

The Affidavit of Ronald D. Carlson

State of Idaho

Bingham County

Ronald D. Carlson disposes and says the information in this document represents his knowledge of historical facts, including times, places, people, actions and activities herein represented, and that all representations of such facts, times places, people, actions and activities are true and accurately represented to the best of the affiant's knowledge. Because of the need to provide background and perspective to aid in the understanding of many important events and actions the chronology of events will not at times be strictly sequential.

In May 1971 I graduated from the University of Idaho with a bachelor's degree in Agricultural Engineering and entered a Masters of Engineering Program at the University. While at graduate school I met a Dutch graduate student, Jose deSoniville whose major professor was Dr. Charles Brockway. Jose deSoniville had developed a digital aquifer model. Little did I know then that the work of this graduate student would do much to launch Brockway Engineering and would ultimately become the very heart of the IPCO strategy for gaining control of the Snake River and the Eastern Snake River Plain Aquifer.

I was hired by Sherl Chapman and employed as a hydrologist by the Idaho Department of Water Administration in September, 1972. My first assignment in that capacity was to determine the connection between a pumping well and the Whiskey Creek Springs located south and east of the City of Grace, Idaho. At that time the Director of the Department was Keith Higginson. Stephen Allred was the Deputy Director. The four IDWA regional offices were established in 1971 in Boise, Twin Falls, Idaho Falls and Coeur d'Alene. These offices were the result of a State initiated agency-review that found the Department was not able to provide adequate public services because the Department had no presence outside of Boise which resulted in limited agency access and burdensome travel from most parts of the state. Norman C. Young had been tapped by the Director to be the first District Engineer in the Eastern Regional office in Idaho Falls. In 1973 Norm Young offered me a position in the Eastern Regional Office. I accepted and moved back to the family farm in Firth to assume the responsibilities for the Safety of Dams program in the Eastern Region. Under this program all structures constructed to impound 100 acre-feet of water or that had a hydraulic height of more than 20 feet were to be routinely inspected to insure that they were maintained in a manner that would justify the issuance of a dam safety certification by the IDWA. As dams were inspected

throughout the state a list of defective dams was developing. Milner Dam, the diversion dam for Twin Falls and North Side Canal, located in the Southern Region was found to have significant deficiencies.

I had been working in the IDWR Eastern Region for less than a year when Norm Young accepted an administrative position in the State office in Boise and I was selected by the Director to replace him as District Engineer for the Eastern Region. In August, 1974 I received my license to practice engineering and land surveying in the State of Idaho and assumed the duties of District Engineer for the renamed Idaho Department of Water Resources. However, at this point I find it necessary to digress back to 1964.

I was raised on an irrigated farm near Firth, Idaho. Our family farm, over the years produced hay, grain, potatoes, and supported a herd of registered Black Angus cattle, maintained a small band of sheep and for many years operated a commercial egg business. Our farm was supplied water by the Snake River Valley Irrigation District. In the late 1950's we would take family trips to watch the progress being made on the construction of Palisades Dam in anticipation of the additional storage water supplies that would result from its completion. Prior to the construction of Palisades water remained in the canals year round. I remember skating with my siblings on the canals in the winter and my father breaking holes in the ice for the cattle to drink. Water ceased to flow in the Snake River Valley Irrigation District canals ended in 1956 because of the provisions of the Palisades storage contracts. Interestingly, in my memory the shortest water supplies we had for the farm were in 1960 and 1961 after Palisades was completed. Some of our land was very sandy and flood irrigation of those lands was difficult even in times of water-abundant years. Consequently there was a strong reaction in eastern Idaho to proposals published in the Post Register for diverting "surplus" water from the Snake to California. As I recall the proposal was to divert the average 1.2 million acre-feet of water being wasted past Milner dam each year to supplement water supplies for southern California. This reaction resulted in a state-wide referendum in 1964 that amended the Idaho Constitution (Article XV Sec. 7) and authorized the creation of a state agency with the authority to formulate a state water plan for optimum development of water resources of the state. As I recall it was the first opportunity I had to vote, and I voted for the amendment. (It is one of the many votes that I have come to question later in my life.)

This state agency became the Idaho Water Resource Board and the first Director was Dr. Robert R. Lee. Dr. "Bob" Lee assembled a staff and started the work of producing a water plan for the state that was focused on optimal water resource development. The politics of water soon came into play and at the risk of being overly simplistic, Bob Lee found himself promoting more "full water development" than Governor Cecil Andrus and IDWA Director Keith Higginson wanted to support. As the pressure on him mounted Bob Lee decided he had better things to

do and resigned as Director. In 1973 Steve Allred was appointed by Governor Cecil Andrus to be Director of the Idaho Water Resource Board.

In 1974 Idaho Code §67-2402 was amended to limit the authorized number of state agencies to twenty (20). While I understand the logic behind limiting the number of state agencies, I now believe that one of the biggest legislative blunders in state history was the combining of the Idaho Department of Water Administration and the Idaho Water Resource Board to create the Department of Water Resources. In recognition of the reasons we voted to create the IWRB, it would have been better to have repealed the 1964 amendment of the State's Constitution than to combine water administration and water planning. In my opinion, if there are not internal conflicts of interest within the IDWR there should be. It seems reasonable to assume that had the IWRB remained a separate agency the current chaos on the Eastern Snake River plain would not have occurred.

However, beyond the 1964 referendum, Idaho responded in many ways to the proposed diversion of Idaho Water to California. One of those responses was to have in place studies that showed the aquifer could be used as a storage reservoir for retaining Snake River water in the upper Snake River Basin. Shortly after the IWRB was created, the Idaho Department of Reclamation (now IDWR) contracted with the USGS to study and evaluate the potential for conducting "artificial recharge" on the Eastern Snake River Plain. The USGS construct an analog model of the Eastern Snake River Plain as part of the evaluation of recharge potential. The report entitled: **Artificial Recharge To The Snake Plain Aquifer . . . An Evaluation of Potential and Effect**, was released in August 1969. It was released by the Department of Reclamation as Water Information Bulletin #12.

The point of referencing this report is to point out that it was well understood at that time that water management, and controlling access to Idaho water by other states would require intentionally using the ESPA as a storage reservoir. This, in my opinion, was a formalization of the historic management paradigm that sought to manage water in ways that increased water retention time in the basin by doing everything possible to keep water from passing Milner Dam. This included things like running water in canals all year long, and making no provision in Idaho Water Law for changing the nature of use of a water right. Because the nature of use of a water right could not be changed, Idaho Power had no legal mechanism available to use stored water for hydropower generation below Milner. It is important to remember at that time the only presence IPCO had above Hagerman was small generating facility the company had acquired at the American Falls Dam.

Soon after I became Regional Manager in 1974 I gained recognition as the resident expert on water law in this area. I frequently answered questions for attorneys with questions about Idaho water law. I remember on one occasion Bob Huntley, who would later serve as Chief

Justice of the Idaho Supreme court asked me to come to Preston to brief the court on Idaho Water Law as part of a case he was arguing. Under my direction, the Eastern Regional staff started conducting a regional “office for the day” in various locations so we could answer questions the residents had about water administration, water rights and our understanding of water law. We of course could only represent water law in the context of agency understanding and application. In that context, we developed water right tests that we would provide to interested members of the public to test their knowledge of Idaho Water law as it was understood by the IDWR. These representations likely influenced decisions that were made by Idaho residents in filing applications, water right claims, and other water related actions. From time to time, I was invited to teach the basics of administrative water law to certain classes in local public schools. The following questions were generally included in the materials the region provided to inform and educate the public about water law in Idaho. All such documents were first reviewed by the appropriate state office staff.

Question: How are water rights established in the State of Idaho?

Answer: Since 1971 for surface water and March 25, 1963 for groundwater, the only process for appropriating the unappropriated waters of the state is through that application, permit, and licensing process established by the Idaho Legislature. Statutory citation: Idaho code sections: 42-103, 42-226

Question: What if my surface diversion or well preceded these dates?

Answer: Prior to the respective dates for surface water and groundwater appropriation could be accomplished through the diversion and beneficial use of water, and the priority date of the right would be the day on which water was first diverted and beneficially used. This is the “constitutional method” of water appropriation.” Statutory citation: 42-101, 42-243

Question: What are the elements of a water right?

Answer: Idaho code 42-243 and other places, including the information needed to complete an application for permit, establish the following elements of a water right:

- a. The name and post-office address of the claimant.
- b. The quantity of water claimed to have been used.
- c. The source of the water supply.
- d. The location of the point or points of diversion.
- e. The nature of the use and the period during each year when the water is used for such purposes.
- f. The priority of the right claimed which shall be determined by the date when the water was first applied to a beneficial use provided there has been no period of abandonment or nonuse or forfeiture of the water right since that date.

In addition to the elements of a water right required to submit a claim under Idaho Code 42-243, the department also requires that the place of use for a water right be established. {Note: The lack of

place of use of a water right is instructive, because early when the upper valley was being developed, place of use appeared to have been unimportant. This is evidenced by sales of water rights that took place. One example is the Long Island canal which sold surplus water rights to many people an earlier in its history. Many of the earliest rights held by other canal companies, irrigation districts and individuals were purchased from the Long Island. Sales resulted in a priority date and a flow rate going to a new point of diversion. This simply indicates that the concept of “consumptive use” was not an element of early water rights.}

Question: What ownership in water do I have when I have a water right?

Answer: A water right is known as a “usufruct”. Idaho code Sec. 42-101 says a water right is not considered to be a property right in itself, but is a compliment or appurtenance of the land or other thing through which it is being beneficially applied. The water used under a right is limited by the beneficial use achieved. The elements of a water right determine the extent of one’s ability to call for water delivery against competing demands and uses. If for example, you have established a right to generate electricity with water, i.e. a hydropower right your use was subordinated to all upstream development. This subordination was accomplished through amendment of the Idaho Constitution in 1928. Priority distribution of hydropower water rights is related to the deliveries for irrigation above and below the hydropower facility, rather than the hydropower rights themselves, which generally cannot be exercised to limit the diversions made by others for other beneficial uses of water.

Question: If I use water from a spring is my right surface water or groundwater?

Answer: A molecule of surface water is identical to a molecule of groundwater. The distinction is groundwater is akin to water stored in a reservoir or lake. A groundwater right is a right to recover storage. If, in the recovery or diversion of groundwater storage by a specific well, it can be shown that pumping is directly affecting an earlier priority water right from a spring, recourse may be found under the provisions of 42-237(d). While the process is cumbersome, and requires the establishment of a Local Ground Water Board, this is the mechanism available for recourse when groundwater pumping interferes with a senior surface use. Idaho Code 42-237(a) establish the regulatory powers of the Director, which are limited to general kinds of actions like establishing reasonable pumping levels, determining when the hydrologic conditions warrant creation of critical groundwater areas, addressing certain illegal diversions of water and to have oversight to assure that elected Watermaster in established water districts are properly applying the doctrine of prior appropriation in an established water district. The director has no direct authority to regulate water rights. That is reserved for elected Watermasters who receive their power to regulate water use from the people who have elect him and granted him the limited authority to regulate and control their rights and property pursuant to chapter 6 of Title 42. In some cases a spring may not be tributary to a surface stream and therefore would not be subject to regulation by the Watermaster of the district. If the water from a spring does not leave one’s property it is considered to be “private water.” The owner of the property on which the spring arises is the only one who can appropriate and use water from that spring. Citation: Sec. 42-213 While a spring is view as surface water and a surface water right, that right is generally not legally affected by changes in ground water levels unless a Local Ground Water Board has established a unique relationship and a specific set of rules that establish the regulatory principles for a specific well and a connected spring.

Question: If I have a water right can I use that water right for other purposes?

Answer: There are no provisions in Idaho Water Law to change the nature of use of a water right. The only elements of a water right that are changeable are point of diversion and place of use. In some circumstances it may be possible to change source on a water right. For example, a spring might be developed to the point that the source becomes groundwater.

Question: Can I lose my water right?

Answer: It is possible to lose a water right through non-use. If a water right is not exercised for a period of 5 consecutive years it becomes vulnerable to claims of forfeiture by others. Interestingly the older the right the more vulnerable to forfeiture it is. Forfeiture only tolls when water is available for diversion. A right that only occasionally is in priority has limited exposure to claims of forfeiture. The courts have consistently expressed their abhorrence for forfeiture. A right can also be lost by failure to pay the assessments due to the water district. The process of forfeiture would require the application of some specific processes for the loss of the water right to occur. Abandonment is another action by which a water right can be lost. Abandonment is an intentional action and does not require five years of non-use.

Question: Can I have more than one water right on the same property?

Answer: You may have an inch per acre appropriated from multiple sources, so long as the combined diversion rate does not exceed 0.02 cfs (one miner's inch) per acre of irrigated ground. In cases where more than 0.02 cfs/acre is required that need must be established by the owner to the satisfaction of the Director.

Question: Do I need to apply for a permit to drill a domestic well?

Answer: The legislature, in adopting the groundwater act, carved out two exemptions from the permit and licensing requirements they established. One of these exceptions is for a single family domestic use where the associated irrigation is one-half acre or less and the diversion rate does not exceed 12,000 gallons per day. Citations: 42-227 & 42-230. Any well drilled requires that the well driller have a drilling permit in hand when drilling. Citation: 42-238.

The second exemption is found in Idaho Code §42-228. The Idaho Legislature made very clear provisions for water entering groundwater storage as a result of leaky reservoirs, canals, ditches to be recovered without permit or license. When a surface supply is diminished by losses to the aquifer the amount needed, not to exceed the amount lost, can be recovered and used for irrigation. Canal companies and irrigation districts frequently have significant delivery losses. Water lost from canals can be recovered by the irrigation entity or the patrons or stockholders they serve. This provision allows lost water to be recovered and beneficially used without the loss of priority associated with a new application. Such loss effectively becomes a storage entitlement if the water is needed. As a general rule, so long as ground water is being used on lands covered by an irrigation district or has canal company shares that water can be recovered and used under the same right and priority as the rights held by the entity that provides the water. While the statutes specifically grant the right of recovery to canal companies and irrigation districts, those on private or lateral ditches (other owners of irrigation works) can also drill wells to lower local groundwater levels for drainage and to recover the systemic lost water. In areas of high water tables such recovery may be initiated by those within the service area of a canal company or irrigation district simply because there may be no compelling reason for the patrons or stockholders to be obligated for the costs of installing a well or wells. Because ground water is considered by the state to be storage and a separate and independent source, of water the department generally encourages stockholders or patrons in canal companies and irrigation districts to make application for permit and establish a new groundwater right. Since there is virtually no risk of regulation by the state, the license for a well on ones property represents an additional recognizable asset.

Question: I want to use the water in a local canal to generate electricity. Can I establish a water right for that purpose?

Answer: Yes you can apply for a right to use water that has been appropriated by others. The general rules are: the permit does not grant access or an easement. These must be negotiated. You will have no right to demand water from the source. If the irrigation company goes out of business your water supply would likely go away because the right of the company cannot be transferred to you and the late priority of your subordinated hydropower right would never be expected to be in priority. A good example of this may be the fish farms in that Hagerman area. In general, the oldest water rights from the springs are held by the Idaho Power Company. These water rights are fully subordinated under state law. Any additional use from those springs can diminish the water going to IPCO. However, any right granted by the state in that reach of the river will only be subject to the surface flow entering that reach, not the aquifer. The state has been very liberal in granting more water to fish establishment than they are beneficially using simply because the permits for those facilities are viewed as having the same subordinated status as the power company. The water rights for fish farms were generally based upon theoretical system capacity rather than actual beneficial use simply because they have no ability to impact make delivery against any other water uses.

As Regional Manager I served as hearing officer and conducted water right hearings related to protested applications for permit, applications for transfer and occasionally applications for exchange. As the hearing officer I drafted the memorandum decisions for hearings I conducted or assisted with.

There is much evidence to support an argument that 1977 was the pivotal year in the history of the Snake River, and in the IPCO and lower valley quest for control of Snake River water supplies. A review of history is necessary to support and understand the conclusion that there has been a methodical quest for control orchestrated by IPCO and its lower valley surrogates, Twin Falls Canal Company (TFCC) and North Side Canal Company (NSCC), both of which are organized with the primary purpose of being power companies.

In the development of the surface water distribution system the Committee of Nine had become a very influential appendage of Water District 1. The Committee of Nine goes back to the formation of the Water District and the formalization of watermaster services in 1919. Because the area above Blackfoot had been developed much earlier than the area below American Falls, all of the flow of Snake River above Blackfoot had been appropriated before 1900. Only during periods of high water did those in the lower basin get usable water from the upper river. The river below Blackfoot gained water, and in 1900 the Twin Falls Canal Company and the Hillsdale division of the North Side Canal Company applied to appropriate 3400 cfs for irrigation of the Twin Falls and Hillsdale projects. The priority date for both projects was Oct. 11, 1900 with Twin Falls getting 3,000 cfs and Hillsdale getting 400 cfs. This amount exceeded the gain in the river below Blackfoot. Any other rights developed below Blackfoot would be "high-water" appropriations that depended upon natural river flow passing the Snake River at

Blackfoot gage. It was clear in the upper valley that the big projects in the lower valley would be seeking ways to improve their positions in the available water supplies. The Committee of Nine, for good reason, was dominated by the water user entities located above Blackfoot, with Aberdeen Springfield Canal company being the largest upstream entity. In the "lower valley" the Twin Falls and Northside Canal companies each had a member on the Committee of Nine and the Minidoka project canals had one member. The remaining six members were selected by the water users to distribute representation among the entities in the "upper valley." The six upper valley members controlled policy development for the Water District. Historically Water District 36 was effectively three water districts. The north fork area had one water distribution process. The main Snake River above Blackfoot had a second and the area below Blackfoot a third. In 1919 representatives from the various parts of the Water District met with the State Reclamation Engineer and asked him to establish a Watermasters office in Idaho Falls. The State Engineer contacted Clyde G. Baldwin, District Engineer for the United States Geological Survey and asked if he would be willing to provide Watermaster services within Water District 36. The USGS agreed to provide these services and Clyde Baldwin was elected by the water users to serve as Watermaster of Snake River Water District 36. The nine representatives of the areas of the water district became established as advisors to the Watermaster. The upper valley was well aware of the aspirations of the junior users in the lower valley to gain more control over Snake River water supplies. Until I became Watermaster in 1978 and the USGS contract to provide Watermaster services ended, a representative of the lower valley had never served as chairman of the Committee of Nine. In fact, Judge Leonard Graham served as permanent chairman for much of the 50 year reclamation period. The uniting force between these competing groups was the focus on gaining congressional approval to construct water storage projects. Beyond that the subliminal struggle for supremacy by the Twin Falls and North Side canal companies was ever-present.

In 1976 Director Steve Allred came to me and said, "Art Larson is going to retire at the end of 1977 and the USGS will no longer be contracting with Water District 1 for watermaster services. Your job is to get elected as Art Larson's replacement. You can make any deal you can negotiate. You can be both Regional Manager and Watermaster, or you can resign as Regional Manager and just be Watermaster; just get elected." In keeping with the Director's request, I made a proposal to the selection committee of the Committee of Nine. Interestingly, I had unanimous support from the lower valley members of the Committee of Nine. The upper valley was much more tentative. Ultimately my offer to the water users was accepted. Starting on the first Monday in March of 1978 I served as both Regional Manager and Snake River Watermaster until May of 2006. Under my employment proposal, the water users paid 2/3 of my salary and the IDWR paid the remaining 1/3. As far as I know that arrangement continues to this day with the current Watermaster, Lyle Swank, whom I initially hired in 1978 as Deputy Watermaster. I might add as a comment, that the combination of responsibilities, and the experience I gained as

Region Manager and Watermaster, gave me what I believe was an unusual and unique opportunity to gain knowledge an perspective no one else has or will ever have again. The opportunity I had, at least until Keith Higginson returned to again serve as Director, I consider to have been the best job in state government. When asked about my willingness to accept an appointment to be IDWR Director I would respond, "Why would I want to take a demotion?"

While I was first elected to be Watermaster in March 1978, much of 1977 was spent getting the computerized accounting completed and to run the year of 1977 so the water users would have a comparison of what they might expect in changes between the new computerized methods and the old hand methods of the past. Bob Sutter and Alan Robertson, who led the hydrology staff in the state office, developed the logic for the new accounting system. Robert J. Sutter wrote all of the programming for the accounting in Fortran IV computer code. His work in developing the accounting was outstanding in every way. There have been many challenges to the logic over the last 40 years but the original Sutter logic has always prevailed. The Water District owes a big debt of gratitude to Bob Sutter.

It is useful here to address the logic that was developed for water right accounting that the Watermaster uses in distributing each day's water supplies.

1. The accounting is not a model. All data used are measured data. The water distribution philosophy was: "If we can't measure it, it didn't happen."

2. Natural flow entitlements can never be adversely impacted by any other diversion on the river. To assure that this is what is happening, each day the water available in each reach of the river is determined. That volume of water was then allocated and removed from the computed supply starting with the amount being diverted under the oldest water right priority(s). When the water supply for that day is fully distributed for each reach of the river, the last right filled in each reach is reflected in the day's accounting run.

3. Any diversion of water in excess of one's natural flow right or allocation for the day is, by definition, storage.

4. Storage is allocated to the surface storage rights without loss and delivered to the diversion heading without shrink other than the daily computed reservoir evaporation. It was recognized that there are losses, but because these losses could not measure they do not exist for accounting purposes. There were offsetting factors that compensate for not shrinking storage deliveries. These included storage returning to the river as natural flow, bank storage entering the river as the reservoirs are drawn down, and the reduction to storage allocations based upon measured reservoir evaporation.

5. The highest quality measured data are only available after the irrigation season has ended. It is then that all of the daily diversion rates can be accurately established, gaging errors corrected, storage allocations confirmed and USGS data verified. When all of these processes have been completed the final accounting for the year is run. Water distribution in Water District 1 remains an after-the-fact accounting for what had occurred the previous year. This process assures the Water District data will always be as accurate and consistent as is humanly possible.

Any diversion from the river that exceeds the sum of the associated natural flow water rights is diverting storage. The fact that storage is being diverted does not mean the entity diverting storage is a storage space holder or has a storage allocation. The accounting process therefore requires the Watermaster to have a source of storage to supply those who are found to have diverted more storage than they own. Consequently the accounting system we established in Water District 1 in 1978 required, for the first time, that the Watermaster have a storage supply available to cover "excess uses of storage." Rental pool resolution for 1978 was Resolution No. 9 and is provided here as it was adopted by the water users at the 1978 annual meeting of Water District 1:

Whereas, the operation of the storage pool committee in past years has proven to be of valuable assistance to the Watermaster in providing an orderly distribution of rental water,

Therefore, be it resolved, that a pool committee again be appointed by the Chairman of the Committee of Nine for the following purposes:

1. To determine general policy regarding sources of rental water;
2. To assist the Watermaster in the allocation of rental water;
3. To consult with the Watermaster on ways to most fully utilize available storage water.

At the end of the 1978 I was seeking a way to make storage more accessible to those who needed to acquire storage to cover over use that occurred, or would occur in the future. The space holder contracts all had storage rental procedures and indeed the Water District had had an informal rental pool based upon those procedures for decades. The State statutes provided no authority to establish rental pools, the only vehicle available was the language found in the space holder contracts. Under the contracts, the procedure was simply for the Watermaster to contact storage space holders who would have unused storage at the end of the year and get permission to transfer some of their storage to the water user needing

additional storage. Reclamation would not allow “profiteering”, and had established the rental price at \$0.75 per acre-foot. The water could not be used outside of the Eastern Snake River Plain, or what was broadly referred to as the Minidoka Project. Because there were no provisions in State law to change the nature of the beneficial use for a water right, water could only be used for irrigation. The Idaho Power company had acquired 45,000 AF of water in American Falls that just resided in the reservoir to provide power head for the small power facility they had acquired at American Falls Dam. IPCO had made water from that space available to irrigators from time to time. As I recall they made it available to irrigators in 1977.

Once again I find it necessary to address the year of 1977 as the pivot point in the history of the Snake River and the Eastern Snake River Plain. The backdrop for 1977 was 1976 when on June 5 the Teton Dam failed catastrophically. With the 1976 losses in mind, 1977 arrives to be the single driest year ever recorded. It was in fact the perfect year to rebuild American Falls dam. The continuing cleanup and restoration work associated with the failure of the Teton Dam and the Reconstruction of American Falls Dam provided cover and camouflage for the shift in control of Snake River and the Eastern Snake Plain Aquifer.

As I indicated previously, as Watermaster, I initially had great support from the lower valley water users. That is likely why in 1977 a contingent representing the Twin Falls Canal company showed up in my office seeking to file an application for permit for power generation at Milner. Their application was seeking to appropriate 12,000 cfs for hydropower production. They were not happy when I told them I did not think I could take the application. The numbers simply would not work. There is about 500 cfs that might be available at Milner between November 1 and April 1. Occasionally during flood control operations 12,000 cfs might be released past Milner between the months of April and June. Clearly the water supply was not sufficient for the intended purposes. They of course explained that the dam had to be replaced and they did not have the money to do it. They said, “Idaho Power will rebuild the dam but their stockholders might sue them if they expend funds for a dam that does not include power generation.” I told them I understood the incentive but there simply is no water available at Milner. The IWRB has set a ‘0’ minimum flow for a reason. Their response was, “approve our permit and we will find the water.” That response made me even more uncomfortable. It would be impossible to fuel a power plant at Milner without taking someone else’s water supply. However, at the end of the day, Ken Dunn instructed me to take the application. His argument was: “Hydropower rights are subordinated. If TFCC and IPCO want to take the risk of building a hydro facility where there is no water there is no risk of injury to anyone else if we approve the permit”. I accepted the TFCC application and forwarded to Southern Region with the recommendation that it be approved. At that point in time it had not yet been advertised so such a recommendation was simply a “for what it is worth.” As I recall it was shortly after this that IPCO filed suit against 7,500 junior priority water right holders, most of whom were

groundwater users asserting that their diversions of water interfered with the water rights of the Idaho Power Company.

Returning again to the establishment of the more formalized rental pool I envisioned. The rules for such a more formalized Rental Pool would include the ability to charge a more attractive rental price and establish an opt in process so the Watermaster did not have to call around for water to cover shortages or excess use. Director, Steve Allred, however, envisioned a much different process. He, as the past Director of the Water Resource Board, suggested a plan for using this need for a formalized rental structure in Water District 1 to implement the Boards Water Banking policy in the recently adopted State Water Plan. His idea was to use the new need for an available storage supply in Water District 1, and a more formalized method of implementing the rental provisions in the federal storage contracts, to get Committee of Nine backing for water banking legislation. Under Steve Allred's plan a statute would be drafted creating provisions for a water supply bank that included the appointment by the IWRB of a "local operating committee".

The February 6, 1979 minutes of the Committee of Nine's Rental Pool Committee has been attached here.

MINUTES OF RENTAL POOL COMMITTEE

February 6, 1979

Chairman Kenneth Anderson called the meeting to order at 10:15 a.m. Those present included Lester Saunders, Chairman of the Committee of Nine; Ted Diehl, North Side Canal, Steve Allred, Director, Idaho Department of Water Resources; Rod Vissia, Regional Director, U.S. Bureau of Reclamation; Ben Brooks, Field Solicitor for USBR, and John Rosholt, Roger Ling, and Kent Foster, attorneys representing the interests of a number of water users, companies and organizations within Water District 1; and Ronald Carlson, Watermaster, Water District 1.

Steve Allred was first on the agenda and expressed the state's position on water rentals. He indicated that while there is little doubt that the availability of rental water has been a valuable asset in Water District 1, he expressed concern that the existing rental program may not provide space holders adequate protection since the past use of rental water appears to be inconsistent with the Idaho Code, and may cloud the storage entitlements because of the provisions of Article 15, Section 4, Idaho Constitution.

Steve outline three possible approaches which might be investigated in an attempt to "legalize" water rentals.

1) Establish a water right for rental water.

This plan proposed making space available in existing reservoirs, on a voluntary basis at the start of each year. This space could then be used under a new water right to provide water for rental purposes. The major problem inherent with this is the possibility that the rental space would have a poorer ability to fill because of the late priority right.

2) Water Bank.

Steve indicated that the concept of a "water bank" as set forth in the State Water Plan appears to offer flexibility and probably less legal complications since the enabling legislation would still have to be passed by the Idaho Legislature.

3) Ririe Reservoir

This proposal is an expansion of either approach 1 or 2.

It involved using the space in Ririe Reservoir as base supply for the rental pool. This would allow mixing Ririe water, which will cost over \$2.00 per acre foot per year for space, with less expensive American Falls and Palisades supplies. Within this concept is an implied internal priority system which would allow a "first in time is first in right" concept to be implemented in making annual rentals.

Rod Vissia and Ben Brooks stated the Bureau of Reclamation's position which can be summarized as follows:

- 1) Water will be committed for rental on a voluntary basis and in writing.
- 2) All requests for rental of water will be in writing and forms will stipulate that this is on a temporary and annual basis without in any way establishing a permanent water right.
- 3) All lands for which rental water is requested shall have a bona fide water right from the State of Idaho and the rental water will be only a supplemental supply.
- 4) All those requesting water on a rental basis shall comply with the Federal Reclamation Laws and regulations issued pursuant thereto.
- 5) All requests for water rental shall comply with these guidelines before water may be delivered to the requesting party.

After further discussion it was the conclusion of the committee that every effort be made to develop a program for the coming year that had specific guidelines and provided a written record of each rental transaction.

John Rosholt proposed the adoption of the attached lease agreement as a basic requirement of future rentals.

It was agreed to hold an early Committee of Nine meeting on March 4, 1979, to consider the rental problem and draft resolutions to present to the water users at their annual meeting.



RONALD D. CARLSON, Secretary
Rental Pool Committee

The resolution establishing the initial rental rules is included here.

RESOLUTION

WHEREAS, the contracts between the Secretary of the Interior and numerous water users organizations for the payment of a portion of the costs of Palisades Reservoir allocated to irrigation designate the Committee of Nine as the Advisory Committee to consult with the Secretary on matters concerning rental of water from Palisades Reservoir, and

WHEREAS, it is deemed necessary to provide guidance for the operations of the Water Rental Pool Committee which as agent for the Secretary of the Interior rents water annually, not only from Palisades Reservoir, but from other reservoirs in the Upper Snake River Basin,

NOW, THEREFORE, be it resolved that this Committee recommend to the Secretary of the Interior or his authorized representative that the following points govern the priorities in the rental of available water and the submittal of water for annual rental:

1. Rental of Available Water.

(a) Priority in the rental of available water shall be given to persons executing leases to rent water who have regularly rented water from the Water Rental Pool during the preceding 5 years.

(b) Priority among all other persons executing leases to rent water during an irrigation season shall be determined by the date on which that person's executed lease is received at the office of the Upper Snake River Watermaster at Idaho Falls, Idaho.

(c) The earlier in the year that the executed lease is received by the Watermaster, the higher the priority that person will receive.

2. Acceptance of Water for Rental.

(a) Holders of space in Palisades Reservoir or in other reservoirs may notify the Upper Snake River Watermaster by July 1 of each year of water they designate as available for rental from the Water Rental Pool for that year's irrigation season. All such holders will share proportionately in the proceeds from the rental of all or any part of the water offered by July 1 for use in that year.

(b) Holders of space in Palisades Reservoir or other reservoirs who notify the Upper Snake River Watermaster after July 1 of any year of water they desire to designate as available for rental from the Water Rental Pool for that year's irrigation season shall share proportionately in the proceeds from the rental of all or any part of the water rented which was designated after July 1 of that year.

(c) All of the water designated for rental before July 1 of any year will be rented before any of the water designated for rental on or after July 1 will be rented.

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(c) All of the water designated for rental before July 1 of any year will be rented before any of the water designated for rental on or after July 1 will be rented.

of Nine This would place water rentals under the control of the Committee of Nine rather than the Watermaster. I expressed my opposition and concern that the Board would become overbearing, would want to set the rules, and more important would charge fees. Steve

arranged a meeting of the IWRB and the Committee of Nine. I would characterize the Board at that meeting as being “overly accommodating”. The Board said, “Our only desire is to facilitate what you need and want to establish in Water District 1. The Rental Pool has informally existed for a long time and we do not intend to impose Board additions or limitation on any Water District 1 Rental process. The Committee of Nine and Watermaster can implement needed rules and the Board guarantees that they will never impose any additional costs or fees on storage rentals. We just want to be helpful the the Watermaster and Committee in achieving their goals and responsibilities under the spaceholder contracts.” With this promise in hand the Committee of Nine went to the Idaho legislature in 1979 and lobbied for the enactment of the legislation creating the state water bank. The legislation passed without dissent, and with an emergency clause. And immediately after enactment the Committee of Nine was appointed to be the local operating committee for the water bank in Water District 1. The initial rules for the rental pool were adopted and the first request for water was submitted by the Idaho Power Company. As I recall it was a request to rent 50,000 acre-feet in 1979. The Committee approved the lease to IPCO and for the first time storage was released for use past Milner. IDWR Director Allred said the only thing he would require in 1979 was that space providing water for uses below Milner would be last-to- fill when the reservoir storage is again allocated. I wrote the original water bank (Rental Pool) rules and as I recall they were accepted with few or no modifications.

During the first decade of my tenure as Watermaster the Committee of Nine collectively were a great group of people to work with. John Rosholt was the only attorney attending Committee of Nine meetings for much of that early period. The Committee of Nine members tended to view him as their counsel even though he made it clear that he was there representing Twin Falls and North Side Canal Companies. As the years went by and the Water District started accumulating money from water rentals the number of lawyers started increasing. There were few conflicts among water users during those early years. John would assist with the drafting of Water District Resolutions. It was some time after the Idaho Power Company filed suit against 7,500 Snake River Basin water right holders that the Superintendent of the Minidoka project, Carlos Randolph suggested that I take a look at John Rosholt’s client list. We found of course that the Idaho Power Company was a client of the Rosholt law firm. I remember calling Director Ken Dunn and informing him of what I had discovered. I remember his response: “Are you sure, if it is true that is a major conflict of interest.” It of course was true and we soon discovered that TFCC and NSCC had historically retained the same lawyers as the Idaho Power Company. The Perry law firm had represented both IPCO and the two canal companies before John Rosholt joined that firm. After the initial flash in the pan and arguments about “Chinese walls” within the firm established to avoid conflicts of interest, which of course was patently silly this apparently conflicted legal interest faded away. The truth is, there likely was no actual conflict of interest. The Rosholt law firm represented three symbiotic power companies, two of which

also were irrigation water providers. The representation that there were sympathies for and identification with other irrigators is a deception that continues to this day. It is my belief that the mischief arising from representing power companies as irrigation entities has resulted in incalculable losses to the irrigation entities located above Blackfoot. It is naïve to assume that this will not continue.