

Section 10(a)(2)(A) of the Federal Power Act (FPA) requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans for *62331 improving, developing, or conserving a water way or waterways affected by the project.

The staff reviewed the Northwest Power Planning Council's Northwest Conservation and Electric Power Plan (Power Plan) to determine if the project is consistent with the Power Plan. The Council's Power Plan envisions meeting the growing regional energy requirements in the most economical manner with environmentally acceptable resources. The Power Plan considers any environmentally acceptable resource that is less expensive than coal-fueled steam electric generation as an acceptable resource for development before the development of coal-fueled power plants (the Council's planned marginal resource).

**41 The staff developed life-cycle costs of energy from the Council's planned generic coal plant, assumed to be needed in the year 2002, for determining if proposed hydroelectric projects are, consistent in the long term with the Power Plan, as required under Section 10(a)(2)(A) of the FPA. The staff assumed that new coal plant generating resources would be required within the region by the year 2002, based on the need for additional generating resources projected for the investor-owned utilities in the Pacific Northwest Region, as discussed in the Need for Power section of this assessment.

The staff found that the life-cycle levelized cost of the proposed project is less, as of its projected on-line date, than the levelized life-cycle cost of the least cost or marginal long term alternative, included in the Power Plan. Therefore, the project as proposed is not inconsistent with the Council's Power Plan, and is economically beneficial within the long-term objectives of the Power Plan.

The staff reviewed the Water Plan and found that the proposed project, both including and excluding the staff's target flow recommendations, would be consistent with the Water Plan, which requires a minimum flow below Milner dam of zero cfs. The staff's recommendation for including target flow conditions in any license issued is consistent with the Water Plan. The staff is not recommending that minimum flows be provided below Milner dam, but rather that the licensees should provide any additional water needed to meet the target flows by leasing water that is in excess of irrigation requirements from the Water Bank, but only if available, and in accordance with the rules of the Water Bank operation.

The staff reviewed the Idaho Fisheries Management Plan, the Idaho Outdoor Recreation Plan, the Idaho Water Quality Standards, and the Department of the Interior's Monument Proposed Resource Management Plan and found that the plans do not affect the proposed project's development or operation with respect to irrigation, flood control, or navigation.

A review of the Commission's Planning Status Report for the Upper Snake River Basin and the Hydroelectric Site Data Base show that there are no proposed or existing projects that would conflict with the proposed project.

Economic Evaluation

A proposed project is economically beneficial so long as its levelized cost is less than the long-term levelized cost of alternative energy to any utility in the region that can be served by the project.

The staff calculates the 50-year projected levelized alternative energy cost in the region in 1992 to be about 85 mills per kilowatt-hour (kWh). This is the levelized unit cost of energy from coal-fueled steam electric plants assumed to be needed in the year 2002, and the value of displaced fuel consumption in existing coal-fueled steam plants until that time. The staff assumed that new coal plant generating resources would be required within the region by the year 2002, based upon the projected need for additional generating resources, by the investor-owned utilities in the Pacific Northwest Region, as discussed in the Need for Power section of this assessment.

**42 The applicants entered into a contract with IPC for the development of power facilities at the Milner site. Under the terms of the contract, IPC would receive the total project power production and would pay the total project costs plus two mills/kWh (escalating 25 percent every 5 years) for all energy produced. The applicants would use the escalating energy payment, which is equivalent to 3.13 mills/kWh when levelized over 50 years, to help offset the costs of repairing the dam, as described in the Dam Safety section of this assessment.

The staff evaluated the economics of the 44-MW project the applicant proposes to construct under various target flow conditions, assumed to be required in the bypass reach of the river between Milner Dam and the proposed powerhouse, to be located 1.6 miles downstream, as shown in Table 1.

Table 1. Summary of the generation, levelized net annual benefits, rate of return on investment (ROI), and levelized annual revenue to the licensee for the project, as proposed to be constructed by the licensee and to be operated under various mitigation/enhancement bypass-flow scenarios.

Table 1. Summary of the generation, levelized net annual benefits, rate of return on investment (ROI), and levelized annual revenue to the licensee for the project, as proposed to be constructed by the licensee and to be operated under various mitigation/enhancement bypass-flow scenarios.

Bypass flows	Average generation (GWh)	Levelized annual benefits	ROI	Levelized annual revenues
58 cfs year round	154	\$4,233,000	18.6%	\$482,400
58 cfs summer,				
150 cfs winter	151	\$3,995,000	18.2%	\$473,400
200 cfs year round	147	\$3,665,000	17.6%	\$460,100
300 cfs year round	143	\$3,305,000	17.0%	\$447,400
300 cfs summer,				
720 cfs winter	134	\$2,522,000	15.6%	\$419,400

*62332 The staff performed reconnaissance level feasibility studies evaluating the economic benefits of installing small units at the base of Milner Dam to utilize the flows that would be released at the dam. The potential power facilities to be located at Milner Dam were sized as shown in Table 2.

Table 2. Milner Dam hydraulic capacity for various environmental mitigation/enhancement bypass flows.

Bypass flow	Unit hydraulic capacity
58 cfs year round.	50-150 cfs unit
58 cfs summer, 150 cfs winter.	50-150 cfs unit
200 cfs year round.	200-600 cfs unit
300 cfs year round.	300-900 cfs unit
300 cfs summer, 720 cfs winter.	300-900 cfs unit

The staff evaluated the economic benefits of developing capacity at Milner Dam to utilize the bypass flows as shown in Table 3.

Table 3. Summary of the generation, levelized net annual benefits, ROI, and levelized annual revenue to the licensee for generating capacity installed at Milner Dam, for various mitigation/enhancement bypass flows.

Bypass flows	Average generation (GWh)	Capacity	Levelized annual benefits	ROI	Levelized annual revenues
58 cfs.	3.8	1 MW	(\$ 46,200)	9.5%	\$11,700
58-150 cfs.	4.4	1 MW	\$ 5,000	11.2%	\$13,700
200 cfs.	11.3	3 MW	\$304,000	16.4%	\$35,400
300 cfs.	13.5	4 MW	\$304,000	15.2%	\$42,200
300-720 cfs.	16.2	4 MW	\$525,500	18.2%	\$50,700

Since the reconnaissance-level feasibility studies show that the addition of capacity at Milner Dam may be economically beneficial compared to the alternative cost of energy in the region, any license issued should include Article 308, requiring that the licensees study the feasibility of installing generating capacity at the dam, and, if the installation is feasible, requiring the licensees to submit a plan for developing the capacity.

The staff evaluated the economic benefits of developing the combination of the proposed project powerhouse, and a power plant at the dam as shown in Table 4.

Table 4. Summary of levelized annual benefits of combined development of a powerhouse at Milner Dam as well as the power plant proposed to be developed downstream, for various mitigation/enhancement by pass flows.

	Combined	Gen.	Levelized	Levelized
	capacity	(GWh)	annual	annual
Bypass flows			benefits	revenues
58 cfs	44 MW ¹	154	\$4,233,000	\$482,400
58-150 cfs	45 MW	155	\$4,238,000	\$487,400
200 cfs	47 MW	158	\$3,969,000	\$494,500
300 cfs	48 MW	156	\$3,609,000	\$497,700
300-720 cfs	48 MW	150	\$3,048,000	\$469,500

FN1. This scenario is the same as the proposed scenario with a downstream powerhouse only, since installing a unit at the dam would not be economically beneficial under this bypass flow.

*62333 The staff evaluated the amounts and levelized costs of water that the applicants would need to lease from the Water Bank to meet the recommended mitigation/enhancement bypass flows as shown in Table 5.

The current cost of water from the Water Bank is \$2.50 per acre-foot per year. In its studies, the staff used a cost of \$4.32 per acre-foot, which is the levelized cost of water over 50 years, assuming that the cost of water would escalate at 5 percent annually.

Table 5. Amounts and levelized costs of the CWB needed to be leased from the Water Bank to meet various mitigation/enhancement bypass flows.

Bypass flows	Storage (acre-feet) required	Levelized average annual cost
58 cfs	3,586	\$15,500
58-150 cfs	3,586	\$15,500
200 cfs	11,246	\$48,600
300 cfs	22,729	\$98,200

300-720 cfs

22,729

\$98,200

The staff evaluated the net annual benefits of the project including the projected cost of the CWB water for various mitigation/ enhancement bypass flows, as shown in Table 6.

Table 6. Summary of the levelized net annual benefits of the project, and combined project (including a power plant at the dam) for various mitigation/ enhancement bypass flow requirements including the levelized annual cost of the CWB.

	Proposed project lev. annual benefits	Combined project lev. annual benefits
Bypass flows		
58 cfs year round	\$4,217,500	\$4,217,500
58 cfs summer, 150 cfs winter	\$3,979,500	\$4,222,500
200 cfs year round	\$3,616,400	\$3,920,400
300 cfs year round	\$3,206,800	\$3,510,800
300 cfs summer, 720 cfs winter	\$2,423,800	\$2,949,800

In order to preserve the high-flow-condition kayaking opportunities that occur in the April- May period in the bypass reach of the river below Milner Dam, the environmental staff recommends requiring the main powerhouse to be shut-down during daylight hours in the April-May period, for the equivalent of eight full-load hours of operation (4000 cfs) for eight days, in accordance with proposed license Article 413. A shutdown of the main power plant during the spring would reduce the project generation by 42,000 kWh for each hour of shut down. The total reduction in project generation for the equivalent of 64 hours of full-load shut down is 2,688,000 kWh. At the regional levelized energy value of 85 mills/kWh, the shutdown would reduce the project benefits by approximately \$228,000 annually. The shut down would reduce the project generation and therefore the revenues that the licensees would receive under the power purchase contract with IPC. The levelized value of the lost revenues to the licensees over the license period would be approximately \$8,400 annually.

**43 The net annual benefits of the project including the projected cost of the spring bypass flow for kayaking under and for the other various mitigation/enhancement bypass flows, and the revenues to be received by the licensees are shown in Table 7.

Table 7. Summary of the licensees' levelized annual revenues, and the levelized net annual benefits of

the project as proposed, and the combined project (including a power plant at the dam) for various water quality and fishery mitigation/enhancement bypass flow requirements, including the levelized annual cost of the CWB, and the cost of plant shut-down for kayaking mitigation.

	Proposed project lev. annual benefits	Proposed project licensee revenues	Combined project lev. annual benefits	Combined project licensee revenues
Bypass flows 58 cfs year round. 58 summer,.	\$3,989,500	\$474,000	\$3,989,500	\$474,000
150 cfs winter.	\$3,751,500	\$465,000	\$3,994,500	\$479,000
200 cfs year round.	\$3,388,400	\$451,700	\$3,692,400	\$486,100
300 cfs year round.	\$2,978,800	\$439,000	\$3,282,800	\$489,300
300 cfs summer,.				
720 cfs winter.	\$2,195,800	\$411,000	\$2,721,800	\$461,100

*62334 The benefits and revenues for the combined project development scenario, as shown in on Table 7., is the same as for the proposed project, with a downstream powerhouse only, because installing a unit at the dam would not be economically beneficial under a 58-cfs bypass flow.

The levelized net annual benefits and revenues of the project to the licensees and IPC under the purchase power contract between the two with the mitigation/enhancement provisions discussed herein are summarized in Table 8 (without the generating unit at the dam) and Table 9 (with the generating unit at the dam).

Table 8. Summary of levelized net annual benefits and revenues to the licensees and IPC with mitigation/enhancement provisions

without a generating unit
at the dam.

Total Project Benefits or Revenues as proposed	Project	To Licensees	To IPC
.58 cfs Summer, .150 cfs Winter	\$3,979,500	\$473,400	\$3,506,100
<i>Loss of Benefits or Revenues for Proposals</i>			
.200 cfs Bypass Flow	330,000#13,300	316,700	
.Water Bank Purchase	33,100	0	33,100
.8-day Kayaking Flows	228,000	8,400	219,600
.Total Mitigation Costs	591,100	21,700	569,400
.Total Project Benefits or Revenues as Mitig- ated	\$3,388,400	\$451,700	\$2,936,700

Table 9. Summary of
levelized net annual be-
nefits and revenues to
the licensees and IPC
with mitigation/en-
hancement provisions
without a generating unit
at the dam.

Total Project Benefits or Revenues as proposed	Project	To Licensees	To IPC
.58 cfs SUMMER, .150 cfs Winter	\$3,979,500	\$473,400	\$3,506,100
<i>Loss or Benefits or Revenues for Proposals</i>			
.200 cfs Bypass Flow	26,000	(21,100)	47,100
.Water Bank Purchase	33,100	0	33,100
.8-day Kayaking Flows	228,000	8,400	219,600
.Total Mitigation Costs	287,100	(12,700)	299,900
.Total Project Benefits or Revenues as Mitig- ated	\$3,692,400	\$486,100	\$3,206,300

Because the economic studies for the proposed project, for all cases evaluated, show that the project power costs less than the levelized alternative regional cost of power, the project is economically beneficial. Because the applicants have

entered into a contract to sell all of the project power to IPC, the proposed project is financially feasible.

The applicants stated that the primary purpose of proposing this project is to provide revenues to aid in paying for the dam rehabilitation, previously discussed in the Project *62335 Safety section of this assessment. In 1984, the cost of rehabilitating Milner Dam was projected to be approximately \$7 million. The staff estimates the minimum long-term annual carrying charges of financing the work to be approximately \$700,000. The annual revenues that the applicant would receive from IPC under the power purchase contract are projected to range from about \$411,000 to about \$489,000 for the various bypass-flow scenarios evaluated, so that the applicants would be required to provide from about \$200,000 up to about \$300,000 of the annual debt service from irrigation revenues.

Need for Power

The Northwest Power Planning Council's (NPPC) August 1988 draft update of its 1986 Northwest Power Plan (Update) shows regional resource deficits in the NPPC area in about 1992 and 2000 with medium-high and medium-low load growth scenarios, respectively. A medium load growth scenario, developed cooperatively with the Bonneville Power Administration (BPA) and included in the Update but not in the Update resource portfolios, could produce deficits about 1996. All three of these forecasts are considered to be equally probable in the probability distribution of load uncertainty assumed for development of the Update power plan. The high load projection could produce deficits by 1991, and under the low load scenario deficits would not occur before 2010. The probability distribution assumes a 76 percent probability that load will equal or exceed the medium-low load growth scenario.

The 1988 projections of the Pacific North west Utilities Conference Committee (PNUCC) project that regional resource deficits would occur in about 1994-1995 under medium load growth assumptions.

**44 NPPC, BPA, and PNUCC all acknowledge that resource deficits could occur on the investor-owned utility (IOU) systems in the NPPC area before occurring in the NPPC area as a whole. The PNUCC shows IOU deficits occur ring as early as 1992-1993 under medium load growth assumptions and currently planned power purchases from BPA. The NPPC Update states that there has been little evidence to date that the NPPC area is moving toward coordinated resource development (the primary theme upon which the plan is formulated). Public utilities in the area are said to perceive the BPA future as being uncertain and to seek a higher degree of independence from BPA. This same perception of an uncertain future has discouraged IOU's from placing any significant amounts of load on the BPA system. Many of NPPC's area high load growth areas are served by IOU's that have fewer resources to meet their power requirements than the publicly owned systems. The absence of area wide coordinated planning could cause resource deficits on the IOU systems as early as 1989 and a need for additional generating resources on the IOU systems as early as 1993, under a medium-high load scenario.

Based on these predictions, a need for power could exist in the NPPC area any time from the early 1990's to late 1990's, and hydro resources coming on-line in the early 1990's could be useful in meeting a small part of that need for power. NPPC has also identified 630 average MW of new hydro power potential that adheres to development constraints imposed by the federal stream protection program and the NPPC protected areas program. The proposed project could provide a small portion of this hydro requirement.

Alternatives to the Proposed Project

Because the applicants are not electric utilities, the available options are to construct or not construct the project. If the license is not issued, the project would not be constructed, and the power that would have been developed from a renewable resource would be lost and eventually would have to be provided using nonrenewable fuels.

If the license is not issued, the applicants will not receive power generation revenues, and would therefore have to

provide the total costs for the Milner Dam rehabilitation from irrigation revenues.

Exhibits

The following sections of Exhibit A and Exhibit F drawings, filed July 27, 1988, con form to the Commission's rules and regulations and should be approved and made a part of the license:

Exhibit A - Section III Turbine and Generator, Section IV Electrical Transmission, and Section V Accessory Equipment.

Exhibit F

Exhibit	FERC No.	Title
F-1	2899-1	Key and General Plans and Canal Sections
F-2	2899-2	Canal and Forebay Embankment Sections
F-3	2899-3	Headworks and Wasteway Plans, Sections & Details
F-4	2899-4	Control Structure Plan and Sections
F-5	2899-5	Intake Structure Plan and Section
F-6	2899-6	Powerhouse and Vicinity Plan, Profile and Sections
F-7	2899-7	Powerhouse Plans
F-8	2899-8	Powerhouse Sections
F-10	2899-10	Milner Dam Rehabilitation Plan
F-11	2899-11	New Spillway Plan and Section
F-12	2899-12	Dam Embankment Sections

FN1. All elevations are relative to mean sea level.

*62336 Elizabeth A. Moler, Commissioner, *concurring*:

I support the Commission's expedited action issuing the license in this proceeding. I do so principally because of the need to act quickly so that the applicants will be able to obtain the funds necessary to strengthen the dam.

I am aware that there are important water law issues embodied in this case. The order is consistent with the Commission's prior actions interpreting its statutory responsibilities under Section 10(a)(1) of the FPA;^[FN1] however, it represents the first time I have participated in a case involving this particular matter of statutory interpretation. Ordinarily I would have asked to delay this case until I had a lengthier opportunity to review the legal issues presented. In this case, however, the public safety issue argues against a delay.

**45 I would note that the United States Court of Appeals for the Ninth Circuit is currently considering a case involving the Commission's interpretation of Section 10(a)(1).^[FN2]

I await the results of that litigation with interest. I do not want my participation in this case to indicate that I have come to any definitive legal conclusion on the matter.

FN1. See, e.g., *Horseshoe Bend Hydroelectric Company*, 42 FERC ¶61, 072.

FN2. *ate of Calif. ex. rel. Water Resources Control Board v. FERC* (9th Cir. No. 87-7538).

Federal Energy Regulatory Commission

45 FERC P 61423, 1988 WL 246992 (F.E.R.C.)
END OF DOCUMENT

Attachment P

The Department received written requests for notice for an opportunity to be heard on the form of the subordination condition to be included on the license for Water Right No. 01-7011 from the Bingham Ground Water District on January 11, 2007; from the Idaho Ground Water Appropriators, Inc. on February 7, 2007; for and on behalf of its ground water districts and other members, represented by the law firm of Racine Olson Nye Budge & Bailey, Chartered; and from the Mud Lake Water Users, Independent Water Users, Jefferson Canal Co., Montevue Canal Co., and Producer's Canal Co., on April 16, 2007, represented by the law firm of Holden, Kidwell, Hahn & Crapo, P.L.L.C.

NOW THEREFORE NOTICE IS HEREBY GIVEN that the Department will accept and consider written Comments from the Permit Holders and other interested persons or entities addressing the form of the subordination condition that should be included on the license for Water Right No. 01-7011. Any Comments submitted should be addressed to Director, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098 and received by the Department or post marked on or before October 10, 2007.

DATED this 5th day of September 2007.



DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September 2007, I caused a true and correct copy of the foregoing Notice of Intent to Issue License to be sent by U.S. Mail, postage paid to the following:

John A. Rosholt, Esq.
Barker Rosholt & Simpson LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, ID 83303-00485

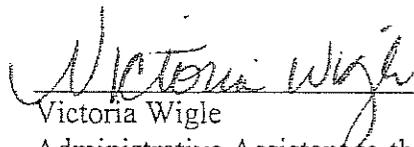
Craig B. Evans, Chairman
Bingham Ground Water District
1725 Riverton Road
P.O. Box 1268
Blackfoot, Idaho 83221

Randall C. Budge, Esq.
Racine Olson Nye Budge & Bailey
201 East Center Street
P.O. Box 1391
Pocatello, Idaho 83204-1391

Lyle Swank, Manager
Department of Water Resources
Eastern Regional Office
900 North Skyline Dr., Ste A
Idaho Falls, ID 83402-1718

Kent W. Foster, Esq.
Robert L. Harris, Esq.
1000 Riverwalk Dr. Suite 200
P.O. Box 50130
Idaho Falls, Idaho 83405

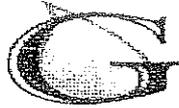
Allen D. Merritt, Manager
Department of Water Resources
Southern Regional Office
1341 Fillmore Street, Suite 200
Twin Falls, ID 83301-3380


Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

Attachment Q

File in 01-7011

A



BINGHAM GROUNDWATER DISTRICT

RECEIVED

JAN 11 2007

DEPARTMENT OF
WATER RESOURCES

P.O. BOX 1268
1725 Riverton Road
Blackfoot, Idaho 83221

Phone (208) 684-9634
Fax (208) 785-4299
binghamgroundwtr@cableone.net

Faxed on JAN 9, 2007

Mailed on JAN 9, 2007

January 9, 2007

Idaho Department of Water Resources
Interim Director, David Tuthill *DTW*
322 E Front St., P.O. Box 83720
Boise, ID 83720-0098
Ph: (208) 287-4800
Fx: (208) 287-6700

Dear Mr. Tuthill:

Re: Milner Hydropower Permit 01-7011

Bingham Groundwater District requests that the above referenced water right be granted license status only if fully subordinated. We also request that we be included as a protestant if there is any action taken by the Idaho Department of Water Resources on this right other than full subordination.

Yours truly,

Craig B. Evans, Chairman, Board of Directors
Bingham Groundwater District

Attachment R

File # 01-7011

Dave

LAW OFFICES OF

**RACINE OLSON NYE BUDGE & BAILEY
CHARTERED**

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FACSIMILE (208) 232-6109

www.racinelaw.net

SENDER'S E-MAIL ADDRESS: rcb@racinelaw.net

BOISE OFFICE

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IDAHO FALLS OFFICE

477 SHOUP AVENUE
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*ALSO MEMBER WY & IL BARS
**ALSO MEMBER UT BAR
***ALSO MEMBER CO BAR
†ALSO MEMBER D. C. BAR
‡ALSO MEMBER MO BAR
§ALSO MEMBER IL BAR
¶ALSO MEMBER WA BAR

LOUIS F. RACINE (1917-2005)
WILLIAM D. OLSON
W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODELL*
JOHN B. INGELSTROM
DANIEL C. GREEN**
BRENT O. ROCHE
KIRK B. HADLEY
FRED J. LEWIS
MITCHELL W. BROWN
ERIC L. OLSEN
CONRAD J. AIKEN***
RICHARD A. HEARN, M.D.†
DAVID E. ALEXANDERT†
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DAVE BAGLEY
CAROL TIPPI VOLYN‡
THOMAS J. BUDGE
CANDICE M. MCHUGH***

February 5, 2007

David R. Tuthill, Jr., Director
Idaho Department of Water Resources
322 E. Front Street
P.O. Box 83720
Boise, Idaho 83720-0098

Re: TFCC/NSCC Permit No. 01-7011
Milner Dam Hydro

Dear Mr. Tuthill:

This letter requests that the Idaho Ground Water Appropriators (IGWA), acting for and on behalf of its ground water districts and other members, be advised of any notices, correspondence or actions taken by the Idaho Department of Water Resources (Department) with regards to Permit No. 01-7011, the Milner Dam siting of Twin Falls and North Side Canal Companies.

This Application was originally filed by Twin Falls Canal Company (TFCC) and North Side Canal Company (NSCC) on March 30, 1977 seeking a permit to appropriate 12,000 cfs for power purposes at Milner Dam. Notice of the Application was published May 16 and 26, 1977. At that time, well before the Swan Falls controversy and resulting settlement, there was a widespread assumption and belief that all power rights were subordinate to all upstream depletions. After the publication, we are informed by Department representatives and upstream users that numerous inquiries were made to the Department expressing concerns about the Application and whether protests were needed to protect their interests. In response, Department representatives, including then Eastern Region Manager and District One Watermaster, Ronald D. Carlson, provided assurance that the proposed hydro power water rights were unquestionably subordinated to all upstream uses

February 5, 2007

Page 2

and development and that there was no reason to be concerned or protest the Application. Protests were not filed in reasonable reliance upon these representations.

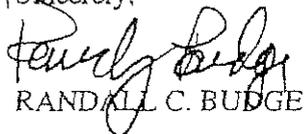
On June 29, 1977, the Department approved Permit No. 01-7011 for power purposes. Appropriate and necessary conditions including subordination were omitted by the Department for reasons unknown. Proof of beneficial use was originally due June 1, 1982. However, the proof of beneficial use due date was changed several times with the latest approval requiring proof of beneficial use on November 1, 1993. Proof of beneficial use was submitted by the applicant on October 30, 1993, and the permit is waiting for action by the Department.

Upon review of this permit file, IGWA believes that any license issued for the above permit must include a condition that is consistent with Policy 32 of the State Water Plan adopted and approved by the Idaho Water Resources Board and codified at Idaho Code §42-1736B and the Department's recommendations in the SRBA that recognize that there is a "zero flow" at Milner Dam (see recommendations for example for water right numbers 2-200, 2-201, 2-223, 2-224, and General Provision No. 4 for Basin 02).

Any license for this water right must include a condition that subordinates this water right to all existing and future uses, including recharge water rights in order to not violate state law or policy and in order to not undermine efforts to effectively manage the Eastern Snake Plain Aquifer. To do otherwise would deprive interested parties and adversely affected right holders of due process and an opportunity to be heard by reason of the above-described representations of the Department at the time of publication. At a minimum, the Application would need to be re-advertised under these irregular and unusual circumstances.

Thus, IGWA respectfully requests that it be advised of any notices, correspondence, or other actions the Department may take with regards to Permit No. 01-7011. Please direct any correspondence or documents to me at Racine, Olson, Nye, Budge & Bailey, Chartered, P.O. Box 1391, Pocatello, Idaho 83204-1391.

Sincerely,


RANDALL C. BUDGE

RCB:rr

cc: IGWA:

Tim Deeg, President
Lynn Tominaga, Executive Director
Executive Committee

Idaho Water Resource board:

Jerry Rigby, Chairman
Hal Anderson, Secretary

Attachment S

Permit 01-7011 File

Law Offices
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Arthur W. Holden
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Robert B. Holden
(1911-1971)
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William S. Holden
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Of Counsel
Fred J. Hahn

*Also Licensed in Missouri & Kansas
**Also Licensed in Utah & Colorado

April 13, 2007

APR 16 2007
DEPARTMENT OF
WATER RESOURCES

David R. Tuthill, Jr. *DR*
Interim Director
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098

Re: Permit No. 01-7011 – Twin Falls Canal Co. & Northside Canal Co. Hydropower Permit

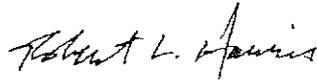
Dear Director Tuthill:

This letter requests that we, acting on behalf of Mud Lake Water Users, Independent Water Users, Jefferson Canal Co., Montevue Canal Co., and Producer's Canal Co., be advised of any notices, correspondence or actions taken by the Idaho Department of Water Resources with regards to Permit No. 01-7011, the Hydropower Application for Permit filed by Twin Falls and Northside Canal Companies for hydropower generated at Milner Dam.

Enclosed with this letter is a similar letter prepared by Randy Budge on behalf of Idaho Groundwater Appropriators (IGWA). We have reviewed this letter, and concur with its contents. Just like IGWA, we believe this permit is significant, particularly to those water users located upgradient to Milner Dam. Thus, we respectfully request we be advised of any notices, correspondence, or other actions the Department may take with regards to Permit No. 01-7011. All correspondence or documents may be sent to Holden, Kidwell, Hahn & Crapo, PLLC, PO Box 50130, Idaho Falls, ID 83405-0130, with attention directed to either Kent W. Foster or Robert L. Harris. We appreciate your attention to this matter. If you have any questions or concerns regarding our request, please do not hesitate to contact us.

David R. Tuthill, Jr.
Idaho Department of Water Resources
April 13, 2007
Page 2 of 2

Sincerely,



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Enclosure

c: Mud Lake Water Users, Inc.
Independent Water Users
Jefferson Irrigation District
Monteview Canal Co.
Producer's Irrigation District

Attachment T

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IDAPA 37
TITLE 03
CHAPTER 08

37.03.08 - WATER APPROPRIATION RULES

000. LEGAL AUTHORITY (RULE 0).

The Director of the Department of Water Resources adopts these rules under the authority provided by Section 42-1805(8), Idaho Code. (7-1-93)

001. TITLE AND SCOPE (RULE 1).

01. Title. (7-1-93)

02. Scope. (7-1-93)

a. **Background and Purpose.** The 1985 Idaho Legislature authorized reallocation of certain hydropower water rights to new upstream beneficial uses. The reallocation is to be accomplished using statutes designed to provide for the appropriation of unappropriated public water supplemented by a public interest review of those reallocations which significantly reduce existing hydropower generation. These rules provide the procedures for obtaining the right to divert and use unappropriated public water as well as water previously appropriated for hydropower use which has been placed in trust with the State of Idaho and is subject to reallocation. Guidelines are provided for the filing and processing of applications, and criteria are established for determining the actions to be taken by the Director. (7-1-93)

b. **Scope and Applicability.** These rules are applicable to appropriations from all sources of unappropriated public water in the state of Idaho under the authority of Chapter 2, Title 42, Idaho Code. Sources of public water include rivers, streams, springs, lakes and groundwater. The rules are also applicable to the reallocation of hydropower water rights held in trust by the state of Idaho. The rules are applicable to all applications to appropriate water filed with the Department of Water Resources prior to the effective date of these rules upon which an action to approve or deny the application is pending and to all applications filed subsequent to adoption of the rules and regulations. In addition, the rules are applicable to existing permits to appropriate water required to be reviewed under the provisions of Section 42-203D, Idaho Code. (7-1-93)

002. WRITTEN INTERPRETATIONS (RULE 2).

003. ADMINISTRATIVE APPEALS (RULE 3).

004. – 009. (RESERVED).

010. DEFINITIONS (RULE 10).

Unless the context otherwise requires, the following definitions govern these rules:

01. **Acre-Foot (AF).** A volume of water sufficient to cover one (1) acre of land one (1) foot deep and is equal to forty-three thousand five hundred sixty (43,560) cubic feet. (7-1-93)

02. **Advertisement.** The action taken by the Director to provide notice, usually by publication of a legal notice in one (1) or more newspapers, of a proposed appropriation or other notice required in administration of his duties and responsibilities. (7-1-93)

03. **Applicant.** The person, corporation, association, firm, governmental agency or other entity, or the holder of a permit being reprocessed pursuant to Section 42-203D, Idaho Code, who initiates an appropriation of water or related water matter for the Director's consideration. (7-1-93)

04. **Application for Permit.** The written request to the department on forms furnished by the department proposing to appropriate the public waters or trust waters of the state. (7-1-93)

05. **Board.** The Idaho Water Resource Board. (7-1-93)

06. **Beneficial Use.** One (1) or more of the recognized beneficial uses of water including but not limited to, domestic, municipal, irrigation, hydropower generation, industrial, commercial, recreation, stockwatering and fish propagation uses for which permits to appropriate water can be issued as well as other uses which provide a benefit to the user of the water as determined by the Director. Industrial use as used for purposes of these rules includes, but is not limited to, manufacturing, mining and processing uses of water. (7-1-93)

07. **Cubic Foot Per Second (CFS).** A rate of flow approximately equal to four hundred forty-eight and eight-tenths (448.8) gallons per minute and also equals fifty (50) Idaho miner's inches. (7-1-93)

08. **DCMI.** An acronym for domestic, commercial, municipal and industrial. In these rules it designates certain classes of these uses presumed to satisfy public interest requirements. Domestic use, for purposes of this definition, is water for one or more households and water used for all other purposes including irrigation of a residential lot in connection with each of the households where the diversion to each household does not exceed thirteen thousand (13,000) gallons per day. Also for purposes of this definition, commercial, municipal and industrial uses are any such uses which do not deplete the system containing the trust water more than two (2) acre feet per day. (7-1-93)

09. **Department.** The Idaho Department of Water Resources. (7-1-93)

10. **Director.** The Director of the Idaho Department of Water Resources. (7-1-93)

11. **Legal Subdivision.** A tract of land described by the government land survey and usually is described by government lot or quarter-quarter, section, township and range. A lot and block of a subdivision plat recorded with the county recorder may be used in addition to the quarter-quarter, section, township and range description. (7-1-93)

12. **Permit or Water Right Permit.** The water right document issued by the Director authorizing the diversion and use of unappropriated public water of the state or water held in trust by the state. (7-1-93)

13. **Priority, or Priority of Appropriation, or Priority Date.** The date of appropriation established in the development of a water right. The priority of a water right for public water or trust water is used to determine the order of water delivery from a source during times of shortage. The earlier or prior date being the better right. (7-1-93)

14. **Project Works.** A general term which includes diversion works, conveyance works, and any devices which may be used to apply the water to the intended use. Improvements which have been made as a result of application of water, such as land preparation for cultivation, are not a part of the project works. (7-1-93)

15. **Single Family Domestic Purposes.** Water for household use or livestock and water used for all other purposes including irrigation of up to one half (1/2) acre of land in connection with said household where total use is not in excess of thirteen thousand (13,000) gallons per day. (7-1-93)

16. **Subordinated Water Right.** 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. (7-1-93)

17. **Trust Water.** That portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided by Section 42-203B(3), Idaho Code. (7-1-93)

18. **Unappropriated Water.** The public water of the state of Idaho in streams, rivers, lakes, springs or groundwater in excess of that necessary to satisfy prior rights including prior rights reserved by federal law. (7-1-93)

011. -- 024. (RESERVED).

025. GENERAL DESCRIPTION OF THE PROCEDURE TO BE USED FOR ALLOCATION (RULE 25).

01. **Applications to Appropriate Unappropriated Water and Water Held in Trust.** Applications to appropriate unappropriated water and water held in trust as provided by Section 42-203B(3), Idaho Code, will be evaluated using the criteria of Section 42-203A, Idaho Code, which requires an assessment to be made of the impact of the proposed use on water availability for existing water rights, the adequacy of the water supply for the proposed use, whether the application is filed for speculative purposes, the financial ability of the applicant to complete the project, and the effect of the proposed use on the local public interest. (7-1-93)

02. **Applications to Appropriate Water from Sources Held by State in Trust.** Applications to appropriate water from sources on which the state holds water in trust, pursuant to Section 203B(5), Idaho Code, will be processed in a three-step analysis. Evaluation will consider the purposes of "trust water" established in Section 42-203B, Idaho Code. (7-1-93)

a. First, the proposed use must be evaluated using the procedures and criteria of Section 42-203A, Idaho Code. If all criteria of Section 42-203A(5), Idaho Code, are satisfied, the application may be approved for unappropriated water. If the application does not satisfy the criteria of Section 42-203A(5) b, c, d, and e, Idaho Code, or is found to reduce the water to existing water rights other than those held in trust by the state, the application will be denied. If the application satisfies all criteria of Section 42-203A(5), Idaho Code, except Section 42-203A(5)a, Idaho Code, but is found to reduce water held in trust by the state, the application will be reviewed under criteria of Section 42-203C, Idaho Code. (7-1-93)

b. Second, Section 42-203C, Idaho Code, requires a determination of whether the proposed use will significantly reduce, individually or cumulatively with existing uses and other uses reasonably likely to exist within twelve months of the proposed use, the amount of trust water available to the holder of the water right used for power production that is defined by agreement pursuant to subsection (5) of Section 42-203B, Idaho Code (hereinafter termed "significant reduction"). If a significant reduction will not occur, the application may be approved without an evaluation of the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

c. Third, based upon a finding of significant reduction, the proposed use will be evaluated in terms of the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

026. – 029. (RESERVED).

030. **LOCATION AND NATURE OF TRUST WATER (RULE 30).**

01. **Snake River Water Rights Agreement.** The legislation ratifying the Snake River water rights agreement between the state of Idaho and Idaho Power Company places in trust a part of the flows available to Idaho Power Company under its hydropower water rights in the Snake River Basin between Swan Falls Dam and Milner Dam. The flows subject to the trust water provisions and reallocation under Section 42-203C(2), Idaho Code, are as follows: (7-1-93)

a. Trust water flows under the Snake River water rights agreement are located in the Snake River between Swan Falls Dam located in Section 18, Township 2 South, Range 1 East, Boise Meridian (B.M.) and Milner Dam located in Sections 28 and 29, Township 10 South, Range 21 East, Boise Meridian (B.M.) and all surface and groundwater sources tributary to the Snake River in that reach. (7-1-93)

b. Surface water and groundwater tributary to the Snake River upstream from Milner Dam is not trust water. After giving notice and considering public comment, the Director will designate the area in which groundwater is presumed to be tributary to the Snake River upstream from Milner Dam. Modification or changes in the designated boundary may be made only after providing notice and considering public comment. The area presently designated as tributary to the Snake River in the Milner Dam to Swan Falls Dam reach is appended to these rules (See Attachment A in APPENDIX A located at the end of this chapter), for information purposes only. (7-1-93)

c. Trust water flows under the Snake River water rights agreement are those occurring in the Snake River and tributaries in the geographic area designated in Rule Subsection 030.01.a. which exceed the established *minimum stream flows but are less than the water rights for hydropower generating facilities in the Swan Falls Dam to Milner Dam reach of Snake River, to the extent such rights were unsubordinated prior to the Snake River water*

rights agreement. Minimum average daily flows have been established by action of the Water Resource Board and legislature at the U.S. Geological Survey gauging station located near Murphy (Section 35, Township 1 South, Range 1 West B.M.) in the amount of three thousand nine hundred (3900) cfs from April 1 to October 31 and five thousand six hundred (5600) cfs from November 1 to March 31, and at Milner gauging station located in Section 29, Township 10 South, Range 21 East, B.M. in the amount of zero (0) cfs from January 1 to December 31. (7-1-93)

02. **Trust Water Created by State Action.** Section 42-203B(3), Idaho Code, provides that trust water can be created by state action establishing a minimum flow without an agreement with the holder of the hydropower water right. Allocation of trust water so established will be pursuant to state law except the criteria of Section 42-203C, Idaho Code, will not be considered. (7-1-93)

03. **Sources of Public Water Not Trust Water.** The following sources of public water are not trust water and are not subject to the public interest provisions of Section 42-203C, Idaho Code: (7-1-93)

a. Sources or tributaries to sources upon which no hydropower generating facilities are located downstream within the state of Idaho (Example - Salmon River). (7-1-93)

b. Sources or tributaries to sources which have a state hydropower water right permit or license or Federal Energy Regulatory Commission license which have not been subordinated, and the state of Idaho has not entered into an agreement with the holder of the hydropower water right pursuant to Section 42-203B(2), Idaho Code, and the State of Idaho has not established a minimum stream flow for purposes of protecting hydropower generation. (7-1-93)

c. Sources or tributaries to sources for which a state hydropower water right permit or license, or the Federal Energy Regulatory Commission license included a subordination condition. Such flows are considered to be public waters subject to appropriation under the provisions of Section 42-203A, Idaho Code (Example - Snake River downstream from Murphy gauging station). (7-1-93)

d. Flows in excess of established rights including rights used for hydropower purposes. Such flows are unappropriated waters subject to allocation under Section 42-203A, Idaho Code. (7-1-93)

e. Flows in the Snake River upstream from Milner Dam and all surface and groundwater tributaries to that reach. Such flows are subject to allocation under Section 42-203A, Idaho Code, without consideration of water rights existing downstream from Milner Dam (Reference: 42-203B(2), Idaho Code). (7-1-93)

031. -- 034. (RESERVED).

035. **APPLICATION REQUIREMENTS (RULE 35).**

01. **General Provisions.** (7-1-93)

a. No person shall commence the construction of any project works or commence the diversion of the public water or trust water of the state of Idaho from any source or change the point of diversion, place, period or nature of use of any existing water right without first having filed an application for permit to appropriate the water or other appropriate form with the department and received approval from the Director, unless exempted by these rules or by statute. (7-1-93)

b. Any person proposing to commence a diversion of the public water or the trust water of the state of Idaho from a groundwater source for single family domestic purposes is exempt from the application and permit requirements of Rule Subsection 035.01.a. Any person proposing to add a single family domestic use to an existing groundwater diversion including one used for single family domestic purposes is exempt from the provisions of Rule Subsection 035.01.a. (7-1-93)

c. Any person watering livestock directly from a natural stream or natural lake without the use of a constructed diversion works is exempt from Rule Subsection 035.01.a. (7-1-93)

d. All applications for permit to appropriate public water or trust water of the state of Idaho shall be

on the form provided by the department entitled "Application for Permit to Appropriate the Public Waters of the State of Idaho" and shall include all necessary information as described in Rule Subsection 035.03. An application for permit that is not complete as described in Rule Subsection 035.03 will not be accepted for filing and will be returned along with any fees submitted to the person submitting the application. No priority will be established by an incomplete application. Applications meeting the requirements of Rule Subsection 035.03. will be accepted for filing and will be endorsed by the department as to the time and date received. The acceptability of applications requiring clarification or corrections shall be determined by the Director. (7-1-93)

e. The department will correspond with the applicant concerning applications which have been accepted for filing by the department which require clarification or correction of the information required by Rule Subsection 035.03. If the additional or corrected information is supplied after thirty (30) days, the priority date of the application will be determined by the date the additional or corrected information is received by the department unless the applicant has requested within the thirty (30) day period additional time to provide the information, has shown good reasons for needing additional time, and the Director has granted additional time. (7-1-93)

f. Failure to submit the additional or corrected information is cause for the Director to void the department's records of the application. (7-1-93)

02. Effect of an Application. (7-1-93)

a. Any application, whether filed before or after promulgation of these rules, which seeks to appropriate water from a source upon which the state holds trust water shall be considered an application for appropriation of unappropriated water. If the Director determines unappropriated water is not available, the application, if otherwise approvable, will be reviewed for compliance with provisions of Section 42-203C, Idaho Code. (7-1-93)

b. The priority of an application for unappropriated or trust water is established as of the time and date the application is received in complete form along with the statutory fee in any official office of the department. The priority of the application, remains fixed unless changed by action of the Director in accordance with applicable law. (7-1-93)

c. An application for permit to appropriate water is not a water right and does not authorize diversion or use of water until approved by the Director in accordance with statutes in effect at the time the application is approved. (7-1-93)

d. An applicant's interest in an application for permit to appropriate water is personal property. An assignment of interest in an application must include evidence satisfactory to the Director that the application was not filed for speculative purposes. (7-1-93)

03. Requirements for Applications to Be Acceptable for Filing. (7-1-93)

a. The department form entitled "Application for Permit to Appropriate the Public Waters of the State of Idaho" (hereafter termed "application for permit form") is the required form to apply for either unappropriated water or trust water. (7-1-93)

b. The following information shall be shown on an application for permit form and submitted together with the statutory fee to an office of the department before the application for permit may be accepted for filing by the department. (7-1-93)

i. The name and post office address of the applicant shall be listed. If the application is in the name of a corporation, the names and addresses of its directors and officers shall be provided. If the application is filed by or on behalf of a partnership or joint venture, the application shall provide the names and addresses of all partners and shall designate the managing partner, if any. (7-1-93)

ii. The name of the water source sought to be appropriated shall be listed. For surface water sources, the source of water shall be identified by the official geographic name listed on the U.S. Geological Survey Quadrangle map, or if no official name has been given, by the name in local common usage. If the source has not

been named, it can be described as "unnamed," but the system or river to which it is tributary shall be identified. For groundwater sources, the source shall be listed as "groundwater." Only one source shall be listed on an application unless the application is for a single system which will have more than one source. (7-1-93)

iii. The legal description of the point of diversion and place of use shall be listed. The location of the point(s) of diversion and the place of use shall be described to the nearest forty (40) acre subdivision or U.S. Government Lot of the Public Land Survey System. The location of springs shall be described to the nearest ten (10) acre tract. Subdivision names, lot and block numbers and any name in local common usage for the point of diversion, or place of use shall be included in the comments section of the application form. If irrigation is listed as a purpose of use, the number of acres in each forty (40) acre subdivision of the place of use shall be listed. (7-1-93)

iv. The quantity of water to be diverted shall be listed as a rate of flow in cubic feet per second and/or as a volume to be stored in acre-feet per year for each purpose of use requested. (7-1-93)

v. Impoundment (storage) applications shall show the maximum acre-feet requirement per year which shall not exceed the storage capacity of the impoundment structure unless the application describes a plan of operation for filling the reservoir more than once per year. (7-1-93)

vi. Every offstream storage impoundment application shall show a maximum rate of diversion to storage as well as the total storage volume. (7-1-93)

vii. The nature of the proposed beneficial use or uses of the water shall be listed. While the purpose may be described in general terms such as irrigation, industrial or municipal, a description sufficient to identify the proposed use or uses of the water shall also be included. (7-1-93)

viii. The period of each year during which water will be diverted, stored and beneficially used shall be listed. The period of use for irrigation purposes shall coincide with the annual periods of use shown in Figure 1 in APPENDIX B (located at the end of this chapter), unless it can be shown to the satisfaction of the Director that a different period of use is necessary. (7-1-93)

ix. The proposed method of diversion, conveyance system and system for distributing and using the water shall be described. (7-1-93)

x. The period of time required for completion of the project works and application of water to the proposed use shall be listed. This period of time shall not exceed the time required to diligently and uninterruptedly apply the water to beneficial use and shall not exceed five (5) years. (7-1-93)

xi. A map or plat of sufficient scale (not less than two (2) inches equal to one (1) mile) to show the project proposed shall be included. The map or plat shall agree with the legal descriptions and other information shown on the application. (7-1-93)

xii. The application form shall be signed by the applicant listed on the application or evidence must be submitted to show that the signator has authority to sign the application. An application in more than one (1) name shall be signed by each applicant unless the names are joined by "or" or "and/or." (7-1-93)

xiii. Applications by corporations, companies or municipalities or other organizations shall be signed by an officer of the corporation or company or an elected official of the municipality or an individual authorized by the organization to sign the application. The signator's title shall be shown with the signature. (7-1-93)

xiv. Applications may be signed by a person having a current "power of attorney" authorized by the applicant. A copy of the "power of attorney" shall be included with the application. (7-1-93)

xv. An application signed by a mark or "X" must have the signator's name printed or typed nearby and the mark must have been witnessed and the application signed by the witness. (7-1-93)

xvi. Applications to appropriate water in connection with Carey Act or Desert Land Entry proposals shall include evidence that appropriate applications have been filed for the lands involved in the proposed project.

(7-1-93)

xvii. The application form shall be accompanied with a fee in the amount required by Section 42-221A, Idaho Code. (7-1-93)

04. Amended Applications. (7-1-93)

a. Applications for permit shall be amended whenever significant changes to the place, period or nature of the intended use, method or location of diversion or proposed use or uses of the water or other substantial changes from that shown on the pending application are intended. An application shall be amended if the proposed change will result in a greater rate of diversion or depletion (see Rule Subsection 035.04.c.), if the point of diversion, place of use, or point of discharge of the return flow are to be altered, if the period of the year that water will be used is to be changed, or if the nature of the use is to be changed. (7-1-93)

b. An application can be amended to clarify the name of the source of water but may not be amended to change the source of water. (7-1-93)

c. An amendment which increases the rate of diversion, increases the volume of water diverted per year or the volume of water depleted, lengthens the period of use, or adds an additional purpose of use shall result in the priority of the application for permit being changed to the date the amended application is received by the department. (7-1-93)

d. An application for permit may be amended by endorsement by the applicant or his agent on the original application for permit form which endorsement shall be initialed and dated. If the changes required to the information on the application are, in the judgment of the Director, substantial enough to cause confusion in interpreting the application form, the amended application shall be submitted on a new application for permit form to be designated as an amended application. (7-1-93)

e. An amended application shall be accompanied by the additional fee required by Section 42-221A, Idaho Code, if the total rate of diversion or total volume of storage requested is increased and by the fee required by Section 42-221F, Idaho Code, for readvertising if notice of the original application has been published. (7-1-93)

f. If the applicant's name or mailing address changes, the applicant shall in writing notify the department of the change. (7-1-93)

036. -- 039. (RESERVED).

040. PROCESSING APPLICATIONS FOR PERMIT AND REPROCESSING PERMITS (RULE 40).

01. General. (7-1-93)

a. Unprotected applications, whether for unappropriated water or trust water, will be processed using the following general steps: (7-1-93)

i. Advertisement and protest period; (7-1-93)

ii. Department review of applications and additional information, including department field review if determined to be necessary by the Director; (7-1-93)

iii. Fact finding hearing if determined to be necessary by the Director; (7-1-93)

iv. Director's decision; (7-1-93)

v. Section 42-1701A, Idaho Code, hearing, if requested; and (7-1-93)

vi. Director's decision affirmed or modified. (7-1-93)

- b. Protested applications, whether for unappropriated water or trust water, will be processed using the following general steps: (7-1-93)
- i. Advertisement and protest period; (7-1-93)
 - ii. Hearing and/or conference; (7-1-93)
 - iii. Department review of applications, hearing record and additional information including department field review if determined to be necessary by the Director. (7-1-93)
 - iv. Proposed decision (unless waived by parties); (7-1-93)
 - v. Briefing or oral argument in accordance with the department's adopted Rules of Procedure. (7-1-93)
 - vi. Director's decision accepting or modifying the proposed decision. (7-1-93)
- c. The Director's decision rejecting and denying approval of an application for permit filed for diversion from a source previously designated as a critical groundwater area or upon which a moratorium has previously been entered may be issued without advertisement of the application. (7-1-93)
- d. An applicant may request in writing that commencement of processing of his or her application be delayed for a period not to exceed one (1) year or that processing be interrupted for a period not to exceed six (6) months. The Director at his discretion may approve the request unless he determines that others will be injured by the delay or that the applicant seeks the delay for the purpose of speculation, or that the public interest of the people of Idaho will not be served by the delay. The Director may approve a request for delay for a shorter period of time or upon conditions, and may renew the approval upon written request. (7-1-93)
- e. As a condition of processing applications or reprocessing permits to reallocate trust water, the Director may require a cash bond or surety bond. Such bond up to five dollars (\$5) per acre of land requested to be irrigated or two hundred fifty (\$250) per cfs for other uses shall serve as a performance bond for satisfactory compliance with the permitted time requirements for commencement of construction, completion of project works and diversion of water to beneficial use. Failure to comply with the permitted time requirements, or such extension of time granted by the Director for good cause shown, is cause for the Director to require surrender of the bond amount to the department's Water Administration Account. The bond shall be returned to the permit holder upon satisfactory compliance with the permit's time requirements. (7-1-93)
- 02. Public Notice Requirement.** (7-1-93)
- a. Applications for permit which have not been advertised. (7-1-93)
 - i. Advertisement of applications for permit proposing a rate of diversion of ten (10) cfs or less or storage of one thousand (1000) AF or less shall comply with provisions of Section 42-203A, Idaho Code. The first required advertisement will be published on the first or third Thursday of a month when published in daily newspapers and on the first or third publishing day of the month for weekly newspapers. (7-1-93)
 - ii. Advertisement of applications for permit in excess of the amounts in Rule Subsection 040.02.a.i. shall comply with provisions of Rule Subsection 040.02.a.i. and shall also be published in a newspaper or newspapers to achieve statewide circulation. (7-1-93)
 - iii. Statewide circulation with respect to Section 42-203A(2), Idaho Code, shall be obtained by publication of a legal notice at least once each week for two (2) successive weeks in a newspaper, as defined in Section 60-106, Idaho Code, of general circulation in the county in which the point of diversion is located and by publication of a legal notice at least once each week for two (2) successive weeks in at least one (1) daily newspaper, as defined in Section 60-107, Idaho Code, published in each of the department's four (4) administrative regions and determined by the Director to be of general circulation within the department's region within which it is published. The administrative regions of the department are identified on Figure 2 in APPENDIX C (located at the end of this

chapter). The names of newspapers used for statewide publication are available from any department office. (7-1-93)

b. Applications for permit which have been advertised. (7-1-93)

i. Notice of applications for permit for water from the Snake River between Swan Falls Dam and Milner Dam or surface and groundwater tributaries to that reach of Snake River which were advertised prior to July 1, 1985 and have been held without final action by the department due to the Swan Falls controversy shall be readvertised by the Director in accordance with Rule Subsection 040.02.a. as appropriate to allow opportunity for protests to be entered with respect to the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

ii. Applications for permit from the Snake River or surface and groundwater sources upstream from Milner Dam which have been held without action due to the Swan Falls controversy may be processed without readvertisement. (7-1-93)

iii. The applicant shall pay the readvertisement fee provided in Section 42-221F, Idaho Code, prior to the readvertisement. (7-1-93)

iv. Failure to pay the readvertising fee within thirty (30) days after the applicant is notified to do so is cause for the Director to void the application. (7-1-93)

c. Notice of existing permits. (7-1-93)

i. Existing permits appropriating water held in trust by the state of Idaho issued prior to July 1, 1985, unless exempted by Rule Subsection 040.02.c.ii. shall be subject to the review requirements of Section 42-203D, Idaho Code, and shall be readvertised in accordance with Rule Subsection 040.02.a. as appropriate. The review is limited to the criteria described in Section 42-203C(2), Idaho Code. (7-1-93)

ii. Permits exempt from the provisions of 42-203D, Idaho Code, include: (7-1-93)

(1) Permits appropriating water not held in trust by the state of Idaho; (7-1-93)

(2) Permits for DDMI uses, stockwater uses and other essentially non-consumptive uses as determined by the Director; and (7-1-93)

(3) Permits for which an acceptable proof of beneficial use submittal was received by the department prior to July 1, 1985, or permits for which an acceptable proof of beneficial use was submitted after July 1, 1985, if evidence satisfactory to the Director has been received to show that the permit was fully developed prior to July 1, 1985 to the extent claimed on the proof of beneficial use. (7-1-93)

iii. Holders of permits subject to the review requirement of Section 42-203D, Idaho Code, shall pay in advance, upon the request of the Director, the readvertising fee required by Section 42-221F, Idaho Code. (7-1-93)

iv. Failure to pay the readvertising fee within thirty (30) days after the applicant is notified to do so is cause for the Director to cancel the permit. (7-1-93)

d. Provisions for Receiving Notice of Application for Permit by Mail. (7-1-93)

i. Pursuant to Section 42-203A(3), Idaho Code, the department will provide upon written request by regular mail, postage prepaid, the notices for all applications for permit of the classes requested. Mailings will be made on a periodic basis to include all notices of a specific class for which advertisements were prepared for publication during the previous period. Mailings will be made on or about the day of the first advertisement as provided in Rule Subsection 040.02.a.i. (7-1-93)

ii. Notice of the advertisement of application as described in Section 42-203A(3), Idaho Code, may be represented by an abstract, summary or other such representation which includes all the information required by Section 42-203A(1), Idaho Code, for a notice of an application for permit. (7-1-93)

iii. The annual mailing fee as described in Section 42-203A(3), Idaho Code, shall include all costs incurred by the department in preparation of mailing of the notices of application to those requesting them. (7-1-93)

iv. The annual fee for receiving notice of all classes will be determined by the Director and shall be paid to the department in advance on an annual basis (July 1 to June 30). The annual mailing fee shall be prorated by the department for requests encompassing less than a full year and will be increased for the additional cost the department incurs for requests encompassing fewer than all classes of notice. (7-1-93)

v. A request for a specific class of notice may be fulfilled by the mailing of notice of all applications for permit received by the department unless the additional cost to the department of preparing the requests for a specific class of notice is paid in advance. (7-1-93)

vi. A request to receive a class of notice of applications shall be effective not later than thirty (30) days after receipt by the department of the request together with the annual fee. (7-1-93)

vii. The notice published in the newspaper of an application or of a permit being reprocessed as required by Rule Subsection 040.02.a. through 040.02.c. is the official notice required by Section 42-203A, Idaho Code. Errors or omissions in the notices of applications received by mail as provided by Rule Subsection 040.02.d. or the failure of the notices to be delivered by mail does not invalidate the published notice. (7-1-93)

03. Protests, Intervention, Hearings, and Appeals. (7-1-93)

a. Protests. (7-1-93)

i. Protests against the approval of an application for permit or against a permit being reprocessed shall comply with the requirements for pleadings as described in the department's adopted Rules of Procedure. (7-1-93)

ii. Protests against the approval of an application for permit or against a permit being reprocessed will only be considered if received by the department after receipt of the application by the department and prior to the expiration of the protest period announced in the advertisement unless the protestant successfully intervenes in the proceeding. (7-1-93)

iii. General statements of protest (blanket protests) against appropriations for a particular class of use or from a particular source of water will not be considered as valid protests by the Director. (7-1-93)

b. Intervention. Requests to intervene in a proceeding pending before the department shall comply with the Department's adopted Rules of Procedure. (7-1-93)

c. Hearings. Hearings will be scheduled and held in accordance with the department's adopted Rules of Procedure. (7-1-93)

d. Appeals. Any final decision of the Director may be appealed in accordance with Section 42-1701A, Idaho Code. (7-1-93)

04. Burden of Proof. (7-1-93)

a. Burden of proof is divided into two (2) parts: first, the burden of coming forward with evidence to present a prima facie case, and second, the ultimate burden of persuasion. (7-1-93)

b. The burden of coming forward with evidence is divided between the applicant and the protestant as follows: (7-1-93)

i. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criteria (a) through (d) of Section 42-203A(5), Idaho Code; (7-1-93)

ii. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of

criterion (e) of Section 42-203A(5), Idaho Code, as to any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear the initial burden of coming forward with evidence for those factors relevant to criterion (e) of Section 42-203A(5), Idaho Code, of which the protestant can reasonably be expected to be more cognizant than the applicant. (7-1-93)

iii. The protestant shall bear the initial burden of coming forward with evidence for the evaluation of the public interest criteria of Section 42-203C(2), Idaho Code, and of demonstrating a significant reduction, except that the applicant shall provide details of the proposed design, construction, and operation of the project and directly associated operations to allow the impact of the project to be evaluated. (7-1-93)

c. The applicant has the ultimate burden of persuasion for the criteria of Section 42-203A, Idaho Code, and the protestant has the ultimate burden of persuasion for the criteria of Section 42-203C, Idaho Code. (7-1-93)

d. For unprotested applications or permits to be reprocessed, the Director will evaluate the application, information submitted pursuant to Rule Subsection 040.05.c. and information in the files and records of the department, and the results of any studies the department may conduct to determine compliance with the appropriate criteria. (7-1-93)

e. In protested matters the Director will take official notice of information as described in the department's adopted Rules of Procedure, and will, prior to considering, circulate to the parties information from department studies and field examinations concerning the protested application or permit being reprocessed, if such information has not otherwise been made a part of the hearing record. (7-1-93)

05. Additional Information Requirements. (7-1-93)

a. For unprotested applications and permits being reprocessed, the additional information required by Rule Subsection 040.05.c. shall be submitted within thirty (30) days after the Director notifies the applicant that the application or permit is being reviewed for decision. The Director may extend the time within which to submit the information upon request by the applicant and upon a showing of good cause. Failure to submit the required information within the time period allowed will be cause for the Director to void an application or to advance the priority of a permit being reprocessed by the number of days that the information submittal is late. The Director will provide opportunity for hearing as provided in Section 42-1701A, Idaho Code. (7-1-93)

b. For protested applications or protested permits being reprocessed, the information required by Rule Subsection 040.05.c. may be requested by the Director to be submitted within thirty (30) days after notification by the Director, may be made a part of the record of the hearing held to consider the protest, or may be made available in accordance with any pre-hearing discovery procedures. Failure to submit the required information within the time period allowed will be cause for the Director to void an application or to advance the priority of a permit being reprocessed by the number of days that the information submittal is late. (7-1-93)

c. The following information shall be submitted for applications to appropriate unappropriated water or trust water and for permits being reprocessed for trust water. The additional information submittal requirements of this rule are waived for filings which seek to appropriate five (5) cfs or less or storage of five hundred acre-feet (500 AF) or less and for filings seeking reallocation of trust water which the Director determines will reduce the flow of the Snake River measured at Murphy Gauge by not more than two (2) acre-feet per day. For filings proposing irrigation as a purpose of use, the additional information is required if more than two hundred (200) acres will be irrigated. However, the Director may specifically request submittal of any of the following information for any filing, as he determines necessary. Information relative to the effect on existing water rights, Section 42-203A(5)(a), Idaho Code, shall be submitted as follows: (7-1-93)

i. For applications appropriating springs or surface streams with five (5) or fewer existing users, either the identification number, or the name and address of the user, and the location of the point of diversion and nature of use for each existing water right shall be submitted. (7-1-93)

ii. For applications appropriating groundwater, a plat shall be submitted locating the proposed well relative to all existing wells and springs and permitted wells within a one-half mile radius of the proposed well.

(7-1-93)

iii. Information shall be submitted concerning any design, construction, or operation techniques which will be employed to eliminate or reduce the impact on other water rights. (7-1-93)

d. Information relative to sufficiency of water supply, Section 42-203A(5)(b), Idaho Code, shall be submitted as follows: (7-1-93)

i. Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year. (7-1-93)

ii. Information shall be submitted on the quantity of water available from the source applied for, including, but not limited to, information concerning flow rates for surface water sources available during periods of peak and average project water demand, information concerning the properties of the aquifers that water is to be taken from for groundwater sources, and information on other sources of supply that may be used to supplement the applied for water source. (7-1-93)

e. Information relative to good faith, delay, or speculative purposes of the applicant, Section 42-203A(5)(c), Idaho Code, shall be submitted as follows: (7-1-93)

i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest. Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code. (7-1-93)

ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials. (7-1-93)

f. Information Relative to Financial Resources, Section 42-203A(5)(d), Idaho Code, shall be submitted as follows: (7-1-93)

i. The applicant shall submit a current financial statement certified to show the accuracy of the information contained therein, or a financial commitment letter along with the financial statement of the lender or other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed. (7-1-93)

ii. The applicant shall submit plans and specifications along with estimated construction costs for the project works. The plans shall be definite enough to allow for determination of project impacts and implications. (7-1-93)

g. Information Relative to Conflict with the Local Public Interest, Section 42-203A(5)(e), Idaho Code, shall be submitted as follows: The applicant shall seek comment and shall submit all letters of comment on the effects of the construction and operation of the proposed project from the governing body of the city and/or county and tribal reservation within which the point of diversion and place of use are located, the Idaho Department of Fish and Game, the Idaho Department of Environmental Quality, and any irrigation district or canal company within which the proposed project is located and from other entities as determined by the Director. (7-1-93)

h. The following information Relative to the Public Interest Criteria of Section 42-203C(2), Idaho Code, shall be submitted by an applicant seeking reallocation of trust water for a project which the Director determines will reduce the flow of the Snake River by more than two (2) acre-feet per day. For filings proposing irrigation as a purpose of use, the additional information is required if more than two hundred (200) acres will be irrigated. The Director may request any or all of the following information for any filing seeking the reallocation of trust water. (7-1-93)

i. A project design and estimate of cost of development shall be submitted. For applications appropriating more than twenty-five (25) cfs, or ten thousand (10,000) AF of storage, or generating more than five (5) megawatts, the information shall be prepared and submitted by a qualified engineer licensed under the provisions of Chapter 12, Title 54, Idaho Code, unless waived by the Director. The design shall be definite enough to reflect the project's impacts and implications as required in subsequent rules. (7-1-93)

ii. If the project proposes development for irrigation purposes, information shall be submitted on crop rotation, including acreages, for lands when newly developed. (7-1-93)

iii. Information shall be submitted concerning the number and kinds of jobs that will be created or eliminated as a direct result of project development including both the construction and operating phases of the project. If jobs are seasonal, the estimated number of months per year of employment shall be submitted. (7-1-93)

iv. For applications or permits being reprocessed for more than twenty-five (25) cfs, or more than ten thousand (10,000) AF of storage, or more than five (5) megawatts, information shall be submitted concerning the changes to community services that will be required during the construction and operation phases of the project including, but not limited to, changes to schools, roads, housing, public utilities and public health and safety facilities, if any. (7-1-93)

v. Information shall be submitted concerning the source of energy for diverting and using water for the project, the estimated instantaneous demand and total amount of energy that will be used, the efficiency of use, and energy conservation methods. (7-1-93)

vi. Information shall be submitted concerning the location, amount, and quality of return flow water, and any water conservation features of the proposed project. (7-1-93)

vii. If the project proposes irrigation as a use, information shall be submitted concerning the kinship, if any, of the operator of the land to be irrigated by the project to the applicant, the location and acreage of other irrigated lands owned, leased, or rented by the applicant, the names, addresses and number of shares held by each shareholder if the applicant is a corporation, evidence of tax-exempt status if a corporation is so claiming, a soil survey prepared in accordance with the U.S. Soil Conservation Service irrigatable land classification system, and a schedule for bringing into production the project lands. (7-1-93)

041. -- 044. (RESERVED).

045. EVALUATION CRITERIA (RULE 45).

01. **Criteria for Evaluating All Applications to Appropriate Water.** The Director will use the following criteria in evaluating whether an application to appropriate unappropriated water or trust water should be approved, denied, approved for a smaller amount of water or approved with conditions. (7-1-93)

a. Criteria for determining whether the proposed use will reduce the quantity of water under existing water rights. A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if: (7-1-93)

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less. (7-1-93)

ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code; or (7-1-93)

iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense. (7-1-93)

iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director. (7-1-93)

v. The provisions of Rule Subsection 045.01.a.v. are not intended to require compensation or mitigation for loss of flow to holders of subordinated hydropower rights or those from which trust water is reallocated. (7-1-93)

b. Criteria for determining whether the water supply is insufficient for the proposed use. The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval. In assessing such noneconomic factors, the Director will also consider the impact on other water rights if the project is abandoned during construction or after completion, the impact on public resource values, and the cost to local, state and federal governments of such an abandonment. (7-1-93)

c. Criteria for determining whether the application is made in good faith. The criteria requiring that the Director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. 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 with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the developed project for a profit or from making a profit from the use of the water. An application will be found to have been made in good faith if: (7-1-93)

i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and (7-1-93)

ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and (7-1-93)

iii. There are no obvious impediments that prevent the successful completion of the project. (7-1-93)

d. Criteria for determining whether the applicant has sufficient financial resources to complete the project. (7-1-93)

i. An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director. This showing is required as described in Rule Subsection 040.05.c. or at the time the hearing provided by Subsection Rule 040.05.c. is conducted. (7-1-93)

ii. A governmental entity will be determined to have satisfied this requirement if it has the taxing, bonding or contracting authority necessary to raise the funds needed to commence and pursue project construction in accordance with the construction schedule. (7-1-93)

e. Criteria for determining whether the project conflicts with the local public interest. The Director will consider the following, along with any other factors he finds to be appropriate, in determining whether the project will conflict with the local public interest: (7-1-93)

i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains; (7-1-93)

ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed use; and (7-1-93)

iii. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions. (7-1-93)

iv. An application which the Director determines will conflict with the local public interest will be denied unless the Director determines that an over-riding state or national need exists for the project or that the project can be approved with conditions to resolve the conflict with the local public interest. (7-1-93)

02. Criteria for Evaluating Whether a Proposed Use of Trust Water Will Cause a Significant Reduction. Reference: Section 42-203C(1), Idaho Code and Rule Subsection 025.02.b. For purposes of reallocating trust water made available by the Snake River water rights agreement, an application for permit or a permit being reprocessed, will be presumed to not cause a significant reduction if the Director determines that it complies with both the individual and cumulative tests for evaluating significant reduction as provided in Rules Subsections 045.02.a. and 045.02.b. (7-1-93)

a. Individual test for evaluating significant reduction. A proposed use will be presumed to not cause a significant reduction if when fully developed and its impact is fully felt, the use will individually reduce the flow of the Snake River measured at Murphy Gauge by not more than two (2) acre-feet per day. An irrigation project of two hundred (200) acres or less located anywhere in the Snake River Basin above Murphy Gauge proposing to use trust water is presumed to not reduce the flow at Murphy Gauge by more than two (2) acre-feet per day. The presumption of this section is not applicable to applications or permits to be reprocessed which the Director determines to be part of a larger development. (7-1-93)

b. Cumulative test for evaluating significant reduction. A proposed use will be presumed to not cause a significant reduction, if the use, when fully developed and its impact is fully felt and when considered cumulatively with other existing uses and other uses reasonably likely to exist within twelve (12) months of the proposed use, will not deplete the flow of Snake River measured at Murphy Gauge by more than: (7-1-93)

i. Forty thousand (40,000) acre-feet per calendar year when considered with all other uses approved for development of trust water during that calendar year; (7-1-93)

ii. Forty thousand (40,000) acre-feet per calendar year using a four (4) year moving average when considered with all other uses approved for development of trust water during that four (4) year period; and (7-1-93)

iii. Twenty thousand (20,000) acre-feet per calendar year from filings approved for reallocation of trust water which meet the criteria of Rule Subsection 045.02.a. (the individual test for evaluating significant reduction). (7-1-93)

c. 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 which exceeds the flow depletion limits of Rule Subsection 045.02, or one which meets the flow depletion limits but has been protested, will cause a significant reduction. In making this determination, the Director will consider: (7-1-93)

i. The amount of the reduction in hydropower generation that the proposed use will cause individually and cumulatively with other uses expected to be developed within twelve (12) months of the proposed use as compared to the existing hydropower generation output of the affected facility or facilities. (7-1-93)

ii. The relative importance of the affected hydropower facility or facilities to other sources of electrical power generation available to the holder of the facility or facilities. (7-1-93)

iii. The timing of the reduction in hydropower generation both on an annual basis and on a long-term basis considering the lag time between the beginning of diversion by the proposed use and the resulting reduction in hydropower generation. (7-1-93)

iv. The effect of the reduction in hydropower generation on the unit cost of hydropower from the facility or facilities and the average cost of electrical power offered by the holder of the facility. (7-1-93)

v. The terms of contracts, mortgages, or regulatory permits and licenses which require the holder of the hydropower generation facility to retain the capability to produce hydroelectric power at a specific level. (7-1-93)

d. Other provisions of these rules not withstanding, applications or permits to be reprocessed proposing a direct diversion of water for irrigation purposes from the Snake River between Milner Dam and Swan Falls Dam or from tributary springs in this reach are presumed to cause a significant reduction. (7-1-93)

e. Other provisions of these rules not withstanding, applications or permits to be reprocessed for DCMJ purposes are presumed to not cause a significant reduction. (7-1-93)

03. **Criteria for Evaluating Public Interest.** If the Director determines that a proposed use of trust water held by the state pursuant to Section 42-203B(5), Idaho Code, will cause a significant reduction, the Director will consider the criteria of Section 42-203C(2), Idaho Code, before acting on the application or permit being reprocessed. The Director shall consider and balance the relative benefits and detriments for each factor required to be weighed under Section 42-203C(2), Idaho Code, to determine whether a proposed reduction of the amount of water available for power production serves the greater public interest. The Director shall evaluate whether the proposed use sought in the permit being reprocessed or the application will provide the *greater benefit to the people* of the state of Idaho when balanced against other uses for the same water resource. In evaluating the public interest criteria, the Director will use the following guidelines: (7-1-93)

a. *The Director will consider the potential benefits both direct and indirect, and that the proposed use would provide to the state and local economy. The economic appraisal shall be based upon generally accepted economic analysis procedures which uniformly evaluate the following factors within the state of Idaho and the county or counties directly affected by the project:* (7-1-93)

i. Direct project benefits. (7-1-93)

ii. Indirect benefits including net revenues to the processing, transportation, supply, service and government sectors of the economy. (7-1-93)

iii. Direct project costs, to include the opportunity cost of previous land use. (7-1-93)

iv. Indirect project costs, including verifiable costs to government in net lost revenue and increased regulation costs, *verifiable reductions in net revenue resulting from losses to other existing instream uses, and the increased cost of replacing reduced hydropower generation from unsubordinated hydropower generating facilities.* (7-1-93)

b. The Director will consider the impact the proposed use would have upon the electric utility rates in the state of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact. These evaluations will include the following considerations: (7-1-93)

i. Projections of electrical supply and demand for Idaho and the Pacific Northwest made by the Bonneville Power Administration and the Northwest Power Planning Council and information available from the Idaho Public Utilities Commission or from the electric utility from whose water right trust water is being reallocated. (7-1-93)

ii. *The long term reliability of the substitute source and the cost of alternatives including the resulting impact on electrical rates.* (7-1-93)

c. The Director will consider whether the proposed use will promote the family farming tradition in the state of Idaho. For purposes of this evaluation, the Director will use the following factors. (7-1-93)

d. 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

nine hundred sixty (960) acres, the application will be presumed to promote the family farming tradition. (7-1-93)

e. If the requirement of Rule Subsection 045.03.c.i. is not met, the Director will consider the extent the applicant conforms to the following characteristics: (7-1-93)

i. The farming operation developed or expanded as a result of the application is operated by the applicant or a member of his family (spouse, parents or grandparents, lineal descendents, including those that are adopted, lineal descendents of parents; and spouse of lineal descendents); (7-1-93)

ii. In the event the application is filed in the name of a partnership, one or more of the partners shall operate the farming operation; and (7-1-93)

iii. If the application is in the name of a corporation, the number of stockholders does not exceed fifteen (15) persons, and one or more of the stockholders operates the farming operation unless the application is submitted by an irrigation district, drainage district, canal company or other water entity authorized to appropriate water for landowners within the district or for stockholders of the company all of whom shall meet the family farming criteria. (7-1-93)

f. The Director will consider the promotion of full economic and multiple use development of the water resources of the state of Idaho. In this regard, the extent to which the project proposed complies with the following factors will be considered: (7-1-93)

i. Promotes and conforms with the adopted State Water Plan; (7-1-93)

ii. Provides for coordination of proposed and existing uses of water to maximize the beneficial use of available water supplies; (7-1-93)

iii. Utilizes technology economically available to enhance water and energy use efficiency; (7-1-93)

iv. Provides multiple use of the water, including multipurpose storage; (7-1-93)

v. Allows opportunity for reuse of return flows; (7-1-93)

vi. Preserves or enhances water quality, fish, wildlife, recreation and aesthetic values; (7-1-93)

vii. Provides supplemental water supplies for existing uses with inadequate supplies. (7-1-93)

g. The Director will consider whether a proposed use, which includes irrigation, will conform to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period in the Snake River drainage above Murphy Gauge. In applying this criteria, the Director will consider the following: (7-1-93)

i. "Above Murphy gauge" means the Snake River and any of its surface or groundwater tributaries upstream from Murphy gauge which gauge is located on the Snake River approximately four (4) miles downstream from Swan Falls Dam from which trust water is to be reallocated; (7-1-93)

ii. Twenty thousand (20,000) acres per year or eighty thousand (80,000) acres per four (4) year period is a four (4) year moving average of Twenty thousand (20,000) acres/year of permits issued during a calendar year for irrigation development. If permits for development of less than twenty-thousand (20,000) acres are issued in a year, additional development in excess of twenty-thousand (20,000) acres can be permitted in succeeding years. Likewise, if more than twenty thousand (20,000) acres is permitted in one year (recognizing that a single large project could exceed twenty thousand (20,000) acres) the permitted development in succeeding years must be correspondingly less to maintain no greater than a twenty thousand (20,000) acres/year average for any four (4) year period; (7-1-93)

iii. The criteria of Rule Subsection 045.03.g. applies to multiple-use projects with irrigation as a principal purpose. Projects which use irrigation as only an incidental purpose, such as the land treatment of waste, shall not be included within this policy; and (7-1-93)

iv. An application determined by the Director to be otherwise approvable but found to exceed the acreage limitations, when considered with other applications approved for development, may be approved with conditions providing for the construction of project works and beneficial use of water to be commenced in a future year. (7-1-93)

h. No single public interest criterion will be entitled to greater weight than any other public interest criterion. (7-1-93)

i. Until such time as the studies prescribed in Policy 32 I of the State Water Plan are completed and accepted by the Idaho Water Resource Board, applications and permits reprocessed which propose to divert water to surface storage from the Snake River and surface tributaries upstream from Murphy Gauging Station shall be presumed to satisfy the public interest criteria of Section 42-203C(2), Idaho Code. Applications or reprocessed permits which are approved prior to completion of the studies, will not be subject to additional reprocessing. (7-1-93)

j. Applications for permit for trust water sources filed prior to July 1, 1985, for projects for which diversion and beneficial use was complete prior to October 1, 1984, are presumed to satisfy the public interest criteria of Section 42-203C(2), Idaho Code. (7-1-93)

k. Applications or permits to be reprocessed proposing a direct diversion of water for irrigation purposes from the Snake River between Milner Dam and Swan Falls Dam or from tributary springs in this reach are presumed not to be in the public interest as defined by Section 42-203C, Idaho Code. Such proposals, are presumed to prevent the full economic and multiple use of water in the Snake River Basin and to adversely affect hydropower availability and electrical energy rates in the state of Idaho. (7-1-93)

l. Proposed DCMU uses which individually do not have a maximum consumptive use of more than two acre-feet/day are presumed to meet the public interest criteria of Section 42-203C(2), Idaho Code, unless protested. (7-1-93)

046. -- 049. (RESERVED).

050. CONDITIONS OF APPROVAL (RULE 50).

01. **Issuance of Permits with Conditions.** The Director may issue permits with conditions to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and specifically to meet the criteria of Section 42-203A, Idaho Code, and to meet the requirements of Section 42-203C, Idaho Code, to the fullest extent possible including conditions to promote efficient use and conservation of energy and water. (7-1-93)

02. **Requirements to Mitigate Impact of Flow Depletion.** Permits to be reprocessed or applications approved to appropriate water from the main stem of the Snake River between Milner and Murphy gauging station for diversion to off-stream storage during the period November 1 to March 31 shall include requirements to mitigate, in accordance with Policy 32 I of the State Water Plan, the impact of flow depletions on downstream generation of hydropower. (7-1-93)

03. **Applications and Existing Permits That Are Junior and Subordinate.** Applications and existing permits approved for hydropower generation shall be junior and subordinate to all rights to the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of the application or existing hydropower permit. A subordinated permit shall not give rise to any right or claim against future rights to the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of the application or existing hydropower permit. A permit issued for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B(6), Idaho Code. (7-1-93)

04. **Permanent Flow Measuring Device Requirement.** Applications approved for on-stream storage reservoirs will, unless specifically waived by the Director, require permanent flow measuring devices both upstream and downstream from the reservoir. (7-1-93)

05. **Well Spacing and Well Construction Requirements.** Applications approved for diversion of groundwater may include conditions requiring well spacing and well construction requirements. (7-1-93)

06. **Reprocessed Permits.** Permits reprocessed pursuant to Section 42-203D, Idaho Code, may be cancelled, modified or conditioned by the Director to make the permit comply in every way with any permit that would be issued for the same purpose based upon a new application processed under these rules. (7-1-93)

07. **Conditioning of Permits.** The Director may condition permits to require commencement of construction of project works within a designated time interval not to exceed one year and completion of construction of project works and beneficial use of water within a time interval not to exceed five (5) years. (7-1-93)

08. **Voiding Approval of Permit.** Permits may be conditioned to authorize the Director to void the approval of the permit if he determines that the applicant submitted false or misleading information on the application or supporting documents. (7-1-93)

09. **Retention of Jurisdiction.** The Director may condition permits to retain jurisdiction to insure compliance with the design, construction and operation provisions of the permit. (7-1-93)

10. **Insuring Minimum Stream Flows and Prior Rights.** The Director may condition permits to insure that established minimum stream flows and prior rights including prior rights reserved by federal law are not injured. (7-1-93)

11. **Insuring Compliance with Water Quality Standards.** The Director may condition permits to insure compliance with Idaho's water quality standards. (7-1-93)

12. **Insuring Assignment of Interest.** The Director may condition a permit issued for trust water to require that any amendment (Section 42-211, Idaho Code), transfer (Section 42-222, Idaho Code), or assignment of interest in the permit by any method whatsoever shall not result in the project failing to meet the public interest criteria of Section 42-203C, Idaho Code except, however, lenders obtaining title to the project through default will have a reasonable period of time, as determined by the Director, to meet such criteria or to convey the project to a person or entity that does meet the criteria. (7-1-93)

051. -- 054. (RESERVED).

055. **MORATORIUM (RULE 55).**

01. **Applications for Permit.** (7-1-93)

a. The Director may cease to approve applications for permit in a designated geographical area upon finding a need to: (7-1-93)

i. Protect existing water rights; (7-1-93)

ii. Insure compliance with the provisions of Chapter 2, Title 42, Idaho Code; and (7-1-93)

iii. Prevent reduction of flows below a minimum stream flow which has been established by the Director or the board pursuant to applicable law. (7-1-93)

b. Notice of the Director's action to cease application approval will be by: (7-1-93)

i. Summary Order served by certified mail upon the then existing affected applicants; and (7-1-93)

ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area affected. (7-1-93)

c. Objections to the Director's action shall be considered under the department's adopted Rules of Procedure and applicable law. (7-1-93)

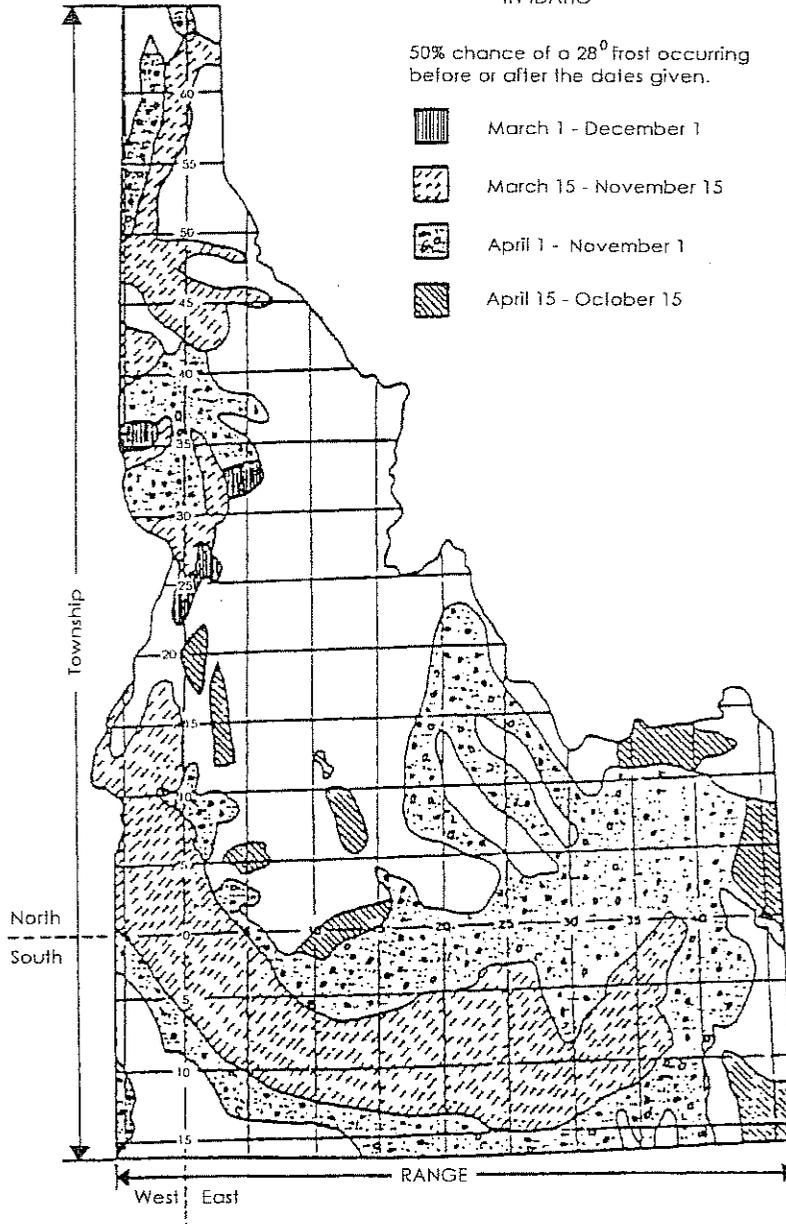
02. Permits. (7-1-93)
- a. To the extent a permit has not been developed, the Director may cancel, or modify permits for which proof of beneficial use has not been submitted in a designated geographical area as an extension of Rule Subsection 055.01. (7-1-93)
- b. Notice of the Director's action to cancel or modify permits shall be by: (7-1-93)
- i. Summary Order served by certified mail upon the affected permit holders in the designated area. (7-1-93)
- ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area. (7-1-93)
- c. Objections to the Director's action shall be considered under the department's adopted Rules of Procedure and applicable law. (7-1-93)
056. -- 999. (RESERVED).

APPENDIX B

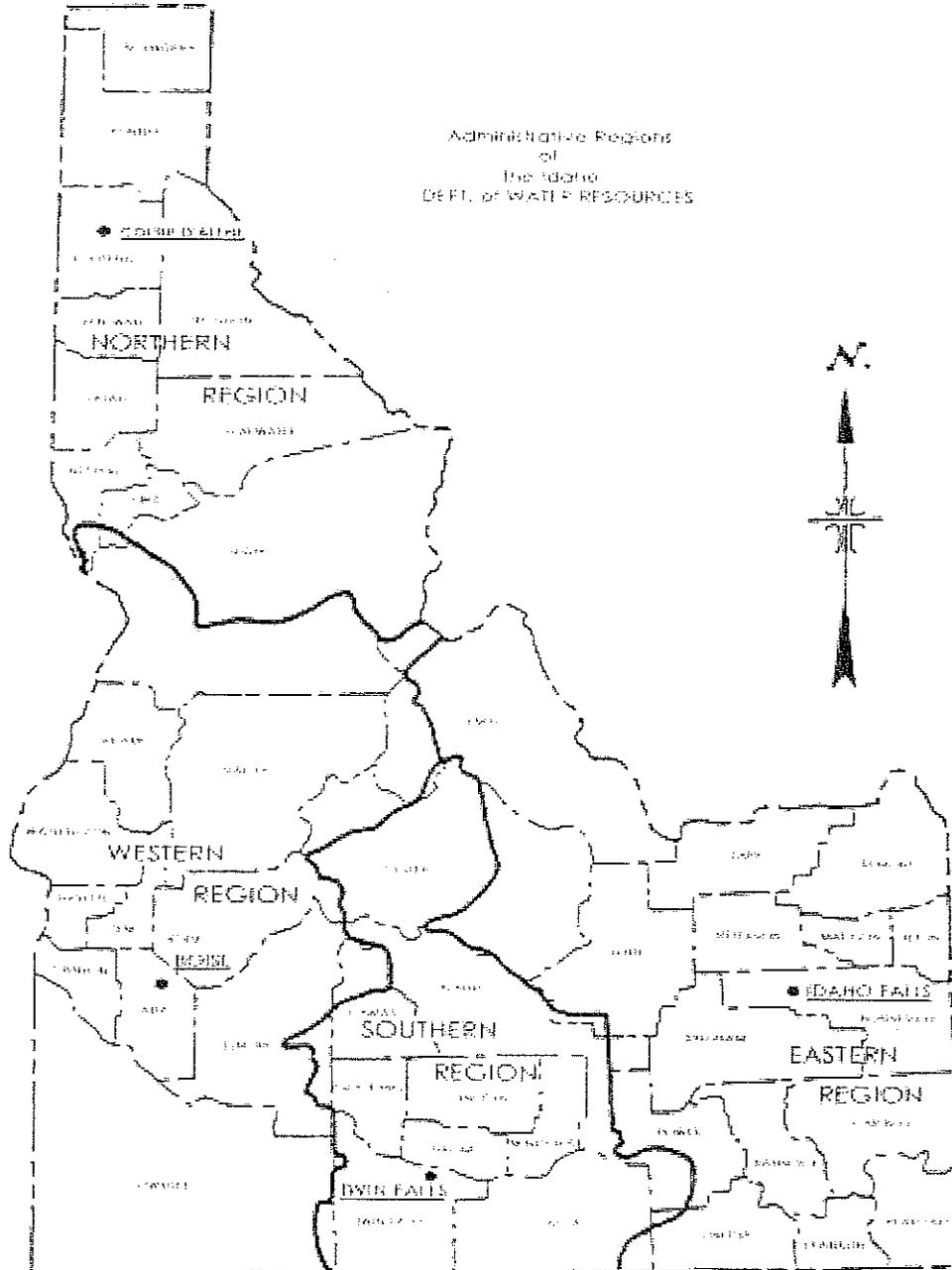
SUGGESTED IRRIGATION SEASONS
IN IDAHO

50% chance of a 28^o frost occurring
before or after the dates given.

-  March 1 - December 1
-  March 15 - November 15
-  April 1 - November 1
-  April 15 - October 15



APPENDIX C



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