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Instream Flows in Idaho

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INSTREAM FLOWS IN IDAHO

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INSTREAM FLOW PROTECTION SYMPOSIUM

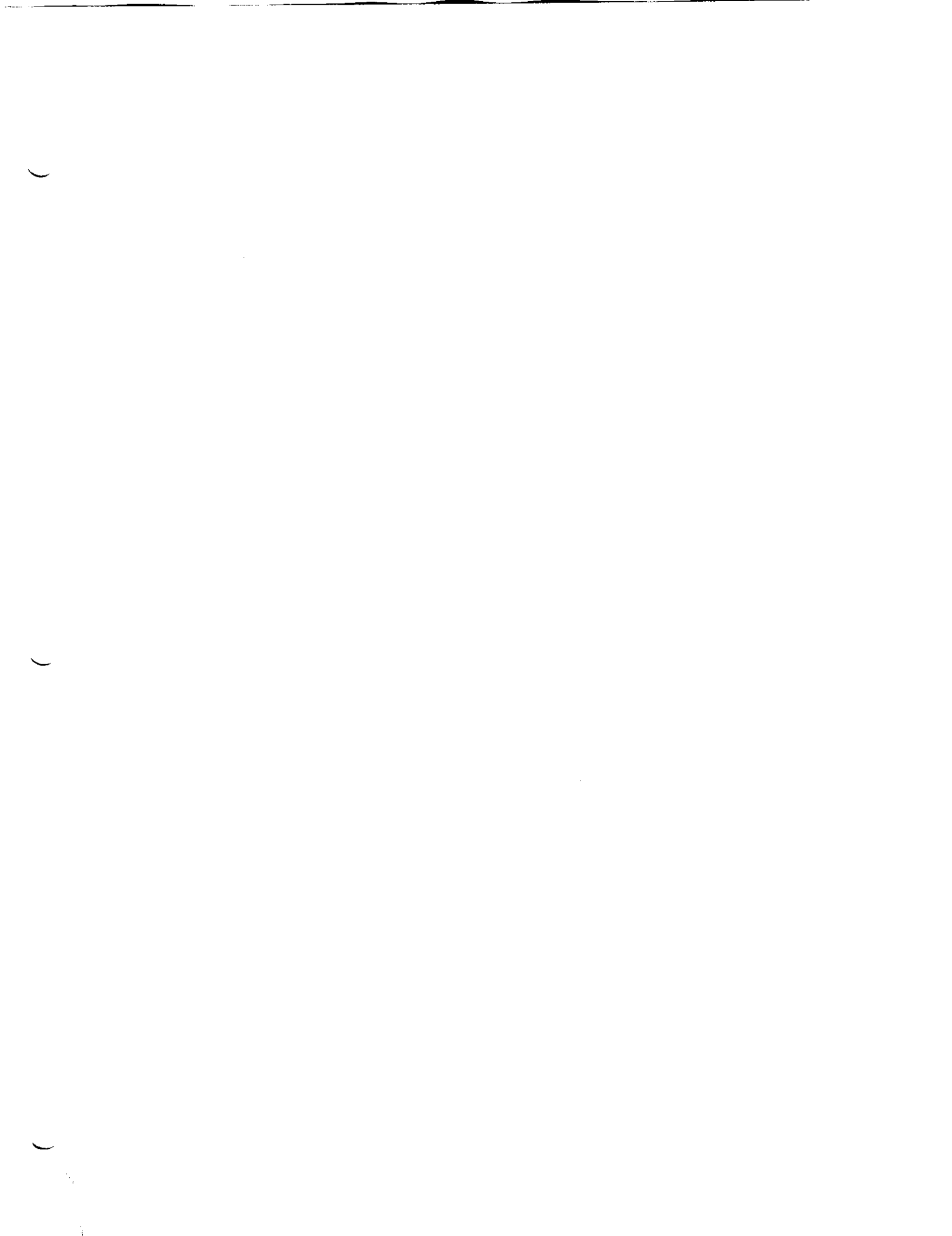
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INSTREAM FLOWS IN IDAHO

CONTENTS

	PAGE
ABSTRACT.....	1
A. The First Instream Flows in Idaho Were Protective Lake Levels Set by Action of the Legislature.....	2
1. The Idaho Supreme Court Affirmed the Beneficial Uses Declared by the Idaho Legislature.....	3
2. Physical Diversion was not a Necessity to Support an Appropriative Right.....	4
B. Development of Water Policy Statewide Led to Minimum Stream Flow Legislation and Protective Flows on the Snake River.....	4
1. 1976 State Water Plan - Instream Flow Program.....	5
2. 1976 State Water Plan - State Natural and Recreational River System.....	6
3. 1976 State Water Plan - Minimum Flows on Snake River.....	6
C. 1982 and 1986 State Water Plans.....	8
D. The Adoption of the State Water Plan Resulted in Litigation Defining the Relative Powers of the Water Board and the Legislature.....	8
1. Both the Idaho Water Resource Board and the Idaho Legislature Thought They had Exclusive Authority to Effect a State Water Plan for Idaho.....	8
2. The Swan Falls Litigation Resulted in New Minimum Flows on the Snake River and New Criteria for Future Diversions from the Mainstem of the Snake River.....	10
a. Regulations Proposed by the Idaho Department of Water Resources in 1985 Would Have Applied the New Trust Criteria Upstream of Milner Dam.....	12
b. The 1986 Idaho Legislature Severed the Snake River at Milner Dam for Purposes of the Determination and Administration of Water Rights.....	12
E. Conclusion: Future Considerations For Instream Flows in Idaho.....	14
FOOTNOTES.....	16



INSTREAM FLOWS IN IDAHO

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ABSTRACT: Existing instream flows in Idaho are a product of legislative enactment,¹ statewide water policy planning² and litigation.³ The present and future status of those instream flow programs is being affected by public trust considerations which have been affirmed by recent action of the Idaho Supreme Court.⁴ This paper will address the development of existing instream flow programs in Idaho from a chronological perspective, indicating where hydrologic conditions, water distribution policy, and the developing public trust doctrine in Idaho may become critical factors in the management and protection of instream flow programs.⁵

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Opinions expressed are those of the authors only and do not necessarily represent the positions of the state of Idaho or any of its agencies.

A. The First Instream Flows in Idaho Were Protective Lake Levels Set by Action of the Legislature

In 1925, the Idaho legislature established statutory lake levels by declaring that the preservation of water in certain lakes for scenic beauty, health and recreation purposes was a beneficial use of the water.⁶ The statutory appropriation was made in trust for the people of the state of Idaho and the water right was issued to the Governor; however, scenic beauty, health and recreation were not among the beneficial uses listed in the Idaho Constitution. Although there was a question of the constitutionality of these actions,⁷ it was 1974 before the Idaho Supreme Court examined the status of legislatively determined beneficial uses and instream flows. This judicial review was prompted by additional legislation passed in 1971.

In 1971 the first instream flows were authorized by the legislature to be appropriated in trust for the people of the state of Idaho. IDAHO CODE §67-4307 to 67-4312 (1980, Supp. 1987). This preservation of water for scenic beauty and recreational purposes was declared by the legislature to be of beneficial use. The Park and Recreation Board of Idaho was authorized to seek the appropriation. The public use of this unappropriated water was declared to be of greater priority than any other use except domestic consumption. Pursuant to the statute, the Idaho Department of Parks filed an application with the Idaho Department of Water Resources for a permit to appropriate the waters specified by the statute. The decision on this application was ultimately appealed to the Idaho Supreme Court,

resulting in what is known as the "Malad Canyon Decision", State, Department of Parks v. Idaho Department of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974).⁸

1. The Idaho Supreme Court Affirmed the Beneficial Uses Declared by the Idaho Legislature

There was concern that a use of water not specifically listed in the Idaho Constitution would not support an appropriative right under the Idaho Constitution. Scenic beauty and recreation were not among the five uses listed in IDAHO CONST. ART. 15, § 3. Were those five uses -- domestic, agriculture, mining, manufacturing and power -- exclusive? The Idaho Supreme Court responded that in this instance, those values and benefits listed in the 1971 legislation -- scenic beauty and recreation -- constituted beneficial uses.

The Malad Canyon Decision was a plurality opinion; of the three justices constituting the plurality, one wrote the opinion, one wrote a concurrence and a third justice concurred without opinion. The language from the concurring opinion in Malad Canyon presages administrative action which is now occurring in Idaho pursuant to public interest/public trust considerations.⁹ The concurring opinion stated,

"I would restrict today's holding to the narrow proposition that the use before us is beneficial so long as, and only so long as, the circumstances of water use in the state have not changed to the extent that it is no longer reasonable to continue this use at the expense of more desirable uses for more urgent needs."

96 Idaho 440, 448 (1974).

2. Physical Diversion was not a Necessity to Support an Appropriative Right

The need for an actual physical diversion was also examined by the court in Malad Canyon. The court determined that a diversion was not constitutionally necessary for an appropriation and that the statute under which the Department of Parks sought its application clearly dispensed with any physical diversion requirement.

The Malad Canyon decision represents an initial tier of examination of instream flows arising from perceived constitutional constraints. At the time of that decision, Idaho had not yet adopted a statewide water plan. In December, 1976, within two years of the Malad Canyon decision, the first state water plan for Idaho was adopted¹⁰ and the instream flow program in Idaho became a very public issue.

B. Development of Water Policy Statewide Led to Minimum Stream Flow Legislation and Protective Flows on the Snake River

Before discussing the instream flow policies in the state water plan, it must be noted that the 1964 constitutional amendment which led to the establishment of a state water planning agency in Idaho arose when public attention was directed toward a proposal by out of state interests to divert water from the Snake River in Idaho, south through Nevada for use in California and the Southwest. Thus, Idaho's Water Resource Board ("Board" herein) was created initially to oversee and develop Idaho's water resources in order that Idaho's water might be preserved and protected for the state's own needs.

1. 1976 State Water Plan - Instream Flow Program

The call for a statewide instream flow program appeared in Policy six of the December 1976 water plan. It was the objective of the policy to fill a procedural void for establishing a right to an instream flow from the unappropriated waters of the state. Four objectives were stated which the Board believed could be achieved by legislation:

1. Water rights should be granted for instream flow purposes;
2. Protection should be afforded existing water rights and priorities of all established water rights;
3. Responsibility for determining instream flows and administrative authority of the program was to rest with the Idaho Department of Water Resources;
4. Idaho Water Resource Board would be the only applicant for instream flows.

These objectives, when realized, would provide an administrative process for the continuing consideration of instream flows.

The minimum stream flow legislation sought by the 1976 state water plan was enacted in 1978. The legislation provides for the Idaho Water Resource Board to make application to the director of the Idaho Department of Water Resources for instream flows. The legislation also embodies the original concern of the state of Idaho regarding out of state diversions:

The legislature further declares that minimum stream flow is a beneficial use of water of the streams of this state for the purpose of protecting this water from interstate diversion to other states or by the federal

government for use outside the state of Idaho. Minimum stream flows as established hereunder shall be prior in right to any claims asserted by any other state, government agency or person for out of state diversion.

IDAHO CODE §42-1501 (Supp. 1987).

As of mid-January 1988, 14 applications for instream flows totaling 383 to 1702 cfs have been approved and 25 applications are pending.

2. 1976 State Water Plan - State Natural and Recreational River System

In addition, the state water plan encouraged the establishment and design of a state natural and recreational river system. The Board envisioned two types of rivers in the system: natural rivers, free of diversions and impoundments which would utilize a natural wilderness type of administration; and recreational rivers, which would be relatively free of diversions and impoundments and would utilize rural, agricultural or urban type of management and administration. There was no legislative adoption of a state natural and recreational river system.

3. 1976 State Water Plan - Minimum Flows on Snake River

A specific policy devoted to the Snake River basin established minimum flows at three critical USGS stream gauging stations on the mainstem of the Snake River:

<u>GAUGING STATIONS</u>	<u>Protected Flow (Average Daily)</u>
Milner	0 cfs
Murphy	3300 cfs
Weiser	4750 cfs

It was the Board's determination that to maintain water for hydropower production and other mainstem water uses, depletion of

flows on the mainstem of the Snake River below these stated flows was not in the public interest. Although there is not documentation to indicate why these specific instream flows were established, some comment can be made.

A flow of 0 cfs at Milner Dam would allow continued development of the drainage upstream of Milner Dam known as the Upper Snake without injury to appropriative rights on the entire mainstem of the Snake river in Idaho. At the time of the adoption of the 1976 water plan, the lowest mean daily flow recorded at the Murphy gauging station was 5420 cfs. At present, the lowest mean daily flow at Murphy has been 4530 cfs recorded in June 1981. Therefore, the difference between 4530 cfs and 3300 cfs would allow for additional development above the Murphy gauging station. Two factors can be mentioned here regarding the availability of flows between the Milner and Murphy gauging stations. The inflow to the mainstem of the Snake River from springs below Milner Dam can be considered fairly constant because the spring flow would decrease only after a prolonged water shortage. Hydrologically, existing diversions from the mainstem and from groundwater pumpers between Milner and Murphy would not cause the 3,300 cfs minimum to be approached, even though the effect to the mainstem can be changed quickly by direct diversions from pumps in that reach.

Of the three minimum daily flows established, it is the flow at the Weiser gauging station which has actually gone beneath the stated instream flow of 4750 cfs. This occurred in the drought of 1977 when minimum daily flows of 4570 cfs and 4690 cfs were

recorded at the Weiser gauging station. These flows were due to irrigation depletion.

C. 1982 and 1986 State Water Plans

In January 1982, a new state water plan was adopted by the Water Board as a result of the first formal review of the objectives and policies presented in the state water plan adopted in 1976. The policies regarding instream flows, the Snake River basin, and the state natural and recreational river system were relatively unchanged.

In December 1986, Idaho's most recent state water plan was adopted. The policies for instream flows and a state natural and recreational river system were again relatively unchanged. The instream flows on the Snake River were changed at the Murphy gauging station in response to the litigation and negotiations regarding the Swan Falls power plant. The power plant is located just upstream of the Murphy gauging station. The discussion of the role of Swan Falls in the establishment of instream flows on the Snake River is discussed immediately below in Section D.

D. The Adoption of the State Water Plan Resulted in Litigation Defining the Relative Powers of the Water Board and the Legislature

1. Both the Idaho Water Resource Board and the Idaho Legislature Thought They had Exclusive Authority to Effect a State Water Plan for Idaho

Prior to the adoption of the state water plan of December 1976, action to establish stream flows in Idaho had been the exclusive province of the legislature. In the 1977 legislative session following adoption of the state water plan, a law was

enacted (without signature of the Governor) providing that the state water plan could not be effective until acted upon by the legislature in the form of a concurrent resolution. IDAHO CODE §42-1736 (Supp. 1986). The Water Board adopted the minimum stream flows for the Snake River in December 1976. When the legislature by concurrent resolution adopted the same flows in 1978, it was questioned whether the instream flows had a 1976 or 1978 priority date. Further, the instream flow at the Murphy gauging station was 5100 cfs less than the operating capacity of the Swan Falls power plant immediately upstream from the gauging station. The status of the state water plan thus became a focus in the litigation of the Swan Falls water rights.¹¹ (The history of the Swan Falls litigation and negotiations was the subject of an earlier presentation to the Western States Water Council during 1985.)¹²

The Swan Falls litigation which began in the fall of 1978 resulted in a determination by the Idaho Supreme Court that the legislature and the Water Board were of equal constitutional stature. The legislature's attempt in 1977 to delay the effectiveness of the state water plan, already adopted by the Idaho Water Resource Board, was declared unconstitutional. The court in its decision did not address the issue of the priority date for the minimum stream flows on the Snake River which were first adopted by the Water Board in December 1976. The most dramatic effect of this litigation was the determination of the status of the water rights for power generation at Swan Falls.

2. The Swan Falls Litigation Resulted in New Minimum Flows on the Snake River and New Criteria for Future Diversions from the Mainstem of the Snake River.

The Idaho Supreme Court concluded that the Swan Falls water rights were not affected by the subordination of the Hells Canyon power facilities located downstream. As a result of that decision, the State of Idaho became involved in a two year process involving the legislature, water users, the governor, the attorney general, and Idaho Power, which, among other things, established new minimum flows at the Murphy gauging station: 3900 cfs (April 1 to October 31); 5600 cfs (November 1 to March 31). These flows were adopted by resolution of the Water Board on March 1, 1985 and enacted into law by the Idaho legislature on March 22, 1985.¹³ The protection of these minimum flows required additional legislation. It must be stated that the protection of these minimum flows is actually a protection of the much older unsubordinated¹⁴ power rights at Swan Falls.

The winter-time minimum flow of 5600 cfs at Murphy appears to be vulnerable to upstream power operations. A provisional determination shows a minimum daily flow of 5440 cfs at Murphy occurred on December 14, 1987, due to power operations at Bliss Dam, not depletions from any junior priorities.

Under Idaho law, the delivery of a water right -- including instream flows -- pursuant to state supervision and enforcement requires the establishment of a water district. IDAHO CODE §42-604 (Supp. 1987). A prerequisite to the establishment of a water district is a decree of water rights within the area of the desired water district. Idaho's ability to enforce the minimum

flows at the Murphy gauging station as well as at Weiser was affected by the lack of an adjudication on the mainstem of the Snake River below Milner Dam. Above Milner Dam there are numerous decrees on the Snake River, although it has been years since there has been a comprehensive adjudication. Consequently, an outgrowth of the Swan Falls negotiation was the legislative determination that an adjudication of the entire Snake River basin was in the public interest and should proceed subject to certain stated constraints regarding reserved right claims. IDAHO CODE §42-1406A (Supp. 1987). With the completion of the adjudication, there would be a listing of water rights for the Snake River Drainage Basin which could be administered as a unit by a watermaster. That adjudication has now been commenced in district court in Idaho, by an order dated November 19, 1987. The solicitation of water right claims began in February 1988.¹⁵

In addition to the legislation establishing the framework for an adjudication of the Snake River, new public interest criteria were drafted for water uses arising after October 25, 1984 that would result in the decrease of Idaho Power's rights in excess of the minimum flows at the Murphy gauging station. IDAHO CODE §42-203C (Supp. 1987). These public interest criteria include: (1) the potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy; (2) the economic impact the proposed use would have upon electric utility rates in the state of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact; (3) the promotion of the family farming

tradition; (4) the promotion of full economic and multiple use development of the water resources of the state of Idaho; (5) in the Snake River Basin above the Murphy gauge whether the proposed development conforms 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. IDAHO CODE §42-203C (Supp. 1987). The legislation also specified that flows between the Murphy minimums and the power plant rights would be held in trust by the State of Idaho until new consumptive appropriations are approved. These waters are hereafter called "trust waters."

a. Regulations Proposed by the Idaho Department of Water Resources in 1985 Would Have Applied the New Trust Criteria Upstream of Milner Dam

During 1985 the Idaho Department of Water Resources promulgated water appropriation rules and regulations which addressed the administration of the trust waters. In addition, the rules and regulations addressed the delivery of water from the mainstem of the Snake River. First, trust waters were not confined to just the area between Milner Dam and the Murphy gauging station. The criteria which had to be met before the water could be appropriated from the trust account would apply upstream from Swan Falls as well as Milner Dam.

b. The 1986 Idaho Legislature Severed the Snake River at Milner Dam for Purposes of the Determination and Administration of Water Rights.

The legislative response to the rules and regulations promulgated by the Idaho Department of Water Resources regarding the administration of the trust waters was made during the 1986

legislative session. Senate Bill 1358 amended IDAHO CODE §42-203B (2) to provide that trust waters do not apply above Milner Dam and no water above Milner Dam shall be considered in the determination and administration of rights downstream from Milner Dam. This action was justified by the legislature's interpretation of their earlier intent in setting a zero minimum flow at Milner.

An action was also filed by Idaho Power under the Administrative Procedures Act stating that the water appropriation rules and regulations of the Idaho Department of Water Resources could not become effective until the new legislation had been considered and incorporated into those rules and regulations. Idaho Power Company v. Idaho Department of Water Resources, No. 3826 (5th District Court, Twin Falls County, Id., filed April 28, 1986). The rules and regulations were revised to apply the trust water criteria only to water tributary between Milner Dam and Swan Falls. The effect of the 1986 legislation is discussed in the future considerations for instream flows which follow.

In summary, the state water plan as a vehicle for the development of instream flows in Idaho has seen the establishment of minimum instream flows on the Snake River and the achievement of statewide legislation enabling the Idaho Water Resource Board to apply for instream flows and the establishment of minimum instream flows. However, there has been no legislation adopted for the establishment of a state natural and recreational river system. The 1986 state water plan did not change the minimum flows set in March 1985. The Board may continue to seek to

appropriate waters in the state for instream flows purposes and will still seek legislation establishing a state natural and recreational river system.

E. Conclusion: Future Considerations for Instream Flows in Idaho

Instream flows as now set in Idaho can be met without exercising public trust authority simply because the flows are low enough that present consumptive uses will not jeopardize them. In assessing the future for establishment and enforcement of instream flows in Idaho, the role of the public trust doctrine and water distribution policy must be examined. The influence of these two legal/management opportunities is critical.

To accommodate the development of instream flows and still allow for future consumptive development presents an opportunity to examine more strictly the beneficial use of appropriative rights. Specifically, if the existing diversion for an appropriative right is in excess of the consumptive irrigation requirement plus a reasonable allowance for loss to the delivery system, then the diversion is in excess of the beneficial right which can be claimed under the appropriation doctrine. However, this may not always be true depending upon the hydrologic setting. There are counter balancing effects from some diversions, such as groundwater recharge, which must be considered.

In Idaho, irrigation projects often receive water from storage as well as natural flow. It may be important to examine the storage contracts for incentives for efficient use of

water.¹⁶ The storage of water in reservoirs also raises questions affecting the determination of what water is available for future appropriations. In a year when a reservoir fills more than once, is the second fill water unappropriated water or is it being managed so that it is not in fact available for new appropriation?¹⁷ These questions will inevitably arise during the adjudication of the Snake River. The determination of rights will necessarily involve the application of standard irrigation efficiencies related to soil, crops and delivery systems. By statute, this is a rebuttable standard in Idaho. IDAHO CODE §42-220 (1977).

A major future consideration, even after the completion of the Snake River adjudication, will be the manner in which water is delivered and distributed over the entire basin. The severing of the Snake River by the 1986 legislature does not impact the delivery of water by a watermaster as much as it impacts the distribution and nature of future consumptive uses in the basin. Although present consumptive uses do not jeopardize established instream flows, a major administrative challenge will be the protection of these flows in the future.

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FOOTNOTES

1. IDAHO CODE §67-4301 to §67-4312 (1980, Supp. 1987) (preservation of certain lakes as health resorts and recreation places); IDAHO CODE §42-1501 to §42-1505 (minimum stream flow); 1985 Idaho Session Laws 514 (minimum stream flows on the mainstem of the Snake River).
2. Idaho, through the action of the Idaho Water Resources Board (created by a 1064 constitutional amendment, IDAHO CONST. ART. 15, §7) has three times adopted a State Water Plan (December 1976, January 1982 and December 1986).
3. State, Department of Parks v. Idaho Department of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974).
4. Kootenai Environ. Alliance v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983); Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985).
5. A comprehensive survey of instream flow programs in Idaho appears in: Brandes, K., ed. 1985. Opportunities to protect instream flows in Idaho, Oregon, and Washington. U.S. Fish Wildl. Serv.
6. In 1925, a lake level was established for Big Payette Lake, IDAHO CODE §67-4301 (1980); in 1927 lake levels were established for Priest Lake, Pend Oreille Lake, and Coeur d'Alene Lake, IDAHO CODE §67-4304 (1980).
7. Letter of August 29, 1972 from the Director of the Idaho Department of Water Resources to the Governor of the State of Idaho. (Part of microfilm file for water right 65-2338 from Big Payette Lake).
8. Welsh, Instream Appropriation for Recreation and Scenic Beauty, 12 IDAHO L. REV. 263-275 (1975).
9. These public trust/public interest concerns are being expressed by term permits on minimum stream flows, and hydropower rights (ref. IDAHO CODE §42-203B(6) (Supp. 1987); required bypass flows for a hydropower project (Birch Creek: D & D Enterprises, Inc. v. Dunn, Bonneville Co. Case No. 33072); protection of historic water use not actually represented by an appropriative claim (Atlanta Hot Springs: IDWR file 63-10275, under name of Barron and Stevenson); and subjection of vested water rights to the public trust doctrine (Niagara Springs: IDWR permit no. 36-7200 - initial administrative decision stated that director of IDWR had

authority under the public trust doctrine to cut back vested water rights for the purpose of protecting an instream flow; on rehearing, applicant changed affected reach of Niagara Springs Creek to an area where it was not necessary for the director to exercise the public trust doctrine to protect the instream flow sought by the applicant.

10. The State Water Plan is a guide to future water resource management in Idaho and results from a series of documents. In July 1972, the Interim State Water Plan was published. It catalogued the resources of the state and presented various alternatives for future water policy to the public. The State Water Plan - Part One, The Objectives, was published in June 1974 to guide the direction of later efforts to formulate the water plan. In December 1976, the State Water Plan - Part Two was adopted wherein several state water policies were advanced. In January 1982, the State Water plan was adopted as a result of the first formal review of the objectives and policies presented in parts one and two of the State Water Plan as previously adopted. The 1982 State Water Plan contained both the objectives and the policies, replacing the earlier two-part approach. Changes were made in 1985 to reflect the agreement entered into by Idaho and the Idaho Power Company concerning water rights at Swan Falls dam. The 1986 water plan involved both a reorganization of policies and a change in objectives. (This explanation appears in the Forward to the 1982 Idaho State Water Plan and at p. 5 of the 1986 Idaho State Water Plan.)
11. The Swan Falls litigation is reported as: Idaho Power Co. v. State, 104 Idaho 570, 661 P.2d 736 (March 30, 1983), (relative powers of the Idaho Water Resource Board and the legislature regarding the State Water Plan); Idaho Power Co. v. State, 104 Idaho 575, 661 P.2d 741 (March 31, 1983) (status of the water rights for hydropower generation at the Swan Falls power plant).
12. The content of this presentation appears in the Summer, 1985 issue of the Western Natural Resource Litigation Digest (Commentary Section) as "Commentary on Swan Falls Resolution" by Patrick D. Costello and Patrick J. Kole. The negotiated agreement for Swan Falls is subject to approval from the Federal Energy Regulatory Commission and the state district court. Only July 30, 1986, the Federal Energy Regulatory Commission denied a request to have a subordination provision included in a power license issued on the Payette River. 36 FERC ¶61,135. Concern about approval of the Swan Falls agreement led to the passage of Public Law 100-216 on

December 29, 1987 which directs the Federal Energy Regulatory Commission to issue an order approving a power license for Swan Falls which incorporates the Swan Falls agreement. 101 Stat. 1450.

13. 1985 Idaho Sess. Laws 514.
14. Neither the state water rights nor the federal power license for the Swan Falls power plant contained language subordinating the Swan Falls water rights to future upstream irrigation uses.
15. In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System, Civil No. 39576 (5th District Court, Twin Falls County, Id., filed June 17, 1987).
16. The recent decision in USA v. State Water Resources Control Board, 227 CAL. RPTR. 161 (California Court of Appeal, May 28, 1986) indicates that public trust considerations may impact water rights in federal projects.
17. The water appropriation rules and regulations presently promulgated by the Idaho Department of Water Resources allow an application for a new right based on the "second" fill.