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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
	)	Subcase Nos. 01-00217, 01-00218,
	)	01-04024, and 01-04025
Case No. 39576	)	(Minidoka Power Rights)
	)	
	)	Subcase Nos. 01-02068 and 01-04054
	)	(Palisades Power Rights)
	)	
	)	REPLY BRIEF
	)	

The State of Idaho, by and through the undersigned deputy attorney general, hereby submits its Reply Brief in support of its motion for partial summary judgment in the above-entitled subcases.

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I. INTRODUCTION

Despite all of the hyperbole in the Surface Water Coalition (SWC)¹ and Idaho Power Company response brief, the issue before the Court is quite narrow. The pending motions for summary judgment simply seek to memorialize the relationship that exists between hydropower generation at the Minidoka and Palisades power facilities and Reclamation storage—namely, “that the exercise of the Minidoka and Palisades water rights at issue in these subcases for purposes of hydropower generation is limited to avoid impairment of the primary storage purpose of the federal reclamation reservoirs on the Snake River above Milner Dam.” Memorandum in Support of the State of Idaho’s Motion for Partial Summary Judgment at 8. Under Reclamation law, this relationship is clear—“The primary object of the statute, and of the project, is the reclamation of arid lands through irrigation. . . . [P]ower is authorized only as an incidental phase of reclamation, not as a primary or independent end in itself. The statute and its amendments are *reclamation* acts, not commercial power development acts.” *Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 530–31 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 687 (1941). The clear statutory mandate is that the commercial uses of power are subordinate “to those of irrigation in any case where the two uses might be in conflict” *Id.* at 541, n.15. The State’s motion for summary judgment simply seeks to protect that status quo in water rights administration by implementing the statutory command.

The SWC and the Idaho Power Company, on the other hand, advocate something quite different. “Cutting through the mass of indirection,” *id.* at 540, set forth in their response brief, their objective is clear—to change the operation of the reservoir system to favor their hydropower generation interests. The SWC and the Idaho Power Company (the “Power

¹ A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Falls Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

Interests”) seek to elevate hydropower generation over storage in the Upper Snake River Basin storage system, plain and simple. The position that they advocate is entirely inconsistent with Reclamation law and the historical administration of these water rights.

II. ANALYSIS

Given the myriad of extraneous issues the Power Interests have interjected into these proceedings, it is important to refocus on the issues before this Court on summary judgment. In the Minidoka Power Rights subcases, the State and the United States moved for summary judgment to resolve those issues related to the “historic practices hydropower remark”² and the “winter power operation remark”³ set forth in the Director’s Recommendations for those claims. In the Palisades Power Rights subcases, the only remark at issue on summary judgment is the “historic practices hydropower remark.”

Yet, the Power Interests spend 83 pages in their response brief making broad assertions that these issues cannot be decided alone, but rather, they must be considered in conjunction with the Power Interests’ assertion that all of the provisions of the Palisades Contracts and all of the provisions of the Eagle Decrees must also be included in these water rights. The Power Interests fail to show, however, how those provisions are material to water rights administration in general or to the relationship between hydropower and Reclamation storage in particular. Moreover, they fail to explain how any of the provisions of the Palisades Contracts or the Eagle Decrees can override well established Reclamation law. Instead, the Power Interests attempt to cloud what is

² Priority Date – “historic practices hydropower remark”

The appropriator shall exercise this right in a manner that recognizes the historic practice that the use of water for power generation is incidental to the rights of others to the use of water for other purposes. The appropriator shall not make a delivery call for hydropower generation except as against junior hydropower rights.

³ Other Provisions Necessary – “winter power operation remark”

The delivery of water to this right may be subject to the provisions for winter power operation at the Minidoka power plant as recognized in the *Burley Irrigation Dist. v. Eagle*, Supplemental Decree (Idaho 5th Jud. Dist., July 10, 1968) and *Aberdeen-Springfield Canal Co. v. Eagle*, Supplemental Decree (Idaho 7th Jud. Dist., March 12, 1969).

a clear and narrow issue on summary judgment in order to avoid summary judgment. *See Algie v. RCA Global Commc'ns, Inc.*, 891 F.Supp. 875, 883 (S.D.N.Y. 1994) (finding that the purpose of partial summary judgment motions is “to narrow the trial and define in advance the issues to be addressed there”).

A. MINIDOKA POWER RIGHTS REMARKS ARE CONSISTENT WITH FEDERAL RECLAMATION LAW AND THE HISTORIC OPERATION OF THE MINIDOKA PROJECT.

i. The Proposed Remarks Maintain The Status Quo.

The State’s summary judgment motion seeks to memorialize the historic relationship between hydropower generation at the Minidoka dam and Reclamation storage in the basin. The Power Interests go to great lengths to try to show that the State and the United States are attempting to change Basin 01 administration, which is simply not true. In fact, the very arguments that the Power Interests raise demonstrate that the pending motions for summary judgment actually maintain the status quo.

a. Power Generation At The Minidoka Dam Was Incidental To Project Purposes Long Before The Creation Of The Power Loss Payment System.

The Power Interests’ argue that there can be no curtailment of the Minidoka Power Rights without the continued exchange of the power loss payments provided for in the Palisades Contracts. The Power Interests ignore, however, the long-established case law in *Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 532 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 687 (1941) (*Ickes*), which holds that power generation at the Minidoka Dam is to be incidental to all irrigation project purposes. In other words, the status quo is that generation of power at the Minidoka power plant is to be curtailed to benefit storage of water for irrigation and other project purposes, regardless of the power loss payment system.

The federal powerplant at the Minidoka Dam was constructed to provide electricity to power the pumps used to lift water to Minidoka Reclamation Project lands. Since electricity for these pumps was only required during the irrigation season, the federal government saw an opportunity to generate power during the non-irrigation season as well. This power, which was excess to the needs of the project, was marketed to project residents and neighboring towns for commercial purposes. Federal Reclamation law, however, expressly provided that the production of this excess power was not to interfere with the primary irrigation purpose of the Minidoka Reclamation Project:

Whenever a development of power is necessary for the irrigation of lands, under any project undertaken under the said reclamation law, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the moneys derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided, That no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project.*

Town Sites and Power Development Act of 1906, Pub. L. No. 59-103, 34 Stat. 116 (1906) (emphasis added). Burley Irrigation District challenged this limitation in 1940, and the United States Court of Appeals for the D.C. Circuit held that the use of water for hydropower generation at the Minidoka Dam is incidental to the use of the same for irrigation development and cannot impair the efficiency of the Minidoka Reclamation Project. *See Ickes*, 116 F.2d at 530-31.

The Burley Irrigation District made many of the same claims in *Ickes* that the District, along with its fellow Power Interests, have now raised in these proceedings. As the Court of Appeals recounted, a percentage of the profits from the sale of Minidoka commercial power was credited to the Reclamation accounts of the Minidoka and Burley irrigation districts. As such, it was in the interest of those districts to have a maximum flow of water through the Minidoka powerplant during the non-irrigation season for generating surplus commercial power. In the

1930s, however, the United States entered into an agreement with the Idaho Power Company that involved the cessation of winter power operations at the Minidoka Dam and the storage of the winter flow in upstream reservoirs for summer irrigation use. *Id.* at 536. In response, the Burley Irrigation District sued Secretary of the Interior Ickes over this arrangement, arguing that the United States “ha[d] no right or authority to withhold, without notice, hearing or compensation, the water decreed for power purposes at Minidoka Dam.” Stanish Aff., Ex. I, Brief for Appellant at 17, *Burley Irr. Dist. v. Ickes* (D.C. Cir. Dec. 8, 1939).

In response, the United States in *Ickes* asserted its duty under the Reclamation Acts to conserve water for irrigation purposes to the detriment of commercial hydropower production:

[W]ith the duty on him under the Reclamation Act to give preference in the use of water to irrigation needs of projects rather than to the production of power for sale, the course of action to be taken by the Secretary was not obscure. *The winter operation of the Minidoka Power Plant must be curtailed to the utilization of only the amount of water which must in any event be released to meet rights lower down on the stream.*

Stanish Aff., Ex. J, Brief for Appellee at 42–43, *Burley Irr. Dist. v. Ickes* (D.C. Cir. Jan. 25, 1940) (emphasis added). The United States argued that it would be wasteful to do otherwise: “We suggest that the use of water for power purposes which the Secretary has curtailed was likewise wasteful of irrigation water.” *Id.* at 83 n.18.

The court in *Ickes* agreed with the United States, finding that the primary objective of the Reclamation Acts under which the Minidoka Reclamation Project was created was irrigation of arid lands, not power production:

The primary object of the statute, and of the project, is the reclamation of arid lands through irrigation. The production of power for pumping in connection with irrigation is an important incident to this main object. Disposition of surplus power, not required for pumping or other uses of irrigation, for commercial uses is authorized by an amendatory act of April 16, 1906 *But the development and sale of such power is authorized only as an incidental phase of reclamation, not as a primary or independent end in itself. The statute and its amendments are*

reclamation acts, not commercial power acts. The legislation is entirely inconsistent with the development and sale of commercial power whenever that may interfere with the development of irrigation or “impair the efficiency of the irrigation project.”

116 F.2d at 530–31 (emphasis added). The court went on to find that hydropower production at Reclamation Act facilities was incidental to irrigation storage:

It would seem that the statute’s clear mandate would subordinate the commercial uses of power to those of irrigation in any case where the two uses might be in conflict, and therefore, whatever might be the case with an appropriation of water for power purposes unqualified by conditions attached by federal law, the Secretary, quite apart from considerations regarding preservation of the power business, was following out the statutory command.

Id. at 541 n.15 (emphasis added); *see also id.* at 535 (“Water passing in winter serves only to generate power at the plant for commercial sale, is useless for irrigation and pumping, and is lost therefore to the project, including Burley District, for its primary purposes. Winter flow is therefore highly wasteful.”).

The Circuit Court of Appeals’ findings in *Ickes* cannot be denied. Power production at the Minidoka Dam “that may interfere with the development of irrigation or ‘impair the efficiency of the irrigation project,’” *Id.* at 530–31, is precluded as a matter of Reclamation law. Thus, regardless of any contractual right the Power Interests may have to compensation for the power generation lost by the creation of the Palisades Reservoir, such contracts cannot override federal Reclamation law. The court in *Ickes* made this abundantly clear, and the United States’ reservoir operations documents confirm this is how the system is operated. *See e.g.*, Stanish Aff., Ex. K, *The Upper Snake River Basin: A Description of Bureau of Reclamation System Operations Above Milner Dam* 32–34 (Jan. 1996) (“Power generation is secondary or incidental to flood control and irrigation water supply at Federal dams and no water is released from Reclamation facilities specifically for power generation except for water held under spaceholder

contracts (IPC is the only electric utility that has a spaceholder contract and that contract amount is 44,275 acre-feet in American Falls Reservoir).”).

The Power Interests are trying to change the status quo. They are seeking to make the United States’ statutory obligation to serve the primary purposes of the Reclamation projects contingent upon continued power loss payments. They assert that if the power loss payments go away, the incidental nature of the power generation at the Minidoka Dam, as set forth in *Ickes*, goes away as well. Their arguments are foreclosed by federal Reclamation law and the *Ickes* decision.

The same conclusion applies to the Power Interests’ argument that the curtailment of power at the Minidoka Dam is also contingent upon continued recognition of the “common plan.” Although limitations on power production at the Minidoka Dam were part of the suite of actions undertaken by Reclamation to justify the construction of the Palisades Reservoir, those actions in no way changed existing federal Reclamation law with regard to power at Minidoka. The incidental nature of power generation at the Minidoka Dam had long-before been decided in *Ickes*.

b. Third-Party Interests Are Not Prejudiced By The Proposed Remarks.

The Power Interests also argue that the remark proposed on summary judgment for the Minidoka Power Rights is fatally flawed because it fails to carryover those references in the Palisades Contracts to the United States’ obligation not to interfere with certain “third-party rights” downstream of the Minidoka Dam. They argue that the North Side Canal Company, Twin Falls Canal Company, and Idaho Power Company were apparently the beneficiaries of this language and that their downstream rights, if any, may not be recognized unless there is a statement in the Minidoka Power Rights providing otherwise.

This argument is without merit. The North Side Canal Company, Twin Falls Canal Company, and Idaho Power Company's downstream water rights, if any, must stand or fall on their own merits. It is not necessary to address those rights in these water rights, especially since none of the allegedly affected rights have been litigated to partial decree. If in fact they have such rights, this fact can be reflected as an additional remark on the water right. The purpose of summary judgment is to narrow the issues in advance of trial. Here granting summary judgment on this aspect of the water rights will clearly narrow the issues without adversely affecting the alleged "third-party rights" of the Power Interests.

ii. The Power Interests Have Failed To Present A Cognizable Argument In Opposition To Summary Judgment In Minidoka Power Right Subcase Nos. 01-04024 and 01-01025.

Summary judgment should be entered in subcase nos. 01-04024 and 01-04025 where the responding parties have failed to raise a genuine issue of material fact in opposition to the State's motion for summary judgment on those issues. The Power Interests' opposition in these proceedings relies entirely on the Eagle Decrees and the Palisades Contracts. However, neither the Eagle Decrees nor the Palisades Contracts address the two junior beneficial use rights at Minidoka Dam. That being so, the Power Interests have failed to raise a genuine issue of fact, or legal opposition, as to why the United States, as the sole claimant of these beneficial use water rights, cannot agree to limit these beneficial use water rights. *See NW Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002) ("The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue.").

B. AS THE SOLE CLAIMANT TO THESE WATER RIGHTS, THE UNITED STATES IS FREE TO VOLUNTARILY LIMIT ITS RIGHTS THERETO.

The United States is the sole claimant of the water rights at issue in these proceedings. Perhaps the most telling fact refuting the Power Interests' position regarding their controlling

interests in these water rights is their failure to file alternative claims to these power rights or to even object to the name element of the Directors' Recommendations in these subcases. Moreover, they fail to explain how their contentions can be reconciled with the holding in *Ickes* that the United States owns these hydropower water rights and that the authority over power production at Minidoka is vested in the Secretary. *Ickes*, 116 F.2d at 531, 539.

As the sole party on record in the SRBA with an ownership interest in these water rights, the United States is entitled to enter into agreements defining how these hydropower water rights will be exercised in relation to other water rights. The Court in *Idaho Power Company v. State*, 104 Idaho 575, 661 P.2d 741 (1983) made this clear: "We hold only that a voluntary subordination agreement is not in violation of Idaho's water law." *Id.* at 587, 661 P.2d at 753. That is exactly what we have here. The United States has voluntarily moved for summary judgment to accept a limitation upon its hydropower water rights.

C. THIS COURT SHOULD DECREE THE PALISADES POWER RIGHTS REMARK AS PROPOSED IN THE STATE'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE POWER INTERESTS HAVE FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT.

Summary judgment should be granted in subcase nos. 01-02068 and 01-04054 because the responding parties have failed to raise a genuine issue of material fact in opposition to the proposed remarks. The Power Interests' response brief is almost entirely silent on the proposed Palisades remarks. The Power Interests make only incidental mention of the remarks in their brief in reference to their request that the entirety of the *Burley* Eagle Decree and the *Aberdeen-Springfield* Eagle Decree be attached to the SRBA decrees for these water rights.

Tellingly, in 1990, members of the SWC took a position in *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232 (9th Cir. 1990) that is contrary to their present position. In *Hodel*, certain environmental organizations sought to enjoin the Secretary of the Interior from reducing the flows from Palisades Dam below 2,000 cfs in order to protect the downstream trout

fishery. Members of the SWC intervened, asserting that the Bureau of Reclamation had the authority and duty to reduce the flows below Palisades as far as is necessary to maximize upstream storage. In fact, those members of the SWC argued for the same “fill and spill” operation that they now find objectionable. *See* Joint Opposition to State and U.S. Motions for Summary Judgment at 43 (“The State exhibits no motivation to not limit storage to other than a ‘fill and spill’ operation – that is, ‘you fill the reservoir until its full, and then you spill whatever comes into it after that point.’”) (citations omitted). In their appeal brief in *Hodel*, the SWC members argued that assuring project storage comes first and foremost: “The Bureau must store water to the greatest extent possible prior to April 1 of each year because a large run-off cannot be anticipated. . . . In fact, because of the spaceholder contracts, the agency is under a mandatory duty to store water in the greatest amounts possible.” Stanish Aff., Ex. L, Brief of Intervenor-Appellees at 18, 25, *Upper Snake River Chapter of Trout Unlimited v. Hodel* (July 20, 1989). Noticeably absent from the discussion in the SWC members’ *Brief of Intervenor-Appellees* was any mention that power generation is an exception to the Bureau duty to optimize storage in the Reclamation reservoirs.

There can be no dispute that the SWC members intended storage be held back not only at Palisades, but throughout all Minidoka Project reservoirs, in times of shortage. In their appeal brief, the SWC members argued that:

any action at any one of the dams in the project must be coordinated with similar actions at other project facilities, keeping in mind the overall objective of storing water upstream whenever possible to avoid the loss of any water past the Milner diversion point, which is the last point in the system where water can be diverted and used on Minidoka Project lands.

Stanish Aff., Ex. L, Brief of Intervenor-Appellees, *Upper Snake River Chapter of Trout Unlimited v. Hodel* at 17. The SWC members continued on to praise the Bureau of Reclamation for its decision to hold back water—i.e., water that could otherwise be producing power—during

the low water years of 1988 and 1989 in favor of storage:

When the Court carefully reviews the intricate operations undertaken by the Bureau of Reclamation in managing the Minidoka Project, the interrelationship of the various dams and reservoirs on that system, together with the impact of State law based water rights and the contractual obligations of the Bureau of Reclamation, it should be readily apparent that BOR undertook the only action prudent and permitted under the circumstances, namely, to reduce flows to an amount resulting in the greatest possible storage [T]he agency has merely operated its Minidoka Project reservoir system consistent with past precedent, congressional authorization, and the circumstances existing at the time.

Stanish Aff., Ex. L, Brief of Intervenor-Appellees, *Upper Snake River Chapter of Trout Unlimited v. Hodel* at 29–30. Again, noticeably absent from this discussion in the SWC members' *Brief of Intervenor-Appellees* is any mention of power generation at Palisades or Minidoka as being an exception to the duty to optimize storage.

Ten years later, those same SWC members now argue that power generation takes priority over storage. They assert that water would be spilling past Minidoka and Palisades Dams for power generation, but for: (i) continued payment of Power Loss compensation; (ii) the existence of the Palisades Contracts; (iii) and the existence of the Eagle Decrees. Thus, the Power Interests argue that power production at these Reclamation Act facilities is superior to storage, but for these concessions.

The State sees it differently. The State agrees with the argument the SWC members made before the Ninth Circuit Court of Appeals in *Hodel*: “the overall objective [is] storing water upstream whenever possible to avoid the loss of any water past the Milner diversion point.” Stanish Aff., Ex. L, Brief of Intervenor-Appellees, *Upper Snake River Chapter of Trout Unlimited v. Hodel* at 17. Power generation is incidental and subordinate to that objective.

Since the Power Interests have failed to raise any genuine issue of material fact in opposition to the State's motion for summary judgment on the Palisades Power Right remarks and have in fact advocated a position consistent with the remark in other litigation, the State is

entitled to summary judgment in subcase nos. 01-02068 and 01-04054.

D. THE EAGLE DECREES ARE NOT BINDING ON THE STATE WHERE THE STATE WAS NOT A PARTY THERETO AND THE ADJUDICATIONS WERE NOT GENERAL STREAM ADJUDICATIONS.

The Power Interests argue that the Court must deny the pending motions for summary judgment because the relief sought therein is inconsistent with the Eagle Decrees, which they assert are binding on the State of Idaho for two reasons. First, Respondents claim that the State was a party to the Decrees, and as such, it is bound thereto. Second, Respondents claim that the Eagle Decree proceedings were general stream adjudications, and as such are binding on all water users, stating that the Eagle Decrees were the result of a “de jure and de facto general adjudication that joined as parties all persons diverting water from the Snake River above the Milner Dam.” Joint Opposition to State and U.S. Motions for Summary Judgment at 52. There is no good faith basis in law for the Power Interests’ argument.

The only evidence the Power Interests offer in support of their assertion that the State is bound by the Decrees was the joinder of the watermaster. Yet, the Power Interests ignore the fact that the watermaster was actually a USGS engineer with limited appointed powers at the time of the Eagle Decrees. *See Swank Aff.* at 2. The Director of the Department of Water Resources could only delegate, and did only delegate, to the watermaster the authority to administer water rights in accordance with the provisions of title 43, chapter 6, Idaho Code. *See Stanish Aff., Ex. M, Certificate of Appointment (Mar. 28, 1969).* As such, the watermaster could only act within the scope of that authority. Nothing in chapter 6 authorizes the watermaster to appear on behalf of the State in its sovereign capacity or to otherwise bind the State in its sovereign capacity. Thus, since the State of Idaho never appeared in its sovereign capacity, it cannot be bound by the Decrees.

The Snake River Basin Adjudication is a general adjudication under the terms of the McCarran Amendment, and the United States is a named defendant in the SRBA, along with all other water right holders in the Snake River Basin including the State of Idaho. In contrast, the Eagle proceedings are most decidedly not a McCarran Amendment general stream adjudication. The Idaho Supreme Court has held that in order for an adjudication to be a McCarran Amendment general adjudication in Idaho “all claimants on the Snake River and all of its tributaries within the state of Idaho must be included in the adjudication.” *In re Snake River Basin Water System*, 115 Idaho 1, 8, 764 P.2d 78, 85 (1988). The Court based its conclusion in part of the committee report accompanying the McCarran Amendment, which states,

by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceeding. . . . Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

Id. at 7, 84. Thus, the Eagle Decrees cannot be termed general stream adjudication decrees because they did not include all water rights in the Snake River Basin. Rather, the Eagle Decrees are the result of a private water adjudication and “binds only those parties to the decree. Section 42-1401A of the Idaho Code clearly provides that a [p]rivate adjudication . . . binds only those persons joined in the action and for the administration of such rights.” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997) (internal quotations and citations omitted). According to the Court in *Hagerman*:

Insomuch as this Court has acknowledged that water rights in the Snake River basin are interrelated . . . the Director’s factual findings as to one water right holder impact the rights of other water right holders. To hold that the Director is “obligated to accept prior decrees as being conclusive proof of the nature of a water right” is contrary to the Director’s statutory role in the SRBA and such a

holding would have the effect of binding water right owners not parties in a prior adjudication to a prior decree issued in a private adjudication. This is an untenable outcome.

Id. (citations omitted). The untenable outcome described by the Court in *Hagerman* is precisely what will result in the current action if the Eagle Decrees are held to be general stream adjudication decrees, as argued by the Power Interests.

The Power Interests rely heavily on the holding of *Mays v. District Court of Sixth Judicial District*, 34 Idaho 200, 200 P. 115 (1921), in support of their claim that the Eagle Decree proceedings intended to be general stream adjudications. “[I]t is clear that the method used to adjudicate water rights is less important than the right to do so From the *Mays* analysis, it appears clear that this Court must look at the factual background and the process that led to the Eagle Decree, and determine whether the process resulted in a general decree.” Joint Opposition to State and U.S. Motions for Summary Judgment at 57, 59. As the Idaho Supreme Court pointed out in a footnote in *Hagerman*, however, the Court in *Mays* was interpreting a statute providing for summary supplemental adjudication of water rights (C.S. § 7036) that was repealed in 1981:

Respondent Canal Companies argues that, although by statute, “the director’s report filed in this matter constitutes ‘prima facie evidence of the nature and extent of the water rights acquired,’... Respondent Canal Companies cite to *Mays v. District Court of Sixth Judicial Dist.*, 34 Idaho 200, 200 P. 115 (1921), for this proposition, not to language in the current statutory scheme. In that case, the Court was interpreting C.S. § 7036 providing for summary supplemental adjudication of water rights That language was repealed in 1981 and does not appear in the current statutory scheme. Act of April 7, 1981, ch. 265, § 3, 1981 Idaho Sess. Laws 561.

State v. Hagerman, 130 Idaho at 741 n.3, 947 P.2d at 414. Therefore, the Power Interests’ reliance on *Mays* is similarly misplaced in the current action and should be disregarded.

Furthermore, the Idaho Supreme Court has already stated that Idaho statutory law does not obligate the Director to accept a prior decree as conclusive proof of the nature and extent of a

water right. “Although a decree evidences a legal right to the use of water, *see* I.C. § 42-230(e), it does not obligate the Director to make a recommendation contrary to his findings.” *Id.* at 741, 947 P.2d at 414. The Court further stated:

*Nowhere in Title 42 is the Director “obligated to accept a prior decree” issued in a private adjudication “as being conclusive proof of the nature of a water right.” This is especially true in light of longstanding decisions in Idaho that decreed water rights, although protected like any other water right, are not insulated from re-examination by the court and may be lost or reduced based on evidence that the water right has been forfeited, *Graham v. Leek*, 65 Idaho 279, 287-88, 144 P.2d 475, 479 (1943), abandoned, *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 59-60, 231 P. 418, 421-22 (1924), *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 393, 43 P.2d 943, 947 (1935), or lost through adverse possession.*

Id. (emphasis added).

Since the Eagle Decrees were not the result of a general stream adjudication, the State of Idaho is not bound by the Eagle Decrees, nor is the Director constrained by the Decrees in making his recommendation. Rather, the Director “looks at these individual decrees as part of the whole, and these decrees are subject to review and not fully sufficient among themselves.” Fletcher Aff., Ex. C, Tuthill Depo. at 33. The Power Interests’ argument that the Eagle Decrees should be considered by this Court as general stream adjudication decrees whose effect are binding on all other water users in the SRBA is simply untenable and inconsistent with Idaho law.

E. IT IS NOT NECESSARY TO INCORPORATE THE ENTIRETY OF THE EAGLE DECREES IN ORDER TO RESOLVE THE OBJECTIONS AND RESPONSES TO THE “HISTORIC PRACTICES HYDROPOWER REMARK” AND THE “WINTER POWER OPERATION REMARK”.

The issue of whether the SRBA Court should incorporate the Eagle Decrees into these water rights is not properly before the Court. A review of the Power Interests objections shows that at no time did any of those parties assert, imply, or suggest that the SRBA Court should incorporate the entirety of the Eagle Decrees. Yet, the Power Interests now assert an entitlement

to have the Court rule on that issue in these proceeding, even though no proper objections or timely motions for summary judgment have been filed. The Court should hold the SWC to their own standards of what can be argued through their objections. *See* SWC Joint Memorandum in Opposition to Motion to Compel, *SRBA subcase no. 01-00004 et al.* (High Water Source/Flood Flow subcases) (Sept. 25, 2008) (arguing that the Ground Water Districts could not move forward on summary judgment on those issues deemed outside the scope of their objections).

Regardless, the Power Interests fail to show how incorporating the *Burley* Eagle Decree and/or the *Aberdeen-Springfield* Eagle Decree into these water rights is material to water rights administration in general or to the relationship between hydropower and Reclamation storage in particular. Instead, the Power Interests make broad assertions regarding the Decrees' applicability, without explaining or providing factual support for why each of the provisions is actually necessary for administration. Conclusory assertions are insufficient for summary judgment. *See NW Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002) ("The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue.").

F. SUMMARY JUDGMENT IS NOT PRECLUDED JUST BECAUSE THE STATE OF IDAHO, THE BOR, AND IDWR HAVE AGREED TO NEW REMARK LANGUAGE THAT IS DIFFERENT FROM THE REMARK LANGUAGE USED IN THE ORIGINAL DIRECTOR'S REPORT.

The Power Interests suggest that summary judgment is precluded in this subcase because the remark language proposed by the State and the BOR differs from the remark language in the Director's Report. They imply that IDWR must submit an amended director's report to the Court pursuant to Idaho Code § 42-1411 before the Court can rule on the motions. Joint Opposition to State and U.S. Motions for Summary Judgment at 52. This argument lacks support in law or reason. There is nothing in Idaho Code 42 § 1411 or of other provisions of the code that requires IDWR to submit a second recommendation to the Court. IDWR submitted the

Director's Reports for these BOR water rights on December 19, 2006. Objections to the original historical practices subordination conditions in the Director's Reports were filed by the BOR and the SWC. As is normal SRBA procedural process, the Parties and IDWR started discussing settlement proposals. In fact, the Parties and IDWR participated in two mandatory settlement conferences, moderated by Special Master Bilyeu. In the settlement discussions, the BOR provided the State and IDWR with information about the hydropower rights at Minidoka dam and how the BOR historically operated by reducing the flow of water for power in favor of optimizing storage for irrigation and other project purposes. As a result of the settlement discussions, the BOR and the State reached an agreement on new remark language that more accurately reflects the historic exercise of these hydropower water rights. Since these remarks simply clarify and narrow the remark recommended by the Director, no purpose would be served by requiring a second director's report.

Indeed, the fact that the Power Interests have had an opportunity to depose the Director responsible for the original remark refutes the need for remanding the matter for a second director's report. As David R. Tuthill, former Director of IDWR, discussed in his deposition:

[W]e have become aware of the fact that there has been a systematic approach by the Bureau of Reclamation to optimize the hydropower use relative to storage water [W]e have become aware that there has been a limitation on the hydropower use through optimizing storage in the system.

See Fletcher Aff., Ex. C, Tuthill Depo. at 108. Former Director Tuthill further stated:

I was aware of the discussions that were taking place, and approved of the use of the new remark as a replacement to the previous remark. . . . [The new language] is before the SRBA court. There's an opportunity for input, in my understanding. There's an opportunity for various perspective [sic] on this. In my capacity as director, I was aware of the process and found the new reflection to be better than the initial reflection. And the adequacy of this new reflection is subject to review by the Court. . . . I think a more explicit description of the extent of subordination is appropriate on a hydropower right.

Fletcher Aff., Ex. C, Tuthill Depo. at 77, 80–81. What this testimony shows is that former Director Tuthill considered the information from the settlement discussions and found the new language better than the language originally proposed by IDWR because it more accurately represented BOR's historical exercise of these power rights.

It is not uncommon in the SRBA for IDWR to consider information gained after the issuance of the Director's Report and to agree to changes because of the new information. Contrary to the Power Interests' protestations, however, the fact that IDWR supports the new remark language does not give rise to a requirement that it submit an amended director's report to the court. Idaho Code § 42-1411 simply does not require a new Director's Report if new language is presented to the Director that more accurately reflects the water right. Furthermore, the Power Interests' argument here is directly contrary to the position taken by its SWC members in the Minidoka Credit subcases. In the objections filed in the Minidoka Credit cases, the SWC members took the position that the Department *lacks* the authority to submit a second director's report.⁴

Finally, the Power Interests are not prejudiced by not having a second director's report. As former Director Tuthill pointed out, the Power Interests are able to raise their concerns regarding the proposed remark language to the Court in this proceeding. The fact that they have submitted an 83-page brief that raises a plethora of alleged issues refutes their contention. Since the Power Interests have had a full opportunity to depose the Director and representatives of the State and the United States and raise their concerns about the proposed remark language in this proceeding, having IDWR file a new director's report in this case would only serve to delay

⁴ For example, see the second objection filed by the Twin Falls Canal Company in Subcase No. 01-211A ("[T]he Director has already issued his recommendation for this water right in Basin 01 Part 1 Report and has no authority to unilaterally change that recommendation by a subsequent report.") Other members of the SWC filed similar objections in this subcase.

resolution of this issues raised in the motion for summary judgment. There is no reason to take a step backward.

G. RELYING ON THE TESTIMONY OF THE FORMER AND CURRENT DIRECTOR OF IDWR DOES NOT VIOLATE IDAHO CODE § 42-1401B.

Finally, the SWC suggests that because the State of Idaho identified the former Director Tuthill and current interim Director Gary Spackman as deponents when the Power Interests sought a deposition pursuant to I.R.C.P. 30(b)(6), violates Idaho Code § 42-1401B. Joint Opposition to State and U.S. Motions for Summary Judgment at 50–51. This argument lacks support in law and logic.

By the plain language of Idaho Code § 42-1401B, the Attorney General may appear in the SRBA and represent the interests of the State of Idaho. Also, by the plain language of the statute, the Director of IDWR may not be a party to the adjudication. However, simply because the former and current director of IDWR provides testimony related to this case does not mean that IDWR is being made a party to the adjudication. Nor does the fact that IDWR cannot be a party to the adjudication mean that the current and former director cannot testify for the State of Idaho about the facts of this case and important state policies.

What the Power Interests fail to recognize is that the State of Idaho speaks through designated representatives. The Idaho Legislature has expressly directed that the Director of the Idaho Department of Water Resources “shall have direction and control of the distribution of water from all natural water sources within a water district” Idaho Code § 42-602. Thus, as testified to by Former Director Tuthill, he is the appropriate deponent because he has first hand knowledge of the facts of this case. *See Fletcher Aff., Ex. C, Tuthill Depo. at 10–11.* The fact that the Legislature has directed that the Department is not a party to the adjudication does not

override the Director's other statutory duties. The mere fact that the Director is providing testimony related to his other duties does not make him a party in the SRBA.

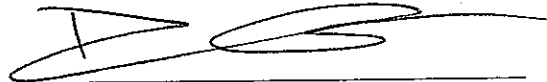
III. CONCLUSION

The proposed remarks at issue on summary judgment accurately represent the historic exercise and administration of the Minidoka and Palisades water rights for generation of hydroelectric power. Because the proposed remarks are necessary to continue the historic administration within Water District No. 1, summary judgment resolving all objections and responses to the "historic practices hydropower remark" and the "winter power operation remark" should be granted.

RESPECTFULLY SUBMITTED this 10th day of November 2009.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

A handwritten signature in black ink, appearing to read 'D. Stanish', with a horizontal line drawn underneath it.

DAVID I. STANISH
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 10th day of November 2009, I caused to be served the original and copies of the **REPLY BRIEF** on the following persons by the methods indicated:

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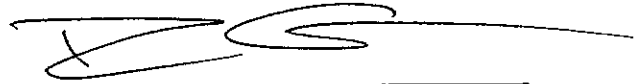
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Counsel for the State of Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

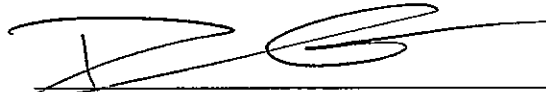
In Re SRBA	)	
	)	Subcase Nos. 01-00217, 01-00218,
	)	01-04024, and 01-04025
Case No. 39576	)	(Minidoka Power Rights)
	)	
	)	Subcase Nos. 01-02068 and 01-04054
	)	(Palisades Power Rights)
	)	
	)	AFFIDAVIT OF DAVID I. STANISH
	)	

State of Idaho)
)ss
County of Ada)

DAVID I. STANISH, being first duly sworn, deposes and states:

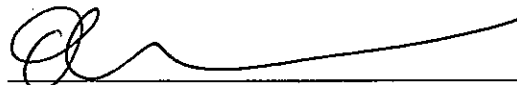
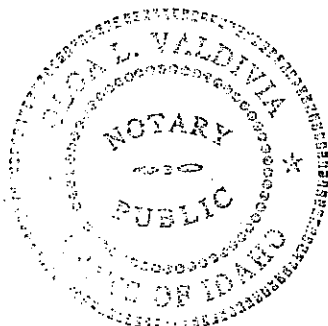
1. I am a competent adult over the age of eighteen years, and the statements made herein are based upon my own personal knowledge of the events described.

2. I am a deputy attorney general assigned to the Snake River Basin Adjudication.
3. Attached to this affidavit are true and correct copies of the following documents:
- Exhibit I: Brief for Appellant, *Burley Irr. Dist. v. Ickes* (D.C. Cir. Dec. 8, 1939);
- Exhibit J: Brief for Appellee, *Burley Irr. Dist. v. Ickes* (D.C. Cir. Jan. 25, 1940);
- Exhibit K: *The Upper Snake River Basin: A Description of Bureau of Reclamation System Operations Above Milner Dam* 32-34 (Jan. 1996);
- Exhibit L: Brief of Intervenor-Appellees, *Upper Snake River Chapter of Trout Unlimited v. Hodel* (July 20, 1989); and
- Exhibit M: Certificate of Appointment (Mar. 28, 1969).
4. Further your affiant sayeth naught.



DAVID I. STANISH
Deputy Attorney General
Natural Resources Division

Subscribed and sworn (or affirmed) to before me, a notary public in and for the State of Idaho this 10th day of November 2009.



Notary Public for Idaho
Residing at Boise, ID
My Commission expires: 2/8/2012

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DAVID I. STANISH
Deputy Attorney General

Exhibit I

**Brief for Appellant, Burley Irr. Dist. v. Ickes
(D.C. Cir. Dec. 8, 1939)**

OFFICE COPY

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA
OCTOBER TERM, 1939.

FILED DEC 8 - 1939

No. 7522, SPECIAL CALENDAR

Joseph W. Stewart

CLERK

BURLEY IRRIGATION DISTRICT, A CORPORATION, *Appellant*,

v.

HAROLD E. FOXES, SECRETARY OF THE INTERIOR.

Appeal from the District Court of the United States
for the District of Columbia.

BRIEF FOR APPELLANT

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Of Counsel

Printed by BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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FOR THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1939.

No. 7522, SPECIAL CALENDAR.

BURLEY IRRIGATION DISTRICT, A CORPORATION, *Appellant*,

v.

HAROLD L. IOKES, SECRETARY OF THE INTERIOR.

Appeal from the District Court of the United States
for the District of Columbia.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment dismissing the complaint in an equity proceeding in the District Court of the United States for the District of Columbia, which court had jurisdiction of the proceeding under the provisions of Title 18, Chapter 3, Sections 41 to 101, inclusive, of the 1929 District of Columbia Code.

This court has jurisdiction upon appeal to review the judgment in question, under the provisions of Title 18, Chapter 2, Section 26 of the 1929 District of Columbia Code.

The bill of complaint prayed an injunction against the Secretary of the Interior in his official capacity. (Complaint, R. p. 1 et seq.) The suit was dismissed by the lower court. (R. p. 208)

OPINION OF THE COURT BELOW.

The opinion of the lower court is set out in the printed Transcript of Record at page 326.

STATEMENT OF CASE.

Construction.

The Minidoka reclamation project for the irrigation of certain lands in Cassia and Minidoka counties in the State of Idaho was approved by the Secretary of the Interior in 1904. The project then consisted of two units, the pumping division, located on the south side of Snake River and now known as the Burley Irrigation District, Appellant (plaintiff below), and the gravity division, located on the north side of Snake River and now known as the Minidoka Irrigation District. (Pl. Exhibit No. 1, pp. 151, 156) The lands in the Burley district are irrigated by water diverted from Snake River at Minidoka Dam, conveyed by gravity to three pumping stations some twelve miles from the dam and there lifted to the level of the lands in the Burley district by pumps operated by electric power. (Pl. Exhibit No. 1, p. 156)

The Minidoka Dam, built primarily as a diversion dam, was completed in 1906 and is essential to both

units or districts. (Pl. Exhibit No. 1, p. 151) The dam lies across Snake River some few miles above the project. It was constructed with penstocks or openings for use in supplying water for the generation of power at the power plant, the construction of which was begun in 1908. (Pl. Exhibit No. 1, pp. 151, 156, 157) The power plant, constructed almost entirely for the use of the pumping division, is now equipped with six generating units the first of which was completed in 1909, and the last in 1926. (Pl. Exhibit No. 1, pp. 151, 152, 156) The construction of a seventh generating unit at the power plant has been authorized by Congress and the funds have been appropriated therefor. (R. pp. 188, 189)

Board of Review—Construction Charges.

In 1915, under authority of the Act of August 13, 1914 (38 Stat. 690, Title 43 U. S. C. 373), and pursuant to an order of January 30, 1915, Secretary Lane appointed a number of local boards of review and a central board of review. The local boards were instructed to examine the statement of the entire cost of a reclamation project as shown on the books of the Reclamation service, and to analyze each item of the statement, and to investigate and report to the Secretary of the Interior in order to aid him to determine the just and equitable amount to be collected from the respective units of the project. The board of review for the Minidoka project included a representative of each unit. The board reviewed thoroughly each item of cost of the project shown on the books and unanimously made definite recommendations as to the division thereof. The recommendations were approved by the central board of review and were adopted by the

Secretary. The board recommended that the cost of the power plant be charged against the lands in the two units of the project on the basis of peak demands for power for irrigation purposes. That is, 95.6 per cent of the cost of the power plant was charged against the lands in the pumping unit (now Burley Irrigation District) and 4.4 per cent against the lands in the gravity unit. (Pl. Exhibit No. 1, pp. 152, 157, 158) The transmission lines were charged against the two units in approximately the same proportions. (Pl. Exhibit No. 1, p. 18) Upon the basis of these and other allocations of costs, the total amount chargeable against the lands in the pumping unit (Burley District) was \$2,785,307, which was, under the Reclamation Law, to be returned to the United States by the water users therein. Upon this determination of the costs to be charged against the land, the charges per acre were indicated at \$56.50 per acre for public lands and \$57.50 for private lands.

These recommendations, allocations and findings of the board were approved by the central board of review. And, on November 3, 1915, Secretary Lane issued a public notice specifying the lands irrigable in the pumping unit, the limit of area per entry on public lands therein, the charges to be paid for each irrigable acre and the number of annual installments in which the charges were to be paid. In the notice, the charges for each irrigable acre were fixed at \$56.50 per acre for public lands and \$57.50 per acre for lands in private ownership, as recommended by the board of review. Thereafter, all entrymen and landowners in the pumping unit executed water-right contracts, on forms prescribed by the Secretary of the Interior, agreeing to pay the respective charges per acre, as set forth

above, and annual charges for operation and maintenance. By virtue of a contract, dated March 15, 1926, between the United States and the Burley Irrigation District, the latter took over the operation of the pumping unit of the project's irrigation system and assumed the indebtedness and obligations of the entrymen and landowners in that unit, incurred under the individual water-right contracts. (Pl. Exhibit No. 1, pp. 158, 159, 160 and 165)

Generation of Power.

Early in the life of the project, electric energy generated at the power plant, in excess of the amount required for the pumping of water for the irrigation of lands in the pumping unit, was sold to residents on the project and in towns adjacent thereto for commercial purposes. Since 1915, the sale of such surplus energy for commercial uses has resulted in a profit over and above all expenses of operation and all needed new construction or improvements to the power system. (R. pp. 16, 99 par. 20; Pl. Exhibit No. 1, p. 160) Out of these profits, \$300,000 has been reserved and expended by the Secretary for the purchase and installation at the Minidoka power plant of machinery, including the sixth generating unit, a switch-yard and an interconnecting substation, for the purpose of increasing the power output of the power plant. (R. pp. 14, 99 par. 16; Pl. Exhibit No. 1, pp. 164 and 167)

On December 5, 1924, an Act was approved (43 Stats. 701, Title 43 U. S. C. 501) authorizing the disposition of power plant profits, section 4, subsection 1 of which provides that:

"Whenever the water users take over the care, operation and maintenance of a project, or a divi-

sion of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants * * * shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, * * *.

A subsequent Appropriation Act, approved May 10, 1926 (44 Stats. 480), specifically directed the disposition of such profits derived from the operation of the Minidoka power plant, and provided that the accumulated net profits as determined by the Secretary from the operation of the project power plants should be applied in the payment of water-right charges due the United States by any irrigation district to whose benefit such accumulated profits should equitably accrue in the judgment of the Secretary, whose decision should be conclusive. It will be remembered that Burley Irrigation District had assumed the construction charges and other obligations incurred under the water-right contracts of the entrymen and landowners in the pumping unit, by virtue of a contract with the United States dated March 15, 1926. (Def. Exhibit No. 6; Pl. Exhibit No. 1, p. 165)

Ownership of the Power System.

Thereafter, on March 14, 1927, Secretary of the Interior Work after representations by the two districts, determined that the profits from the sale of power should be credited to the two districts in the proportions of 95.6 per cent to Burley Irrigation District and 4.4 per cent to Minidoka District. (Pl. Exhibit

No. 1, pp. 166, 167) The Secretary referred to the recommendations of the board of review in 1915 and their adoption and use by the then Secretary in "fixing the construction charges of the two districts," and concluded that "the Burley district owns 95.6 per cent of the power plant and the Minidoka district the remainder, or 4.4 per cent." Two years later, March 2, 1929, upon a petition by the Minidoka District for a reconsideration of the decision of March 14, 1927, Secretary West refused to reconsider or reverse the action of his predecessor. (Pl. Exhibit No. 1, pp. 168, 169)

In July, 1929, the Minidoka District renewed its requests for reconsideration by filing a petition with the new incumbent Secretary, Hon. Ray Lyman Wilbur. (Pl. Exhibit No. 1, p. 170) Shortly thereafter, a committee, known as the Rothrock Committee, was appointed by an Acting Secretary "to consider the ratio of ownership by the Minidoka and Burley districts in the Minidoka irrigation project and the ratio of participation of the two districts in the proceeds of power profits." (Pl. Exhibit No. 1, pp. 44, 170) The Committee undertook to redetermine the respective ownership of the two districts in the power system and, in its report to the Secretary, stated that the ownership of the Burley Irrigation District in the power system was only 72.7 per cent and that profits should be distributed on that basis. (Pl. Exhibit No. 1, pp. 170, 171) While the Committee's report was still before the Secretary, the Burley Irrigation District filed suit in the Supreme Court of the District of Columbia to enjoin him from reconsidering the ratio of ownership of the two districts in the "power features" of the Minidoka project and the division of credits and dis-

tribution of the power profits as between the two districts. (R. pp. 19, 101 par. 26) The trial court gave judgment for the plaintiff, held that the shares of the districts, both past and future, in profits from the sale of energy generated at the power plant follow in the respective ownership in the plant, which was in the proportion of 95.6 per cent in the Burley District and 4.4 per cent in the Minidoka District, and enjoined the distribution of profits upon any other basis. (Pl. Exhibit No. 1, pp. 173, 174) Upon appeal, this Court affirmed the decree of the lower court and held that property rights in the power plant had vested in the plaintiff and that the Secretary could not interfere with or destroy such rights by attempting to reverse or revoke the action of his predecessors. *Wilbur v. Burley Irrigation District*, 58 Fed. (2d) 871, 61 App. D. C. 145.

Each year up to December 31, 1934, profits from the sale of power on the Minidoka project for commercial purposes, in the aggregate of \$930,892.65, were credited to the two districts in the foregoing proportions. (R. pp. 16, 99 par. 20)

The Water Rights.

At this point, it is necessary to understand the nature and sources of the rights to water used on the project for both irrigation and power purposes.

On June 20, 1913, in an action brought to determine the disposition of the waters of Snake River, in which the Secretary of the Interior and others were parties, the Fourth Judicial District Court of the State of Idaho adjudged and decreed the rights to such waters. This decree is commonly referred to as the "Foster Decree." Several rights were decreed for the irriga-

tion of lands in the Minidoka project, of which the following is typical as to language:

"RIGHT No. 6

That the defendant, the Secretary of the Interior of the United States and his successors in office, is hereby awarded the use of the waters of the natural flow of Snake River, diverted at the Minidoka Dam for use on the lands lying under the canals of the Minidoka and Cassia Counties, Idaho, in the following amount from August 6, 1908; 1,000 second-feet, hereby designated as Right No. 6." (R. p. 196 par. 56; Pl. Exhibit No. 2, pp. 28, 32)

In this decree, rights to the use of water for the generation of power on the Minidoka project were decreed in exactly the same way as were the water-rights for irrigation uses. Right No. 9 provided:

"RIGHT No. 9

That the defendant, the Secretary of the Interior of the United States and his successors in office, is hereby awarded the use of the waters of the natural flow of Snake River at Minidoka Dam for power, light, manufacturing and pumping purposes in the following amount and from the following date: 2,500 second-feet from June 15, 1909, and 200 second-feet from July 1, 1912. Said water to be returned to Snake River below the Minidoka Dam after being used for said power purposes, and hereby designated as Right No. 9." (R. p. 196 par. 56; Pl. Exhibit No. 2, p. 33)

Subsequently, in June, 1929, a similar action for the same purpose was heard in the Federal District Court for the District of Idaho, Eastern Division, in which the Woodville Canal Company was plaintiff and Clark

and Edwards Canal and Irrigation Company and others were defendants. Among the other parties to this action were the Secretary of the Interior, the Bureau of Irrigation District and the Minidoka Irrigation District. (Pl. Exhibit No. 2, p. 3) The decree in this action, commonly referred to as the "Woodville Decree", provided in part:

"... that the said Foster Decree is hereby made a part of this Decree and all the provisions thereof are hereby declared to be binding upon all the parties to this action * * *," (R. p. 196 par. 56; Pl. Exhibit No. 2, p. 27)

Later, on June 22, 1932, in a similar action brought in the Federal District Court of the District of Idaho, Southern Division, the rights decreed to the Secretary and his successors in the Foster Decree were awarded to the United States and its successors. (R. p. 196 par. 56; Pl. Exhibit No. 3, pp. 10, 11) Continuously for a period of more than 21 years, up to October 1, 1934, such portion of the 2700 second-feet of water so decreed for power generation as was necessary to supply the power demands on the whole project during the non-irrigation season, was used for that purpose at the Minidoka power plant. (R. pp. 23, 101 par. 30)

The New Plan.

Then, effective October 1, 1934, the Secretary adopted a new plan purporting to effect a conservation of water. Prior to that date, negotiations were carried on between the Secretary's agents and the Idaho Power Company for the consummation of a plan whereby the water, theretofore decreed and used for power purposes at the Minidoka power plant, would

be withheld and stored in American Falls reservoir during the non-irrigation season, and the power theretofore generated at the Minidoka power plant by the use of such water would be displaced by power brought in from the Idaho Power Company. The plan also contemplated the extension for twenty-five years of a contract, executed in 1930 (Pl. Exhibit No. 6), by which the Company had been receiving, during the non-irrigation season, all the surplus power generated at the Government's Black Canyon Power Plant (some 250 miles distant) at a cost of \$600.00 per month. Furthermore, it was decided to pay \$50,000 per year to the United States on the theory of compensating the latter for the "use and disuse" of its power plants.

Pending these negotiations, in September, 1934, one B. E. Stoutemeyer, agent of the defendant, submitted to the water users of Snake River Valley two propositions. The first proposed the assessment of \$50,000 against "the parties who receive the benefit of the water saved, in proportion to their respective rights in the (American Falls) reservoir." The alternative, Number 2, proposed that, out of the power brought in to the project by the Idaho Power Company enough would be sold by the government to the Minidoka District to supply the requirements of consumers in that district up to double the amount of power theretofore used, "the district guaranteeing the payment of \$50,000 per year for such power." This proposal pointed out that the "present net collections from power sales in the Minidoka district are understood to be approximately \$50,000 per year." Proposition Number 2 was adopted by the advisory board of the American Falls Reservoir District, but with a reserva-

tion to "fall back" on Number 1 if Number 2 should fail either on account of rejection by the Minidoka District or "on account of a decision of the courts that the power contract with the Minidoka District is invalid or beyond the power of the Secretary." Minidoka District accepted Number 2. Appellant, the Burley District, had no rights in American Falls Reservoir, no representation on the advisory board and could not vote at the meeting. It protested against the adoption of proposition Number 2, but without avail. (R. pp. 25-29, 102 pars. 34, 35)

The Contracts—Operation of the Plan.

Thereafter, the new plan was carried into effect by the execution of a contract between the Secretary and the Minidoka District on January 1, 1935 (R. pp. 32, 102 par. 36; R. pp. 86-93), and a contract between the Secretary and the Idaho Power Company, in May, 1935, effective as of October 1, 1934. (R. pp. 28, 101 par. 31; R. pp. 71-79)

The contract with the Minidoka District provided, in effect, that out of the power delivered to the project by the Idaho Power Company, the government would sell sufficient to the Minidoka District to meet the power demands of consumers in that district, up to double the amount theretofore used in the district for commercial power purposes. Out of the receipts from the sale of this power to consumers, the district guaranteed the payment of \$50,000 per year to the United States "for the use and disuse of its power plants." The contract further provided, that "in the event that the courts should decide that the Secretary may not discontinue or reduce the non-irrigation season use of the power plant at Minidoka Dam without compensa-

tion to the water users of the Burley Irrigation District, then either of the parties hereto may terminate this contract by notice in writing to the other party hereto." (R. pp. 86-93)

The contract with the Idaho Power Company provided for the delivery by the Company to the Minidoka project, of not to exceed 10,000 kilowatts of electric energy during the non-irrigation season, that is, from October 1, to April 1, of each year, and 7,500 kilowatts during the irrigation season, of which the power in excess of 4,000 kilowatts is breakdown power. No money payments were provided for this power. The considerations moving to the Company, as recited in the contract, and characterized by the president of the Company as inducements which led the Company to enter into the agreement (R. p. 268), are:

- (1) The vital interest of the Company in water conservation;
- (2) The promise of the United States not to construct additional competitive government power facilities at the American Falls;
- (3) The extension for twenty-five years of the 1930 Black Canyon contract between the Company and the United States;
- (4) Receipt by the Company, free, of large amounts of power generated at the Minidoka power plant during the irrigation season. (Def. Exhibit No. 2)

The Black Canyon contract with the Idaho Power Company, executed in April, 1930, which was extended by and to run concurrently with, the 1935 contract (R. p. 276), provided for the delivery to the Company during the non-irrigation season of all surplus energy

generated at the Black Canyon plant, at a price of \$600 per month, and for the operation of the plant by the Company, if it so desired, at full capacity during the non-irrigation season. (Pl. Exhibit No. 6)

Under this 1930 contract the Idaho Power Company received the following amounts of power from the Black Canyon plant in 1934 (note: before the execution of the 1935 contract relating to the power situation at Minidoka) (Pl. Exhibit No. 8(a)):

	Total output of Black Canyon plant (Kilowatt hours)	To Idaho Power Company (KWH)
1934		
January	5,055,453	4,803,889
February	4,537,317	4,320,362
March	5,285,751	5,108,288
October	2,821,807	2,383,414
November	2,972,963	2,692,954
December	2,616,737	2,364,208

In 1935 the Idaho Power Company received the following amounts of power from Black Canyon (Pl. Exhibit No. 8(b)):

	Total Output (KWH)	To Idaho Power Company (KWH)
1935		
January	3,244,372	2,993,406
February	3,471,061	3,273,683
March	4,686,038	4,449,349
October	1,357,471	774,337
November	3,189,235	2,988,217
December	2,223,769	2,006,453

In the execution of the new plan, the Minidoka power plant was closed down during the non-irrigation or winter season, by reason of the withholding of the water theretofore decreed and used for the generation of power at the plant. (R. p. 182, par. 26) The water

thus withheld is stored in American Falls Reservoir. (R. p. 188, par. 39) Furthermore, upon the expiration of its lease in 1935 of 50,000 acre-feet of storage space in American Falls Reservoir, for irrigation use, appellant was not permitted to renew the lease because of its refusal to approve the new plan. (R. pp. 292, 293)

In accordance with the plan the appellee Secretary, in March, 1936, promulgated findings of the net profits from sales of power on the whole project, and adjacent towns, for the year 1935, and as a part of such findings proposed to credit the following sums derived from such sales in 1935:

To Burley Irrigation District \$63,807.51.
To Black Canyon Power Plant \$50,000.00.
To Minidoka Irrigation District \$5,321.27.

(R. pp. 35, 36, 105-110, pars. 41, 42) Each year, prior to the adoption of the new plan, such profits from the sale of power on the whole project and adjacent towns were credited to the appellant in the proportion of 95.6 per cent and to the Minidoka District 4.4 per cent, in accordance with findings of the predecessors of the appellee and the mandates of the courts. (R. pp. 16, 39, par. 20; Pl. Exhibit No. 1, pp. 173, 174; *Wilbur v. Burley Irrigation District*, 58 F. (2d) 871, 61 App. D. C. 145)

On March 28, 1936, appellant instituted this action to enjoin the wrongful acts of the appellee. In March, 1937, a temporary injunction was granted enjoining the appellee from crediting or distributing the profits from the sales of power on the Minidoka project, except in the proportion of 95.6 per cent to the Burley Irrigation District, and 4.4 per cent to the Minidoka

District. (R. pp. 152, 153) This order was modified in April, 1938. (R. p. 153) Upon the trial in March, 1939, the lower court dismissed the action and the plaintiff appealed. The judgment of the lower court provides that the temporary injunction, as modified, shall continue in force pending appeal. (R. p. 208)

STATUTES INVOLVED.

The statutes or relevant parts thereof, involved in this appeal are set out in the Appendix hereto.

STATEMENT OF POINTS.

1. Appellant is the beneficial and equitable owner of the power plant at Minidoka Dam to the extent of 95.6 per cent, thereof.
2. Appellant is the beneficial and equitable owner of the power distribution system on the Minidoka Project to the extent of 95.6 per cent thereof.
3. The water-rights decreed for power purposes by the courts having jurisdiction thereof, are appurtenances to the Minidoka power plant and to the lands in the Southside Pumping Division (Burley District) of the Minidoka Project.
4. Appellant is the beneficial and equitable owner of the water-rights decreed for power purposes at Minidoka Dam by courts having jurisdiction thereof.
5. Appellant, as the agent and representative of the water users, acquired rights in the power plant, distribution system, irrigation system and water-rights by reason of the Public Notice of November 3, 1915, the water right applications signed by the water users and the Act of Congress approved December 5, 1924,

43 Stats. 701, Title 43, U. S. C. 501, commonly known as the Fact Finders Act.

6. Appellee has no right or authority to withhold, without notice, hearing or compensation, the water decreed for power purposes at Minidoka Dam.

7. Appellee illegally failed to turn down to the Minidoka power plant; the 2700 second-feet of water decreed for power purposes or so much thereof as is necessary to generate sufficient power to meet the power demands on the Minidoka Project.

8. Appellee could not use the distribution system to distribute power brought into the Project to take the place of power that could and should have been generated at said power plant and give to the power brought into the Project a different status than power generated at said power plant.

9. The power delivered by the Idaho Power Company to the Minidoka Project is not in exchange for power from the Black Canyon power plant.

10. The consideration passing to the Idaho Power Company for the power delivered by it to the Minidoka Project was as set forth in the contract of 1935 between the United States and the said Company and was not an exchange of power from the Black Canyon power plant.

11. Appellee has no authority to credit to the Black Canyon power plant any of the receipts from the sale of commercial power on the Minidoka Project.

12. The receipts from the sale of commercial power on the Minidoka Project, including both that actually generated by the Minidoka power plant and that

brought into the Project in lieu of power which would have been generated by said power plant if 2700 second-feet of water had passed through the said plant, are impressed with a trust in favor of the Appellant.

13. Appellant is entitled to 95.6 per cent of the profits from the sale of commercial power actually generated at the Minidoka power plant and from the sale of power brought into the Project in lieu of power which would have been generated by said power plant if 2700 second-feet of water had passed through the said plant.

14. The judgment and the facts found by the court in *Burley Irrigation District v. Wilbur*, Equity 50636, affirmed by this Court in *Wilbur v. Burley Irrigation District*, No. 5395, and all facts necessarily involved therein, are res judicata and binding in this action.

15. The acts of Appellee complained of do not involve the exercise of judgment and discretion.

16. The acts of the Appellee complained of would deprive the plaintiff of its property without due process of law.

17. The proposed findings of the Appellee relating to the profits from the sale of commercial power on the Minidoka Project in 1935 and the distribution and allocation thereof, were void because arbitrary, capricious and in violation of the property rights of the Appellant.

18. The findings of fact of the court below are contrary to the evidence and are not supported by the evidence.

19. The conclusions of law of the court below are erroneous.

SUMMARY OF ARGUMENT.

Appellant (hereinafter called the plaintiff) claims that 95.6% of the sum of \$50,000 now in the hands of the Secretary as part of the proceeds of the sale of electricity on the Minidoka project in 1935 is impressed with a trust in plaintiff's favor because the Secretary secured the sum through wrongfully depriving plaintiff of its property. The Secretary proposes to convert the proceeds of the wrongful use to another having no interest therein. Plaintiff insists that equity will direct the Secretary to credit the sum to plaintiff's account.

The basis of plaintiff's claim must be stated in successive propositions. They are:

1. The courts of this jurisdiction and predecessors of the defendant have heretofore found and determined that plaintiff is the beneficial and equitable owner of 95.6% of the Minidoka power plant and such judicial findings and determinations are res judicata here.

2. The water for the generation of electric energy at the power plant was decreed by the state and federal courts for that purpose and was, for twenty-five years, applied to and appropriated for such beneficial use by means of the power plant. The right to the use of such water is thus an appurtenance to the power plant, of which plaintiff is the equitable owner, and to the lands irrigated in the Burley district. Plaintiff is, therefore, the equitable owner of the water-right under the law of Idaho and decisions of the Supreme Court of the United States.

3. The defendant, without due process of law and without compensation, withheld the water decreed for

the generation of electric energy at the power plant and used it for the benefit of others. He thus unlawfully deprived the plaintiff of its property and of the use of its property, and violated vested property rights of the plaintiff.

4. If the water decreed for the generation of power had not been withheld by defendant, sufficient power would have been generated at the Minidoka power plant to supply the demands for power on the project, and the sale of such power in the Minidoka district in 1935 would have yielded a net return of \$50,000. Under the decision of this Court plaintiff would have been credited with 95.6% of such sum. The sum of \$50,000 now in defendant's possession was received by him from the retail sale of electric energy furnished by the Idaho Power Company to supply the power deficiency created by the withholding of the water decreed for power generation at Minidoka plant.

5. The fund which the defendant has in his possession is the exact difference between the sum which the defendant proposes to credit to the plaintiff and the amount to which the plaintiff is entitled under the decrees of the courts of this jurisdiction. No one other than the plaintiff claims or is entitled to the fund. The reason advanced by the defendant for the proposed credit to the Black Canyon Power Plant is fictitious, and there is no basis for such proposed credit.

6. The funds in the possession of the plaintiff are the proceeds derived from the wrongful taking, by the defendant, of plaintiffs' property, while such property was under the control and protection of the defendant. Such funds are thus impressed with a trust in favor of the plaintiff.

It follows from the foregoing that equity will restrain the defendant Secretary from crediting these amounts as he proposes and will require him to credit them to appellant.

Plaintiff makes no claim for specific performance of any contract, and no contract is involved in plaintiff's claim, excepting only in so far as property rights have long since vested pursuant to the original water-right contracts made by the entrymen on the Burley District.

Much of the testimony adduced by defendant and contained in the printed record has no relation whatsoever to the issues presented by plaintiff's claim. A few facts, uncontradicted in the record, are the basis for plaintiff's case and are sufficient for its determination.

Findings and Conclusions of the Court Below.

Before presenting the Argument, we refer for a moment to the Findings of Fact and Conclusions of Law of the court below. Immediately upon the conclusion of the argument upon the trial the learned justice announced his decision and directed, "Accordingly, counsel for the defendant may prepare findings of fact in accordance substantially with the claims of the defendant, and conclusions of law substantially in accordance with the claims of the defendant, together with the judgment of the court, submit them to counsel for the plaintiff, and then to the court." (R. p. 328.) This was on March 30, 1939. On June 27, 1939, Counsel for defendant filed seventy-one findings of fact and fourteen conclusions of law (R. pp. 172, 210), which were on the same day found by the court (R. pp. 201, 208).

In major part these findings and conclusions are directed to proving the desirability of greater amounts of water for irrigation and the advisability of further conservation of water for that purpose. All such findings and conclusions are wholly immaterial to the issues in this case. Plaintiff makes no contention in respect to them. The situation on this point is precisely the same as if a person sought to enjoin the taking of his land and house for public road purposes without due process or compensation, and the authorities merely replied that the public needed the road. The public need is not the issue; the illegality of the taking without due process and without compensation is the issue. Many other findings and conclusions are directed to proving vague benefits alleged to have accrued to the Burley District through greater conservation of water. These benefits, as the Court will observe, are wholly vague, uncertain and largely imaginary, but even if they were real, they are immaterial to the issues raised by plaintiff. Such benefits, if any, could be shown in a judicial proceeding brought to condemn plaintiff's property but they cannot be held to justify outright confiscation by an administrative officer. Many of the other findings of fact are clearly conclusions of law, as the Court will observe upon reading; others are argumentative and some are without support in the evidence. However, all facts upon which plaintiff relies are either found by the court (Findings 2, 3, 7, 86, 87, 68, 69, 70 and 71) or are admitted in defendant's pleadings. Without attacking the findings or conclusions of the court in detail, a tedious and complicated undertaking, plaintiff presents its argument based upon facts not contradicted in the record and to be found among the findings of the trial court or in defendant's admissions.

ARGUMENT.

I.

Plaintiff is the Beneficial and Equitable Owner of 95.6 Per Cent of the Minidoka Power Plant.

This proposition was the precise point adjudicated in *Burley Irrigation District v. Wilbur (Wilbur v. Burley Irrigation District, supra, No. 5395 in this Court)*, as an examination of the Transcript of Record in that case (Pl. Exhibit No. 1 in this case) will show. It is *res judicata* in the present case.

We must discuss this point at length because it is the basic point in plaintiff's case and the court below ruled adversely on it, holding that the court in the former case did not "have before it for consideration or decision the question of ownership or title to the Minidoka project, the dam, the power plant, the transmission lines or any irrigation or power works and facilities thereto". (R. pp. 203, 204, par. 4.)

The Determination of Secretary Lane.

The record (Pl. Exhibit No. 1) shows that in 1915 Secretary of the Interior Lane determined that the landowners in the Southside pumping unit (now the Burley District) must pay for 95.6 per cent of the cost of the power plant at the dam. (Pl. Exhibit No. 1, p. 159.) Accordingly, when he fixed the price at which these entrymen could enter and own the land, he included 95.6 per cent of the cost of the power plant as part of the price they must pay. They made contracts with him on that basis, and have been paying on that basis ever since. (Pl. Exhibit No. 1, p. 159.) The Reclamation Act contemplates that when the cost of

a project has been repaid to the United States by the landowners, the property shall be transferred to them. These reclamation projects are not public largesse such as P. W. A. and other similar government ventures are. They are self-liquidating projects. The Government merely finances the affair until the entrymen over a period of time can pay out the investment. Reporting to the Senate on February 24, 1939, the Honorable John C. Page, Commissioner of Reclamation, said (Senate Document No. 36, 76th Congress, 1st Session, p. VIII):

"In its financial aspects, the reclamation program differs from other programs for internal improvement under Federal auspices. In the original plan proceeds from the sale of public lands were to be invested in irrigation works in the Western States. These funds were not to be expended as gifts but were to be repaid by water users into the reclamation revolving fund, from which appropriation for additional construction could be made. The sources of revenue to this fund have been increased, but the repayment principle has remained unchanged."

And again he said (p. 10):

"These projects were not to be gifts, but the costs of their construction were to be repaid by settlers on the reclaimed land."

The foregoing quotations describe precisely what occurred in this case. The entrymen and landowners in the Burley District contracted for, and for twenty-four years have been paying on, 95.6 per cent of the power plant. This would seem to establish conclusively that they have a vested property right in that plant. Whatever the technical nature of their interest might be,

they clearly are the beneficial and equitable owners in that proportion of the plant. So much would seem to need no further demonstration. But still other events make this assurance doubly sure.

The Determinations of Secretaries Work and West.

In 1927 a dispute arose as to who was entitled to the profits from the power plant. Secretary Work, acting pursuant to statutory authority, considered and determined the matter. (Pl. Exhibit No. 1, pp. 8, 36.) In his view, the answer to the question depended upon the ownership of the plant. It is necessary that we note with care his findings. They appear in full on pages 31 and 32 of Plaintiff's Exhibit No. 1. He said, in part:

"The Board of review recommended that the cost of the power plant be apportioned between the two districts on the basis of their maximum demand for power—that 95.6 per cent of the cost of the power plant be charged to the Burley District and 4.4 per cent be charged to the Minidoka District. The plan of the board of review for the apportionment of the construction costs of the power system was adopted by the then Secretary of the Interior and was used in fixing the construction charges of the two districts. *** *As the matter now stands, to state it simply, the Burley District owns 95.6% of the power plant and the Minidoka District the remainder, or 4.4 per cent.* To declare that because the operation of the power plant has proven profitable the Minidoka District should be entitled to more than 4.4 per cent of the profits would be arbitrary, and could only be sustained by holding that the recommendation of the board of review was erroneously approved." (Italics ours.)

We note that Secretary Work based his findings as to profits upon his findings as to ownership. *It was because the Burley District owned 95.6 per cent of the plant, he reasoned, that it was entitled to 95.6 per cent of the profits.*

Upon a petition for reconsideration, Secretary West, Mr. Work's successor in office, affirmed the prior finding (Pl. Exhibit No. 1, p. 32). Here then are the official determinations of two Secretaries of the Interior that the Burley District was entitled to 95.6 per cent of the profits of the power plant *because it owned 95.6 per cent of the plant.*

This is clear beyond any question upon the face of the documents involved. Secretary Work and Secretary West found that Burley owned 95.6 per cent of the power plant, *and upon that basis and that basis alone* allocated to Burley 95.6 per cent of the profits. This would seem to conclude the matter beyond all dispute. But still further events fortify the conclusion.

The Rothrock Committee.

In 1929 Acting Secretary Joseph M. Dixon appointed a committee, known to this case as the Rothrock Committee, the function of which was to re-determine the ownership of the power plant (Pl. Exhibit No. 1, p. 44). We emphasize the function assigned to the Rothrock Committee. The language of the order was:

"The following Committee is appointed to consider the ratio of ownership by the Minidoka and Burley Districts in the Minidoka Project and the ratio of participation of the two districts in the proceeds of power profits."

The Committee proceeded with its work and submitted a report (Pl. Exhibit No. 1, pp. 44-53), in which it proposed to reallocate the cost of the power plant and to redetermine its ownership. The Committee set up certain figures and said (Pl. Exhibit No. 1, p. 51):

"These figures represent the proportionate ownership of the two districts in the total power venture cost of \$925,089.70. The ratio of ownership is therefore 27.3 per cent for the Minidoka Irrigation District and 72.7 per cent for the Burley Irrigation District. Since these ratios represent the extent of actual ownership in the power venture, they are consequently a measure of ownership in the property paid for out of undivided profits by charges to the so-called commercial power unit. They represent *also* the proper ratio of participation in power profits which have been distributed in the past and which may be distributed in the future."

And again the Committee said (Pl. Exhibit No. 1, p. 53):

"These matters are being pointed out for the purpose of emphasizing the importance of clearly defining the interest and ownership of each of the present districts in all existing constructed features of the Minidoka Project in order that controversy may be avoided."

We note that this Rothrock Committee stated as its prime problem the question of ownership of the property and that the distribution of the profits was an "also" to that prime consideration.

The Decision of Justice Adkins.

At that point the Burley District brought a suit against the Secretary in the Supreme Court of the Dis-

trict of Columbia. (Equity No. 50686; Pl. Exhibit No. 1, p. 1.) In its bill of complaint the Burley District alleged in some detail the facts which we have hereinabove outlined, and alleged in paragraph 22 of that Complaint (Pl. Exhibit No. 1, p. 10):

"That the plaintiff is informed and believes and therefore avers that Ray Lyman Wilbur, Secretary of the Interior, intends and proposes to reopen and reconsider the ratio of ownership of the Minidoka and Burley Irrigation Districts in the power features of the Minidoka Project, and the credits, division, and distribution of the aforesaid power profits, past, present, and future, as between the two aforesaid irrigation districts * * *," etc.

The Complaint prayed that the Secretary and his successors in office be enjoined from reconsidering or rehearing the matter of the ratio of ownership of the property and participation of the two districts in the power profits, and particularly that he be enjoined from adopting, approving or putting into effect the Rothrock Committee report. (Pl. Exhibit No. 1, p. 12.)

The case came on for trial before Justice Adkins. Evidence was taken and argument made. What was the contention of the plaintiff in that proceeding? Here is how Justice Adkins understood the contention presented to him. In his opinion he said (Pl. Exhibit No. 1, p. 155):

"Plaintiff contends that the net profits, the amount of which is to be determined by the Secretary, are to be applied to the purposes mentioned in the statute, but that the share of the profits to go to each district depends upon their respective ownerships in the power plant, and that this

was finally determined by Secretary Work in his decision of March 14, 1927."

It is thus clear that the court understood that the whole contention of the plaintiff was based upon its claim of ownership in the plant, and that this was the issue to be decided. Justice Adkins made findings of fact, rendered a written opinion and entered a decree.

It is necessary to examine with care what the court did and the basis for its action as revealed in its findings, opinion and decree. Such examination reveals that the basis, and the sole basis for the action of the court was the ownership of the plant.

In its findings of fact, the court found as a fact the proposed report of the Rothrock Committee as we have above-quoted it. (Pl. Exhibit No. 1, p. 171.) It also found as a fact "That the defendant, Ray Lyman Wilbur, Secretary of the Interior, is threatening to consider the report of the aforesaid committee and to reconsider the ratio of ownership by the Minidoka and Burley Districts in the power plant of the Minidoka Irrigation Project and the ratio of participation of the two districts in proceeds of the power plant * * *," (Pl. Exhibit No. 1, p. 172.)

In its written opinion, referring back to the action of Secretary Work, the court said:

"On March 14, 1927, upon application of plaintiff and after hearing counsel for both irrigation districts Secretary Work found that plaintiff owned 95.6 per cent of the power plant, and the Minidoka District owned the remainder, or 4.4 per cent, and he reached the conclusion that the profits from the sale of electric energy should be credited to the two districts in those proportions, and he so ordered." (Pl. Exhibit No. 1, p. 154.)

The court then made the statement which we have quoted above as to the contention of the plaintiff and added "This seems to be a reasonable construction of the statute. It was followed by Secretary West, and I adopt it. It follows that the present Secretary of the Interior is without power to take the action recommended by the Committee appointed in 1929 and now pending before him." (Pl. Exhibit No. 1, p. 155.)

In its decree the court—

"Ordered and decreed that the decision of Secretary Work, after hearing afforded both districts, affirmed by Secretary West, that the proportionate ownership of the Minidoka and Burley Irrigation districts in the power plant of the Minidoka Project, Idaho, is 4.4 per cent in the Minidoka and 95.6 per cent in the Burley District, is conclusive and final; * * * (Pl. Exhibit No. 1, p. 173).

Upon that premise the court enjoined the Secretary from considering or adopting the Rothrock report and from redividing, redistributing, etc., the power profits upon any basis except 95.6 per cent to Burley and 4.4 per cent to Minidoka.

We emphasize the heart of the decree. It was that the Secretary could not disturb the ownership of the plant, and therefore it followed that he could not change the allocation of the profits. As was the case with Secretary Work, the court found the key to the controversy to be the ownership of the plant. That was the theory of the plaintiff which the court adopted and that was the ground upon which the conclusion rested. As a matter of fact there was no other ground upon which the conclusion of the court could have rested. What right had Burley to 95.6 per cent of the

profits, except only the fact that it owned 95.6 per cent of the plant? There was no other conceivable basis upon which it could claim the profits. It advanced no other. The court considered no other claim, and awarded the injunction solely upon the proposition that Burley owned 95.6 per cent of the plant.

The Decision of This Court.

The Secretary appealed from the decision of Justice Adkins. This Court affirmed. (*Wilbur v. Burley Irrigation District*, 58 F(2d), 871, 61 App. D. C. 145.) This Court recited the facts underlying the controversy, quoted Secretary Work's statement that, "As the matter now stands, to state it simply, the Burley District owns 95.6 per cent of the power plant, and the Minidoka District the remainder, or 4.4 per cent," stated that the recommendation of the Rothrock Committee "would amount to a readjustment of the ratio of ownership of the two districts in the power plants" (p. 873), and held that the threatened action of the Secretary "is an interference with property rights already vested". The Court specifically described the scope of the decree it was affirming. It said:

"It is important to note that the injunction here extends only to the redetermination by the Secretary of the proportionate ownership in the Minidoka power project by the Minidoka and Burley Irrigation Districts."

The Rule of Res Judicata.

We submit that under the foregoing facts the ownership by the Burley District of 95.6 per cent of the power plant is now *res judicata*. The rule is stated in

Grubb v. Public Utilities Commission, 281 U. S. 471 as follows:

"A judgment upon the merits in one suit is res judicata in another where the parties and the subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end."

The ownership of the power plant was not only a matter presented to sustain the right asserted, but was the *only* matter presented for the purpose, and this Court said that the relief granted extended only to the matter of ownership. If the Supreme Court correctly stated the rule in the above quotation, and a judgment upon the merits in one suit is *res judicata* in another where the parties and the subject matter are the same, as respects matters actually presented to sustain the right asserted, there can be no controversy over the proposition that the ownership of the Minidoka power plant is res judicata in the present proceeding. The case is an almost perfect example of the operation of the rule.

Furthermore, the principle which the Court announced and applied, that the Secretary cannot revise or revoke a final determination of his predecessor, is applicable only where such action interferes with or destroys vested property rights. This is clearly stated by the Court.

"Where a final determination has been made and property rights as a result thereof have become vested, it is not within the jurisdiction of the determining Secretary or his successor in office to review or revise it, and any attempt at such action will be enjoined by the courts."

(See also *West v. Standard Oil Company*, 278 U. S. 200) Obviously, therefore, the only ground upon which the Court enjoined the threatened revocation of the determination of the Secretary's predecessor, was that property rights in the power plant had theretofore become vested. It was necessary that the Court first find that such property rights had vested in order to apply the correct principle of law. In other words, the determination of the question of ownership was necessary to the Court's decision.

We respectfully submit that there is no escape from the application of res judicata to the question of the ownership by the Burley District of 95.6 per cent of the power plant.

In the case now at bar the court below found as a conclusion of law "Nor did that court (referring to the case of *Burley v. Wilbur* which we have been discussing) have before it for consideration or decision the question of ownership or title to the Minidoka project, the dam, the power plant, the transmission lines or any irrigation or power works and facilities appurtenant thereto". (R. pp. 203, 204 par. 4). With the greatest respect we submit that the learned Justice was wholly in error in that finding. There is no conceivable basis for it. The only way it could be sustained would be to ignore wholly and unreservedly every step and every document in that case--the pleadings, the evidence, the contentions of the parties, the findings of fact, the opinion and the decree of the court below and the opinion of this Court. Upon this ground alone the judgment of the court below in this case must be reversed. The court below made a primary and fundamental error on this major premise of the whole case, and so all its other rulings, which were dependent upon this one, were in error.

In the court below the defendant insisted upon discussing the matter of *title* to the power plant, meaning the legal title, and insisting that the title remains in the United States. This insistence is wholly beside the point and is merely confusing. No question has ever been raised as to the legal title. It is and always has been in the United States. No one has ever suggested that the United States has ever transferred the title. The matter is obviously susceptible of simple proof because no documents of title transfer have ever been prepared or executed so far as we know. The law does not permit a transfer of title to these reclamation works until the cost of the project has been repaid in full by the water-users (now the irrigation districts). The plaintiff makes no claim of title. The plaintiff claims *ownership*, meaning a beneficial and equitable ownership, which this Court in *Wilbur v. Burley*, *supra*, said it had and which the Secretary was restrained from disturbing. The adversary discussion of title has no bearing upon the rights which we insist are ours.

We submit that the decisions of Secretary Work, of Justice Adkins and of this Court were clearly correct on the merits. But we go further and assert that in any event the matters there in controversy are res judicata between these same parties in the present case.

II.

Twenty-Seven Hundred Second-Foot of Water for Power Purposes is an Appurtenance to This Power Plant and to the Lands Irrigated Within the Plaintiff District.

The Water Decreed for Power Purposes.

In 1913 the Fourth Judicial District Court of Idaho had before it the matter of disposition of the water of Snake River, to which proceeding all persons having an interest in such water were parties. As a result the court, among other things, decreed 2700 second-foot of water for power purposes at the Minidoka power plant. The language of the decree was:

"Right No. 9

That the defendant, the Secretary of the Interior of the United States and his successors in office, is hereby awarded the use of the waters of the natural flow of Snake River at Minidoka Dam for power, light, manufacturing and pumping purposes in the following amount and from the following date: 2,500 second-feet from June 15, 1909, and 200 second-feet from July 1, 1912, said water to be returned to Snake River below the Minidoka Dam after being used for said power purposes, and hereby designated as Right No. 9."

Later, the United States District Court for the District of Idaho entered precisely the same decree except that the water was decreed to "the United States and its successors" instead of to the "Secretary of the Interior and his successors."

Of what effect were these decrees?

The Idaho Law.

The law on the point is quite specific. The right to water, while a property right (*People v. Hinderlider*, 98 Colo. 505, 57 Pac. (2d) 894), is not, under Idaho law, a property right in and of itself. It is an appurtenance to the thing by which the water is put to a beneficial use. The Idaho Statute provides:

"And the right to the use of any public waters which have heretofore been or may hereafter be allotted or beneficially applied shall not be considered as being a property right in itself, but such right shall become the complement of or one of the appurtenances of the land or other thing to which, through necessity, said water is being applied." (Idaho Code, Sec. 41-101)

No amount of discussion could make the foregoing any clearer than it is in its own words. A person can have no separate property right in a water-right; it must be as an appurtenance to the thing to which the water is being applied.

In the present case it is clear that the power plant at the Minidoka dam is the thing by which the 2700 second-feet of water decreed for power purposes is put to its beneficial use. It is settled that the generation of power is a beneficial use. *U. S. v. Utah Power & Light Company*, 208 F. 821; *Thompson Co. v. Pennebaker*, 173 Fed. 849; *Speer v. Stephenson*, 16 Idaho 707, 102 Pac. 365.

One more thing is necessary to perfect the vesting of this property right. In Idaho, the rule of appropriation applies. See Idaho Code, Sec. 41-103. This means that in Idaho a person must not only have a right to the water but he must actually appropriate it to a beneficial use before any property right in the

water vests in him. It is alleged in the complaint in the present case and admitted by the defendant in his answer, that the 2700 second-feet of water was actually appropriated to the use of generating power for a long period of years. The complaint alleges and the answer admits:

"That such portion of the water so decreed as has been necessary to generate sufficient power to meet the power demands on the Minidoka project during the non-irrigation season has been used each year from 1910 until the last day of October 1934." (R. pp. 23, 101 par. 30)

Thus, in the present case both the right and the appropriation are established, the former by the decrees of the courts and the latter by the allegation and admission of the parties.

The Rule in *Ickes v. Fox*.

But it is said by the defendant that the decrees of the courts were to the Secretary of the Interior or to the United States and that the appropriation of the water was likewise by them. Therefore, says the defendant, the Burley District has established no property rights in the water. Precisely that same contention was made by this same defendant in *Ickes v. Fox*, 300 U. S. 82, (85 F. (2) 294, 66 App. D. C. 128) and both this Court and the Supreme Court of the United States rejected it. Defendant is now endeavoring to retry and to reverse the ruling made against him in that case.

In *Ickes v. Fox* the entrymen on an irrigation project in the State of Washington had contracted, in their water-right applications, for such amount of water as would be necessary to irrigate their land. Various

Secretaries of the Interior had determined this amount to be 4.8 acre-feet per year. Secretary Ickes, needing \$1,000,000 for another project, attempted to reduce the water under contract to three acre-feet and to impose extra charges for all water in excess of that amount. The identity of that case with the present case is established by the title of the Minidoka contract (R. p. 86), which discloses the similarity of the motives, in this language,

"Contract with Minidoka Irrigation District to secure collection of required \$50,000. per year to apply on cost of Black Canyon dam, Black Canyon Power Plant, and Deadwood reservoir." (R. p. 86)

When the aggrieved entrymen in *Ickes v. Fox*, brought suit to enjoin his proposed action, he defended on the ground that the United States was the diverter, the storer and the distributor of the water, that therefore the water-rights were the property of the United States, and the suit was really an action against the United States. The Court rejected all these contentions. It held that under both the law of Washington and the Reclamation Act the water was an appurtenance to the land to which it was being beneficially applied, that therefore the water-rights were the property of the landowners, and that the suit was merely to restrain Secretary Ickes from interfering with vested property rights. The Court said:

"So far as these respondents are concerned, the Government did not become the owner of the water-rights, because those rights by Act of Congress were made appurtenant to the land irrigated; and by a Washington statute, in force at least since 1917, were 'to be and remain appur-

tenant to the land.' * * * Although the government diverted, stored and distributed the water, the contention of petitioner (Secretary Ickes) that thereby ownership of the water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land-owners; and by the terms of the law and of the contract already referred to the water-rights became the property of the land-owners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy v. Kerr*, 296 Fed. 536, 544, 545. The Government was and remained simply a carrier and distributor of the water (*ibid.*), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works." (300 U. S. pp. 93, 94, 95).

Thus, the court held that even though the actual appropriation was by the United States or its agents, (just as it was in the present case), under the law of Washington the naked water-right was not, in and of itself, a property right, but was an appurtenance to some other right. The water in that case was a property right of the landowners for whose benefit the water was appropriated. Precisely the same doctrine applies to the present case. The water involved in *Ickes v. Fox* was appropriated for irrigation purposes and the water involved in the present case was appropriated for power purposes. But both purposes are beneficial uses. Moreover, whereas the law of the State of Washington provided that the water should be an appurtenance to the land or place, the law of Idaho provides that it shall be appurtenant to the land or to the thing by which it is put to a beneficial use. In

this case the power plant is *the thing*. The doctrine of *Ickes v. Fox* applies to the water appurtenant to the power plant in this case just exactly as it applied to the water appurtenant to the land in that case.

Right to Use of Water a Vested Property Right.

Moreover, it is important to note that the decrees of the Idaho and United States District Court, to which we have referred, decreed the water for irrigation to the United States in precisely the same language as it decreed the water for power purposes to the United States. *If, under Ickes v. Fox, the water thus decreed for irrigation purposes became a vested property right of the landowners to whose beneficial use the water was applied, it necessarily follows that the water decreed for power purposes in precisely the same language in the same decree, became a vested property right of the power plant owner to whose beneficial use this water was applied.*

It is clear, we therefore submit, that the 2700 second-feet of water decreed by the courts for power purposes at Minidoka dam and actually appropriated to that use for many years, is an appurtenance to the power plant under the statutes and decisions of Idaho. This water-right being an appurtenance to the power plant, is therefore a vested property right of the Burley Irrigation District, because this district is the owner of 95.6 per cent of the power plant, as we have shown in Point I hereinabove. It is an ancient rule of law that, "if a mill be granted, reserved, or devised, either with or without the term 'appurtenances,' it includes all water-rights, ditches, or other works essential to the running of the mill." (Kinney on Water Rights, p. 1809.) In other words, he who owns the

mill also owns the water-rights wherewith to run it.

It was suggested by defendant in the court below, that this 2700 second-feet of water was desired by him to be stored and distributed to other persons who would use it for irrigation purposes. That may be true. It may also be that, in general, the irrigation use is superior to a power use. But we are not dealing with the choice or wishes of the Secretary. Neither are we dealing with a general theory. We are dealing with a specific, precise adjudication by the courts of Idaho and of the United States as to the proper disposition of all the water of Snake River. With all the interested parties before it, the court decreed so much water for irrigation and so much for power. The record does not show whether the Secretary did or did not present to the court in those proceedings the view which he now presents to this Court that this 2700 second-feet of water ought to be stored for irrigation instead of being used for power. Whether he did or did not is immaterial. He was a party to those proceedings. If he presented his view, the court obviously denied it. If he did not present it, he must not have considered it valuable or persuasive. In any event the court determined what amount of the water should be used for irrigation and what amount should be used for power. Property rights vested upon the basis of that judicial determination. The Secretary now attempts, twenty-five years later, to upset and destroy those property rights without recourse to the judicial branch and without due process or compensation.

As between the Burley District and the Secretary, both parties to the court proceedings before the United States court in 1929, the judgment and decree that 2700 second-feet of water at Minidoka Dam is for power

purposes is a binding judicial determination. This Court has no power to change it. This Court has no jurisdiction to allocate the use of the water of Snake River, Idaho. It has jurisdiction over the person of the Secretary and could enjoin him from destroying property rights which have vested and from ignoring and violating a valid outstanding judgment and decree of two courts of competent jurisdiction.

III.

The Defendant Secretary Could Not Legally Deprive Plaintiff of a Vested Property Right, or of Any Part of the Value of Any Property Right, Without Due Process of Law and Proper Compensation Therefor.

The Fifth Amendment.

As we have shown, the water-rights decreed for power purposes at the Minidoka power plant are vested property rights in the plaintiff. The defendant cannot deprive plaintiff of these property rights without affording it an opportunity to be heard and the payment of just compensation. The Fifth Amendment, which prohibits the deprivation of property without due process and the taking of property without just compensation, is a restraint on the executive as well as the legislative and judicial powers of the Federal Government. *Murray's Lessee et al. v. Hoboken Land and Improvement Company*, 18 How. (59 U. S.) 272. And its protection extends to corporations as well as to natural persons. *Union Pacific R. Co. v. Company v. U. S.*, 99 U. S. 700, 719; *Carter v. Carter Coal Company*, 298 U. S. 238, 311. The Amendment refers to a direct appropriation exactly as has been accom-

plished and threatened by the defendant here. *Norman v. B. & O. Railroad Company*, 294 U. S. 240, 305; *Knop v. Lee*, 12 Wall. 457, 551, 552.

The Supreme Court has expressly applied the restraint of the Fifth Amendment to the Secretary of the Interior. In *Noble v. Union River Logging Railroad*, 147 U. S. 165, 176, the court affirmed a decree enjoining the Secretary from revoking the action of his predecessor under whose official act the petitioner had acquired vested property rights in land. The defendant here attempts to do likewise. The court said that a revocation of the action of the Secretary "by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void." See also *Lakes v. Fox et al.*, 300 U. S. 82, 96.

Water Taken for Public Use.

The record clearly shows that the plaintiff's water-rights, decreed for power purposes, have been taken by the defendant. The water so decreed is withheld and stored in American Falls Reservoir (R. p. 138, pars. 38, 39) and is not used to operate the power plant. Taking property for public use occurs where land or other property is taken from the owner for the use of the Government, or the public, and where, if the property were not paid for, the burden would fall upon the person whose property is taken and not upon the public generally. *Michigan Central R. Co. v. Slack*, 17 Fed. Cas. No. 9527a, affirmed 100 U. S. 595. See also *U. S. v. Greck Nation*, 295 U. S. 103; *U. S. v. North American Trans. & Trading Co.*, 253 U. S. 330, and *Phelps v. U. S.*, 274 U. S. 341. The use of water for irrigation is a public use. *Clark v. Nash*, 198 U. S. 361.

It is of no importance, if true, that the control of the power and the irrigation systems is under the United States, for in the Creek Nation case, *supra*, the court said that control of the United States over the property and affairs of the Indians—

“did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without tendering, or assuming an obligation to tender, just compensation for them; for that would . . . be . . . an act of confiscation.”

Obviously, control and operation of the power plant by the United States cannot affect the right of the plaintiff in its property nor its right to compensation when that property is confiscated.

The Idaho Law.

The Constitution of the State of Idaho prohibits such a taking without compensation. Article I, Section 14 provides:

“Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.”

And the courts of Idaho have said that the water appropriated for any beneficial use, which would include use for power purposes, cannot be taken without compensation therefor. *Basinger v. Taylor*, 30 Idaho 289, 164 Pac. 522; *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 219, 113 Pac. 741, 743.

In the latter case the Montpelier Milling Co. had for some years been using the water of Montpelier

creek to generate power to run a grist mill. The city of Montpelier built a municipal water-works system and took the water from the creek above the site of the Company's dam. The Constitution of Idaho provides that domestic use of water is higher than use for power. The City contended that since its use was preferred to the use of the Company, the latter must automatically give way, and the City could appropriate the water. The City said that, “Appropriation and use for manufacturing purposes conferred no right which could not be taken away and destroyed by an appropriation for domestic use.” The court denied the City's contention, holding that the right to use water for any beneficial use is a property right and can not be taken away without compensation. The court said:

“This section (section 3, Article 15 of the constitution) clearly recognizes that the right to use water for a beneficial purpose is a property right, subject to such provisions of law regulating the taking of property for public and private use as referred to in sec. 14 art. 1, of the constitution.

It is clear, therefore, that under the provisions of the above-quoted section of the constitution (Section 3, Article 15), a municipality cannot take water for domestic purposes which has been previously appropriated for other beneficial uses without fully compensating the owner, and in this case it appearing that the respondent appropriated waters of Montpelier creek and applied the same to a beneficial use in 1891, the appellant had no right to interfere with such appropriation, to the injury of respondent, without full compensation.” (p. 219)

Furthermore, Section 41-101 of the Idaho Code, relating to the right to the use of water beneficially applied, provides that:

"* * * the right to continue the use of any such water shall never be denied or prevented from any other cause than failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water."

Moreover, Congress has expressly required that such rights be protected. The Act of July 26, 1866, 14 Stat. 263, Title 43, U. S. C., Section 661, provides, in part, that:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same * * *."

Thus, the full force of Federal and State constitutions, statutes and decisions commands the preservation and protection of these rights to the use of water.

The same considerations apply with equal force to the partial destruction of the plaintiff's property right in the power plant, through the failure of the defendant to use the water, appurtenant to the plant, for the generation of electric energy. Plaintiff's property right in the power plant is rendered valueless to the extent that the generating facilities of the plant are curtailed by the withholding of the water. As the court said, in *Buchanan v. Warley*, 245 U. S. 60:

"Property is more than the mere thing which a person owns; it includes the right to acquire, use, and dispose of it; and the constitution * * * protects these essential attributes."

It seems clear that the defendant has no right to take and withhold the water decreed for power purposes and thus deprive the plaintiff of its property right in the use of the water and of the power plant without paying compensation therefor.

Much evidence was adduced by the defendant at the trial to show that the water decreed for power purposes, of which the plaintiff has been deprived, had been conserved, under the plan, and used for irrigation—a use which the defendant insists is superior to the use for power production. This evidence is wholly immaterial. We admit that the use of water for irrigation is superior to the use of water for the generation of power. We do not deny that water-rights decreed for the production of power may be taken in order to serve the irrigation needs. The point is that such rights are property rights in exactly the same sense and to the same extent as are water-rights for irrigation uses, and therefore, even when such water-rights are converted from their decreed use and applied to the highest use, the owner is entitled to just compensation for the taking. No clearer declaration of this principle is required than the statement of the Supreme Court of Idaho in the Montpelier case, *supra*, where it said that *whatever the use may be, rights to the use of water for a beneficial purpose are property rights and are protected by the Constitution of that State.*

IV.

The Defendant Secretary is in Possession of Money Received as the Result of Depriving Plaintiff of Its Vested Property Rights Without Due Process of Law.

The controversy in this case is over the disposition of a sum of \$50,000. now in the hands of the defendant Secretary. He proposes to credit the entire amount to the Black Canyon power plant. The Burley District, plaintiff in this suit, claims 95.6 per cent of it.

How came the Secretary by this money?

The chain of circumstances is as follows:

So long as the Secretary turned 2700 second-feet of water through the Minidoka power plant, sufficient electric current was generated to supply all demands for power on the whole Minidoka project during the non-irrigation season. (R. pp. 23, 101 par. 30) The sales of this power within the Minidoka Irrigation District were yielding net returns of about \$50,000. per year. (R. p. 87, par. 4) Under the injunction affirmed by this Court in *Wilbur v. Burley Irrigation District*, *supra*, 95.6 per cent of these \$50,000. annual net returns from the sale of electricity generated by the Minidoka power plant, were credited to the Burley Irrigation District. So long as the electricity resulting in these profits was generated by that plant, 95.6 per cent must have continued in the future to be credited to the Burley District.

In about October, 1934, the Secretary shut off the water from the Minidoka plant. This action, if taken alone, would have left the power consumers in the Minidoka District without electricity. So the Secretary made a contract with the Idaho Power Company

whereby that Company agreed to deliver at the Minidoka power plant from its American Falls or other Idaho plants enough power to meet the power demands on the Minidoka project, with stated maximum limitations on the amounts which might be demanded. (R. p. 75 par. 3) The Secretary then made a contract with the Minidoka Irrigation District wherein he agreed to sell the district, from the power supplied by the Idaho Power Company, sufficient power to supply the requirements of the power consumers within the district. (R. p. 89 par. 11) Since the annual net return theretofore from the sale of power to these consumers was estimated at \$50,000., the Minidoka District guaranteed to the United States that net collections from these sales over and above costs would not fall below \$50,000. (R. p. 90 par. 12) The Secretary was to collect direct from the consumers and then furnish the district each year a statement of his collections, etc. (R. p. 90 par. 13)

Having shut off the water from the Minidoka power plant, and having brought in power from the Idaho Power Company to supply the deficiency thus created, and having sold this power to consumers in the Minidoka District, and having collected from those consumers upon such sales, the Secretary had in hand at the end of 1935 net returns in the sum of \$50,000. from such sales. (R. pp. 105-110 par. 42)

If the Secretary had turned 2700 second-feet of water through the Minidoka power plant, he would have had in hand \$50,000. from the sale of electricity thus generated. It is thus clear that the \$50,000. which the Secretary has had in hand since the end of 1935 was secured by him as the result of his shutting off the

2700 second-feet of water and of his failure and refusal to operate the power plant.

The power plant and the water appurtenant thereto are vested property rights of the Burley Irrigation District. Therefore, it seems clear that by depriving the Burley District of its property rights in the water and in the plant, the Secretary has come into possession of the \$50,000, which he now holds.

It is interesting to note that the persons with rights in American Falls Reservoir, who benefit directly by the withholding of the water from Minidoka dam, are perfectly willing to pay \$50,000. a year if the court decides "that the power contract with the Minidoka District is invalid or beyond the power of the Secretary". (R. p. 28) The complicated series of contracts and the proposed credit of the \$50,000. to the Black Canyon plant is merely a plan to be tried out, under the guidance of the agent of the defendant, to see if benefits can be bestowed on everybody except Burley, the latter having no representation and no vote in the affair. (R. p. 28) It is frankly admitted by the Snake River Valley Water Users (R. pp. 27-28), that if upon a test of the plan, the courts should find that Burley has some rights in the situation and cannot be deprived of its property without compensation, the whole present scheme will be abandoned and the "parties who receive the benefit of the water saved" (R. p. 27) will pay the \$50,000. "as a necessary part of the expense of securing the water to fill the reservoir". (R. p. 28) So much has already been agreed upon.

We emphasize that in this case we do not seek to require the Secretary to operate the Minidoka plant. We do not ask an injunction against his storing the 2700 second-feet of water in American Falls reservoir

and then using it for irrigation purposes for the exclusive benefit of others than ourselves. We in no way attempt to interfere with the Secretary's discretion in the operation of the reclamation project or with his disposition of the water of Snake River. We believe that upon the facts and under the well-settled rules of law we would be entitled to injunctive decrees on all these phases of the situation. But the present case is within a very narrow compass. Under the facts as they happen to be, the Secretary by wrongfully depriving us of vested property rights has come into possession of the sum of \$50,000. We insist, and in a moment will show, that this money rightly belongs to nobody other than ourselves, that the proposal to credit it to the Black Canyon plant is an unwarranted and unjustifiable gratuity, that the fund is impressed with a trust in our favor, and we ask that the Secretary be required to credit us with 95.6 per cent of it.

V.

The Fund in the Hands of the Secretary Belongs to no One Other Than Burley District.

Before discussing the trust in favor of plaintiff with which the disputed \$50,000. is impressed and which is one link in the chain of its claim to the fund, we digress for a moment to negative any other possible claim to the fund. However awkward this digression, its importance makes it necessary.

Quite obviously the \$50,000. does not belong to the electric consumers in Minidoka District. They received their electricity and paid for it. As vendees they have no interest in the disposition of the proceeds of the sales in the hands of the vendor.

The Minidoka Irrigation District might appear to have a claim to 4.4 per cent of this fund, and the plaintiff makes no denial of that claim. Plaintiff claims 95.6 per cent thereof and the logic of that position, if sustained, would indicate that Minidoka District is entitled to the remaining 4.4 per cent. Whether Minidoka ever makes claim to such balance is immaterial to this suit. On the other hand, it is a curious phenomenon that under the Secretary's proposals (R. pp. 105-110 par. 42), the Minidoka District would receive credit for its full 4.4 per cent of the total net proceeds for 1935, plus a slight fraction (.07 per cent) more, and the entire amount proposed to be credited to the Black Canyon Power Plant is to be taken from the share of the Burley District. The figures shown in the Secretary's proposed findings are

To Burley Irrigation District	\$63,807.50
To Minidoka District	\$2,384.52
To Black Canyon Power Plant	2,936.75
Total	\$119,128.77

Reduced to a percentage of the whole, these amounts represent:

Burley Irrigation District	53.56%
Black Canyon Power Plant	41.97%
Minidoka District	4.47%

Thus it is that the Secretary proposes to leave Minidoka District with its full credit of 4.4 per cent of the entire net proceeds, and to take from Burley the full amount to be given to Black Canyon. Burley therefore might logically and rightfully claim the whole of

the \$50,000. fund. However in the interest of clarity and simplicity it insists merely upon its perfectly clear right, which is 95.6 per cent as decreed to it in *Wilbur v. Burley Irrigation District*, *supra*. The Secretary makes no suggestion that the Minidoka District has any interest in the \$50,000.

The Idaho Power Company.

Obviously this fund does not belong to the Idaho Power Company. It might appear upon first impression that since that Company supplied the power which was sold and which gave rise to the \$50,000., the Company would be entitled to compensation from such proceeds. But the contract between the Company and the United States makes it clear that the Company received ample consideration other than money in return for this power. That consideration is carefully spelled out in the contract. It was in four items:

1. The United States refrained from building a power plant at American Falls, which plant had been definitely planned and if built would have been competitive to the Company's plant there;
2. The United States agreed to give the Company all the surplus power from the Minidoka plant;
3. The United States agreed to let the Company use for power generation all the water going over American Falls;
4. The United States agreed to extend for 25 years its contract with the Company concerning power from the Black Canyon plant.

The contract expressly states that in view of these considerations the Company will deliver the required

power to the Minidoka District free of charge, and further says (R. p. 76 par. B) "No money payments shall be made for power furnished by the Company except for breakdown service."

The president of the Idaho Power Company was a witness in this case and was quite specific in his enumeration of the considerations for the contract. He listed the Company's interest in water conservation, the prevention of the building of the American Falls plant by the United States, and the extension of the Black Canyon contract. He neither mentioned nor intimated any interest of the Company in any cash consideration. The Secretary makes no suggestion that the Company has any interest in the fund in his hands.

The Black Canyon Power Plant.

We come now to consider the possibility of an interest in this fund on the part of the Black Canyon power plant. The Secretary proposes to credit the entire \$50,000. to that plant. He proposes to do so upon the ground that the power delivered by the Idaho power Company at Minidoka was in exchange for power given the Company from Black Canyon. Plaintiff flatly denies that the power delivered by the Idaho Power Company to the Minidoka District was in exchange for Black Canyon power. We assert that the basis asserted by the Secretary for crediting the \$50,000. to Black Canyon is a sham, that the credit would be a pure gratuity, that the record in this case conclusively proves that there was no exchange of Black Canyon power for power delivered at Minidoka by the Idaho Power Company, and that the assertion

that this arrangement was an exchange of power is not true.

This is a key point in this case. Because, if the power delivered at Minidoka was not secured through an exchange arrangement involving Black Canyon, there is no conceivable basis for crediting Black Canyon with any part of the proceeds of the sale of power at Minidoka. The Secretary suggests no other basis, and there is no other basis.

There Is No Exchange of Power.

We advance four propositions to sustain our contention that there is no exchange of Black Canyon power.

In the first place, and quite conclusively, the Idaho Power Company had had for five full years, before the 1935 contract involving delivery of power at Minidoka was conceived, a contract with the United States whereby the Company received all surplus power from the Black Canyon power plant during the non-irrigation season and paid for it the sum of \$600. per month. In other words, for five years before it began to deliver any power at Minidoka under the 1935 contract, the Idaho Power Company had been receiving all—not a part, but *all*—the surplus power generated by the Black Canyon power plant from October 15 to April 15 each year for a specified cash consideration of \$600. per month. When it began to deliver power at Minidoka it received no greater amount of power from Black Canyon. In fact, as Plaintiff's Exhibit 8 shows, it received *less* power than it had been receiving. How, then, can it be said that it was delivering power at Minidoka *in exchange* for the Black Canyon power?

It was already buying all the Black Canyon power for cash. It continued to pay cash in the same amount. The 1930 Black Canyon contract in all its original terms continued concurrently with the new contract involving Minidoka. The United States had for five full years been completely satisfied with \$600. per month, which was \$3,600. a year, for all its Black Canyon power. Why, then, all of a sudden, after five years, must the Black Canyon plant get \$53,600. for power which it had been contentedly selling for \$3,600. The exchange of power thesis is purely an imaginary hypothesis put forward to give some color to a transaction which otherwise would have no semblance of protective support.

We invite a full examination into the Black Canyon contract of 1930 (Pl. Exhibit No. 6), and Plaintiff's Exhibit No. 8 which relates to it.

In the second place, the contract between the Idaho Power Company and the United States involving the delivery of power at Minidoka is complete in itself and makes no reference to any exchange of power at Black Canyon. The date of the execution of that contract is uncertain. It recites that it was "made this 1st day of October, 1934," and that the "parties hereto have signed their names the day and year first written above," but it also says that the Company acted pursuant to a resolution of its Board of Directors "duly adopted May 9th, 1935" (R. p. 79). So it could not have been entered into on October 1, 1934, as it recites, but was probably executed in May or June, 1935. However all that may be, the contract quite precisely recites the considerations moving from each party to the other. We have already outlined those provisions. The Idaho Power Company agreed to do one thing—

deliver power at Minidoka. The United States agreed to do four things—refrain from building its plant at American Falls, let the Company use all the water going over American Falls, give the Company all the surplus power from the Minidoka plant, and extend the term of the Black Canyon contract.

The only reference to Black Canyon in this contract is to be found in paragraph B-1. As we have seen, the 1930 Black Canyon contract, whereby the Idaho Power Company got all the power from the Black Canyon plant for \$600. a month during the non-irrigation season, was limited to five years and would have expired in April 1935. The only thing the new contract of 1935 had to say about the Black Canyon contract was to extend its term to run concurrently with the new contract. The language is specific. (R. p. 76 par. B-1) It says:

"The present Black Canyon contract under date of April 10, 1930, between the United States and this Company is extended to run concurrently with this agreement, provided that the United States shall deliver to the Company under said Black Canyon contract all the Black Canyon power and energy available in excess of that power and energy now specifically reserved under said contract when used for construction and other purposes", enumerating the reservations.

We note that the Black Canyon power is to be delivered to the Company "*under said Black Canyon contract*"—not under the new 1935 contract, not as an exchange for power to be furnished at Minidoka, but *under the old 1930 Black Canyon contract*. We note further that the old contract is extended—not in some of its terms but *all* of its terms, just as it was.

In the face of the specific terms of the 1935 contract, the Secretary now attempts to introduce into it another major provision, and says that the power delivered at Minidoka by the Idaho Power Company was really in exchange for power generated at Black Canyon and there delivered to the Power Company. We submit that he cannot be heard to make any such claim in the face of the terms of the contract. The contract speaks for itself, and quite clearly. The attempt to rewrite it so as to supply some support for an otherwise wholly unjustifiable scheme whereby the plaintiff here is to be deprived of vested property rights without any compensation whatsoever, borders on the outrageous. That an exchange of power was in no way a part of the contract for the delivery of power at Minidoka is perfectly plain on the face of the contract.

In the third place, if the power delivered by the Idaho Power Company was in exchange for power received by that Company from Black Canyon, what consideration moved to the United States for all the other things it agreed in the contract to do? The only thing the Idaho Power Company agreed to do was to deliver power at Minidoka. That power was sold at retail and netted \$50,000. The Secretary says that the whole \$50,000 must go to Black Canyon because that plant delivered that value of power to the Idaho Power Company. Under that view, the delivery of power at Minidoka was fully compensated for by the delivery of an equal value in power at Black Canyon. If so, what did the United States receive for all the things it agreed in the contract to do? Did it gratuitously, and without return, forego its contemplated plant at American Falls? Did it gratuitously, and without return, deliver to the Idaho Power Company

all the surplus power from the Minidoka Power plant? Did it gratuitously, and without return, agree to let the Idaho Power Company use for power generation all the water passing over American Falls? The contract does not so recite, but on the contrary is clear and specific as to the consideration for all these things. The Court cannot ignore the recitations of the contract and read into it the gratuitous disposal of valuable rights by the United States to a private power company.

In the fourth place the suggestion that some exchange arrangement necessitates the payment of \$50,000. to the Black Canyon plant is made obviously ridiculous by the consideration of a few figures. The Idaho Power Company received 22,000,000 kilowatt hours of electric current from the Black Canyon plant in 1935 and paid \$3,600. for it. (Pl. Exhibit No. 8 (b).) The Company delivered 12,700,000 kilowatt hours to Minidoka and received 3,000,000 kilowatt hours from Minidoka, so that its net delivery there was 9,700,000 kilowatt hours. (Pl. Exhibit No. 14, p. 4.) By what stretch of the imagination can the Burley District be required to pay \$50,000. for 9,700,000 kilowatt hours when the Idaho Power Company is paying \$3,600. for 25,000,000 kilowatt hours; three times as much electricity for one-fourteenth of the price?

In reply to the foregoing it may be suggested that Black Canyon is not receiving enough for its power. This is merely saying that the Secretary made a bad bargain with the Idaho Power Company in 1930. That is precisely the situation in which this same Secretary, acting through these same agents, found himself in *Lockes v. Fox, supra*. There he needed \$1,000,000. to complete a project which he started and had no funds

with which to finish. So he tried to take the money from some water-users on another project. The courts refused to let him do that. So in this case, he cannot violate the property rights of the water-users on the Burley District in order to reimburse himself for an improvident contract made with the Power Company in regard to Black Canyon power.

If there was in fact no exchange of power with Black Canyon there is no basis for crediting Black Canyon with any part of the \$50,000. If Black Canyon was selling its power for \$600. a month cash, there is no conceivable basis for awarding it an additional \$50,000. a year for that same power. If the Idaho Power Company was delivering this power at Minidoka in consideration of the performance of certain specified things by the United States, and if this was the full contract as it appears to be, there is no conceivable basis for gratuitously awarding a third party \$50,000. on account of the delivery of this same power.

We submit, and insist, that the proposed crediting of the \$50,000. to the Black Canyon power plant is a pure gratuity and the suggested basis for such a credit is a pure sham.

No suggestion has been made by the Secretary that the United States has any interest in or claim to the \$50,000. except by way of its ownership of the Black Canyon power plant.

We submit therefore that the 95.6 per cent of the fund here in dispute cannot rightfully be credited to the Minidoka electric consumers, to the Minidoka Irrigation District, to the Idaho Power Company, to the Black Canyon power plant, or to the United States. In short, it belongs to no one other than the Burley Irrigation District. This concludes our digression and

we now return to the main thread of our affirmative argument.

VI.

The Money Proceeds in the Hands of the Secretary are Impressed With a Trust in Favor of Plaintiff.

Under IV hereinabove we contended that the Secretary secured this \$50,000. fund by depriving the Burley Irrigation District of its vested property rights in a certain amount of water and in the use of the power plant. Our next proposition is that the fund thus secured is impressed with a trust in favor of the Burley District.

The equitable doctrine which we invoke is too well-established to require citation of authority, and the instances in which it has been applied by the courts are too numerous and too varied in circumstance to permit a detailed analysis and exposition here. It is to be found in all the authorities from Justinian through what Sir George Jessel called "the modern doctrine of equity" and such writers as Pomeroy, down to our own Restatement of the Law and the latest text writers.

In the Digest of Justinian (Lib. 10, title 4, leg. 12, § 3), we find,

"If any one shall make wine with my grapes, oil with my olives, or garments with my wool, knowing they are not his own, he shall be compelled by action to produce the said wine, oil or garments."

In *National Bank v. Insurance Company*, 104 U. S. 54, 68, the Supreme Court quoted the famous Master of the Rolls as follows, referring to *Knatchbull v. Hall*, *in re: Hall's Estate*, 13 Ch. D. 696:

"The Master of the Rolls, Sir George Jessel, showed that the modern doctrine of equity, as regards property disposed of by persons in a fiduciary position, is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them."

Pomeroy's Equity Jurisprudence (4th Ed.) has the following often-cited statements on the subject:

"The specific instances in which equity impresses a constructive trust are numberless—as numberless as the modes by which property may be obtained, through bad faith and unconscientious acts." (Sec. 1045)

"By the well-settled doctrines of equity, a constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it. * * * It is true that the beneficial owner can often recover the money due to him by a legal action upon an implied assumpsit; but in many instances a resort to the equitable jurisdiction is proper and even necessary." (Sec. 1047)

"It is not essential for the application of this doctrine that an actual trust or fiduciary relation should exist between the original wrong-doer and the beneficial owner. Whenever one person has wrongfully taken the property of another, and converted it into a new form, or transferred it, the trust arises and follows the property or its proceeds." (Sec. 1051)

The Restatement of the Law of Restitution (Section 202) states the Rule as follows:

"Where a person wrongfully disposes of property of another knowing that the disposition is

wrongful and acquires in exchange other property, the other is entitled at his option to enforce either (a) a constructive trust of the property so acquired, or (b) an equitable lien upon the property to secure his claim for reimbursement from the wrong-doer."

In its Comment on this Rule, the Restatement says:

"The rule stated in this Section is applicable whether the claimant was the legal or equitable owner of the property disposed of by the wrong-doer, and whether or not there is a fiduciary relation between the claimant and the wrong-doer," and further,

"The rule stated in this Section is applicable not only where the wrong-doer acquires property by a wrongful sale, purchase or exchange of the property of the claimant, but also where he acquires property in exchange for the wrongful use of property of the claimant."

Bogart on Trusts and Trustees, the latest recognized authority in this field, says:

"The constructive trust may be defined as the device used by chancery to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs." (Sec. 471)

The modern digests contain pages of fine-print citations on the subject. The facts in cases in which the doctrine has been applied run all the way from the conversion of corn into whiskey (*Silsbury v. McCoon*, 3 N. Y. 379) to a bank's pledge of a bond deposited with it under an agreement to return the bond (*Gwynn v. Spurway*, 28 F. (2d) 37).

The two elements essential to the rise of such a constructive trust are (1) some relationship between the parties which caused the claimant of the property to rely upon and expect the possessor to protect the claimant's interest and (2) a wrongful act of conversion or use whereby the possessor came into possession of other property or funds.

Both of these elements are present in this case. The Secretary was in complete possession and control of the power plant of which the Burley District was, under the judgment of this Court, the beneficial and equitable owner, and of the water rights appurtenant thereto. The value of these vested property rights was entirely under the protection of the Secretary.

The Secretary came into possession of \$50,000. by the wrongful use and misuse of this property, by which wrongful acts he deprived the Burley District of \$50,000. which otherwise it would have received. These elements being present, a constructive trust arises in respect to the proceeds in the hands of the Secretary. Equity will direct that he credit the Burley District with those proceeds.

VII.

Neither Specific Performance of a Contract Nor Any Act of Discretion is Involved.

In conclusion, we refer to two points stressed by the defendant in the court below. They are that the Burley District is in effect attempting (1) to achieve the specific performance of a contract, and (2) to control an act of discretion on the part of the Secretary.

It must be apparent from our argument hereinbefore detailed, that plaintiff in no way, sense or manner applies to the court for the specific performance of a

contract. Our case rests upon ownership of property and the Secretary's proposal illegally to deprive us of that property. No contract is involved. The only contract between the parties is that of March 1926, and the Burley District has at no point invoked any clause of that contract. The only clause in any way pertinent to the present controversy is that by which the Burley District succeeded in interest to the rights of the original entrymen. We are obviously not seeking specific performance of that clause. If defendant intends to rely upon this contention, we ask of him that he designate the contract and the clauses thereof upon which he claims the Burley District is seeking specific performance.

As to the second point, if we be correct in our contention that we have vested rights in this property and that the Secretary proposes illegally to deprive us of those rights, it is too well-settled to require discussion that he may be enjoined from such action. *Ickes v. Fox, supra, West v. Standard Oil Company, supra, and Wilbur v. Burley Irrigation District, supra*, are a sufficient citation of authority on that point. The Secretary has no discretion to violate vested rights. He has a sum of cash which was secured by depriving us illegally of our property, which sum belongs to no one other than us, and we ask that we be credited with that sum in our accounts on the Secretary's books. We insist upon that credit under settled rules of law which make that money ours. The Secretary has no discretion to deprive us of our property and then deny us the proceeds. Our rights are vested and beyond his discretion. We do not ask the Court to require the Secretary to do one single thing as to which he has the least discretion.

CONCLUSION.

It is respectfully submitted that the court below erred in the respects enumerated in the Statement of Points hereinabove contained, that its judgment must therefore be reversed and plaintiff's prayers for injunctive relief be granted.

Respectfully submitted,

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December 8, 1939.

APPENDIX.

Statutes Involved.

Act of July 26, 1866, c. 262, Sec. 9, 14 Stat. 253, Title 43 U. S. C.:

"Section 661. Appropriation of waters on public lands; right of way for canals and ditches. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *."

Act of June 17, 1902, c. 1093, Sec. 8, 32 Stat. 387, Title 43 U. S. C.:

"§ 383. Vested rights and State laws unaffected by chapter. Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any States or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (June 17, 1902, c. 1093, § 8, 32 Stat. 390.)"

"§ 419. Contract for irrigation project; notice as to lands irrigable, unit of entry, and construction charges. Upon the determination that any irrigation project is practicable, the Secretary of the Interior may cause to be let contracts for the

construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available, and thereupon he shall give public notice of the lands irri-gable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments in which such charges shall be paid and the time when such payments shall commence: * * * * *

"§ 461. Determination of construction charges generally. The construction charges which shall be made per acre upon the entries and upon lands in private ownership which may be irrigated by the waters of any irrigation project shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably." * * * * *

"§ 498. Transfer of management and operation of works to water users generally. When the payments required by this chapter are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: Provided, That the title to and the management and operation of the reservoirs and the works necessary for their

protection and operation shall remain in the Government until otherwise provided by Congress. (June 17, 1902, c. 1093, § 6, 32 Stat. 389)."

Act of August 13, 1914, c. 247, Sec. 5, 38 Stat. 686, Title 43 U. S. C.:

"§ 373. General authority of Secretary of Interior. The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this chapter into full force and effect."

"§ 492. Operation and maintenance charges generally. In addition to the construction charge, every water-right applicant, entryman, or landowner under or upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance charge based upon the total cost of operation and maintenance of the project, or each separate unit thereof, and such charge shall be made for each acre-foot of water delivered; but each acre of irri-gable land, whether irrigated or not, shall be charged with a minimum operation and maintenance charge based upon the charge for delivery of not less than one acre-foot of water. If the total amount of operation and maintenance charges and penalties collected for any one irrigation season on any project shall exceed the cost of operation and maintenance of the project during that irrigation season, the balance shall be applied to a reduction of the charge on the project for the next irrigation season, and any deficit incurred may likewise be added to the charge for the next irrigation season. (Aug. 13, 1914, c. 247, § 5, 38 Stat. 687)."

"§ 499. Discretionary power to transfer management. Whenever any legally organized water-users' association or irrigation district shall so request, the Secretary of the Interior is authorized, in his discretion, to transfer to such water-users' association or irrigation district the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe."

Act of December 5, 1924, c. 4, Sec. 4, subsection I, 43 Stat. 701, Title 43 U. S. C.:

"§ 501. Disposition of profits of project taken over by water users. Whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid."

"§ 371. * * * * *
(e) The words 'division of project' mean a substantial irrigable area of a project designated as a division by order of the Secretary."

Appropriation Act of May 10, 1926, 44 Stats. 480:

"Minidoka project, Idaho: For operation and maintenance, continuation of construction, and incidental operations, \$2,005,000: Provided, That

the accumulated net profits as determined by the Secretary of the Interior, arising under the project, derived from the operation of the project power plants, leasing of Government grazing and farm lands, the sale and use of town sites, and from all other sources, shall be applied by the Secretary of the Interior, so far as may be necessary, in payment of any water-right charges due the United States by any individual water user or irrigation district to whose benefit personally or in the aggregate such accumulated profits should equitably accrue in the judgment of the Secretary of the Interior, whose decision shall be conclusive. Any surplus of such accumulated net profits and future profits from such sources shall be applied as provided by Subsection I, section 4, Act of December 5, 1924 (Forty-third Statutes, page 701)."

Idaho Code, Annotated:

"41-101. *Nature of property in water.*—Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be

allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water."

"41-103. *Right acquired by appropriation.*—The right to the use of the waters of rivers, streams, lakes, springs, and of subterranean waters, may be acquired by appropriation."

Idaho Constitution:

"ARTICLE I. Sec. 14. *Right of eminent domain.* The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

"Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor."

"ARTICLE XV. Sec. 1. *Use of waters a public use.*—The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law."

"ARTICLE XV. Sec. 3. *Water of natural stream—Right to appropriate—State's regulatory power—Priorities.*—The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

RG 276
District of Columbia Circuit Court
General Appellate Jurisdiction
General Docket Briefs, 1893-1956
Box # 903
Appellant's Brief

Exhibit J

**Brief for Appellee, Burley Irr. Dist. v. Ickes
(D.C. Cir. Jan. 25, 1940)**

OFFICE

NAVY DEPARTMENT

In the United States Court of Appeals for the
District of Columbia

1908

Between the United States of America

Plaintiff

And

James H. McMillan

Defendant

Case No. 10,000

Filed for Record

1908

U.S. DEPT. OF JUSTICE

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Argument—Continued.

II. On the merits of the case—Continued.

- G. Rather than showing arbitrariness, capriciousness, or bad faith, the record clearly shows that the Secretary's actions are reasonable and that his allocation of profits is in fact generous to the appellant.
1. The Secretary's action in entering into the contracts of 1934 and 1935 with the Idaho Power Company and the Minidoka Irrigation District, respectively, and his findings and distribution of 1935 net profits were reasonable and necessary to conserve vitally needed irrigation water and to provide vitally needed electric power.
2. The appellant has no interest in and no right to receive profits from the operation of any power plant other than the Minidoka Power Plant.
3. There is no sham or subterfuge in the Secretary's crediting of \$50,000 annually to the Black Canyon Power Plant and that credit does not constitute a gratuity.
4. The Secretary's findings and distribution of profits for 1935 are actually generous to the appellant.
- D. The action taken by the Secretary does not interfere with or affect any property rights, equitable or otherwise, belonging to the appellant.
1. All property rights, legal and equitable, in the Minidoka Dam, the power plant, all other "reserved works," the water decreed for power purposes and the electric energy produced by the Minidoka Plant are vested in the United States.
- a. The Congress has provided that both possession and title to the dam and power plant shall remain in the United States.
- b. Since title to the works involved or any right therein can pass out of the United States only pursuant to specific act of Congress, the appellant has no claim to any interest in the dam or power plant.
- c. Appellant's contention that it owns, or has an equitable interest in the dam and the power plant is supported by no argument on the merits of the question of ownership and all points on which appellant relies are ineffective.

Argument—Continued.

- II. On the merits of the case—Continued.
- D. The action taken by the Secretary—Continued.
1. All property rights—Continued.
- d. The appellant has no rights of any kind in the commercial power distribution system.
- e. The appellant has no property right in the flow of 2,700 second-feet of water decreed to the United States for power purposes at the Minidoka Power Plant.
- f. The electric energy produced at the Minidoka Power Plant is property of the United States.
2. Even if the appellant did have rights in the property, the action of the Secretary would not be an interference with them since, by contract with the appellant, he is given full control over that property.
- E: The Burley Irrigation District has no basis for complaint that the transmission lines of the project are being used to convey electricity to the Minidoka Irrigation District.
- F. The Burley Irrigation District cannot complain that it has been unfairly treated. Having received and accepted the numerous benefits resulting from the conservation plan effected by the Secretary, the appellant is estopped to allege that the Secretary was without authority to adopt the conservation plan.
1. The appellant has benefited from the savings of water effected by the Secretary under the conservation plan which is an integral part of the arrangement now under attack.
2. The appellant has received a substantial benefit from an improved power supply.
3. The Burley Irrigation District is estopped to attack the Secretary's action in effecting the conservation plan.
- III. The District Court Was Without Jurisdiction Over This Controversy and Hence the Bill of Complaint Was Properly Dismissed.
- A. The relief sought by the appellant will prevent the Secretary of the Interior from performing the contract of January 1, 1935, with the Minidoka Irrigation District and that district is therefore an indispensable party without whose presence the court could not proceed.

Argument—Continued

III. The District Court Was Without Jurisdiction—Continued.

A. The relief sought—Continued.

1. The court cannot take jurisdiction in the absence of persons whose interests are so related with those of parties before the court that relief cannot be granted to the latter without determining substantial rights of the former.

2. The Minidoka Irrigation District has substantial rights and benefits under its contract of January 1, 1935, with the United States which would be cut off completely if appellant received the relief which it seeks.

3. Under the precedents it is clear that the Minidoka Irrigation District is an indispensable party without whose presence the court cannot grant the relief sought.

B. The Idaho Power Company receives valuable rights and benefits under its contract of October 1, 1934, with the United States, which rights and benefits are jeopardized in this proceeding, thereby constituting the company an indispensable party without whom the court cannot proceed.

C. The court is without jurisdiction since this action seeks to compel the United States specifically to perform its contract of March 15, 1926, with the Burley Irrigation District.

1. This action seeks to compel the United States specifically to perform its contract.

a. The contract of March 15, 1926, is the sole source of any right in the appellant to secure a credit of any power profits.

b. The prayers of the appellant for judgment constitute a demand for specific performance of the contract of March 15, 1926.

c. The United States is the party to the contract of which specific performance is sought and is the real party in interest.

2. No suit requiring the United States specifically to perform its contract can be maintained without its consent.

Conclusion.

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1 Williston on Contracts, Sec. 137A (Rev. Ed. 1936)	55

In the United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1939

No. 7522, SPECIAL CALENDAR

BURLEY IRRIGATION DISTRICT, A CORPORATION, APPELLANT

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The appellant is a quasi-municipal corporation organized under the laws of the State of Idaho by the water users of the South Side Pumping Division which is a part of the Government's Minidoka Reclamation Project in the Snake River Basin of Idaho. (R. 173, 174, 179.) The major purposes of this suit by the Burley Irrigation District against the Secretary of the Interior are to modify the rights now enjoyed by the Minidoka Irrigation District and the Idaho Power Company under their contracts with the United States of January 1, 1935, and October 1, 1934, respectively; to enjoin the crediting annually to the Government's Black Canyon Power Plant and the Minidoka Irrigation District of the proceeds from sales of certain elec-

(1)

tric power by the Government on or near the Minidoka Project; to require the crediting annually of 95.6 percent of such proceeds to the Burley Irrigation District under its contract of March 15, 1926, with the United States; and to circumscribe the administrative control exercised by the United States through the Secretary of the Interior and the Bureau of Reclamation over Federal reclamation and irrigation projects in the Snake River Basin of Idaho.

The facts of this case have been fully and completely stated and determined in the findings of fact as made by the district court (R. 172-201), to which the court's attention is directed.

In its "Assignment of Errors" only one assignment is directed toward the district court's findings. That is assignment number 22: "The court erred in finding facts contrary to the evidence and in finding facts not supported by the evidence" (R. 212).

Despite the repetition of the assignment in its Statement of Points (brief, p. 18, Point 18), apparently appellant has abandoned that assignment (appellant's brief, p. 22). Furthermore, at no place in appellant's brief is there any attempt to show either the existence of any evidence contrary to the district court's findings or any lack of evidence to support them. Indeed, appellant has not even included in the transcript of the record all of the evidence on which the trial court based its findings. That fact is evidenced, on the one hand, by the appearance of asterisks throughout the transcript of testimony and by the context of the testimony included and, on the other hand, by the court's introductory statement to his findings (R. 173) that they

are predicated on, among other things, "*all the evidence submitted in this case.*" [Italics added.]

Yet the appellant asserts facts in its brief which are at variance with the facts as found (and to the undisputed evidence to which the appellant does not refer). For instance, appellant asserts (appellant's brief, p. 4):

That is, 95.6 percent of the cost of the power plant was charged against the lands in the pumping unit (now Burley Irrigation District) and 4.4 percent against the lands in the gravity unit (Pl. Exhibit No. 1, pp. 152, 157, 158). The transmission lines were charged against the two units in approximately the same proportions (Pl. Exhibit No. 1, p. 18).

Considering first the statement concerning the cost of the power plant, it is found to vary from the court's finding No. 51, as follows:

That charges against water users and districts are set out in public notices and contracts, and the amount of the charge against the water users or the district does not depend upon the amount charged on the books as the cost of the works in question, but upon the amount announced by the Secretary of the Interior in his public notices with a view to returning the estimated cost of the project to the reclamation fund. [R. 193.]

The statement likewise conflicts with the undisputed testimony that public notices fixing the charges to be paid by landowners of the gravity division were issued long prior to the alleged determination of the amounts to be charged to the lands of each division. (R. 282, 283; defendant's Exhibit No. 9, certified to this court.)

But appellant's statement concerning the charges of the costs of the transmission lines is more patently in error. As to transmission lines the trial court found:

The Minidoka Project is composed of and includes seven divisions known as follows:

* * *

7. The Commercial Power Division, to which charges were made for power generating units, transmission lines, transformers, substations, and other electrical works used in the generation and distribution of surplus electric power for commercial purposes including electrical heating, lighting, and general power purposes. [Finding No. 8, R. 175.]

That the works referred to as the commercial power distribution system of the Minidoka Project, including most of the transmission lines and transformers in connection with the said project, consist in the main of certain original transmission and transformer works which were charged on the books to a separate division or account known as the Commercial Power Division of the Minidoka Project and were not charged to the Burley Irrigation District or the lands of the South Side Pumping Division but to another division of the Minidoka Project known as the Commercial Power Division and also consist of certain transformer and transmission works, substations and interconnection works constructed at a later date, in part constructed and charged in the same way in the same manner as the original works and in part provided for from receipts secured from power distributed through the original works. That part of the power system not charged to the Commercial Power Division

sion was charged to and is to be repaid by the water users or the districts which include their lands. [Finding No. 16, R. 178.]

It is thus clear that even on the books the cost of the transmission lines and other power facilities used for the generation and distribution of power for commercial sale were never charged "against the two units," meaning the Burley and Minidoka Districts, or their lands or landowners. They were charged to a self-liquidating Commercial Power Division. Only the transmission lines to serve the irrigation district water pumps remained for charging, on the books, against the irrigation districts or their lands or landowners. And those lines are immaterial to the issues of this case. The appellant's only record reference for its statement regarding transmission lines is to a compilation in its Exhibit No. 1, which, while it shows a book charge against the irrigation districts for unidentified transmission lines, clearly shows a larger charge against the Commercial Power Division for costs of the commercial power works. (Plaintiff's Exhibit No. 1, p. 18, point 10.) Obviously, no question is raised by that reference as to the correctness of the trial court's findings: the two are consistent.

Likewise, on page 24 of the appellant's brief it is stated that—

The entrymen and landowners in the Burley District contracted for, and for twenty-four years have been paying on, 95.6 percent of the power plant.

That statement, unsupported by any record reference, is to be supplemented by the uncontradicted fact found by the trial court as follows:

That there was no money paid by the Burley Irrigation District to the United States on the cost of construction of the irrigation works furnished by the United States for the service of the lands in that district nor upon the cost of the Minidoka power plant. That what happened was that the Government made a profit in the power business, credited most of it to the Burley District, and by such credit wiped out the installment charges which otherwise would have been payable by the District to the United States. That the major part of the construction charges for the pumping division of the project have not yet come due. [Finding No. 52, R. 193.]

That the District thus received practically free of cost the full benefit of the irrigation and power works built and paid for by the United States under the provisions of the Reclamation Law. [Finding No. 53, R. 194.]

A copy of the form of contract (water-right application) signed by the individual water users is attached to the bill of complaint (Exhibit No. 4, R. 61-65) and refutes appellant's assertion that the water users contracted for 95.6 percent of the power plant. What they contracted for was a water right for the irrigation of the lands described in the application or contract, and nothing else.

On page 5 of its brief, appellant states:

By virtue of a contract, dated March 15, 1926, between the United States and the Burley Irrigation District, the latter took over the operation

of the pumping unit of the project's irrigation system * * *.

The full facts, however, are as found by the trial court: That certain minor works, or "transferred" works, such as laterals, sublaterals, and pumping substations are now being operated and maintained by the Minidoka Irrigation District and the Burley Irrigation District, respectively, under contracts later made with the United States. But all the major irrigation and power works, or "reserved" works, which include all the works in connection with the various divisions of the Minidoka Project except the transferred works, have ever since their construction been operated, maintained, and controlled by the United States. Those reserved works include all dams, reservoirs, power plants, and power-distribution facilities. The right of the United States to operate, maintain, and control the reserved works is recognized in the contract of March 15, 1926, between the United States and the Burley Irrigation District. The transferred works are of much less importance and of much less value than the reserved works. [Finding No. 17, R. 178.]

The record references on which appellant relies for its statement in no way conflict with the trial court's finding on this matter.

Since the appellant's brief does not state many of the facts which appellee believes to be pertinent to a consideration of the action which has been taken by the Secretary of the Interior, and for the convenience of the court, those facts will be summarily stated.

The Minidoka Project is a project of the United States Bureau of Reclamation. It is located in the heart of the Snake River Valley, in Idaho, a vast and arid area the entire economy of which is founded solely on irrigated agriculture (R. 179, 274, 275). Great areas of the valley are unreclaimed desert, but about 1,000,000 acres of land are under cultivation, and dependent upon irrigation from the Snake River (R. 179, 274, 295). The project consists of seven divisions, known as the Jackson Lake Division, the American Falls Reservoir Division, the Gravity Division, the South Side Pumping Division, the Gooding Division, the North Side Pumping Division, and the Commercial Power Division (R. 175, 270). The water users of the South Side Pumping Division, which embraces about 46,000 acres, are organized as the Burley Irrigation District, and the water users of the Gravity Division, embracing about 71,000 acres, are organized as the Minidoka Irrigation District (R. 173, 174, 175).

The Minidoka Project and the various divisions thereof and all structures and facilities in connection therewith, including both irrigation and power works, were constructed by the United States under the provisions of the act of Congress of June 17, 1902 (32 Stat. 398, Sec. 371 *et seq.*, Tit. 43, U. S. C.), as amended, commonly known as the Reclamation Law, and the costs thereof were met with moneys from the Reclamation Fund of the Federal Government (R. 174, 176, 177, 281). For many years the entire project was administered solely by the Bureau of Reclamation. In 1926 and 1927, however, the United States entered into con-

tracts with the Burley and Minidoka Irrigation Districts, respectively, containing, among others, provisions whereby the districts assumed the operation and maintenance of what were designated as the "transferred works," which consisted of various portions of the system for distributing irrigation water, such as branch canals and their laterals and certain pumping plants for lifting water in the canals. (Plaintiff's Exhibit No. 5 and defendant's Exhibit No. 6, both certified to this court.) The operation and maintenance of the "reserved works," consisting of Jackson Lake Dam and Reservoir, American Falls Dam and Reservoir, Lake Walcott Reservoir, the Minidoka Dam and spillway, the Minidoka Power Plant and penstocks and its six generating units, the headgates and headworks and intakes of both the North Side and South Side Canals, the Gooding Canal system, the Main South Side Canal from Minidoka Dam to the pumping plants, and the transmission lines, substations, transformers, and all other electrical works, have always been and now are reserved to and exercised by the Federal Government through the Bureau of Reclamation (R. 173, 272, 273; defendant's Exhibit No. 6, certified to this court).

The contracts of 1926 and 1927 with the Burley and Minidoka Irrigation Districts also provided that the Secretary of the Interior would determine and announce the accumulated net profits derived from the commercial sale of surplus power generated at the Minidoka Power Plant. Those contracts further provided for the crediting of those net profits to the construction and operation charges on the lands embraced in the

Burley and Minidoka Irrigation Districts respectively, which charges were, by the contracts, assumed by the districts. It was also provided that the Secretary would announce, determine and credit the future annual net profits, to be credited, first, on the annual construction charges until the entire construction indebtedness of the respective districts had been paid; second, upon operation and maintenance charges; and third, as the districts or water users may direct. The ratio of division of the net power profits to be credited to the two districts was thereafter fixed by the then Secretary on the basis of 95.6 percent of the net profits to the Burley Irrigation District and 4.4 percent to the Minidoka Irrigation District. Under the contracts the Secretary has credited large amounts of both accumulated and annual profits to the construction charges of the respective districts. So large are those amounts that the Burley Irrigation District has had to make no actual payments at all on its construction charges, the credits having more than taken care of all installments of those charges which have become due (R. 193, 231).

Without irrigation the lands in the Snake River Valley are too arid to produce agricultural crops. Storage of water in reservoirs is especially important in meeting the irrigation needs of the lands, for, after the floods of the spring and early summer, the natural flow of the stream is far insufficient to meet water requirements (R. 179, 180, 303, 309).

During the 5-year period from 1931 to 1935 severe crop losses occurred because of water shortage and the failure of the American Falls Reservoir to fill and thereby to store adequate water for use during the latter

part of the irrigation season (R. 180, 181, 309, 310). That reservoir supplies about 1,700,000 acre-feet of water storage capacity, and supplies water necessary, in whole or in part, to the irrigation of about 900,000 acres of cultivated land (R. 176, 179, 295, 302). One of the causes which directly contributed to the failure of the American Falls Reservoir to fill and to the resulting water shortages was the use of large amounts of the winter flow of water of Snake River in the operation of the power plant at the Minidoka Dam (R. 181, 306). There is no reservoir below the power plant in which water can be stored or conserved after it has been used in developing power at the power plant, and consequently any water so used during the winter nonirrigation season is wasted and lost for irrigation uses (R. 181, 306). The amount of water wasted in this fashion has been over 225,000 acre-feet annually, or about enough to irrigate all the lands in the South Side Pumping Division, represented by the appellant Burley Irrigation District (R. 181, 275). Such waste of water is inimical to the imperative need for conservation of irrigation water in the Snake River Valley, on which the entire economy of the valley is founded (R. 181, 292).

There has been, furthermore, a steady rise in the demand for power for irrigation pumping on the Minidoka Project, almost entirely for the lands in the South Side Pumping Division of the Burley Irrigation District. By the year 1935 this demand for power for irrigation pumping had reached a point which at times during the irrigation season actually exceeded the supply which could be produced by use of the full capacity of

the Minidoka Power Plant. Additional power was needed for pumping and no surplus power was available from the plant to carry on the commercial, domestic, and industrial power business of the Minidoka Project and the towns adjacent thereto, which business had been the source of the power profits realized from operation of the Minidoka Power Plant. This lack of power was aggravated by the continually growing demand for commercial power. (R. 183, 184, 241, 256; defendant's Exhibits Nos. 2, 3, 5, certified to this court.)

No commercial power business can survive without a continual and dependable source of available power throughout the year, and hence the inability of the Minidoka Power Plant to supply the commercial power demands during the peak of the irrigation season doomed the commercial power business to virtual extinction by loss of customers to another and a dependable supply of power unless a supplemental supply of power from other sources was brought into the project, so that continuous service to consumers might be maintained (R. 183, 250).

By 1935 it had become vitally necessary to conserve water to prevent any repetition of the disastrous water shortages of the previous years as well as to provide an additional supply of power for the Minidoka Project to meet the rapidly increasing project demands for power (R. 183, 184; defendant's Exhibits Nos. 2, 3, 5, certified to this court). In order to accomplish these purposes, the Secretary of the Interior entered into a contract (defendant's Exhibit No. 10, certified to this court) with the Idaho Power Company under which the company agreed to deliver to the Government at the

Minidoka Project certain amounts of additional power both during the irrigation season and during the non-irrigation season. In consideration for this power, the United States agreed to forego during the term of the contract any exercise of its right to build a power plant of its own at American Falls and to extend to run concurrently with the contract in question for a term of 25 years, unless sooner terminated, a contract under which power developed at the Government's Black Canyon Power Plant, located in western Idaho and not a part of the Minidoka Project, was delivered to the Power Company. This transaction constituted in effect an exchange of power between the Government and the Company under which the Company took the Black Canyon power from the Government's power plant and in exchange delivered power to the Minidoka Project, both during the summer and during the winter seasons (R. 182). The winter power secured from the Idaho Power Company in exchange for the Black Canyon power made it possible partially to close down the Minidoka Power Plant during the winter season and to reduce the use or demand for winter water at that plant to the lesser amount which must in any event go by to supply domestic, municipal, and other uses below (R. 182, 183, 311). Further, this increased supply of power from outside sources made it possible during the summer irrigation season to meet both the pumping and commercial power demands on the project, and thereby to give continuous, year-around commercial service (R. 184, 249; defendant's Exhibits Nos. 2, 3, 5, certified to this court). In that way the contract made possible the preservation of the profitable commercial

power business on the Minidoka Project which would otherwise have been entirely lost (R. 184, 249). It is this power business which supplied the profits which the appellant has received in the form of credits and which are involved in this litigation. Had the power business been lost, there would have been no profits whatsoever since the only demand for commercial power which could have been served by a plant unable to furnish power during the summer, as was the Minidoka Plant operating alone, was the seasonal demand for power for heating purposes during the winter. That heating business, according to the undisputed evidence and the finding of the trial court, would produce revenue so small as to result in no net profits at all (R. 183, 184, 245, 246, 249, 250, 251; defendant's Exhibits Nos. 2, 3, 5, certified to this court).

Under statutory requirements, it was determined to be necessary to credit to the Black Canyon Power Plant the sum of \$50,000 to pay for the power delivered from that plant to the Idaho Power Company as partial consideration for the company's agreement to furnish the additional power needed at the Minidoka Project (R. 189). This sum of \$50,000 was considered to be properly chargeable against the revenues to be received from sale on the Minidoka Irrigation District of the substitute power furnished there by the Idaho Power Company. To guarantee its collection a contract, dated January 1, 1935 (defendant's Exhibit No. 11, certified to this court), was entered into between the United States and the Minidoka Irrigation District, whereby that district guaranteed the \$50,000 needed for the Black Canyon Power Plant and in return was

to receive stated amounts of power for sale within the district for its own account. Under no conditions could or can the amount of power to be furnished to the Minidoka Irrigation District under the contract exceed the amount of outside power furnished by the Idaho Power Company under its contract with the United States which has been discussed above (R. 190; defendant's Exhibit No. 11, certified to this court, article 11).

The Minidoka Irrigation District had long contemplated the construction of a power plant of its own. Under the law of Idaho, the Minidoka Irrigation District had full powers to do so (Idaho Code Annotated (1932), sec. 42-308). Had it done so, the Minidoka Power Plant of the Government project would have lost the entire market in the Minidoka District (R. 189, 253).

The conservation plan put into effect by the Secretary of the Interior under the respective aforementioned contracts of October 1, 1934, and January 1, 1935, was the only feasible plan to enable the conservation both of needed irrigation water and of the profitable power business. The essential factor in any water conservation plan was the cessation of waste of water, needed to be stored for irrigation, in the winter operation of the Minidoka Power Plant. This, the plan permitted. The preservation of the profitable power business depended on the securing of an additional supply of summer power to augment the insufficient supply then available from the Minidoka plant. This, too, the plan effected (R. 188, 252, 257, 264, 306). Furthermore, the water conserved in the American Falls Reservoir under this conservation plan becomes available

for the production of power at the Minidoka Power Plant during the irrigation season (R. 188, 189, 251, 252, 257, 264). Without some plan of conserving water during the winter, there would be insufficient water, in low water years, to operate even the present and inadequate Minidoka Power Plant to capacity during portions of the irrigation season (R. 188, 189, 251, 252, 257, 264). Yet it is precisely at that time that most electrical energy is needed, both for pumping purposes and to maintain the year-around commercial power business. (R. 183, 241; defendant's Exhibits Nos. 2, 3, 5, certified to this court.) No method existed, moreover, by which additional power could be secured to serve the growing power demands of the Minidoka Project and to permit the saving of the winter flow of Snake River, except by means of power transmitted over the transmission system of the Idaho Power Company (R. 185, 188).

Pursuant to the various contracts with the two irrigation districts, the Acting Secretary of the Interior, on March 12, 1936, made the first and only findings of the *net profits* from the sales of power on the Minidoka Project and towns adjacent thereto during the year 1935. (R. 190; defendant's Exhibit No. 7, certified to this court.) The amount of *net profits* so found to have been derived from the operation of the Minidoka Power Plant during the year 1935, namely, the sum of \$66,744.26, was divided and credited by the Secretary in exact conformity with the decree in the case of *Burley Irrigation District v. Wilbur* (Equity No. 50636, Supreme Court of the District of Columbia, *aff'd*, 58 F. (2d) 871, 61 App. D. C. 145), namely, in the pro-

portion of 95.6 percent to the Burley Irrigation District and 4.4 percent to the Minidoka Irrigation District (R. 191). In the same findings the Secretary determined the net profits from the sale in the Minidoka Irrigation District of power received from the Idaho Power Company. Those profits were credited to the Black Canyon Power Plant in the sum of \$50,000 and to the Minidoka Irrigation District in the sum of \$2,384.52. That power not having been generated at the Minidoka Power Plant, none of the profits from its sale were found to be profits of that plant.

In finding the net profits from the Minidoka Power Plant, the Secretary did not make any deduction for depreciation or interest charges. Had such deductions been made, the net profits which could have been credited to the extent of 95.6 percent to the Burley Irrigation District would have been greatly reduced. The Secretary also credited to the Minidoka Power Plant the major part of the power profits derived from power sales in the Minidoka Project area and in adjacent towns, although, as has already been stated, the mainstay of the profitable commercial power business and the only reliable source of power for maintaining continuous service and, thus, for carrying on such power business came from another source (R. 192, 286, 250).

THE ISSUES INVOLVED

This case has been so confused by the presentation of numerous collateral issues that it seems necessary to state the basic issues upon which the decision of the court must depend. Those issues are:

1. Do the acts of the Secretary of the Interior, of which the appellant complains, pertain to a subject mat-

ter within his proper authority to take official action and do they flow solely from the exercise by the Secretary of a discretion lawfully vested in him?

2. If so, are the Secretary's actions so arbitrary and capricious, or do they interfere with a property right of the appellant so that they may be overthrown or controlled by the court?

3. Are the Minidoka Irrigation District and the Idaho Power Company indispensable parties without whom this litigation cannot proceed?¹

4. Is this in fact a suit to compel specific performance of a contract by the United States which cannot be maintained without the consent of the United States?²

SUMMARY OF ARGUMENT

The decision of the District Court can be affirmed either on the merits or on jurisdictional grounds. On the basis of the facts found by the trial court, which are conclusive and cannot be questioned in this appeal, the judgment of the District Court is clearly correct on the merits of the case.

The actions of the Secretary, of which the appellant complains, are actions within his authority and they, as well as the actions which appellant would have this court compel affirmatively, involve the exercise of a discretion lawfully vested in the appellee. The fundamental issue is the propriety of the Secretary's action

¹The jurisdictional issues, 3 and 4, are presented last and will be argued last inasmuch as they were not the basis of the trial court's action (R. 226) and, further, as an understanding of the merits of the controversy lends understanding to the jurisdictional points.

in excluding from the determined net profits of the Minidoka Power Plant, in which profits appellant shares to the extent of 95.6 percent, an item of \$32,384.52 found by him to have been the profits from the sale of outside power brought onto the project and not generated at the Minidoka Power Plant. The determination of these net profits is a function vested by law and by contract exclusively in the Secretary of the Interior and requires the exercise of discretion. Even if we go behind the determination of net profits to scrutinize the operation of the Minidoka Power Plant, which there is no proper occasion to do, it is equally clear that the Secretary is authorized and required to exercise discretion in the operation of that plant.

It is conclusively settled doctrine, however, that the courts will not and cannot examine into or control the actions of an administrative official of the Government performed in the exercise of a lawfully vested discretion unless it is shown that he acted arbitrarily, capriciously, or in bad faith. Furthermore, rather than showing arbitrariness, capriciousness, or bad faith, the record clearly shows that the Secretary's actions are reasonable and that his allocation of profits is in fact generous to the appellant.

The contracts of 1934 and 1935 with the Idaho Power Company and the Minidoka Irrigation District, respectively, and the Secretary's findings and distribution of 1935 net profits were reasonable and necessary to conserve vitally needed irrigation water and to provide vitally needed electric power. There is neither sham nor subterfuge in the Secretary's crediting of \$50,000 annually to the Black Canyon Power Plant nor does

that credit constitute a gratuity. Furthermore, the Burley Irrigation District has no claim of right whatsoever to any profits derived from the sale of power generated elsewhere than at the Minidoka Power Plant.

The action taken by the Secretary, moreover, does not interfere with or affect any property rights, equitable or otherwise, belonging to the appellant. All property rights, legal and equitable, in the Minidoka Dam, the power plant, all other "reserved works," the water decreed for power purposes and the electric energy produced by the Minidoka Plant are vested in the United States. By act of Congress, both possession and title to the dam and power plant must remain in the United States "until otherwise provided by Congress." Congress has made no provision on this matter as yet. Appellant's contention that it owns, or has an equitable interest in the dam and the power plant or in the commercial power distribution system or in the flow of 2,700 second-feet of water decreed to the United States for power purposes at the Minidoka Power Plant, is supported by no argument on the merits of the question of ownership and all points on which appellant relies are ineffective. Indeed, even the electric energy produced at the Minidoka Power Plant is property of the United States. Furthermore, even if the appellant did have rights in the property, the action of the Secretary would not be an interference with them since, by contract with the appellant, he is given full control over that property.

The Burley Irrigation District has no basis for complaint that the transmission lines of the project are being used to convey electricity to the Minidoka Irriga-

tion District since the appellant has never paid the cost of any commercial power transmission facilities nor does it own them. And, even assuming that the Burley Irrigation District did own these facilities, nevertheless it cannot obtain compensation for the use of common property, the Minidoka Irrigation District being a co-owner.

Finally, the Burley Irrigation District cannot complain that it has been unfairly treated. Having received and accepted the numerous benefits resulting from the conservation plan effected by the Secretary, the appellant is estopped to allege that the Secretary was without authority to adopt the conservation plan.

Aside from the merits of this case, the action of the trial court must be affirmed because of jurisdictional defects: (1) the absence of indispensable parties, and (2) the lack of jurisdiction to compel the United States specifically to perform its contract. The relief sought by the appellant will prevent the Secretary of the Interior from performing the contract of January 1, 1935, with the Minidoka Irrigation District, whose interests are so related with those of parties before the court that relief cannot be granted to the latter without determining substantial rights of the former. That district is therefore an indispensable party without whose presence the court may not proceed. The Idaho Power Company is the second indispensable party. That company receives valuable rights and benefits under its contract of October 1, 1934, with the United States, which are jeopardized in this proceeding, thereby constituting the company an indispensable party without whom the court cannot proceed.

Furthermore, the court is without jurisdiction since this action seeks to compel the United States specifically to perform its contract of March 15, 1926, with the Burley Irrigation District. That contract is the sole source of any right in the appellant to secure a credit of any power profits and the prayers of the plaintiff for judgment constitute a demand for specific performance of that contract. Since the United States is the party to the contract of which specific performance is sought, the relief sought cannot be granted.

ARGUMENT

I

The findings of fact of the trial court are conclusive and cannot be questioned in this appeal

In the Statement of the Case it has already been pointed out that apparently the appellant has abandoned its assignment of error which attacks the validity of the trial court's findings of fact (appellant's brief, p. 22). Despite that fact the appellant takes occasion to attempt, in the most general way, to attack those findings and the conduct of the trial court in making the findings (appellant's brief, p. 21).

The appellant states that the trial court announced its decision immediately upon the conclusion of the trial and intimates that the findings of fact and conclusions of law signed by the court were drawn up solely by the defendant and were signed by the court without careful consideration. The appellant fails to mention, however, that the court adjourned for five days after the presentation of testimony in order care-

fully to consider the case; and that counsel for the appellant and the appellee spent numerous hours in joint conference carefully and conscientiously drafting the language of the findings and conclusions to accord with the evidence presented at the trial and attempting to agree on each finding and conclusion. Moreover, no mention is made by the appellant of the fact that, at the request and suggestion of counsel for the appellant, various findings were incorporated and numerous changes made in the findings and conclusions as originally drafted by the appellee. Nor is any mention made of the fact that counsel for the appellant was granted full opportunity by the trial court to object to any findings or conclusions; that the court was exceedingly lenient in listening for almost two hours to various objections presented; that most of the objections were overruled by the court as unfounded; and that the court did not sign the findings, conclusions, and judgment as submitted, but made various changes before he signed them.

In spite of these facts, the plaintiff now attempts to argue by innuendo that the findings and conclusions were not carefully considered, and that they are not supported by the evidence. The plaintiff cannot now ask this court to determine the weight of the evidence and thus usurp the function of the trial judge who had the opportunity to judge of the credibility of the witnesses personally by listening to and questioning them. Indeed, Rule 52 (a) of the Federal Rules of Civil Procedure expressly declares that "findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to

judge of the credibility of the witnesses." This court has declared the rule to be well settled in this jurisdiction that the lower court's findings will not be disturbed on appeal unless upon an examination of the evidence they are clearly wrong.

Abbott v. Coe, — F. (2d) —, — App. D. C. — (Nov. 20, 1939);

Hazen v. Hawley, 86 F. (2d) 217, 222, 66 App. D. C. 266;

Dear v. Guy, 78 F. (2d) 198, 64 App. D. C. 314;

Pollock v. Jameson, 70 F. (2d) 756, 63 App. D. C. 152;

Rhoderick v. Swartzell, 65 F. (2d) 813, 62 App. D. C. 180, cert. den. 290 U. S. 677, 54 Sup. Ct. 100, 78 L. Ed. 584;

Matson v. Rusch, 59 F. (2d) 360, 61 App. D. C. 184.

See also,

United States v. United Shoe Mach. Co., 247 U. S. 32, 41, 38 Sup. Ct. 473, 62 L. Ed. 968.

It is submitted that all the evidence in the transcript clearly supports the findings of the trial court, and in no specific instance does appellant make any showing to the contrary. The findings must therefore be given full weight by this court.

A still further reason exists which forecloses any question of the propriety of the trial court's findings of fact. There is no certificate that the transcript of record in this case contains all of the evidence before the trial court. And from an examination of the transcript it is obvious that it does not. Throughout the transcript of evidence appear asterisks signifying omissions. The substance of the transcribed testimony also

clearly indicates the existence of omissions. Yet the trial court, in the opening paragraph of its findings expressly states that they are founded on *all* of the evidence adduced (R. 173).

It is well established that the burden of showing that the findings are contrary to or not supported by the evidence rests upon the party who asserts an error of that character. He must produce before the appellate court all the evidence submitted in the court below if he wishes to establish his contention that the court's findings were erroneous. It is well settled that the correctness of the trial court's findings of fact will not be questioned or reviewed by the appellate court where it does not appear that all the evidence has been included in the record presented to the court.

The Supreme Court of the United States, in *United States v. Copper Queen Mining Company*, 185 U. S. 495, 498, 46 L. Ed. 1008, 1010, stated:

In this case there is nothing whatever in the bill of exceptions to show that the evidence contained therein is all the evidence that was given on the trial, and we cannot presume, for the purpose of reversing the judgment, that there was no evidence given upon which the jury might rightfully have found the verdict which they did.

And in *Collier v. United States*, 173 U. S. 79, 82, 43 L. Ed. 621, 622:

* * * It follows that even if the reports and official documents to which the findings refer were legally inadmissible to show want of amity, *we could not hold that there was no legal evidence supporting the conclusion that amity did*

not exist, since all the evidence which the court states it considered on this subject is not in the record. * * * [Italics added.]

This proposition has been repeatedly affirmed and adhered to by the Supreme Court of the United States and by the various Federal courts.

Nashua Savings Bank v. Anglo-American L. M. & A. Co., 189 U. S. 221, 231, 47 L. Ed. 782, 787;

Hansen v. Boyd, 161 U. S. 397, 403;

Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 606, 36 L. Ed. 829, 834;

City v. Babcock, 70 U. S. 240, 18 L. Ed. 31;

Stockmann v. Allen, 4 F. (2d) 299, 55 App. D. C. 223;

Bell v. Sheridan, 21 D. C. Rep. 370;

Speck v. Bullard, 90 F. (2d) 227 (C. C. A. 5th);

United States v. Yant, 88 F. (2d) 956 (C. C. A. 7th);

Pratt v. Stout, 85 F. (2d) 172, 176 (C. C. A. 8th);

Roberts v. National Savings Life Insurance Co., 75 F. (2d) 530 (C. C. A. 8th);

Oregon-American Lumber Co. v. Simpson, 8 F. (2d) 946 (C. C. A. 9th);

Elliott v. Canadian Pacific Railway Co., 161 Fed. 250 (C. C. A. 2d);

North American Loan & Trust Co. v. Colonial & United States Mortgage Co., 76 Fed. 623 (C. C. D. S. Dak.);

United States Mutual Accident Association v. Robinson, 74 Fed. 10 (C. C. A. 8th);

Taylor-Craig Corporation v. Hage, 69 Fed. 581 (C. C. A. 8th).

It follows that the only question, then, which is open for review in this court is the question whether the findings of fact as made by the trial court support the judgment.

II

On the merits of the case the judgment of the district court is clearly correct

A. The actions of the Secretary, of which the appellant complains, are actions within his authority and they, as well as the actions which appellant would have this court compel affirmatively, involve the exercise of a lawfully vested discretion

1. The sole basic issue is the propriety of the Secretary's action in excluding from the determined net profits of the Minidoka Power Plant an item of \$52,384.52 found by him to have been the profits from the sale of outside power brought onto the project and not generated at the Minidoka Power Plant

The bill of complaint in this case attacks the Secretary's findings of net power profits for the year 1935 and his announcement, contained in the same document, of the amounts of those profits to be credited to the appellant. The substantive prayers for relief in the bill of complaint are that the Secretary be enjoined from crediting to anyone other than the Burley and Minidoka Districts, in the proportions of 95.6 percent and 4.4 percent, respectively, any of the "net collections" (net profits) from the sale of power in the Minidoka District and the town of Minidoka under the 1934 and 1935 contracts, heretofore referred to, with the Idaho Power Company and the Minidoka District, respectively, and that the Secretary be enjoined from failing to credit (i. e., be compelled to credit) to the Burley District, the appellant, 95.6 percent of the net profits from the sale of power obtained from the Idaho

Power Company or any other source outside of the Minidoka Power Plant (R. 36, 37). Consequently the only thing ultimately in issue is the propriety of the findings of net profits for the year 1935 and the proposed distribution of them in the form of credits, as contained in the document which we shall refer to as the Secretary's findings,¹ and anticipated future findings of a similar type.

At the outset, and to clarify the arguments, one matter which lends confusion must be examined. Appellant alleges that in the findings and distribution of net profits from sales of power on the whole project in 1935, the Secretary credited \$63,807.51 or 53.56 percent to the appellant, \$50,000 or 41.97 percent to the Black Canyon Power Plant and \$5,321.27 or 4.47 percent to the Minidoka District (bill of complaint, par. 41, R. 35; appellant's brief, pp. 15, 52). Such allegations are confusing because they fail completely to take cognizance of the distinction taken in the Secretary's findings between power received from outside sources, sold in the Minidoka District and the town of Minidoka, and power from the Minidoka Power Plant sold elsewhere. There is no question concerning the distribution of the net profits from the sale of power generated at the Minidoka Plant. Those profits the Secretary proposed to credit 95.6 percent to the appellant and 4.4 percent to the Minidoka District in strict accordance with former administrative decisions and the decision of this court in *Wilbur v. Burley Irrigation District*,

¹ The document containing the findings and proposed credits is set out verbatim in paragraph 42 of the answer, R. 106-110, and also constitutes defendant's Exhibit No. 7, certified to this court.

58 F. (2d) 871, 61 App. D. C. 145 (R. 191). The appellee does not question the appellant's right to receive 95.6 percent of any net profits in which it is entitled to any share at all. But appellee contends that the appellant is not entitled to any share in the profits resulting from the sale of power *not produced at the Minidoka Power Plant*, but brought into the project from an outside source through the 1934 contract with the Idaho Power Company and sold only in the Minidoka District and the town of Minidoka pursuant to the 1935 contract between that district and the United States.

A mere glance at the Secretary's findings for 1935 will show conclusively that, both in form and in fact, he took a distinction between, on the one hand, the profits from sale of power *from the outside source sold in the district and town of Minidoka*, and, on the other hand, the profits from the sale of *all the power produced at the Minidoka Power Plant*. The Secretary found \$52,384.52 to be the profits from the outside power sold in the district and town of Minidoka, \$50,000 of which he credited to the Black Canyon Power Plant and the remainder of which he credited to the Minidoka District, all pursuant to the contract of 1935 with that district. He found \$66,744.26 to be the profits from sale of all the power produced at the Minidoka Power Plant, and that he divided in the proper ratio between the two irrigation districts.*

* Although it is immaterial to the real issues of the case and is a point not mentioned by appellant, in the interests of complete accuracy it should be noted that, pursuant to the contract of 1935 between the United States and the Minidoka District, all the power actually sold for the account of that district, in that district and the town of Minidoka, is not necessarily power received from

The sole ultimate matter in issue, then, is the propriety of the Secretary's action in excluding the \$52,384.52 item from the net profits found to be attributable to the Minidoka Power Plant and in not crediting 95.6 percent of that sum to the appellant. The effect of any injunction which might be issued pursuant to appellant's prayers would be to compel the Secretary to find that item of \$52,384.52 to be a part of the profits of the Minidoka Power Plant, in which appellant would share to the extent of 95.6 percent.

the Idaho Power Company. Some of the kilowatt-hours actually delivered may have and probably did originate at the Minidoka Power Plant. Even though definite and accurate measurements are made of the power received from the outside source, as well as of the power generated at the Minidoka Plant, power from both sources becomes merged in the distribution system. Depending on the load on the system and water conditions at the Minidoka Plant, at periods all of the power in the system may be from either of the two sources exclusively. But under the contract the Secretary must, and there is no evidence that he does not, limit the amount sold for the credit of the Minidoka District so that it does not exceed the amount which is received in the project system from the Idaho Power Company line. Since the power received from the Idaho Power Company is firm power, and that available for commercial sale from the project plant is seasonal or dump power, it is clear that the appellant is not harmed by the exchange which may be effected, and it does not so contend. Furthermore, the Secretary's treatment of that problem in his findings of fact is both reasonable and appropriate as well as one which, in itself, cannot prejudice the appellant. It should be noted that, since the amount of power sold for the account of the Minidoka District cannot ever exceed the amount of power received from the Idaho Power Company, any unbalance between the two amounts is and has to be to the advantage of appellant which, in the Secretary's formula, is allowed its 95.6 percent of *all* profits for power not sold under the 1935 contract with the Minidoka District.

2. *The determination of the net profits from the operation of the Minidoka Power Plant is a function vested by law and by contract exclusively in the Secretary of the Interior*

There can be no substantial argument that the Secretary does not have full authority to determine the net profits from the operation of the Minidoka Power Plant. Subsection I of section 4 of the Fact Finders' Act of December 5, 1924 (43 Stat. 703, sec. 501, Tit. 43, U. S. C.), provides that the "net profits" from the operation of power plants on Federal Reclamation Projects shall be "determined by the Secretary." The Interior Department Appropriation Act of 1927 (act of May 10, 1926, 44 Stat. 453, 480, 481) specified that "the accumulated net profits as determined by the Secretary of the Interior, arising under the [Minidoka] project, * * * shall be applied by the Secretary of the Interior, * * * whose decision shall be conclusive." Furthermore, under article 8 of the contract of March 15, 1926, between the Burley Irrigation District and the United States (defendant's Exhibit No. 6, certified to this court), it was expressly agreed by the plaintiff that the net profits "will be announced and determined each year by the Secretary." Clearly, the Secretary has been vested with full authority in the determination of the net profits.

Consequently, it is apparent without argument that the Secretary, both by statute and by contract, has full and exclusive authority to determine the net profits from the operation of the Minidoka Power Plant.

2. *The determination of net profits is a function requiring the exercise of discretion*

It seems unnecessary to belabor the point that the determination of net profits from the operation of any given power plant, or from any other source for that matter, is a matter requiring the exercise of discretion.

The general accounting formula for determining net profits is, of course, the deduction of expenses from gross profits or total income. But before that simple problem in subtraction is performed it is necessary to compute what constitutes the gross profits for the given period and what constitutes legitimate expenses. The law books are studded with cases of controversy over the propriety of inclusion and exclusion of particular items in those two computations. Obviously those computations are not matters of routine; obviously they require the exercise of judgment and discretion in the inclusion and exclusion of items. *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232, 236, 237.

In this very case, in the trial below, the appellant sought to show that the Secretary erred in including in the gross receipts for 1935 moneys received that year but billed in the latter part of 1934 (he also having excluded moneys billed in the latter part of 1935 but collected in 1936). In response to a question on cross-examination directed at that contention, Mr. Hatcher, the appellant's only witness on that point, testified as follows:

Well, it is just a matter of reasoning there.
* * * Let us put it on this basis, and I think it answers your question: That if the Secretary

wants to say that the revenue billed in 1935 should be apportioned on this basis and revenue billed in 1934 and not collected in 1935—if he wants to make that determination—he is simply reversing the thing that I have done there and said my way of doing it is not correct. I have done it the other way around. [R. 226, 227.]

From the testimony of the appellant's own witness it is obvious that the inclusion or exclusion of items of income is a matter of judgment and discretion.

In the same category precisely as the item to which Mr. Hatcher addressed himself is the Secretary's determination to exclude from the computation of income from the Minidoka Plant the income from sale of power received, not from the Minidoka Plant, but from an outside source and sold in the district and town of Minidoka. That determination involved the exercise of discretion.

4. *If we look behind the determination of net profits to the operation of the plant, which there is no proper occasion to do, it is equally clear that the Secretary is authorized and required to exercise discretion in the operation of the Minidoka Power Plant*

The appellant lays great stress on the fact that the Secretary might have operated the Minidoka Power Plant in such a way as to produce more power and more income. But that fact is of no consequence for two reasons: (1) because the determination of profits as made by the Secretary is the ultimate matter in issue, and, that being a matter involving the exercise of a discretion lawfully vested in the Secretary, it cannot be inquired into by the court as will be subsequently shown; and (2) because the Secretary also has full authority to operate the plant and that operation is

not a ministerial act but one requiring the exercise of discretion.

Looking to the second point we find that under the Reclamation Law the Secretary has full authority and power to control and operate the power plant. Act of June 17, 1902, secs. 6 and 10, 32 Stat. 388, 389, 390, secs. 491, 498, 373, Tit. 43, U. S. C.; act of April 16, 1906, sec. 5, 34 Stat. 116, 117, sec. 522, Tit. 43, U. S. C. In section 6 of the act of June 17, 1902, *supra*, provision is made for transfer from the Government of the management and operation of certain works in certain conditions, but it is expressly "*Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress." In its findings of fact the District Court found that "the Minidoka power plant is incorporated in and forms a part of the Minidoka Dam, the dam forms one of the walls of the power plant and the penstocks for the power development serve also as outlet works for the reservoir" (Finding 9, R. 176) and that the dam, power plant, distribution facilities, and other works have at all times been operated, maintained, and controlled by the United States (Findings 11, 17, R. 176, 178, 179). There is no evidence in conflict with those findings. It is clear, therefore, that control and operation by the United States, through the Secretary of the Interior, is appropriate and required by statute since the power plant is a part of the dam and its penstocks serve as outlet works of the dam, obviously being used and necessary to the protection and operation of the reservoir created by the dam, within the meaning

of the proviso of section 6, *supra*. No other act of Congress has authorized disposition of the operation and control of the power plant, the expenses of which are continuously appropriated for by the Congress. (See Interior Department Appropriation Act, fiscal year 1940, act of May 10, 1939, Public No. 68, ch. 119, 76th Cong., 1st sess., p. 33 of the slip-law copy.)

Furthermore, in article 7 of its contract of March 15, 1926, with the United States, the appellant specifically acknowledged and agreed that the United States was to continue to operate the "reserved works" which are defined therein to include the power plant as well as the distribution facilities, dams, and other major works.

Therefore, both by statutory law and by contract, between the appellant and the United States, the full and unfettered control and operation of the power plant have been vested in the Secretary of the Interior.

It is too obvious to require any argument that the control and operation of a power plant to meet the varied and constantly changing needs of a reclamation project, both for pumping irrigation water and for meeting commercial demands, require the exercise of the widest range of discretion. It is equally obvious that the Secretary's lawful authority, indeed his express mandate, to operate the plant carries with it that discretion.

Apparently this is admitted by the appellant, at least for the purposes of this case. On pages 50 and 51 of appellant's brief it is stated that,

We emphasize that in this case we do not seek to require the Secretary to operate the Minidoka

plant. We do not ask an injunction against his storing the 2,700 second-feet of water in American Falls reservoir and then using it for irrigation purposes for the exclusive benefit of others than ourselves. We in no way attempt to interfere with the Secretary's discretion in the operation of the reclamation project or with his disposition of the water of Snake River. We believe that upon the facts and under the well-settled rules of law we would be entitled to injunctive decrees on all these phases of the situation. But the present case is within a very narrow compass. Under the facts as they happen to be, the Secretary by wrongfully depriving us of vested property rights has come into possession of the sum of \$50,000. * * *

We suggest that that statement typifies the position in which the appellant finds itself. If the appellant, as it states, is not seeking to interfere with the Secretary's discretion in preserving water and in operating the Minidoka Power Plant, then it has no standing in this proceeding. If the Secretary has discretion to curtail the operation of the plant, then obviously he is not *wrongfully* depriving anyone of anything by doing so and equally obviously he is not acting wrongfully in failing to find and credit profits which might have been earned if the plant had been operated at full capacity. That proposition is too patent to require further demonstration.

B. It is conclusively settled doctrine that the courts will not and cannot examine into or control the actions of an administrative official of the Government performed in the exercise of a lawfully vested discretion unless it is shown that he acted arbitrarily, capriciously, or in bad faith.

This doctrine is so well established and so familiar to this court that reference need be made for the court's convenience only to a few of the innumerable authorities.

In the case of *Wilbur, Secretary of the Interior, v. Minidoka Irrigation District*, 50 F. (2d) 495, 60 App. D. C. 205, *cert. denied* 284 U. S. 634, this court considered a case almost exactly like that which is now presented. The Minidoka District sought an injunction against the then Secretary's action in crediting part of the profits, resulting from rentals of irrigation water, to another division of the project and not to the Minidoka and Burley Districts. In holding that the bill of complaint should have been dismissed the court said:

* * * Moreover, the remedy which plaintiff seeks is in substance and effect a judgment in mandamus directing the Secretary to act contrary to the facts and law of the case as found by him. Such an appeal will not be entertained by the courts.

In *Louisiana v. McAdoo*, 234 U. S. 627, 633, 34 S. Ct. 938, 941, 58 L. Ed. 1506, it is said by Mr. Justice Lurton for the court: "There is a class of cases which held that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect

to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government." See *Worke v. Reeves*, 267 U. S. 175, 45 S. Ct. 252, 69 L. Ed. 561, and authorities therein cited.

The principle has been well stated by the Federal Circuit Court of Appeals for the Second Circuit:

* * * The courts will enforce ministerial duties required of executive officers by mandates of Congress and will enjoin acts such as trespass, a step taken beyond the scope of statutory authority or jurisdiction of executive officers, but they will not interfere with matters intrusted by Congress to the discretion of the heads of executive departments of the government. *Worke v. Reeves*, 267 U. S. 175, 45 S. Ct. 252, 69 L. Ed. 561; *Lane v. Haglund*, 244 U. S. 174, 37 S. Ct. 558, 61 L. Ed. 1066; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 13 S. Ct. 271, 37 L. Ed. 123; *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559, 609. [*Transcontinental & Western Air, Inc.*, v. *Farley*, *Postmaster General*, 71 F. (2d) 288, 291, *cert. denied* 293 U. S. 603.]

In this connection see *United States ex rel. Roughton v. Ickes*, 101 F. (2d) 248, 69 App. D. C. 324, in which this court applied the same principle after a full discussion of the authorities; *Ducker v. Butler*, 104 F. (2d) 236, — App. D. C. — (March 20, 1939); and *Lyders v. Ickes*, 84 F. (2d) 232, 65 App. D. C. 379.

Supreme Court decisions on the same proposition, not cited in the opinions of the cases just referred to, include:

American Telephone & Telegraph Co. v. United States, 299 U. S. 232, 236, 237;

Dakota Central Telephone Co. v. South Dakota, 250 U. S. 163, 184;

United States ex rel. Ness v. Fisher, 223 U. S. 683, 691, 692;

Gaines v. Thompson, 7 Wall. 347, 351, 352.

The *American Telephone & Telegraph Company* case is particularly pertinent since the discretion involved there was in the formulation of a system of accounting.*

The court is equally without power to question the action taken by a Government official in the exercise of a power and discretion granted him even by contract. As stated by the Supreme Court in *Kihlberg v. United States*, 97 U. S. 398, 402:

* * * it is sufficient that the parties expressly agreed that distances should be ascertained and

* It should be mentioned that the courts have held that the accounting problem of determining net losses is one involving questions of fact and that the ultimate determination of net losses by an authorized Government official is a finding of fact. *Crimora Mangness Corp. v. Wilbur*, 47 F. (2d) 417, 419, 420, 60 App. D. C. 55, 57, 58, *cert. denied*, 283 U. S. 861; *Aguilera v. Ickes*, 66 F. (2d) 208, 62 App. D. C. 228. A finding of net profits is in no different category, in that respect, than a finding of net losses. And it is well settled that the courts will not disturb or inquire into a finding of fact by an administrative official, within whose authority it was to find the fact, so long as there was evidence to support the finding. *Wann v. Ickes*, 92 F. (2d) 215, 67 App. D. C. 291; *Houston v. St. Louis Packing Co.*, 249 U. S. 479; and the cases there cited. There is no question in this case that the Secretary was authorized to find the net profits and no contention is made or can be made that he did not have all the basic information before him in making his finding.

fixed by the chief quartermaster, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government. The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument. To the same effect are:

Merrill-Trackgaber Co. v. United States, 241 U. S. 387;
Ripley v. United States, 223 U. S. 695;
United States v. Barlow, 184 U. S. 123;
United States v. Gleason, 175 U. S. 588;
Chicago, S. F. & C. R. R. v. Price, 138 U. S. 185;
Martinsburg & P. R. R. v. March, 114 U. S. 549;
Sweeney v. United States, 109 U. S. 618.

Consequently, since the Secretary both by statute and by contract has full authority and discretion in the determining of profits and the operation of the power plant, as heretofore shown, it is clear that the court will not and cannot inquire into the manner in which he exercised that discretion in the absence of any showing of arbitrariness, capriciousness, or bad faith in the substantive action taken.

The same conclusion is required on even another well established doctrine, that of the presumption of regularity as applied to the acts of public officers. Particularly apt is the language of the Supreme Court in *United States v. Chemical Foundation*, 272 U. S. 1, 14, 15:

* * * The presumption of regularity supports the official acts of public officers and, in the

absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. *Confiscation Cases*, 20 Wall. 92, 108; *United States v. Page*, 137 U. S. 673, 679-680; *United States v. Nix*, 189 U. S. 199, 205. Under that presumption, it will be taken that Mr. Polk [appointed by President to act for him] acted upon knowledge of the material facts. The validity of the reasons stated in the orders, or the basis of fact on which they rest, will not be reviewed by the courts. *Dakota Cent. Tel. Co. v. South Dakota*, 250 U. S. 163, 184; *Monongahela Bridge v. United States*, 216 U. S. 177, 195; *Martin v. Mott*, 12 Wheat. 19, 30. Cf. *Levinson v. United States*, *supra* [253 U. S. 138], 201.

It is submitted that that holding is directly applicable here where there is no evidence, clear or otherwise, of irregularity.

Aside from the cases cited by the court in the *Chemical Foundation* case, *supra*, there is need to cite only one other authority, more recent than that case: *Klamath and Modoc Tribes of Indians v. United States*, 296 U. S. 244, 253.

C. Rather than showing arbitrariness, capriciousness, or bad faith, the record clearly shows that the Secretary's actions are reasonable and that his allocation of profits is in fact generous to the appellant.

1. The Secretary's action in entering into the contracts of 1934 and 1935 with the Idaho Power Company and the Minidoka Irrigation District, respectively, and his findings and distribution of 1935 net profits were reasonable and necessary to conserve vitally needed irrigation water and to provide vitally needed electric power.

To inquire into the reasonableness of the Secretary's findings of net profits from the Minidoka Power Plant and his action in curtailing the operation of that plant,

it is necessary to consider the contracts of 1934 with the Idaho Power Company and 1935 with the Minidoka District, on which the findings were in part predicated, and also the background of those contracts. The principal facts of importance are contained in the trial court's findings of facts and many of them have been included herein in the Statement of the Case, *supra*.

It must be recalled that the economy of the entire Snake River Valley, including the area of the Minidoka Project, is founded solely on irrigated agriculture; that irrigation water is vital to the continued existence of the population of that entire area (R. 179, 274, 275); that disastrous water shortages, due in large part to the failure to fill of the American Falls Reservoir, had occurred attended by heavy crop losses for the five-year period from 1931 to 1935, inclusive (R. 181, 275, 306, 307, 310); that the only feasible means of conserving additional water for storage in the American Falls Reservoir was by stopping the winter discharge of water which was discharged and lost for irrigation uses solely to operate the Minidoka Power Plant to supply commercial demands during the winter season (R. 181, 306); and that by preventing that waste there could be stored enough water to supply the irrigation needs of almost as much land, already in cultivation and in dire need of water, as is contained in the Burley Irrigation District (R. 181, 275, 300, 324). With that situation before him, and with the duty on him under the Reclamation Act to give preference in the use of water to the irrigation needs of projects rather than to the production of power for sale, the course of action to

be taken by the Secretary was not obscure.⁹ The winter operation of the Minidoka Power Plant must be curtailed to the utilization of only the amount of water which must in any event be released to meet rights lower down on the stream.

It must be borne in mind also that there was a demand for power for domestic and commercial use on the project which had to be met, and that power from another source, to implement the reduced output of the Minidoka Plant, would have to be provided. (R. 183, 184, 188, 249; defendant's Exhibits Nos. 2, 3, 5, certified to this court.) But the power problem, as already shown in the Statement of the Case, *supra*, was more complex than that. There had been a steady increase in the demand for power for pumping irrigation water during the summer, combined with a like increase the year

⁹ The primary purpose of the Reclamation Act is to provide irrigation works to furnish water for reclamation of arid and semiarid lands. Act of June 17, 1902, 32 Stat. 388, included in Tit. 43, secs. 371 *et seq.*, U. S. C. See particularly sec. 1 of the act (Sec. 391, Tit. 43, U. S. C.). In the only specific grant to the Secretary of authority to dispose of excess power, Congress expressly stated that "no lease shall be made of such surplus power or power privilege as will impair the efficiency of the irrigation project." (Act of April 16, 1906, sec. 5, 34 Stat. 116, 117, Sec. 529, Tit. 43, U. S. C.) The same policy of Congress still prevails as to any disposition of power. See Sec. 9 (c) of the Reclamation Project Act of 1939 (last sentence), (Act of August 4, 1939, Public No. 260, Chap. 418, 76th Cong., 1st sess.). Furthermore, the Constitution and laws of Idaho provide that irrigation use has precedence over others, except domestic use. Art. XV, Sec. 3, Idaho Const.; Idaho Code Annotated (1932), Sec. 17-4117. As has been said by the Idaho Supreme Court, "In this arid country the largest duty and the greatest use must be had for every inch of water in the interest of agriculture and home building." *Van Camp v. Emery*, 13 Idaho 202, 208, 89 Pac. 752, 754.

around in the demand for power for commercial sale. (R. 183; defendant's Exhibits Nos. 2, 3, 5, certified to this court.) By 1935 the situation had become such that, during periods of the irrigation season, the Minidoka Plant, operating at full capacity, could barely supply the demand for pumping power. (R. 183, 241; defendant's Exhibits Nos. 2, 3, 5, certified to this court.) The commercial business was threatened with extinction unless a large bloc of firm, dependable, year-round power could be secured from another source (R. 183, 184, 188, 249, 250). Without that the consumers would have to look elsewhere for their power, which must be continuously available the year around. Only the seasonal and unprofitable sale of power for heating purposes could have been met from the Minidoka Plant (R. 183, 184, 245, 246, 250, 251). Consequently, the Secretary was faced with the necessity of securing adequate firm power to supplement the supply from the Minidoka Plant both summer and winter, thereby retaining a part of the profitable commercial business for that plant. Furthermore, as the trial court found, without additional conservation of water, the capacity of the Minidoka Power Plant could not be increased by the installation of additional units (R. 188, 252, 257, 264).

To meet the problems created by the need for further conservation of irrigation water and the need for a dependable year-round supply of firm power, negotiations were begun during 1934 to secure a supply of additional power, both summer and winter, from the Idaho Power Company, which was the only available source of supply.

For some time prior to 1934 certain amounts of power had been secured for the Minidoka Project from the Idaho Power Company pursuant to the terms of the contract of April 23, 1929, between that company and the United States (Defendant's Exhibit No. 4, certified to this court). That contract, entirely inadequate to meet the increased needs for firm power on the project, was due to expire by its own terms on October 1, 1938. Furthermore, the contract of April 10, 1930, whereby the Idaho Power Company received certain power from the Government's Black Canyon Power Plant, was due to expire on October 15, 1936 (Plaintiff's Exhibit No. 6, certified to this court). There was obviously no assurance that the Idaho Power Company would have been willing to renew the terms of those contracts, even had they been adequate to meet the newly developed situation, either separately or together. It was necessary that the company be ready to deliver large amounts of firm power on demand and be ready also to furnish needed stand-by or "break-down" service. The negotiations resulted in the contract of October 1, 1934, whereby the Idaho Power Company became obligated to deliver the needed firm power, and more power than it had previously been obligated to deliver (Defendant's Exhibit No. 10, certified to this Court).

By thus assuring an adequate supply of power from the Idaho Power Company during the winter, it became possible to reduce the operation of the Minidoka Power Plant during that season so that the water, other than that which must be let down stream in any event to fill domestic and stock needs below the reservoirs, could be

stored and conserved in the American Falls Reservoir. It should be noted, furthermore, that the water so conserved becomes available later for use in the Minidoka Power Plant when the water is released for irrigation uses. Hence the water conserved during the winter may be used for the production of additional power during the summer at which time there is imperative need for irrigation pumping power (R. 182, 183, 188, 189, 251, 311; defendant's Exhibits Nos. 2, 3, and 5, certified to this court).

Of the several considerations flowing to the Idaho Power Company in the contract of October 1, 1934, an important one is the continuation of the Government's obligation to supply to that company power from the Black Canyon Power Plant (not a part of the Minidoka Project but located in the western portion of the State of Idaho) which at that time was being delivered under the contract of April 10, 1930, which would otherwise have expired on October 15, 1936. The facts proved in this case show, and there is no controversy over the correctness of this fact, that the Idaho Power Company was in very real need of the Black Canyon power as an additional source of supply for the western portion of its system in which it has a deficiency of power (R. 187, 268).

It becomes obvious, therefore, that the contract of 1934 between the United States and the Idaho Power Company was eminently reasonable and necessary to conserve vitally needed irrigation water and provide essential electric power.

Equally reasonable and necessary was the contract of 1935 with the Minidoka Irrigation District. (Defend-

ant's Exhibit No. 11, certified to this court.) Pursuant to a provision contained in the Interior Department Appropriation Act for fiscal year 1930 (act of March 4, 1929, 45 Stat. 1562 at 1590) the Secretary of the Interior is required to realize from the sale of power produced at the Black Canyon Power Plant net revenues adequate to repay to the reclamation fund the cost of the Dead Wood Reservoir, the cost of the Black Canyon Power Plant and Power System and one-half the cost of the Black Canyon Dam. In order to meet that requirement and to establish a reasonable charge for the use of the Black Canyon Power Plant and related works in providing power to the Idaho Power Company as a consideration for its delivery of power to the Minidoka Project, it was determined that \$50,000 per year should be realized from the disposition of the power contracted to be delivered from the Black Canyon Plant to the Company (defendant's Exhibit No. 7, certified to this court; R. 108, 109). In order to realize that \$50,000 for crediting to the Black Canyon Power Plant, and to guarantee its availability annually, the Secretary of the Interior entered into the contract of January 1, 1935, with the Minidoka Irrigation District. In that contract the district undertook to guarantee the \$50,000 per annum and, in consideration, secured the right to have sold for its account on the Minidoka District and in the town of Minidoka certain amounts of power which in no instance could exceed the amounts received on the project from the Idaho Power Company under the contract of October 1, 1934.

We submit that the reasonableness of this contract with the Minidoka Irrigation District is readily appar-

ent. The Government needed the \$50,000 per annum for the required repayment of the cost of the Black Canyon Power Plant, the Dead Wood Reservoir, and in part, the Black Canyon Dam as consideration for the disposition of large amounts of power from the Black Canyon Plant under the contract of October 1, 1924, with the Idaho Power Company. The securing of that \$50,000 per annum clearly, then, is an integral part of the necessary plan for the conservation of water and securing of additional firm power on the Minidoka Project. Furthermore, the power sold ~~from~~ the Minidoka District was directly attributable to the Idaho Power Company and indirectly attributable to the Black Canyon Power Plant, being in no way attributable to the Minidoka Power Plant.

2. *The appellant has no interest in and no right to receive profits from the operation of any power plant other than the Minidoka Power Plant*

As will be hereafter shown more fully,* the appellant's rights to be credited with profits stem solely from its contract of March 15, 1926. Article 8 (a) of that contract specifically states that the Secretary shall annually announce and determine "the net profits realized from the various sources named in subsections I and J of section 4 of the act of December 5, 1924" (43 Stat. 703, secs. 501, 526, Tit. 43, U. S. C.). Those subsections provide only for the distribution of "net profits, as determined by the Secretary, derived from the operation of *project* power plants." [Italics added.] No other power plants are mentioned. Furthermore, it was expressly recognized in the decree entered in the case of *Burley Irrigation District v. Wilbur* (Equity

* See pp. 117-124, inc., *infra*.

No. 50636, Supreme Court of the Dist. of Col., *aff'd* 58 F. (2d) 871, 61 App. D. C. 145) that the only rights of the Burley District to credits from power profits were in connection with the profits derived from the Minidoka Power Plant. The decree stated " * * * the respective shares of the aforesaid districts [the Burley and Minidoka Districts] in and to profits * * * derived from the sale * * * of the electrical energy generated at the aforesaid power plant [the Minidoka Power Plant] * * * are in the proportion of 4.4 percent to the Minidoka District and 95.6 to the Burley Irrigation District" (plaintiff's Exhibit No. 1, p. 173, certified to this court). [Italics added.] It is also significant that the appellant points to no right to credits from any power plant other than the Minidoka Plant. We submit, therefore, that the appellant has no claim to profits produced by power generated elsewhere than at the Minidoka Power Plant.

A simple example will be illustrative of the situation. Suppose the Secretary, to meet a demand on the project for more power than could be produced by use of the full capacity of the Minidoka Power Plant, had entered into a contract with the Idaho Power Company (the only available source of supply) to furnish certain amounts of additional power, the company to receive, perhaps among other considerations, the entire net profits from the sale of that additional power on the project. Could the appellant contend that it had any interest in those profits or in the payments made to the company? The answer is obvious. *The appellant clearly has no interest in the power brought in from another source, in the revenue received from it or in the price paid for*

ii. And that is precisely the basic situation here. The power is brought to the project from another source to meet a very real demand which cannot be supplied from the project plant. The appellant has no interest in that power, its revenue or its cost, and no interest, then, in the \$50,000 to be credited to the Black Canyon Plant or to any excess profits from the sale of the outside power.

The only contention left open to the appellant, concerning the example which has just been given, is that part of the need for outside power resulted from the Secretary's voluntary action in restricting operation of the project plant during the nonirrigation season. But such a contention is fruitless even if we assume that the court could properly break the transaction down to attribute a value to part of the consideration furnished by the company, i. e., the promise to supply and the supplying of the power necessary to meet that part of the need for power which resulted from the Secretary's action. We have already demonstrated that the Secretary had discretion, both by law and by contract with the appellant, to control and restrict the operation of the plant and that his exercise of that discretion is reasonable. Furthermore, as already pointed out, appellant admits the Secretary's discretion in that regard (appellant's brief, pp. 50, 51).

In conclusion, then, since the contracts were reasonable to meet the needs of the project, since the Secretary's findings as to the crediting of profits from the sale of the outside power were made pursuant to those contracts, and since the appellant has no interest in those profits, it follows that the actions of the Secretary,

of which complaint is made, were reasonable and were not arbitrary, capricious, or made in bad faith.

3. *There is no sham or subterfuge in the Secretary's crediting of \$50,000 annually to the Black Canyon Power Plant and that credit does not constitute a gratuity*

The appellant strenuously contends (appellant's brief, p. 54, *et seq.*) that the crediting of \$50,000 annually to the Black Canyon Power Plant is a sham and a subterfuge. The trial court specifically found, however, that there was no sham or subterfuge in the making of the contractual arrangements now under attack by the appellant (R. 191). The appellant's contention is in reliance primarily on the fact that under the 1930 contract the Idaho Power Company received the Black Canyon power for a stated sum and that, since the 1930 contract is continued by the 1934 contract, the United States still receives that same sum. Appellant does not purport, however, to examine the fundamental premise of its argument, which must be that the money agreed to be paid by the Idaho Power Company is adequate compensation for the power received from the Black Canyon Plant. Apparently appellant's contention is that if that sum were the only sum formerly received it must be assumed to constitute reasonable compensation. There is, of course, no predicate in the record or in reason for such a suggestion.

An examination of Articles 20 and 22 of the 1930 contract for delivery of power to the Idaho Power Company from the Black Canyon Plant (plaintiff's Exhibit No. 6, certified to this court) shows clearly that the \$600 per month which the Idaho Power Company agreed to

pay was solely an operation and maintenance charge flowing from the agreement to operate the plant at the request of the Idaho Power Company during the winter season. It appears clearly that the \$600 monthly payment is not a payment for the power but is merely a reimbursement to the United States for the cost of operation of the plant for a period during which it otherwise might not be operated. From an examination of the entire contract it is apparent that the consideration for the power furnished to the Idaho Power Company lies in large part in agreements by the company to furnish certain services and certain power for use on the Government projects (which do not include the Minidoka Project). The appellant has made no showing whatsoever that the services required of the Idaho Power Company in 1934 were commensurate with the services required of that company in 1930 when the contract was originally executed. Indeed, the appellant makes no showing at all as to the value of those services at any time. Obviously, then, there is no showing, that in 1934, conditions existed which had been anticipated when the contract of 1930 was consummated in advance of operation of the project of which the Black Canyon Power Plant is a part. Equally obviously, there is no showing that in 1934 existing and anticipated conditions were such that other power revenues were as much as were anticipated in 1930 or that the services performed under the 1930 contract by the Idaho Power Company were of as much monetary value to the Government.

The fact that power had been secured from the Idaho Power Company under the ~~1930~~ ¹⁹²⁹ contract does not mean

providing for delivery of power by the Idaho Power Company to the Minidoka project

that the 1934 contract was a sham. The ~~fact~~ ^{fact} ~~that~~ ^{fact} ~~the~~ ^{fact} ~~contract~~ ^{fact} ~~was~~ ^{fact} ~~a~~ ^{fact} ~~sham~~ ^{fact} would, by its own terms, have expired on ~~April 14, 1934~~ ^{April 14, 1934} certified to this court. ~~Exhibit No. 4~~ ^{Exhibit No. 4} Moreover, the Government was contemplating the installation of a power plant at American Falls which would have been competitive to the Company's plant there and which would have used water then being used by the Company. In addition, greater amounts of power were needed on the Minidoka Project than were being furnished under the ~~1930~~ ¹⁹²⁹ contract. Since the Idaho Power Company needed power, especially winter power (R. 187, finding 35 (3)), there was no assurance that the Idaho Power Company would have been willing to continue to deliver power merely on the terms of the ~~1930~~ ¹⁹²⁹ contract. On the contrary, in order to secure the ~~increased~~ ^{increased} amounts of power which the Idaho Power Company undertook to deliver under the 1934 contract, the United States had to offer various inducements to the Idaho Power Company, including not only the extension for 25 years of the contract concerning the power from the Black Canyon Plant, but also agreements by the United States to refrain from building a power plant at American Falls and to permit the Company to use for power generation all the water going over American Falls. The 1934 contract was thus substantially different from the ~~1930~~ ¹⁹²⁹ contract (R. 191). Obviously, the fact that power had been delivered under the ~~1930~~ ¹⁹²⁹ contract is no basis for assuming that the Company would have continued to deliver power to the Minidoka Project without receiving the Black Canyon power and having the 1930 contract extended for 25 years.

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In the further support of its contention that a sham or subterfuge exists, the appellant relies on three other, though related, points:

1. The October 1, 1934, contract does not refer to an exchange of power.
2. If the power delivered by the Idaho Power Company to the Minidoka Project was the consideration for the Black Canyon power, then the United States received no consideration for all the other benefits it conferred upon the Idaho Power Company.
3. The Idaho Power Company in 1935 paid \$3,600,000 for 25,000,000 kilowatt-hours of Black Canyon power; whereas the Burley District pays \$50,000 for 9,700,000 kilowatt-hours.

Each of the above points is either fallacious or immaterial. But first it should be noted that the trial court specifically found that the present arrangement effects the delivery of Idaho Power Company power in exchange for the Black Canyon power and the other considerations enumerated (R. 182). The court found that the power from the Black Canyon Plant enters the Idaho Power Company system at Emmett, Idaho, "and from that point is transmitted either direct or by the displacement method" to the Minidoka Project (R. 187). These findings were based upon adequate and competent evidence, including not only the contract of October 1, 1934 (Defendant's Exhibit No. 10, certified to this court), but also direct testimony by the president of the Idaho Power Company and a competent electrical engineer familiar with the project (R. 255, 267). No contradictory testimony was shown by the appellant.

Whether or not the 1934 contract makes any reference to "an exchange of power" is immaterial; there is in fact such an exchange. But the 1934 contract, providing for the delivery of power to the Minidoka Project, specifically and expressly states that "the Company has proposed to furnish power from its present facilities to be utilized in connection with the use of the present facilities of the United States at Minidoka, Black Canyon, and Diversion in such way as will effect a conservation of water in said [American Falls] reservoir for storage and irrigation purposes" (R. 73). In addition, it is expressly declared in the 1934 contract that "concurrently with this agreement * * * the United States shall deliver to the Company * * * all the Black Canyon power and energy available in excess of that power and energy now specifically reserved" (R. 76).

The appellant's second additional point borders on absurdity. Even if it were true, as the appellant argues, that the United States made a bad bargain, that neither proves that the Secretary indulged in a subterfuge nor does it invalidate the contract. It is an elementary proposition of contract law that one consideration will support any number of counter promises on the other side. 1 Williston on Contracts, Sec. 137A (Rev. Ed. 1936); 1 Restatement of the Law of Contracts, Sec. 83 (1932). Clearly, the Company's undertaking to furnish increased amounts of power is sufficient consideration for every promise or consideration given it by the United States. The fact that other considerations were given to secure the company's obligation to furnish the power obviously does not mean that there was not an

exchange of power. Among other things, it must be remembered that the use of the company's transmission lines was involved, for which no specific compensation was stated and that the company, having a winter shortage of power (R. 187, 268) may have required additional considerations to induce it to agree to deliver power miles away at the Minidoka Project, rather than merely to take and pay for, in another manner, the power it needed from the Black Canyon Plant.

The appellant's point that the Idaho Power Company pays \$3,600 for 25,000,000 kilowatt-hours whereas the appellant pays \$50,000 for 9,700,000 kilowatt-hours is utterly confused. (See appellant's brief, p. 59.) It disregards the fact that the sums paid by the Company under the 1930 contract were by no means the major, but only a relatively minor consideration for the power furnished it from the Black Canyon Plant; it disregards the finding of the court that the power delivered by the Idaho Power Company to the Minidoka Project was *firm* power whereas the power which the Company received from the Minidoka Plant was dump power usable only for heating purposes and consequently far less valuable (R. 183, 184, 192, 245, 246, 251). Furthermore, there is no shown or known basis for assuming that the Burley Irrigation District will or does have to "pay" \$50,000 or any other sum for power, either directly or indirectly. Lastly, the premise of the appellant assumes that the Burley Irrigation District is entitled to this money. But this is one of the very questions now in issue.

The appellant's contention that the credit of \$50,000 to the Black Canyon Power Plant is a *strawman* therefore, clearly without foundation.

Equally without foundation is the appellant's related contention (appellant's brief, p. 60) that the Secretary is violating the rights of the Burley Irrigation District in order to provide a gratuity for the Black Canyon Project. First, the appellant does not allege nor has it produced any evidence that the sum of \$50,000 is either an excessive or unnecessary amount to pay for the power developed at Black Canyon. Hence, the Secretary's finding (R. 109, defendant's Exhibit No. 7, certified to this court) that \$50,000 is the necessary and reasonable charge for the Black Canyon power must be presumed correct. *United States v. Chemical Foundation*, 272 U. S. 1, 14, 15 (1926); *Klamath and Modoc Tribes of Indians v. United States*, 296 U. S. 244, 253. Second, the decision of *Ickes v. Fox*, 300 U. S. 82, cited by the appellant as authority for this contention is entirely inapplicable to the present case. The *Fox* case was argued before the Supreme Court on a motion to dismiss in which the merits of the controversy were not involved. The bill alleged that a reservoir was constructed for irrigation of lands in the Kittitas Irrigation District and other lands and in order to raise the necessary sum of \$1,000,000 an order was issued exacting a specified rental charge for additional water to be collected in addition to the construction charges payable by the entrymen of the Sunnyside Division of the Yakima Project. The sole issue before the Supreme Court was, as stated by Justice Sutherland, "whether the United States is an

indispensable party defendant." The Court's decision was merely that the United States was not an indispensable party. The action is now pending, there not yet having been a trial on the merits.

The facts in this present case are entirely different from the facts as alleged by the entrymen in the *For case*. The Burley Irrigation District is not being required to pay additional charges. Furthermore, the contractual arrangement does not constitute an attempt to confer a gratuity on the Black Canyon Project since a large amount of firm power is being delivered to the Minidoka Project in exchange for the Black Canyon power. The Black Canyon surplus power is being sold to outsiders (the Idaho Power Company and the Minidoka Project) in a manner similar to the sale of power to individual commercial consumers. This power, to which the Burley District can assert no claim, is of direct benefit to the Minidoka Project since it provides firm power necessary to supplement the power generated at the Minidoka Plant which, by itself, would not be usable except for heating purposes. Obviously, the *For case*, a decision on vitally different alleged facts and decided on a purely jurisdictional point, is not relevant in any way to this point.

Lastly, the Burley Irrigation District cannot question the right of the United States to sell the power generated at the Black Canyon Power Plant. The credit of \$50,000 is not a gratuity but is the reasonable charge made for the sale of power generated at the Black Canyon Power Plant. Whether such sale is to the Gem Irrigation District (see articles 3 and 4 of the 1930 contract with Idaho Power Company), or to pri-

ate consumers, or to the Idaho Power Company, for its own use or on an exchange basis for delivery of power to the Minidoka Project is wholly immaterial insofar as the Burley Irrigation District is concerned. In those circumstances appellant's contention, that there was no need in 1934 and 1935 for crediting \$50,000 per annum to the Black Canyon Power Plant is clearly fallacious. Appellee determined that \$50,000 was necessary and the regularity and propriety of his action will not be inquired into by the court.

The Secretary acted strictly in conformity with the requirements of the 1934 and 1935 contracts with the Idaho Power Company and the Minidoka District, respectively, in excluding from the power profits of the Minidoka Power Plant for 1935, the profits from the sale of power received from the sale in the district and town of Minidoka of power delivered by the Idaho Power Company. The reasonableness of his action in doing so clearly flows from the reasonableness of and necessity for those two contracts.

The Secretary's findings and distribution of profits for 1935 are actually generous to the appellant

The findings and distribution of net profit for the year 1935, which the appellant seeks to enjoin, are in fact more generous to the appellant than they need be.

In making his computation of profits the Secretary made no deduction from gross revenue for depreciation on the power plant or for interest to the United States on its moneys expended on the commercial power facilities and as yet not returned to the Reclamation Fund.

See footnote 3, *supra*.

(R. 192, 286.) It is common knowledge that, in the application of approved accounting methods, deductions for both those purposes may appropriately be made in determining net profits. Furthermore, the appellant alludes to no provision of the Reclamation Act, its supplements or amendments, and there is no provision requiring that such deductions be not made or indicating that they should not be made.

Furthermore, it has already been shown that the power received from the Idaho Power Company is the mainstay of the profitable commercial power business on the project, and that without that or a similar outside source of dependable firm power there would have been substantially no power profits for distribution (R. 192, 250). The Secretary could equitably have credited the major portion of the receipts from the sale of power in the profitable commercial market, not to the Minidoka Power Plant, but to the major factor in producing such receipts, namely, the power received from the Idaho Power Company in exchange for the power from the Black Canyon Power Plant (R. 192, 193, 250). Nevertheless, the Secretary found \$66,744.26 of power profits to have been derived from operation of the Minidoka Plant.

* It is interesting to note that in the Reclamation Project Act of 1939 the Secretary is required, in any sale of electric power or lease of power privilege, to fix the rates at such a level that they will produce for the benefit of the Government "interest on an appropriate share of the construction investment at not less than 3 per centum per annum" (Sec. 9 (c) of the act of August 4, 1939, Pub. No. 260, Chap. 413, 76th Cong., 1st sess.).

D. The action taken by the Secretary does not interfere with or affect any property rights, equitable or otherwise, belonging to the appellant.

1. All property rights, legal and equitable, in the Minidoka Dam, the power plant, all other "reserved works," the water decreed for power purposes, and the electric energy produced by the Minidoka Plant are vested in the United States.

The appellant devotes a large part of its argument to, and places great reliance on, the proposition that it has a property right, an equitable right or beneficial ownership, in the Minidoka Dam, the Minidoka Power Plant, the decreed right to 2,700 second-feet of water for power development and the electric energy produced at the plant. That point appears to be urged to support two contentions: (1) that the Secretary is without authority to exercise any discretion in this matter since to do so would interfere with appellant's property rights; and (2) that a trust will be imposed on the profits collected from sale of the outside power in the district and town of Minidoka, which profits are now in the hands of the Secretary, allegedly by the taking of appellant's property rights for which compensation should be but has not been paid.

* The assertions which the appellant makes throughout its brief (appellant's brief, pp. 43, 61, 61) that the Secretary is in possession of any fund or any moneys are erroneous. Section 5 of the Reclamation Act of June 17, 1902 (32 Stat. 388, secs. 392, 476, Tit. 43, U. S. C.) provides: "The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated. * * * All moneys received from the above sources shall be paid into the reclamation fund." A later statute substituted the fiscal agent of the United States as the collecting agent, instead of the receiver of the local land office; but the requirement that all moneys so collected shall be paid into the reclamation fund, which is a special fund in the Treasury of the United States, has never been changed and is now and since enactment always has been in full force and effect. Furthermore, section 5

those contentions must fail because the very predicate on which they are built is without foundation. The appellant has no property rights, legal or equitable, which are in any way affected by the action of the Secretary.

a. The Congress has provided that both possession and title to the dam and power plant shall remain in the United States.

Section 6 of the act of June 17, 1902, provides that the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress" (32 Stat. 388, 389, sec. 498, Tit. 43, U. S. C.).

The trial court found in this case, on the uncontroverted evidence, that the power plant is an integral part of the dam, which creates the reservoir known as Lake Walcott, and that the penstocks through which water is carried for the generation of power in the power plant are part of the outlet works of the reservoir (R. 176, 240, 270). There can be no doubt, therefore, that not only the dam but also the power plant are works necessary for the protection and operation of the reservoir within the meaning of the statute, and of the act of April 16, 1906 (34 Stat. 116, sec. 822, Tit. 43, U. S. C.), under which leases of surplus power and power privileges were made prior to the adoption of the Reclamation Project Act of 1939 (act of August 4, 1939, Public No. 280, ch. 413, 76th Cong., 1st sess.), expressly provided that "the moneys derived from such leases shall be covered into the reclamation fund." Such moneys are promptly turned into the Treasury by the fiscal agents who collect them. They are not now and never have been in the hands of the Secretary. They can be taken out of the Treasury and used only when appropriated by act of Congress.

that both the title to, and the operation of the reservoir are therefore reserved to the United States until otherwise provided by Congress. Appellant fails entirely to point out any provision made by Congress in any statute which constitutes a relaxation of the reservation made in section 6 of the act of June 17, 1902, *supra*. There is no such statutory provision.

Section 6 has received considered judicial attention. In *Twin Falls Canal Company v. American Falls Reservoir District No. 2*, 59 F. (2d) 19, cert. denied, 287 U. S. 638, the Twin Falls Canal Company sought to recover from American Falls Reservoir District No. 2 its purported share of the cost of operation and maintenance of Milner Dam and Reservoir. In holding that the American Falls District was not the proper defendant, the Circuit Court of Appeals for the Ninth Circuit said (59 F. (2d) at 22):

It is obvious from the findings of fact and the record that not only is title to the system in issue in the United States, but that it has exclusive control and entire supervision of construction and will have until the project is completed, and the management and operation will remain in it until otherwise provided by the Congress. 43 USCA secs. 498, 523, 524. *Leavias v. Northport Irr. Dist.*, 121 Neb. 777, 238 N. W. 757, 10-3-120 Neb. 314, 232 N. W. 583.

Appellee has had no power over, or to exercise, control, or power in the management, control, or operation of the works or project, and the conceivable theory is pointed out, nor is it shown to the court, how trespass of the United States in such construction, maintenance, or operation can

be charged against appellees. *Malone, v. El Paso County Water Imp. Dist. No. 1* (Tex. Civ. App.) 20 S. W. (2d) 815. There is no distinction between the principle involved in the Malone Case and that involved in the instant case. The maintenance, operation, control, etc., in each case was in the United States, and section 6 of the Federal Reclamation Act (43 U.S.C. secs. 491, 498) applies to each. The findings, supported by the evidence, are conclusive that appellee had not succeeded to the management, operation, or control; and that is the decisive factor. * *

Particularly significant is the language used by the Supreme Court of Nebraska in *Levamis v. Northport Irr. Dist.*, 120 Neb. 314, 282 N. W. 583 (1930), *idem* 121 Neb. 777, 288 N. W. 757 (1931). In that case recovery was sought for damage to crops caused by water seepage resulting from faulty operation of the North Platte Project irrigation works. The theory was advanced that the contract between the United States and the Northport Irrigation District rendered the United States an agent for the district so that the negligence of the United States could be imputed to the district. The court said (288 N. W. 758, 759):

However, the contract must be construed with reference to the federal and state statutes, which are as much a part thereof as though incorporated into the body of it. The powers, duties, and liabilities of the district and the United States are only such as each is authorized by statute to assume. The federal statute applicable to this case is 43 U. S. C. A., secs. 523, 524. These statutes authorize the secretary of the interior to dispose of surplus water impounded for

the purpose of irrigating public lands to, among others, irrigation districts. The method of carrying out the provisions of this act is provided in that canals and ditches may be constructed. It is also provided that, when the payments required by the act are made, then the management and operation of such irrigation works shall pass to the owners of the land, to be maintained at their expense, under such rules and regulations as may be acceptable to the secretary of the interior. It is further provided that the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the government until otherwise provided by congress. Surely there is nothing in the federal statutes which indicates that, in the construction, maintenance, and operation of irrigation works, the United States was to become the contractor for, or the agent of, the irrigation districts formed to take advantage of its facilities for impounding and carrying water to the land. In effect, the federal statutes negative such a relationship, by the retention of title to the works, by absolute control of the construction and maintenance, and finally by providing that when the works are eventually turned over to the district it shall be under such rules and regulations as are acceptable to the secretary of the interior.

It is particularly pertinent to the refutation of the argument suggested by the appellant in this case that in the *Levamis* case the court specifically held that the United States was not acting and could not be acting as the agent for irrigation districts on federal projects in its operation of the works on these projects. That

conclusion was obviously founded on the premise, pursuant to the provisions of the Reclamation Act, that no part of title or operation of the works could pass from the United States.

In the more recent case of *United States v. Power County, Idaho*, 21 F. Supp. 684, 687 (D. C., E. D. Idaho, 1937) the court stated:

The title to the lots and the reservoir involved is still in the United States and remains there until otherwise provided by Congress. *Twin Falls Canal Co. v. American Falls Reservoir District No. 2*, 9 Cir., 59 F. 2d 19. The lots when acquired by the United States became a necessary and proper part of the reservoir enterprise and incidental thereto, and because of that fact the United States was authorized to acquire title thereto. The only interest the district has in the reservoir until title thereto is passed by Congress is in the right of the district to receive water which is delivered to it by the United States from the reservoir and to the use and benefit of certain amount of water storage capacity in the reservoir which was constructed and is still owned and operated by the United States under an Act of Congress and the contract of June 15, 1923, as amended on October 10, 1924. *North Side Canal Company, Ltd., v. State Board of Equalization of Wyoming*, 8 Cir., 17 F. 2d 55. Whether the lots are a proper part of the reservoir or not, it would make no difference, as the United States still owns them and the legal title remains in it until otherwise provided by Congress.

It seems that the courts have held that section 6 of the act means precisely what it says and that neither

title nor possession and control of the Minidoka Dam and Power Plant can have passed to the appellant or to anyone else in the absence of any further provision by Congress. Title, and the entire bundle of rights which constitutes title, is reserved to the United States by the unqualified and complete reservation contained in section 6.

Since title to the works involved or any right therein can pass out of the United States only pursuant to specific act of Congress, the appellant has no claim to any interest in the dam or power plant.

The Minidoka Project, including the dam, power plant and distribution works, were built pursuant to the Reclamation Law with funds of the United States and on land belonging to the United States (Trial Court's findings, Nos. 11 and 12, R. 176, 177, which are uncontroverted by any evidence). Consequently full title, both legal and equitable, to those works vested in the United States in the absence of any specific provision by Congress to the contrary. (R. 199.)

Article IV, section 3 of the Federal Constitution provides:

The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *

It is eminently clear that that provision of the Constitution means precisely what it says and that no interest of any type, legal or equitable, in property of the United States can be acquired by any person except pursuant to provision made by the Congress. It seems unnecessary to cite the many authorities on this subject, but for the convenience of the court reference will be made to the following few: *United States v. Fitzgerald*,

15 Pet. 407, 420; *Utah Power & Light Co. v. United States*, 243 U. S. 389; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 330, *et seq.*, rehearing denied, 297 U. S. 728.

As stated by the Supreme Court in the *Utah Power & Light Company* case, *supra*:

* * * Not only does the Constitution (Art. IV, sec. 3, cl. 2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired.

* * * [243 U. S. at 404].

It is to be noted that legal title, as a naked concept, is not the thing which can be disposed of only pursuant to act of Congress. It is "rights" in the property which can be disposed of only in that way.

Clearly, then, in a case such as that now before the court, where Congress has provided that title shall remain in the United States and where there is no other act of Congress authorizing the disposition of any rights in the property, the appellant cannot rightly claim any title or ownership, legal or equitable, for any such claim must be predicated on "rights" in the property.

In the line of cases beginning with *Wilcox v. McCone*, 13 Pet. 498, the Supreme Court has consistently held that where public land has been withdrawn from entry under the public land laws, no one, no matter what

his equities, can secure any right whatsoever in the lands.¹⁰ In the language of the court in the *Wilcox* case, "no title whatsoever" can be acquired and the Government retains "perfect title." The rationale of those cases is that, pursuant to authority of the Congress, title to the lands is reserved to the Government and therefore that no interest of any kind can be acquired by others in the property. Obviously the theory of those decisions, and the cases themselves, are full authority for the proposition that here, where Congress itself has specifically reserved title to Government property, the appellant can secure no rights of any kind in that property.

Furthermore, when Congress undertakes to provide for the disposition of title to Government property and to prescribe the conditions on which rights in it may be secured, no title, even equitable title, passes until all those conditions have been fully met. *Irwin v. Wright*, 258 U. S. 219. See also *Lincoln County v. Pacific Spruce Corporation*, 26 F. (2d) 435; *Wood v. Canyon County*, 43 Idaho 558, 253 Pac. 839; *Hund v. Twin Falls County*, 40 Idaho 606, 236 Pac. 533. It seems to follow, *a fortiori*, that no equitable title vests when Congress specifically provides that in no circumstances can title be disposed of.¹¹

¹⁰ *Utah Power & Light Co. v. United States*, 243 U. S. 389 (1917); *Chicago M. & St. P. Ry. v. United States*, 244 U. S. 361 (1917); *Northern Pac. Ry. Co. v. Wisner*, 246 U. S. 288 (1918); *Gardner v. United States*, 252 U. S. 459 (1920); *United States v. Minnesota*, 270 U. S. 181, 206 (1926).

¹¹ Appellant apparently bases its claim to ownership or equitable title on its alleged obligation to pay the costs of the facilities which constitute the property. Not only does appellant point to no stat-

Appellant's contention that it owns or has an equitable interest in the dam and the power plant is supported by no argument on the merits of the question of ownership and all points on which appellant relies are ineffective.

Nowhere in appellant's brief does it address itself to the fundamental concepts governing ownership of the dam and power plant which have just been discussed. Those fundamental concepts, alone, require a conclusion that the appellant has and can have no rights of any kind in the dam or power plant. However, for the sake of completeness the appellant's points, on which it bases its claim, will be considered. Those points are five in number, as follows:

1. The appellant alleges that the water users of the South Side Pumping Division have contracted for, and for twenty-four years have been paying on, a certain percent of the cost of the works, and argues that, therefore, it has a "vested property right" in the structures.

2. The appellant points to Secretary Hubert Work's decision of March 14, 1927, affirmed by Secretary West, concerning the division of the *then accumulated* net profits between the Burley Irrigation District and the Minidoka Irrigation District, in which Secretary Work used the following language:

As the matter now stands, to state it simply, the Burley District owns 95.6 percent of the rights to support the claimed transfer of rights to it, but it does not controvert the found fact that the Government has not yet been fully repaid the cost of the facilities, and the appellant remains indebted (R. 193). Even, then, if Congress had allowed passage of rights in the facilities on payments for them, under authority of the cases cited above, no title, even equitable title, could pass until all conditions had been met, i. e., until payment had been completed.

mainder, or 4.4 percent.

3. The appellant points further to the fact that, in his order appointing the "Robrock Committee," the Acting Secretary (plaintiff's Exhibit No. 1, p. 44, certified to this court) used the following language:

The following Committee is appointed to consider the ratio of ownership by the Minidoka and Burley Districts in the Minidoka Project and the ratio of participation of the two districts in the proceeds of power profits.

In its report the committee made various references to the "proportionate ownership" of the two districts.

4. The appellant refers to the action instituted by it in the Supreme Court of the District of Columbia to enjoin the Secretary from reconsidering the ratio of division of the net profits from the power generated at the Minidoka Power Plant and from making a different percentage of distribution. (*Burley Irrigation District v. Work*, Equity No. 50636). The case came up for trial before Justice Adkins upon the basis only of the pleadings and a stipulated statement of facts (plaintiff's Exhibit No. 1, p. 118). In his opinion, Justice Adkins referred to the contentions of the Burley Irrigation District that it "owned" the power plant and that the Secretary proposed to reconsider the "ratio of ownership." Justice Adkins held that the prior decisions of the Secretary were conclusive and final and enjoined the Secretary from "disturbing or changing the proportionate ratio upon which the net profits from the Minidoka Project have been divided" (plaintiff's Exhibit No. 1, p. 173).

5. The appellant also relies on the action of this court in affirming Justice Adkins' decision. *Wilbur v. Bayley Irrigation District*, 58 F. (2d) 871, 61 App. D. C. 145. The decision referred to the above-quoted statement of Secretary Work and stated that "the injunction here extends only to the redetermination by the Secretary of the proportionate ownership in the Minidoka project by the Minidoka and Burley irrigation districts." *Stalis add.*

These five premises constitute the sole basis for the contention of the appellant that it is the owner of any rights in the works. Without pausing to question whether this court has jurisdiction to pass upon the question of the ownership of a power plant and dam located outside the District of Columbia, we examine those points separately.

(1) It is true that the entrymen on the Minidoka Project have contracted to repay the estimated construction cost of the works. But no money was actually paid by the Burley Irrigation District to the United States either on the cost of construction of the irrigation works or on the cost of the power plant. What happened was that the Government made a profit in the power business, credited most of it to the appellant, and by such credit wiped out the installment charges which would otherwise have been payable by the appellant to the United States (R. 193). The appellant has thus received practically free of cost the full benefit of the irrigation and power works built and paid for by the United States. The appellant made no actual payments on the cost of the power plant and hence has no basis for asserting that because of "payments"

U. S. 190, 199)

which it has made it has a vested property right in the power plant or transmission system, automatic. But it avails the appellant nothing even if we assume that it is paying for the dam and power plant as it contends. We have already shown conclusively that Congressional authority is necessary to permit appellant or anyone else to acquire any rights in those facilities and that Congress has never taken any action toward that end. Furthermore, the facts show that appellant remains indebted to the United States for the major portion of its original construction cost indebtedness (R. 193).

There can be no basis for any assertion, therefore, that incurring the obligation to pay the construction charges would automatically effect a shift in the ownership or equitable title of the power or irrigation facilities in the absence of Congressional action.

The term "title" as used in the Reclamation Act is not restricted or limited in any way by any modifying words to indicate that the Government's title is merely a naked legal title. No suggestion is present in the language of the statute to justify any assumption that the real or equitable ownership of the Minidoka Project shall be in the irrigation districts. The latter theory, in fact, would be contrary to the language and the purpose of the statute. In the words of the Supreme Court of the United States (*Adams Express Co. v. Kentucky*, 238 U. S. 190, 199):

It is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used. If that is plain there is an

end to construction and the statute is to be taken to mean what it says.

It is clear that Congress never intended to give up, just as soon as the construction charges had been paid, either the ownership or the title to the works or the right to control them. (In this case part of the charges are yet undue and unretired in any event.) These irrigation projects are governmental projects. Payment of the charges was not to be the substitute for Congressional action to effect a change in ownership. Moreover, the water users had made their applications and had undertaken the construction charges with full knowledge of the provisions of the Reclamation Law. (2) The second of the premises upon which the appellant rests its contention that it is the owner of rights in the facilities is the decision of Secretary Work as affirmed by Secretary West.

Since the Reclamation Law clearly specifies that ownership of all the facilities remains in the United States "until otherwise provided by Congress," the Secretary was clearly without authority to do any act purporting to effect any change in the ownership of the power facilities. Hence, even if the Secretary had attempted to adjudicate a dispute which involved the question of ownership, any decision or interpretation he rendered or any language he uttered would be insufficient to bind the United States on the question of ownership or to divest the United States of ownership or of any property rights.

Cramer v. United States, 261 U. S. 219, 234, 43 Sup. Ct. 342, 67 L. Ed. 622 (1923).

Jeems Bayou Fishing Club v. United States, 260 U. S. 561, 564, 43 Sup. Ct. 205, 67 L. Ed. 402 (1923);

Utah Power & Light Co. v. United States, 243 U. S. 389, 408-409, 37 Sup. Ct. 98, 61 L. Ed. 791 (1917);

Pine River Logging Co. v. United States, 186 U. S. 279, 291, 22 Sup. Ct. 920, 46 L. Ed. 1164 (1902);

Dubuque & Sioux City R.R. Co. v. Des Moines R.R. Co., 109 U. S. 329, 3 Sup. Ct. 188, 27 L. Ed. 952 (1883);

Whiteside v. United States, 93 U. S. 247 (1876);

Wilcox v. McConnell, 13 Pet. 498.

But it is submitted that the Secretary never had before him the issue of ownership. By contract the districts were entitled to share in the profits and the only problem before him for decision was the proportion in which they should share. As evidenced by his phrase, "to state it simply," his use of the term ownership was quite clearly only a short and convenient way of expressing the conclusion that, since the Burley and Minidoka Irrigation Districts had entered into obligations to repay a certain proportion of the estimated cost of the power plant, it was equitable to distribute the then accumulated net profits in that proportion. His decision was confined solely to the ratio of distribution of the then accumulated net profits and clearly no question of ownership was before him.

(3) This same criticism is applicable to the third premise upon which the appellant bases its contention of ownership. The purpose of the so-called Rothrock

Committee had been to investigate and suggest a rational basis for allocation of the net power profits found to have been earned by the sale of power generated at the Mindoka Power Plant. The Committee considered none of the legal questions since, under its Order of Appointment, it was not required to consider or express an opinion thereon. Indeed, the Committee Report expressly states that it did not and would not consider any of the legal questions involved (plaintiff's Exhibit No. 1, p. 83). Furthermore, it is indisputable that neither the Order of Appointment nor the Committee Report could take the place of Congressional action in effectuating the transfer of ownership. There was no authority to dispose of property in the works, and the cases cited in point (2), *supra*, are applicable.

(4), (5) This brings us to the fourth and fifth premises advanced by the plaintiff: the decree of Justice Adkins and its affirmation by this Court in *Wilbur v. Barley Irrigation District*, *supra*. This submitted, however, that the question as to the ownership of the power plant or any other works was not involved in that suit. The sole question raised was whether the Secretary had authority to withdraw a decision made by his predecessors concerning the percentage or ratio of division of the net power profits and to substitute a new and different percentage or ratio of distribution. That that was the sole question appears very clearly from Justice Adkins' opinion. He stated: "The question of law before the court is whether the present Secretary of the Interior has power to review and modify the decision of his predecessor." (Plaintiff's Exhibit No. 1, p. 154).

The statements made by the court with regard to ownership of the works by the Burley District were purely dicta. What was there decided was that the Secretary, having once exercised his discretion by deciding what proportion or percentage of the profits earned by the Mindoka Power Plant should be credited to the Burley District, cannot recall such decision and make another of different one. Furthermore, the court made no finding with regard to the question of ownership. Its language was based entirely on the allegations of the plaintiff and the language of the agreed statement of facts. These statements of the court, therefore, can by no means be considered as constituting a conclusive finding.

It is well established that a decree must be construed with reference to the issues it was meant to decide. Thus in deciding whether a former decree was an adjudication conclusive on the parties, the Supreme Court, in *Vicksburg v. Henson*, 231 U. S. 259, 273, said:

The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted and what the decree was really designed to accomplish.

It must be borne in mind that, in the litigation between the appellant and former Secretary Wilbur, the court was concerned only with the distribution of profits found by the Secretary and not with his action in finding the total net profits to be distributed. It is only the latter problem, which is involved here,

This proposition has been repeatedly reaffirmed. See *Oklahoma v. Texas*, 272 U. S. 21, 42-43, and *United Shoe Machinery Corp. v. United States*, 258 U. S. 451, 460.

Nor can it be argued that the question of ownership was implicit in the *Wilbur* case, and hence decided *sub silentio* by the court. It is equally well established that cases in which existed questions other than the ones actually decided are not precedents or authority for the questions which were not considered. The Supreme Court, in *Webster v. Fall*, 266 U. S. 507, 511 (1925) said:

Counsel for appellant directs our attention to other cases, where this Court proceeded to determine the merits notwithstanding the suits were brought against inferior or subordinate officials without joining the superior. We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. See *New v. Oklahoma*, 195 U. S. 252, 256; *Tefft, Walter & Co. v. Mansuri*, 222 U. S. 114, 119; *United States v. More*, 3 Cr. 159, 172; *The Edwards*, 1 Wheat., 261, 275-276. [Italics supplied.]

The statements in the *Wilbur* case cannot, therefore, be regarded as a considered decision or finding on the

question of ownership to the Minidoka Power Plant, or any other power or irrigation facilities in connection with the Minidoka Project.

The appellant contends, however, that the Court enjoined the threatened revocation of the determination of Secretary Wilbur's predecessors because the Burley Irrigation District had acquired property rights in the power plant. Such an argument is obviously fallacious. The only "vested property right" which the Burley Irrigation District has is its right, vested in it by its contract of March 15, 1926, and the decisions of Secretary Wilbur's predecessors, to receive 95.6 percent of the net profits, as determined by the Secretary, which were derived from the sale of power generated at the Minidoka Power Plant. It was that right and no other alleged right which was being threatened by the attempt of Secretary Wilbur to substitute a new ratio or percentage of division of net power profits between the appellant and the Minidoka Irrigation District. It was that right and no other alleged right which this Court protected by its decision in *Wilbur v. Burley Irrigation District*. That right was the only right which was involved in the prior litigation. Hence, the decision in *Wilbur v. Burley Irrigation District* is *res judicata* only insofar as that right is concerned. It does not affect any other issue. No determination of the question of the ownership of the power plant was necessary to the court's decision to enjoin permanently the threatened alteration of the ratio of division of net profits. The Burley District had a right which was threatened by the then Sec-

Carr v. United States, 98 U. S. 433;
Hussey v. United States, 222 U. S. 88, 93;
United States v. Candalaria, 271 U. S. 432;
Louisiana v. Garfield, 211 U. S. 70;
United States v. Lee, 106 U. S. 196, 217.

d. The appellant has no rights of any kind in the commodatary supply distribution system.

Thus, even on appellant's own theory it can claim no interest in these works. They were built by the United States with its funds on its land and appellant has not undertaken to pay anything for them.

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of the appellant has no property right in the flow of 2700 second-feet of water decreed to the United States for power purposes at the Minidoka Power Plant.

At the outset of this discussion of the ownership of water rights it may be well to refer briefly to certain facts concerning the structure of water rights.

The decreed rights to water of the Snake River are all relative to each other in accordance with specified dates of priority. Only at very brief periods is it possible to fill all the respective decreed water rights. The available water at any particular time, therefore, goes to fill the earliest right in full or to the extent demanded. Any available surplus then accrues to the right next in priority and so on down until the available supply is exhausted. It is entirely optional with the party to whom such rights are decreed to determine, up to the full amount to which he is entitled, the extent to which he will demand water. In their administration of the water distribution, the State water officials have always regarded the decreed amounts as the *maximum* amounts which may be delivered upon demand, not as the minimum amounts which must unconditionally be delivered irrespective of any demand. The decreed right is thus regarded by the State water officials as a permissive privilege to use, not a compulsory requirement to misuse (R. 197, 198, 298, 299), and such is the law (2 Kinney on Irrigation (2d Ed.), Sec. 782; 1 Wiel on Water Rights (3d Ed.), Sec. 478; *Water Supply and Storage Co. v. Larimer & Weld Reservoir Co.*, 25 Colo. 37, 53 Pac. 386; *Niday v. Barker*, 16 Idaho 73, 101 Pac. 254). Any water not used by the Secretary for power production at the Minidoka Power Plant therefore accrues to the next right asking for water at that time.

It happens that the next right is the decreed storage right of the United States at the American Falls Reservoir (R. 198, 300). Hence, the practice of the Secretary under the present water conservation plan of not demanding water for power purposes to the full amount decreed to the United States increases the amount of irrigation water which can be conserved for irrigation and power purposes during the irrigation season (R. 188, 189, 198, 251, 300). The use of the water for storage in the American Falls Reservoir is not a conservation of the water right for power purposes at Minidoka Dam or a "taking" of that water; it is merely a disuse or reduced use of that right as a result of which, by operation of law, the water becomes available to fill the next right in priority.

The appellant, admitting in its brief that there can be no property right in and of itself to the 2,700 second-feet of water decreed to the United States for power purposes at the Minidoka Power Plant, argues that the right to use that amount of water is an appurtenance

"A water right is merely a right to use, not a *mandate* to use. Consequently appellant's argument on page 41, *et seq.*, of its brief is not only confusing but also is based on a complete misunderstanding of this basic concept of a water right. Furthermore, even though the "taking" of a water right, where such a taking exists as in *Montpelier Milling Co. v. City of Montpelier*, 49 Idaho 212, 113 Pac. 741 (relied on by appellant), may create a right of compensation, that is not so where the use of water, or which the complainant is deprived, was a wasteful use. *Scheldt v. Falls Water Co.*, 224 U. S. 107. In that case, as here, the complaining party had used water to furnish power (mechanical power in that case), but the court held that his use was wasteful and not entitled to protection. We suggest that this use of water for power purposes which the Secretary has curbed was merely a wasteful of irrigation water."

to the power plant. Hence, argues the appellant, ownership of the power plant carries with it ownership of the water or the right to use the water decreed for use at the power plant. We have already conclusively shown, however, that the appellant has no possible basis for asserting any rights of ownership in the power plant. Consequently, the appellant's contention as to the water falls of its own weight.

Appellant asserts on page 35 of its brief, as the heading and general subject of the chapter beginning on that page, "Twenty-seven Hundred Second-Feet of Water for Power Purposes is an Appurtenance to This Power Plant and to the Lands Irrigated Within the Plaintiff District." It is immediately apparent that the two propositions so asserted are in violent and irreconcilable conflict with each other, for if the power rights decreed to the United States and the Secretary of the Interior are appurtenant to the power plant, they pass with and are a part of the power plant; and if they are a part of the power plant and pass with the title of the plant, they could not also be appurtenant to the lands irrigated within the appellant district. So in the very beginning, appellant's two propositions conflict with and defeat each other.

Moreover, the water rights here involved have been decreed "to the Secretary of the Interior and his successors in office" and to the United States. The Burley Irrigation District is nowhere mentioned in any decree nor were any such rights ever transferred to it (R. 196). Furthermore, the State water officials of the State of Idaho, who are in charge of the distribution of water from the Snake River, have at all times recog-

nized the Secretary of the Interior as the owner of these decreed rights. The State water officials have at all times accorded to the Secretary's representatives the right to exercise the option whether or not to deny them the water which they are permitted to take under that decree. Nor has the Burley Irrigation District ever claimed, to the State water officials in charge of water distribution, to be the owner of that decreed water right or any part of it or to have any right to demand its distribution (R. 197). That the Secretary of the Interior is the owner of this water right is the consistent administrative interpretation of the decrees by those charged with its administration.

Clearly, this court does not have jurisdiction to change the allocation of the use of the water of Snake River, Idaho, which allocation has been determined by decree of competent courts in Idaho with admitted jurisdiction.

Appellant is not justified in finding the solace which it does in *Tekes v. Fox*, 300 U. S. 82.

In that case the court held that the water users have a water right which will be protected by the courts. The peculiarity of appellant's position rests in the fact that appellant's demand is not in aid of the water rights of the water users, but is in destruction of such rights. For what appellant demands is that the Secretary be required to waste 2,700 second-feet of water all winter long in the winter operation of the Minidoka powerplant, in the vain hope that such winter operation might lead to increased power profits. It is the Secretary who is protecting the water rights of the water users, and taking the necessary steps to conserve the water so that the water will be available during the irrigation season, when it is needed, to supply such rights of the users of the various divisions of the Minidoka Project and the entire Snake River Valley, in which valley over 600,000 acres of irrigated land are dependent on stored water from the American Falls Reservoir.

based primarily on the provision of the Reclamation Act of June 17, 1902, which declares, "That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated" (32 Stat. 388, 390, sec. 372, Tit. 43, U. S. C.), and a similar provision of the law of the State of Washington. But in this case we are not concerned with those or similar provisions, for the water right under consideration is not one for irrigation or use on land; it is a right to the use of water for generation of power in a power plant. Appellant seeks to overcome that important distinction by referring to an Idaho statute providing that water rights may be appurtenant to a thing (the power plant) it is said in this instance) as well as to land. It is significant that appellant refers to no such provision of Federal statute, and none exists.

But appellant's statement of and reliance on the Idaho statute in this case is misleading (appellant's brief, p. 36). The Supreme Court of Idaho does not seem to agree with appellant as to the significance of the statute involved. That court has held repeatedly that, under the law of Idaho, including the statute cited by appellant, water rights may be segregated and held separate from the land (or thing) or may be assigned, sold or transferred to other land.

Bennett v. Twin Falls North Side Land & Water Co., 27 Idaho 643, 150 Pac. 336;

Village of Hailey v. Riley, 14 Idaho 481, 95 Pac. 686;

Hard v. Boise City Irr. & Land Co., 9 Idaho 589, 76 Pac. 381.

See also Idaho Code Annotated (1932), secs. 42-801-806, 42-829, 42-1380. In the *Bennett* case, *supra*, the court explicitly stated that "under the law and the decisions of this court, a water right is a distinct property right from the land on which it is used" (150 Pac. at 349). Nor can it be said that the United States is unable to own water rights. Under Idaho law, a person may be an appropriator of a water right even though he does not use the water for his own land but sells or distributes that water to someone else. *Murray v. Pub. Utilities Comm.*, 27 Ida. 603, 150 Pac. 47, 50-51; *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Ida. 643, 150 Pac. 336, 340. The Idaho statutes clearly recognize that the United States may own water rights (e. g., Idaho Sess. L. (1939), ch. 205, secs. 1, 3, p. 413). Since water rights may, in Idaho, be held separately from the land (or thing), it is clear that *Idaho v. Foss*, based on contrary conclusions as regards Washington law, is inapplicable to the question of the appurtenance and ownership of water in this case. See *United States v. Humboldt Lovelock Irr. Light & Power Co.*, 97 F. (2d) 38, 45, cert. denied, 305 U. S. 630.

Test there by any misunderstanding as to the nature of the interlocking water rights of the water users of a Federal reclamation project and the water rights of the Government in connection with such project, the decision in the case of *Idaho v. Foss* is to be read in connection with the decisions of the Supreme Court in the cases of *Idaho v. United States*, 263 U. S. 497, 506, and *Swgart v. Baker*, 229 U. S. 187. Both of the latter relate to the interpretation of the Reclamation Act and the administration of the Secretary of the Interior thereunder.

In the case of *Idaho v. United States*, *supra*, it is stated by the Supreme Court, speaking through Justice Van Devanter, "But the water is not sold. In disposing of the lands in small parcels, the plaintiff (United States) invests each purchaser with

However, we submit that it would be utterly immaterial if Idaho law, or any other provided that water rights are appurtenant to things. The "thing," here is the power plant and the United States, not the appellant, has full title and ownership of that plant as has already been shown. The appellant's reliance on *Ichtes v. Fox* is based on the proposition stated therein that the water right under law there applicable inheres to the benefit of the owner of the property on or in which it is used. Therefore, even on the basis of that decision, the water right belongs to the United States and not to the appellant.

Furthermore, it should be noted that in *Ichtes v. Fox* the court was very careful to point out that it was distinguishing between ownership of the water rights and ownership of the project works.

* * * Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. * * * [300 U. S. at 95].

a right to have enough water supplied from the project canals to irrigate his land, but it does not give up all control over the water, or do more than pass to the purchaser a right to use the water so far as may be necessary in properly cultivating his land. *Beyond this, all rights incident to the appropriation are retained by plaintiff (the United States).*" [Italics added.]

See also, *San Joaquin Co. v. Stanislaus County*, 233 U. S. 454, 460; *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U. S. 871, 882; *United States v. Union Gap Irrigation Co.*, 209 Fed. 274, 276.

The court conceded the property right of the Government in the project works and clearly indicated that it would not and could not hold that the right belonged to anyone other than the Government, where the water right in issue is for use in the project works (as it is for use in the power plant here).

But the appellant is not justified in relying on *Ichtes v. Fox* for even other reasons. As stated in the initial sentence of the opinion in that case, the sole question presented was whether the United States was an indispensable party. Also, the case was decided on a motion to dismiss (the action is still pending and has not yet been determined on the merits) which admitted important facts not yet proved in that action and *not involved in this case*. The court laid stress on the fact that, according to the undenied allegations of the bill, the respondents had fully discharged all their contractual obligations to the United States and that their rights had become vested. Here the appellants have not discharged fully their contractual obligations to the United States; as has been pointed out several times, even with the application of power credits to its obligations, the appellant still remains obligated to the United States under its contract of 1926 for a part of the estimated cost of construction of the project (R. 193).

7. The electric energy produced at the Minidoka Power Plant is property of the United States

It is conceded that the appellant has, under its contract of March 15, 1926, with the United States, a right to be credited with 95.6 percent of the net profits as determined by the Secretary, which are derived from

the sales of power generated at the Minidoka Power Plant. Irrespective of that right, however, the appellant cannot claim to be the owner of that electrical energy. The appellant cannot control the use of the power plant since the United States has full ownership of the plant and since, by statute and by contract, control is specifically vested in the Government. Nor can appellant control the use of the electrical energy there generated since the full ownership of that energy is in the United States. This proposition has been conclusively established by the recent decision of the Supreme Court of the United States in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, rehearing denied 297 U. S. 728, in which the court stated as follows:

The Government acquired full title to the dam site, with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam. That water power came into the exclusive control of the Federal Government. The mechanical energy was convertible into electric energy, and the water power, the right to convert it into electric energy, and the electric energy thus produced, constitute property belonging to the United States [citation of cases].

Authority to dispose of property constitutionally acquired by the United States is expressly granted to the Congress by section 3 of Article IV of the Constitution. This section provides:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this

Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular State." [297 U. S. 330.]

In summation, it becomes obvious on the basis of a proper analysis of the appellant's contentions and the application of the pertinent statutes and court decisions that the Burley Irrigation District has absolutely no basis for claiming any ownership in any part of the Minidoka Project or in any of the power or irrigation facilities or in the flow of water decreed for power purposes at the Minidoka Plant or in any electrical energy produced by those facilities. Nor can the appellant assert any valid claims to enable it to control the discretion of the United States in the operation, use, disuse, or disposition of any of these facilities, equipment, or electric energy. No rights of ownership having ever been acquired by the Burley Irrigation District, it has no bases for claiming any such rights.

2. Even if the appellant did have rights in the property, the action of the Secretary would not be an interference with them since, by contract with the appellant, he is given full control over that property.

As has already been pointed out, in its contract of March 15, 1926, with the United States (defendant's Exhibit No. 6, certified to this court, R. 121-152), the appellant specifically acknowledged and agreed that the United States, through the Secretary, was to operate the "reserved works," which are defined therein to include the dam, power plant, power distribution facilities, and certain other works, and was to determine the profits. And as has also been previously shown, the court is, in such circumstances, precluded from questioning the action taken by a Government official in

performing a function granted him by contract of the litigating party.

Kihlberg v. United States, 97 U. S. 398;
Sweeney v. United States, 109 U. S. 618;
Martinsburg & P. R. R. v. March, 114 U. S. 549;
Chicago, S. F. & C. R. R. v. Price, 138 U. S. 185;
United States v. Gleason, 175 U. S. 588;
United States v. Barlow, 184 U. S. 123;
Ripley v. United States, 223 U. S. 695;
Merrill-Euckgaber Co. v. United States, 241 U. S. 387;
(all *supra*).

It is not necessary to belabor the point that if a party contracts with another for operation of the former's property he cannot complain of the method of operation so long as it is within the authority granted by the contract. Certainly that is abundantly true in a case such as this where, as already shown, the agent's operation is reasonable. It cannot be said that the Secretary, under the contract, had any express or implied duty to operate in any specified way or not to operate in the way in which he is operating.

The Burley Irrigation District has no basis for complaint that the transmission lines of the project are being used to convey electricity to the Minidoka Irrigation District.

The power delivered by the Idaho Power Company under its contract with the United States of October 1, 1934, is distributed to consumers in the Minidoka Irrigation District and in other parts of the Minidoka Project through the transmission and distribution facilities appurtenant to the Minidoka Power Plant.

Those facilities, included in the commercial power distribution system, consist of the switchyard, interconnecting substation, transformers, and transmission lines. Their cost was charged on the books for the most part to a separate division or account known as the Commercial Power Division of the Minidoka Project, and in part provided for from receipts secured from power distributed through the original power works in accordance with the contracts between the United States and the Burley and Minidoka Irrigation Districts of March 15, 1926, and February 11, 1927, respectively. Their use has eliminated the necessity of constructing an independent parallel transmission system (R. 175, 239, 270; plaintiff's Exhibit No. 1, p. 18, point 10).

The appellant contends (pars. 36, 37, 38, and 39, Bill of Complaint, R. 29-34) that it is the owner of 95.6 percent of the transmission lines and the other distributing works of the project, and that the failure to compensate the Burley Irrigation District for the use of these transmission facilities in distributing the power imported from the Idaho Power Company is in violation of its rights.

The appellant, however, has no valid basis for demanding compensation for the use of these facilities for at least two adequate reasons. First, the Burley Irrigation District has never paid for these facilities, as has already been adequately demonstrated. Second, even if it had paid for these facilities and even if it had owned them, nevertheless, the Minidoka Irrigation District, being an owner in common, would be entitled to the use

of the transmission facilities without any obligation to pay compensation to the Burley Irrigation District.

The contention of the Burley Irrigation District that it "owns" 95.6 percent of these facilities clearly imputes that the Minidoka Irrigation District is a co-owner of the facilities to the extent of 4.4 percent. Nor is the interest of the Minidoka Irrigation District obliterated because of the disproportion of alleged ownership between the two parties. A party having an interest of 4/4 percent is assured of judicial confirmation of his rights of co-ownership. *Hocksprung v. Stevenson*, 82 Mont. 222, 266 Pac. 406 (4.5 percent co-ownership); *Luado v. Lester*, 105 W. Va. 491, 143 S. E. 155 (1/6 co-ownership). The expenditure of large sums by one co-owner in the development of the common property clearly cannot extirpate the other co-owner's interest. *Meritt Oil Corp. v. Young*, 43 F. (2d) 27 (C. C. A. 10th).

Since it is obvious that the Minidoka Irrigation District, on the basis of the appellant's contentions, is a co-owner, we can apply the general principle regulating the mutual rights of co-owners. That principle is as follows:

A tenant in common has the right to occupy and use common property and one co-tenant cannot recover of the others for use and occupancy, in absence of agreement, ouster, or subletting [*Allen v. Jones*, 12 F. (2d) 186, 56 App. D. C. 245].

From the nature of the property here involved it is indubitable that the use of the project transmission and transformer facilities for importing power from the

Tidaho Power Company in no way interferes with the use of the same facilities for transforming and transmitting power secured from the Minidoka Power Plant (R. 200, 255-56, 262). It is also clear that the use of these facilities for transmission of power from the Tidaho Power Company does not in any way tend to increase the depreciation of the distributing system (R. 200, 262). In such circumstances, therefore, the following holding in a case involving use by co-owners of an electrical transmission line becomes particularly applicable:

In the present case it is clear, from the nature of the property involved, that each of the co-owners may make use of the common property without conflict with the use by any of the others. It may be said that all are in possession; and the possession and use of the property by one, or any number, does not interfere with the use by the others. Since the rule is that any co-owner of common property has the legal right to make such use of the property as he sees fit, even to the exclusion of all others, if necessary, would it not follow that one has the right to use such property in any manner not inconsistent with the use of the others, when all are in possession? It is not contended that the use by defendants will in any way interfere with the use of the plaintiffs, or in any way place a greater burden of liability on them. In view of the nature of the property involved, and the rules applicable to the use of personal property by owners in common, we are of opinion that the circuit court erred in limiting the use of defendants to the particular connection formerly used by their assignor, *Reynsey*.

[*Lucado v. Lester*, 105 W. Va. 491, 143 S. E. 155, 156-157.]

Since the use of the transmission facilities involves no outlay of the Burley Irrigation District, there can be no question of the right of the Minidoka Irrigation District, as co-owner, to the use of these facilities.

Indeed, even if the transmission lines have been used solely by the Minidoka Irrigation District, the Burley Irrigation District would not be entitled to rent. In this regard the Court of Appeals for the District of Columbia has held that a co-tenant, even though he had sole use of the property, cannot be compelled to pay rent to his co-tenant. *Allen v. Jones*, 12 F. (2d) 186, 56 App. D. C. 245. In reversing the decree of the lower court which had imposed rent payments on the defendant co-owner, the court stated:

The petition filed by the appellee, as plaintiff below, sets forth that she and the defendants are the heirs at law and next of kin of Mary M. Moten, deceased, and as such vested with fee simple title to the real estate sought to be partitioned, and that since the death of Mary M. Moten the defendants "have used and occupied the said premises without paying any rental therefor to the petitioner herein." Agreeably to the prayers of the petition, the cause was referred to the auditor of the Supreme Court of the District, who found that since the death of Mrs. Moten the property had been solely used and occupied by the defendants "without the payment of rent therefor."

The decree of the court was for the sale of the premises and an accounting by the defendants

to the plaintiff, for use and occupancy. The question for determination here, therefore, is whether one of several tenants in common may compel his cotenants to account to him for use and occupation, in the absence of an agreement, express or subletting by the cotenants.

In *Lyon v. Bursey*, 42 App. D. C. 519, we ruled that a tenant in common is not liable to his cotenants for use and occupation unless there has been an actual or constructive ouster of the cotenants. See, also, *Meyers v. Loan & Savings Ass'n*, 116 A. 453, 139 Md. 607, 615; *Zwergel v. Zwergel*, 194 N. W. 505, 224 Mich. 81, 86; *Carroll v. Carroll*, 74 N. E. 913, 188 Mass. 558. [*Allen v. Jones*, 12 F. (2d) 186-187, 56 App. D. C. 245-246.]

Irrespective of any assumption which we may take, therefore, it is obvious that under no circumstances can the Burley Irrigation District base any valid claim to rent or other compensation for the use of the transmission facilities in distributing power from the Idaho Power Company to the Minidoka Irrigation District or other parts of the Minidoka Project.

F. The Burley Irrigation District cannot complain that it has been unfairly treated. Having received and accepted the numerous benefits resulting from the conservation plan effected by the Secretary, the appellant is estopped to allege that the Secretary was without authority to adopt the conservation plan.

J. The appellant has benefited from the savings of water effected by the Secretary under the conservation plan which is an integral part of the arrangement now under attack.

The appellant has received numerous benefits as a direct result of the conservation of water in American Falls Reservoir effected through the Secretary's conservation plan. Some of these benefits are as follows:

(1) In 1935 the appellant received, under a temporary rental contract, the stored water supply available from 50,000 acre-feet of storage capacity in the American Falls Reservoir. This supply was substantially enlarged by reason of the water conservation plan adopted by the Secretary (R. 194, 292).

(2) By reason of an exchange of water to which the appellant is entitled in the Jackson Lake Reservoir, 250 miles upstream, for water in American Falls Reservoir, only some 25 miles upstream, the appellant is benefited by the increased storage in that latter reservoir which is effected by the Secretary's conservation plan. To the extent that the American Falls Reservoir is more nearly able to fill, the appellant secures a proportionate increase in the following benefits which flow from the exchange of its Jackson Lake water for American Falls water to the extent that the latter is available (R. 194, 277, 303, 304, 305, 324):

a. The exchange saves to the appellant approximately 13 percent of its water which would otherwise be lost by evaporation and seepage while in transit down the river from Jackson Lake.

b. Since it takes about five days to get water down from Jackson Lake, the appellant is benefited by the exchange which obviates losses which might otherwise occur by reason of the 5-day delay in getting its water.

c. The exchange of water obviates the danger of "pirating" of the appellant's water at the numerous irrigation canals operating from the river between Jackson Lake and American Falls.

(3) Through the use of American Falls Reservoir water, the appellant is able to utilize its share of Lake Walcott water more efficiently. This results from the circumstance that because the canal which supplies the Burley Irrigation District is at a fairly high grade, only a very limited amount of water will flow into the canal unless water is borrowed from the American Falls Reservoir to hold up the level of Lake Walcott (R. 195, 305).

(4) The use of American Falls Reservoir water provides more water for power purposes at the Minidoka Power Plant and also serves to keep up the head of water for power production at that plant by maintaining Lake Walcott at a high level (R. 195).

All these benefits to the appellant were either effected or enhanced by the saving of 250,000 acre-feet of water in the American Falls Reservoir during 1935 as a result of the Secretary's conservation plan.

2. The appellant has received a substantial benefit from an improved power supply.

The appellant has also received and accepted an improved power supply, both for irrigation and commercial power purposes. It has accepted the benefit of power profits derived from a commercial power business which, as has been demonstrated fully heretofore, is dependent for its continued existence as a successful and profitable business solely on the exchange power imported into the project by the Secretary from the Idaho Power Company (R. 196).

3. The Burley Irrigation District is estopped to attack the Secretary's action in effecting the conservation plan.

Having accepted and enjoyed the numerous and substantial benefits mentioned above, the position of the Burley Irrigation District in this suit is without equity. Even if this court should hold that the Secretary's action was unauthorized, the appellant's contentions could not be sustained. Since the appellant has accepted the fruits of the Secretary's action, the appellant cannot be permitted to deny its validity while retaining its benefits. The appellant cannot accept that which is beneficial and simultaneously seek to have held void that which is burdensome. It cannot repudiate the obligations of the allegedly unauthorized transaction while retaining and demanding the continued enjoyment of its benefits. *Baker v. Cummings*, 181 U. S. 117, 130; *Rader's Adm'r v. Maddox*, 150 U. S. 128; *Branch v. Jessup*, 106 U. S. 468, 475-476; *Warmsen v. Metropolitan R. Co.*, 184 N. Y. 83, 76 N. E. 1036; *Watkins v. National Bank*, 51 Kans. 254, 32 Pac. 914. It is submitted, therefore, that the appellant is now estopped to attack either the validity of the plan or the authority of the Secretary in adopting it.

III

The District Court was without jurisdiction over this controversy and hence the bill of complaint was properly dismissed.¹⁸

A. The relief sought by the appellant will prevent the Secretary of the Interior from performing the contract of January 1, 1905, with the Minidoka Irrigation District and that district is therefore an indispensable party without whose presence the court could not proceed.

B. The court cannot take jurisdiction in the absence of persons whose interests are so related with those of parties before the court that relief cannot be granted to the latter without determining substantial rights of the former.

The Minidoka Irrigation District was not made party to this suit (R. 174). Its rights would, however, be vitally affected by any decree rendered by the court. The Minidoka Irrigation District is, therefore, an indispensable party without whose presence the court is without jurisdiction.

The general principle with regard to indispensable parties is that the court cannot proceed with a cause in the absence of persons whose interests are so interrelated with the interests of parties before the court that relief cannot be granted against those before the court without determining substantial rights of those who are absent. 2 Moore's Federal Practice 2188 (1938).

In the leading case of *Shields v. Barrow*, 17 How. 130, 139, 15 L. Ed. 158, 160 (1854), the Supreme Court of

¹⁸ The trial court took cognizance of the jurisdictional arguments advanced by the appellee, there the defendant, but based its decision on the merits and not on jurisdictional grounds. (R. 296).

the United States; in pointing out the three classes of parties to a bill in equity, stated:

They are: 1. Formal parties. 2. [Necessary parties] Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. [Indispensable parties] Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition, as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties.

2. The Minidoka Irrigation District has substantial rights and benefits under its contract of January 1, 1935, with the United States which cannot be cut off completely if appellant received the relief which it seeks.

In this proceeding the Minidoka Irrigation District clearly falls within the third category mentioned in *Shields v. Barrow, supra*. The appellant's bill of complaint expressly prays for an injunction which will prevent the Secretary of the Interior, and all persons acting under his authority, direction, or control, from creating any sum to anyone under the contract of January 1, 1935, between the Minidoka Irrigation District and the United States, and which will compel the Secretary to credit to the appellant 95.6 percent of the profits from sale of outside power on the Minidoka Irrigation District. The entire contract of January 1, 1935, will obviously be nullified if the appellant obtains the relief which it seeks.

Under the contract the Minidoka Irrigation District is assured of the delivery of stated amounts of power for distribution on the district and in the town of Minidoka. The district is entitled to receive the entire net profits from the sales of that power, less \$50,000 which it guarantees for credit to the Black Canyon Power Plant. But the appellant seeks an injunction which will prevent the crediting or other disposition to the Minidoka District of those profits. Obviously, then, a very vital right of that district will be affected, indeed, wiped out, if appellant's prayer is granted.

Since the contract provides for its termination if a court should grant the relief now sought by the appel-

¹⁷ The contract appears as defendant's Exhibit No. 11, which has been certified to this court, and also appears as Exhibit No. 10 to appellant's bill of complaint (R. 86-93).

deat (Par. 20, R. 92), it is abundantly clear that this proceeding also imperils all other rights of the Minidoka District under its contract of 1935, including the right to demand or receive power and also the right (Par. 15, R. 91) to approve or disapprove the installation or construction of improvements to the distribution system costing more than \$1,000. That latter right is one which the district, or the appellant for that matter, does not have otherwise, since the United States, under its contracts of 1926 and 1927 with the two districts, has unfettered control over the making of improvements on the same distribution system and the charging of them against the proceeds of the power sales in which both districts are interested.

b. Under the precedents it is clear that the Minidoka Irrigation District is an indispensable party without whose presence the court cannot grant the relief sought

Not only do good conscience and equity require that the court refuse to assume jurisdiction in this case, but the law itself is clear that it is the duty of the court to dismiss the bill for want of jurisdiction because of the lack of an indispensable party.

Two recent cases in this court appear to be controlling in this case: *Balter v. Ickes*, 89 F. (2d) 856, 67 App. D. C. 112 (1937), cert. denied 301 U. S. 709, 57 Sup. Ct. 941, 81 L. Ed. 1363 (1937), and *Ducker v. Butler*, 104 F. (2d) 236, — App. D. C. — (March 20, 1939). See also *Green v. Brophy*, No. 7381, this Court, decided January

as Defendant's Exhibit No. 6, certified to this court, and printed in the record as an exhibit to the answer, R. 191 et seq.; plaintiff's Exhibit No. 6, certified to this court.

15, 1940; *Wynen v. Brooks*, 105 F. (2d) 766, — App. D. C. — (May 22, 1939).

The *Balter* case was a suit to restrain Federal officers from using or crediting funds contributed partly by the United States and partly by the City of St. Louis for the building of a memorial. This court held that the United States and the City of St. Louis were parties to a contract and that since the decree sought would affect the execution of this contract, the City was an indispensable party. This court stated:

The test in the instant case is whether a final decree can be entered without affecting the interest of the city of St. Louis. *The interest of the city here unquestionably is to have the United States carry out its part of the agreement, and, while the city could not obtain specific performance against the United States, as it might against a private individual, its interest remains and might be vitally affected by any decree which might be entered in this case.*

Both parties are essential to the completion of this enterprise. Neither party could proceed with its completion without the cooperation of the other. Therefore, although the agreement is executed on the part of the city, in so far as the payment of its portion is concerned, questions will undoubtedly arise involving the future maintenance and upkeep of the memorial when it is completed, in which the city would have a vital interest.

This is not a suit by one of the parties to the contract, seeking to annul it, but by third parties, asserting a somewhat questionable interest, who attempt to defeat the carrying out of the agree-

ment. *It follows, we think, that before any final decree adjudicating the issues can be entered, all the parties to the contract must be before the court and be given an opportunity to be heard.* [Italics supplied.]

Both the language and the decision in the *Butler* case are directly applicable to the instant suit. The interest of the Minidoka Irrigation District unquestionably is to have the United States carry out its part of the agreement, and, while the Minidoka Irrigation District could not obtain specific performance against the United States, as it might have against a private individual, its interest remains and would be vitally affected by any decree which might be entered in this case.

In the *Ducker* case the plaintiffs sought to participate in moneys appropriated by Congress to compensate attorneys for their services in obtaining congressional recognition of a claim of the Confederate Band of Ute Indians. Congress had specified that all contracts or assignments upon which any claim for attorneys' fees were made must be approved by the Secretary of the Interior and the fees deemed reasonable by him. A contract between a Mr. Justis and the Indians and an assignment of a half interest therein to one Butler had been approved by the Secretary. The plaintiffs, claiming an interest in the fees by virtue of unapproved contracts between the plaintiffs and Justis, sought an injunction against the Secretary of the Interior to prevent distribution of any of the fund to the heirs or creditors of Justis. Neither Justis' estate nor his heirs had been made parties. After discussing the question

of the Secretary's discretion in determining the reasonable amount of fees to be allowed, this court stated:

In the second place, even as to the one approved contract of June 25, 1928, under which appellants claim, the bill is fatally defective because persons indispensable for the adjudication of the case have not been made parties. In the absence of indispensable parties dismissal of the suit is proper. (*Brady v. Work*, 263 U. S. 435, 437, 44 S. Ct. 168, 68 L. Ed. 375; *Gregory v. Stetson*, 133 U. S. 579, 587, 10 S. Ct. 422, 33 L. Ed. 792; *Webster v. Fall*, 266 U. S. 507, 45 S. Ct. 148, 69 L. Ed. 411; *Gruetich v. Butler*, 265 U. S. 388, 393, 44 S. Ct. 532, 68 L. Ed. 1068; *Minnesota v. Northern Securities Co.*, 194 U. S. 199, 235, 22 S. Ct. 308, 46 L. Ed. 499; *Utilities Production Corp. v. Carter-Oil Co.*, 10 Cir., 72 F. 2d 655, 661; *Chicago, M., St. P. & P. Ry. Co. v. Adams County*, 9 Cir., 72 F. 2d 816, 819.) A court should not adjudicate the rights or liabilities of a person unless he is actually or constructively before it. (*Shields v. Barrow*, 17 How. 130, 141, 15 L. Ed. 188; *Bogert v. Southern Pacific Co.*, 228 U. S. 137, 147, 33 S. Ct. 497, 57 L. Ed. 768; *United States v. Beahm*, 8 Cir., 253 F. 1, 7; *Washington v. United States*, 9 Cir., 87 F. 2d 421, 427.)

Indispensable parties are those who have an interest in the controversy "of such a nature that a final decree cannot be made without affecting the rights of such parties, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (See *Washington v. United States*, 9 Cir., 87 F. 2d 421, 427, for a discussion of the proper synonymous usage of "necessary" and

"indispensable." *Shields v. Barrow*, 17 How. 130, 139; 15 L. Ed. 158, followed in *Commonwealth Trust Co. v. Smith*, 266 U. S. 152, 159, 45 S. Ct. 26, 69 L. Ed. 219; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 235, 22 S. Ct. 308, 46 L. Ed. 499; *Niles-Bement-Pond Co. v. Iron Moulders' Union Local No. 63*, 254 U. S. 77, 80, 41 S. Ct. 39, 65 L. Ed. 145; *Waterman v. Canal Louisiana Bank and Trust Co.*, 215 U. S. 33, 48, 30 S. Ct. 10, 54 L. Ed. 80; *California v. Southern Pacific Co.*, 157 U. S. 229, 249, 15 S. Ct. 591, 39 L. Ed. 683; *Green v. McIntire*, 39 App. D. C. 249; *Balter v. Ickes*, 67 App. D. C. 112, 114-115, 89 F. 2d 856, 858-859, certiorari denied, 301 U. S. 709, 57 S. Ct. 941, 81 L. Ed. 1363; 7 Hughes; Federal Practice (1931); Sec. 4296. Cf. Rule 19, Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c; 2 Moore; Federal Practice (1938) 2133, 2142; 2 Edmunds, Federal Rules of Civil Procedure (1938) 821.)

The claims of appellants, and of Appellee Butler as well, depend upon the approved contract between Justis and the Ute Indians. As Justis is dead his estate is vitally interested in any determination which may be made of the amount to be allotted by the Secretary of the Interior on account of that contract. Any decree granting to appellants a share of the fund must necessarily affect the interest of the estate in the fund, and, consequently, it is an indispensable party. (Cf. *Williams v. Bankhead*, 19 Wall. 563, 570-572, 22 L. Ed. 184; *Pilger v. Sutherland*, 61 App. D. C. 84, 87, 57 F. 2d 604, 607.) In fact, appellants' theory of action rests in part upon the contention that Justis' estate is insolvent, and the clearly revealed purpose of

the suit is to prevent any part of the fund being distributed to it. Under the circumstances it is obvious that the estate, the heirs, and any possible creditors, have a vital interest in the controversy. It is equally obvious that the final decree sought in the present case cannot be made without affecting their interest, and that a final termination of the case pleaded may be wholly inconsistent with equity and good conscience, unless an opportunity is afforded to a representative of the estate of Justis to contest the validity of the contracts under which appellants claim, and to challenge the amount claimed thereunder. (*Russell v. Clarke's Executors*, 7

Cranch 69, 98, 8 L. Ed. 271.) Moreover, even if the case were one in which appellants were entitled to the relief sought, the estate would be an indispensable party for a further reason, i. e., in order that the decree might constitute a proper acquittance to the Government. It is well settled that where one claims a right in a fund held by a Government officer "the party who has been designated by compact or otherwise as the person entitled to the fund, but whose right to receive it is denied or disputed, should be made a party so as to bind him and afford proper acquittance to the government." (See *Doerschick v. Mellon*, 60 App. D. C. 383, 386, 55 F. 2d 741, 744; *Harrison v. Ormes*, 252 U. S. 469, 473, 40 S. Ct. 369, 64 L. Ed. 667; *Mellon v. Orinoco Iron Co.*, 286 U. S. 121, 126, 45 S. Ct. 53, 69 L. Ed. 199; *Morganthau v. Fidelity & Deposit Co.*, 68 App. D. C. 163, 165, 94 F. 2d 632, 634.) [*Ducker v. Bates*, 104 F. (2d) 236, 238-239, — App. D. C. March 20, 1939.)]

The *Ducker* case is clearly applicable to the instant question. Here the Minidoka Irrigation District is the party designated by contract, which has a claim to some of the funds which were derived from the sale of outside power to the Minidoka Irrigation District and which are now held by the Secretary of the Interior under the temporary injunction in this case and 95.6 percent of which the appellant seeks to have credited to it rather than 100 percent to the Minidoka District. As such, the Minidoka Irrigation District, under the decision of the *Ducker* case, is clearly an indispensable party. Furthermore, as the court pointed out in the *Ducker* case, the Minidoka Irrigation District "would be an indispensable party . . . * * * in order that the decree might constitute a proper acquittance to the Government. It is well settled that where one claims a right in a fund held by a Government officer, the party who has been designated by compact or otherwise as the person entitled to the fund, but whose right to receive it is denied or disputed, should be made a party so as to bind him and afford proper acquittance to the government."

The courts are consistent in their rulings that all parties affected by an instrument or agreement are indispensable parties to a suit attacking that instrument or agreement. For additional authorities see:

Central R. R. Co. of New Jersey v. Mills, 113 U. S. 249;
Northern Indiana R. R. Co. v. Michigan Central R. R. Co., 15 How. 232;
Transcontinental & Western Air, Inc. v. Parkersburg, 71 F. (2d) 288 (C. C. A. 2d) cert. den. 298 U. S. 603;

Egyptian Novaculite Co. v. Stevenson, 8 F. (2d) 576 (C. C. A. 8th);
State of Missouri v. New Madrid County, 73 Fed. 304 (C. C. E. D. Mo.);
Stenbach v. Prudential Ins. Co. of America, 172 N. Y. 471, 65 N. E. 281;
Columbia Water-Power Co. v. Columbia Electric-St. Ry. Light and Power Co., 43 S. C. 154, 20 S. E. 1062;
Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 N. W. 751.

Moreover, in the cases wherein the plaintiff seeks, as does the Burley Irrigation District in this suit, to require or to enjoin disposition of a fund or of property to which there are other claimants, it is well established that the other claimants are indispensable parties.

Brady v. Work, 263 U. S. 435, 437;
New Mexico v. Lane, 243 U. S. 52, 53;
Williams v. Bankhead, 19 Wall. 563, 22 L. Ed. 184;
Leitchfield v. Register and Receiver, 9 Wall. 575, 578;

J. C. Ebb, Ltd. v. Coe, — F. (2d) —, — App. D. C. — (June 30, 1939);

Russell v. Clark's Ex'rs, 7 Cranch 69, 3 L. Ed. 271;

Raphael v. Trask, 118 Fed. 678 (C. C. S. D. N. Y.);

Mahr v. Norwich Union Fire Ins. Soc., 127 N. Y. 452, 26 N. E. 391;

Mfgs' Light & Heat Co. v. Lemasters, 91 W. Va. 1, 112 S. E. 201.

Under both the law and the facts of this case, therefore, it is clear that the Minidoka Irrigation District

is an indispensable party. Nor does any element make itself evident in this case which will enable the court to assume jurisdiction despite the lack of an indispensable party. Even in cases where the substantive law question has been undisputed, the Supreme Court of the United States has refused to enter a final decree in the absence of interested parties. *New Orleans Water Works v. New Orleans*, 164 U. S. 471. In that case the plaintiff sought a decree against the City of New Orleans to declare void ordinances permitting water pipes to be laid in the streets by certain property owners and to require the City to cancel licenses to do so as being in derogation of the plaintiff's rights under a contract with the City. In two previous cases involving the same plaintiff and other parties who were present before the court, the ordinances had been declared void insofar as the plaintiff's rights were concerned. Nevertheless, the court held that it was without jurisdiction in this case because all the property owners whose licenses were being threatened were interested parties and had not been joined.

Nor, of course, is the court justified in assuming jurisdiction and proceeding to dispose of the case in the absence of an indispensable party solely because of the impossibility of joining all the indispensable parties. This proposition is reiterated by practically every decision dismissing a suit because an indispensable party was absent. See particularly:

State of Texas v. Interstate Commerce Commission, 258 U. S. 158;

Minnesota v. Northern Securities Company, 184 U. S. 199;

Northern Indiana Railroad Co. v. Michigan Central Railroad Co., 15 How. 232;

Balter v. Ickes, 89 F. (2d) 856, 67 App. D. C. 112, cert. denied 301 U. S. 709.

Furthermore, it cannot be argued that this suit constitutes merely an attack upon the authority of a Federal officer. The Supreme Court of the United States has definitely discarded such reasoning if used in an attempt to justify proceeding judicially in the absence of a party to whom the litigation would be of "immediate concern." In the case of *State of Texas v. Interstate Commerce Commission*, 258 U. S. 158, a suit had been brought against the Interstate Commerce Commission to have its rulings on wages declared unconstitutional. This was a direct attack on the power of a Federal agency. But since the employers and employees operating under those rulings to whom any decree would be of "immediate concern" had not been joined, the suit was dismissed for lack of indispensable parties.

It is indubitable, therefore, that in every conceivable aspect of this case the Minidoka Irrigation District is an indispensable party without whose presence the court is unable to enter a final decree which will be consistent with equity and good conscience. Any attempt so to do will unavoidably and substantially affect the interests of an absent party and will adjudicate rights without affording the party affected the right to a hearing. In those circumstances, the bill must be dismissed for absence of an indispensable party, without whom the court has no jurisdiction over the cause.

B. The Idaho Power Company receives valuable rights and benefits under its contract of October 1, 1934, with the United States, which rights and benefits are jeopardized in this proceeding, thereby constituting the company an indispensable party without whom the court cannot proceed.

The authorities and precedents concerning indispensable parties have been cited and analyzed in the preceding subsection, in connection with the status of the Minidoka Irrigation District. Those authorities may likewise be applied to the facts surrounding the relationship of the Idaho Power Company to this proceeding (R. 174).

In its contract of October 1, 1934, with the United States,¹⁰ the Idaho Power Company agreed that the contract might be terminated by the United States in several ways: by construction by the Government of a power plant at the American Falls Dam, or by two years' written notice, or by six months' written notice in specified circumstances (Par. 3 C, R. 77). Those circumstances, which alone permit termination on six months' notice, are "a final court decision or final court decisions (A) holding (1) that the Secretary cannot lawfully secure an annual net income of \$50,000 to reimburse the United States for the use of the Black Canyon Plant by assessments or charges as an item of reservoir operation and maintenance cost against the parties who are benefited by the water saved hereunder, and also holding (2) that the Secretary cannot lawfully secure such income by sale of the power furnished under Article 3 and Section B thereof, to the Minidoka Irriga-

¹⁰ The contract is defendant's Exhibit No. 10, certified to this court, and is also printed in the record, pages 71-79, as Exhibit No. 7 to the bill of complaint.

tion District; or (B) holding that the Secretary may not discontinue or reduce the nonirrigation season use of the power plant at Minidoka Dam in order to conserve the flow of Snake River for storage, for the purpose of irrigation, in the American Falls Reservoir for the benefit of the contracting parties therein, and in the proposed reservoir in the North Fork, if and when it is built. * * *

It is obvious that the relief sought by the appellant in this case is precisely that which, if granted, would call into operation the six months' cancellation clause of the Idaho Power Company's contract. It is equally obvious that, under the authorities to which reference has already been made, the interests to which reference in its contract would be vitally affected by reason of the creation of an otherwise nonexistent power to terminate the contract on short notice.²⁰ Therefore, if the company's rights under the contract are substantial, it clearly is an indispensable party to this proceeding, in which it has not been joined.

That the company's rights under the 1934 contract are eminently substantial is apparent from a mere recitation of some of them. Under the contract the company is entitled to use for power purposes, through

²⁰ There is no evidence or citation of statute showing that Congress has appropriated any funds for construction of a Government power plant at the American Falls Dam, and the fact is that Congress has not appropriated funds for that purpose. Under familiar doctrine it cannot, of course, be assumed that Congress will appropriate funds for any such purpose. This court, therefore, cannot assume that the United States is able, in fact, to terminate the contract under the clause providing for cancellation in the event of construction of such a plant.

its American Falls plant, all water released from the Government's American Falls Reservoir, a right otherwise nonexistent (Par. 3, R. 75); by the effected extension of the otherwise expired contract of April 10, 1930 (plaintiff's Exhibit No. 6, certified to this court) for delivery of power from the Government's Black Canyon Power Plant, the company is entitled to receive large quantities of power from the Black Canyon Plant (Par. 3B-1, R. 76); the company is assured that the United States will not invade, beyond a limited point, the company's power market outside of the Minidoka Project (Par. 3C, R. 77-78), and the company is entitled to receive certain substantial payments for the delivery of "break-down power" on the Minidoka Project (Par. 3B, R. 76).

It is abundantly clear, consequently, that the Idaho Power Company would be deprived of an existing contractual right to secure substantial benefits, for a period of at least two years, if the appellant were to secure the relief which it seeks, and that, therefore, the company is an indispensable party.

C. The court is without jurisdiction since this action seeks to compel the United States specifically to perform its contract of March 15, 1926, with the Burley Irrigation District.

The direct purpose of this suit is to require the United States specifically to perform its contract with the Burley Irrigation District of March 15, 1926,²¹ as interpreted by the appellant. The United States not having consented to such suit, the law is clear that the United

²¹ The contract has been certified to this court as defendant's Exhibit No. 6 and it also appears in the record as Exhibit A to the answer (R. 121-152).

States cannot be compelled, by a suit against its officers, specifically to perform its contracts, and the court is therefore without jurisdiction.

1. This action seeks to compel the United States specifically to perform its contract

a. The contract of March 15, 1926, is the sole source of any right in the appellant to secure a credit of any power profits

The appellant asserts four sources of its right to receive a credit of power profits:

(1) Subsection I of section 4 of the Fact Finders' Act of December 5, 1924 (Second Deficiency Act of 1924) (43 Stat. 703, Sec. 501, Tit. 43, U. S. C.);

(2) The provision in the Interior Department Appropriation Act of 1927 relating to the Minidoka Project (act of May 10, 1926, 44 Stat. 480);

(3) The Contract between the United States and the Burley Irrigation District of March 15, 1926; and

(4) The decision in *Wilbur v. Burley Irrigation District*, 58 F. (2d) 871, 61 App. D. C. 145.

No other source of such a right is suggested and none exists.

Examination of the statutes, the contract and the aforesaid court decision, on which appellant relies, reveals that the rights of the Burley Irrigation District to secure any profits at all stem solely and entirely from the contract of 1926 and that the statutes and the court decision are, at the most, only points of reference which, in the absence of the contract, would have been insufficient to accord any rights to the Burley Irrigation District.

Subsection I of section 4 of the Fact Finders' Act of December 5, 1924, *supra*, states:

Subsec. I. [*Profits from projects taken over by water users.*—That whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid [43 Stat. 703, sec. 501, Tit. 43, U. S. C.].

This provision states that the net profits are to be credited to *water users*. But the Burley Irrigation District is not a water user; it is an association of water users. Hence, the Burley Irrigation District could not come within the terms of subsection I without some contractual arrangements enabling the Burley Irrigation District to qualify as a water user. But even more important, subsection I states that the credits are to be made on account of construction charges. The Burley Irrigation District, however, never owed any construction charges to the United States except under its contract with the United States of March 15, 1926. The

Burley Irrigation District first assumed the obligation of construction indebtedness by virtue of section 9 of that contract (R. 128, 129).

We submit that it is, therefore, clear that the only rights which the Burley Irrigation District ever acquired arise solely from its contract of March 15, 1926. It was that contract which first created any indebtedness of the Burley Irrigation District to the United States on which credits of power profits could be made; and it was only by that contract that the Burley Irrigation District acquired any rights to secure the credits which otherwise were due to its individual member water users.

Furthermore, this statutory provision makes it mandatory upon the Secretary of the Interior to credit to the construction charge of the project the total accumulated net profits derived from the operation of project power plants and the leasing or sale of project lands and town sites as well as the future net profits from such sources *only* when the water users have taken over the care, operation, and maintenance of the project. The clear implication, therefore, is that the water users have no *right* to demand such credits *until* they have taken over the care, operation, and maintenance of the project or a division thereof. But, up to now, the Burley Irrigation District has taken over only the minor features of the project and of the South Side Pumping Division, namely:

The three branch distribution canals known as the G, H, and J canals of the division;
The laterals therefrom; and

The three pumping plants connected with the division known as First Lift, Second Lift, and Third Lift Pumping Plants (R. 178, 273).

It has not taken over the following principal features which are now and always have been operated and maintained by the United States:

Jackson Lake Reservoir and Jackson Lake Dam;
American Falls Reservoir and American Falls Dam;
Lake Walcott Reservoir;
Minidoka Dam;
Minidoka Power Plant and all power works and distribution facilities in connection therewith;
Headworks of both the North Side and South Side canals; and
Main South Side Canal from the Minidoka Dam to the pumping plants;
West Canal from the South Side Canal to Snake River (R. 178, 272-273).

It seems apparent, then, that the statute created no right, certainly no self-executing right, in the appellant to any power profits.

Still another ground establishing that the Burley Irrigation District acquired no rights merely by virtue of subsection I is contained in the last sentence of subsection I which expressly states:

No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid.

The effect of this proviso on the crediting of power profits was recently construed by this court in the case of *United States ex rel. Shoshone Irrigation District v. Ickes, Secretary of the Interior*, 70 F. (2d) 771, 63 App. D. C. 167, cert. denied 293 U. S. 571. In that case, this court, making indisputable reference to the plaintiff irrigation district, quoted subsection I of section 4 of the Fact Finders' Act of December 5, 1924, and then stated:

It will be observed that, by the express terms of this act, applicable to irrigation projects generally, no distribution of net profits from the operation of the power plant would be made to individual water users until all obligations to the government have been paid. In other words, the operation of the statute was suspended pending the final payment of the obligations of the respective water users to the government.

For these various reasons it is clear that the Burley Irrigation District has acquired no rights to demand net power profits merely by reason of that statute.

Nor can the Burley Irrigation District base any claim to current net profits on the provision in the Interior Department Appropriation Act of 1927, *supra*, which relates to the Minidoka Project. That provision specifies:

[*Minidoka project—Application of net proceeds from power plants, etc., to pay water-right charges.*]—Minidoka project, Idaho: * * * Provided, That the accumulated net profits as determined by the Secretary of the Interior,

arising under the project, derived from the operation of the project power plants, leasing of Government grazing and farm lands, the sale and use of town sites, and from all other sources, shall be applied by the Secretary of the Interior, so far as may be necessary, in payment of any water-right charges due the United States by any individual water user or irrigation district to whose benefit personally or in the aggregate such accumulated profits should equitably accrue in the judgment of the Secretary of the Interior, whose decision shall be conclusive. Any surplus of such accumulated net profits and future profits from such sources shall be applied as provided by Subsection I, section 4, Act of December 5, 1924 (Forty-third Statutes, page 701). [Act of May 10, 1926, 44 Stat. 480.]

This section of the Interior Department Appropriation Act of 1927 gave the Burley District a right to demand that credits be made on construction charges *only* from the net profits *accumulated* as of the date of passage of the Appropriation Act of 1927. The act specifically provided that "any * * * future profits * * * shall be applied as provided by Subsection I, section 4, Act of December 5, 1924." Here also, therefore, it is clear that this section does not, of itself, establish the right of the Burley District to demand any of the profits which it now seeks, all of which accrued or will accrue after the date of this statutory provision.

By virtue of the contract between the United States and the Burley Irrigation District of March 15, 1926, however, the Burley Irrigation District does have a valid claim to net profits when determined by the Sec-

retary. The sections of that contract pertinent in this regard are sections 8 (a), 8 (b), and 8 (c) (R. 123, 124).

Under sections 5 and 6 of that contract of March 15, 1926, the care, operation, and maintenance of certain minor works, listed above, were transferred to the Burley Irrigation District. Although these transferred works did not constitute the major portion of the project works or of the works of the South Side Pumping Division, the Secretary nevertheless agreed, under section 8 (a) of the contract, to determine and announce the total accumulated net profits in accordance with subsections I and J of the Fact Finders' Act of December 5, 1924, and, under section 8 (c) of the contract, to determine and announce the net profits realized in the future, namely, after April 1, 1926. The administrative interpretation accorded by the Secretary of the Interior to subsection I of the Fact Finders' Act, therefore, is that the accumulated net profits *could* be legally credited to the Irrigation District as soon as even incidental works of the project had been transferred. It was not deemed necessary, before these profits *could* be accorded to the districts, for the districts to have taken over the care, operation, and maintenance of the entire project or entire divisions thereof. The contract of 1926 alone provided that those profits *would* be credited to the District. Hence, it is clear that the rights of the Burley Irrigation District to claim net profits as determined by the Secretary of the Interior are based solely on the contract of March 15, 1926. Prior to that contract the Burley Irrigation District

had no rights to make any demand as to the crediting of the power profits or any other profits.

Turning now to the last source from which the appellant claims a right to profits, we find that the *only* function of the decision of *Burley Irrigation District v. Wilbur*, *supra*, was to make perpetual the *percentage* of net profits from the Minidoka Power Plant to which the Burley Irrigation District would be entitled. In crediting profits under the contract, the Secretary had determined to do so on a basis of awarding 95.6 percent of the net profits to the Burley Irrigation District and 4.4 percent to the Minidoka Irrigation District. Later, the Secretary attempted to change the percentage of distribution of those profits. The Burley Irrigation District objected to any such change and secured an injunction against the then Secretary. The sole issue in the case of *Burley Irrigation District v. Wilbur*, therefore was whether the Secretary, after a decision once made by himself or his predecessors, had power to alter that decision. The court, in holding that the Secretary had no such power, decided only that issue and none other. It did not establish a right to receive power profits; it merely defined the extent of a right already existent.

It is indubitable, therefore, that the right of the Burley Irrigation District to claim any current net profits stems solely from the contract of March 15, 1926.

b. *The prayers of the appellant for judgment constitute a demand for specific performance of the contract of March 15, 1926*

The appellant's prayers for judgment, both on the appellant's theory of this case and on the appellee's theory

of this case, constitute a demand for specific performance of the contract of March 15, 1926, in the distribution of profits in the ratio of 95.6 percent to the Burley Irrigation District and 4.4 percent to the Minidoka Irrigation District pursuant to the Secretary's conclusive and final determination of that ratio as applicable to the distribution of profits under the contract. In its bill of complaint, the appellant prays an injunction restraining the Secretary from crediting any power profits to anyone except to the two irrigation districts in the ratio of 95.6 percent to the Burley and 4.4 percent to the Minidoka Districts, and from "failing to credit" to the Burley District a full 95.6 percent of the profits from all power sales no matter what the source of the power (R. 36, 37). The prayer seeks affirmative relief, an injunction to *compel* the appellee to make certain credits which he has not made.

The appellant is therefore proceeding on the theory that the Burley Irrigation District is not being credited with 95.6 percent of the profits to which it is entitled. We have shown, however, that it is entitled to nothing except under the contract of March 15, 1926. Hence it is clear that any demand to require the appellee to credit the Burley Irrigation District with the proportion of profits which it demands is and can be nothing more or less than a demand to require the specific performance of the contract.

The appellee's theory of this case is that the Burley Irrigation District, receiving the full 95.6 percent of the profits to which it is entitled, is seeking to require the Secretary of the Interior to conform to the contract

with respect to revenues not found to be part of the net project profits. But here also it is equally clear that any demand to require the Secretary of the Interior to credit nonproject profits according to the manner in which project profits are credited under the terms of the contract is an attempt to force the United States specifically to perform that contract, for from no other source has the appellant any right to any profits.

c. *The United States is the party to the contract of which specific performance is sought and to the real party in interest*

Although this suit is nominally against the Secretary of the Interior, the United States is the real party in interest. This becomes apparent merely by glancing at the contract of March 12, 1926, which determines the rights of the appellant of which it seeks performance. This contract is one between the *United States* and the Burley Irrigation District. Indeed, the very first words of the contract are: "This agreement made this 15th day of March, 1926, between the UNITED STATES OF AMERICA, herein called the United States * * *". Throughout the contract, there is continual reference to the United States. In no instance does any provision read that the contract is with the Secretary of the Interior instead of being a contract solely with the United States. Moreover, the contract is signed for the Government only by the UNITED STATES OF AMERICA acting through its Interior Department representative. Furthermore, the credits to the Burley Irrigation District are made by the United States upon the announcement and determination by the Secretary of the Interior of the net profits for each year. The direct effect of the

injunction here sought, therefore, would be to compel the United States specifically to perform its obligation to make such credits. Indeed, from a practical standpoint, the injunction, if granted, may very well result in compelling the United States also specifically to perform its obligation, under articles 7 and 37 of the contract, to operate the Minidoka Power Plant. Clearly, the United States is the real party interested in the contract of March 15, 1926, of which specific performance is sought.

2. *No suit requiring the United States specifically to perform its contract can be maintained without its consent*

The Supreme Court of the United States has enunciated its firm adherence to the proposition that a suit against either a State or the United States the effect of which is to enforce the specific performance of a contract is one which cannot be maintained without the consent of the State or the United States, respectively.

Wells v. Roper, First Assistant Postmaster General, 246 U. S. 335, affirming *idem*, 44 App. D. C. 276;

Pennoy v. McConaughy, 140 U. S. 1;

In re Ayers, 123 U. S. 443;

Hagood v. Southern, 117 U. S. 52;

Louisiana v. Jumel, 107 U. S. 711.

In the *Ayers* case, the Supreme Court decisively stated:

* * * But where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific

performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution. [*In re Agers*, 123 U. S. 443, 504.]

Recently this court applied this principle in *United States ex rel. Shoshone Irrigation District v. Iches*, 70 F. (2d) 771, 63 App. D. C. 167, cert. denied 293 U. S. 571. In that case the plaintiff irrigation district brought an action for a writ of mandamus to compel the Secretary of the Interior to credit annually to the plaintiff irrigation district the profits derived from the sale of power generated at the power plant in connection with the Shoshone Irrigation Project. These profits were to be credited to the irrigation district and applied annually to its construction charge by virtue of the provisions of section 31 of its contract with the United States:

Should any net profits be realized by the United States from any of the various sources named in subsections I and J of said Act of Congress of December 5, 1924, the same will be announced and determined each year in a written statement to be sent to the district. The portion of such net profits, if any, as determined by the Secretary, shall be credited each year as follows: (a) On the annual installment project construction charges (including the construction charges payable by nonconsenting application landowners)

of the district beginning with the installment first coming due and continuing with succeeding construction installments as far as such credit will go, until the entire construction indebtedness of the district has been paid. [*United States ex rel. Shoshone Irr. Dist. v. Iches*, 70 F. (2d) 771, 772, 63 App. D. C. 167.]

This court held that the suit in the *Shoshone* case was in the nature of an action to compel the specific performance of a contract between the plaintiff irrigation district and the United States, and, in affirming the denial of the writ of mandamus, stated:

The suit here is in the nature of an action to compel the specific performance of a contract between plaintiff company and the United States. Such a suit is one against the United States, and one in which the courts are without jurisdiction, unless specially accorded jurisdiction by authority of Congress, which has not been done in this case. It is elementary that, where the purpose of a suit is in effect to enforce the specific performance of a contract, this cannot be accomplished by indirect actions, either against federal officers or by mandamus.

The terms of section 31 of the Shoshone contract, it must be noted, are almost identical with those of section 8 (c) of the contract of March 15, 1926, from which arise the Burley Irrigation District's rights to current net profits derived from power generated at the Minidoka Power Plant. Furthermore, both contracts were made with reference to the provisions of Subsection I

of section 4 of the Fact Finders' Act of December 5, 1924, and both contracts had provisions authorizing the irrigation districts to take over the care, operation, and maintenance of portions of the project. Except for the fact that in the *Shoshone* case the action was for a writ of mandamus whereas the present action is for an injunction, there is no possible distinction between the *Shoshone* case and this suit.

But that is a distinction without a difference.

Unquestionably, the criterion is whether the suit is an attempt, *direct or indirect*, to compel the United States specifically to perform its contract. It is immaterial whether the form of the action is designed to evoke an injunction or a writ of mandamus.

Wells v. Roper, First Asst. Postmaster Gen. of the U. S., 246 U. S. 335, 337;

In re Ayers, 123 U. S. 443, 502-503;

Boeing Air Transport v. Farley, Postmaster Gen., 75 F. (2d) 765, 768, 64 App. D. C. 162, followed in *Fennia Airlines, Inc., v. Farley, Postmaster Gen.*, 75 F. (2d) 769, 64 App. D. C. 166, *cert. den. Pacific Air Transport v. Farley*, 294 U. S. 728;

Transcontinental & Western Air, Inc., v. Farley, 71 F. (2d) 288 (C. C. A. 2d, 1934), *cert. den.* 293 U. S. 603.

The appellant may perhaps suggest that *Ickes v. Fox*, 300 U. S. 82, on which appellant relies heavily, supports its contention that this suit is not one for specific performance of a contract by the United States.

The *Fox* case, however, is not applicable. Careful examination of the record in this case shows clearly that

it is within the scope of the cases above cited which were not mentioned or overruled by the court in *Ickes v. Fox*.

Furthermore, in the *Fox* case, the court relied on the fact that, according to the unproved but admitted allegations of the bill of complaint, the plaintiffs there had a property right in water, and held that where the suit was to protect a property right, it was not an instance in which plaintiffs sought to compel the United States specifically to perform a contract. In this case, however, as we have already shown, the appellant has no property right in the power plant, or in the dam or in the water. Appellant's only right is the right to receive profits pursuant to its contract with the United States. This case, then, is on all fours with the *Shoshone* case and the others cited and is not within the purview of the decision in *Ickes v. Fox*, or within the scope of *Philadelphia Co. v. Stimson*, 223 U. S. 605, and the other authorities cited in the *Fox* case.

All the other authorities here cited clearly and conclusively bear out the appellee's contention that this is a suit for specific performance. If the appellant's prayers be granted, this suit, though nominally against the Secretary of the Interior, will directly require the United States specifically and affirmatively to perform its contract of March 15, 1926, with the Burley Irrigation District. Hence this court is without jurisdiction and should affirm the decree of the District Court dismissing the plaintiff's suit.

CONCLUSION

By reason of all the foregoing points, it is respectfully submitted that the decision of the court below was correct and should be affirmed.

Respectfully submitted.

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Dated JANUARY 25, 1940.

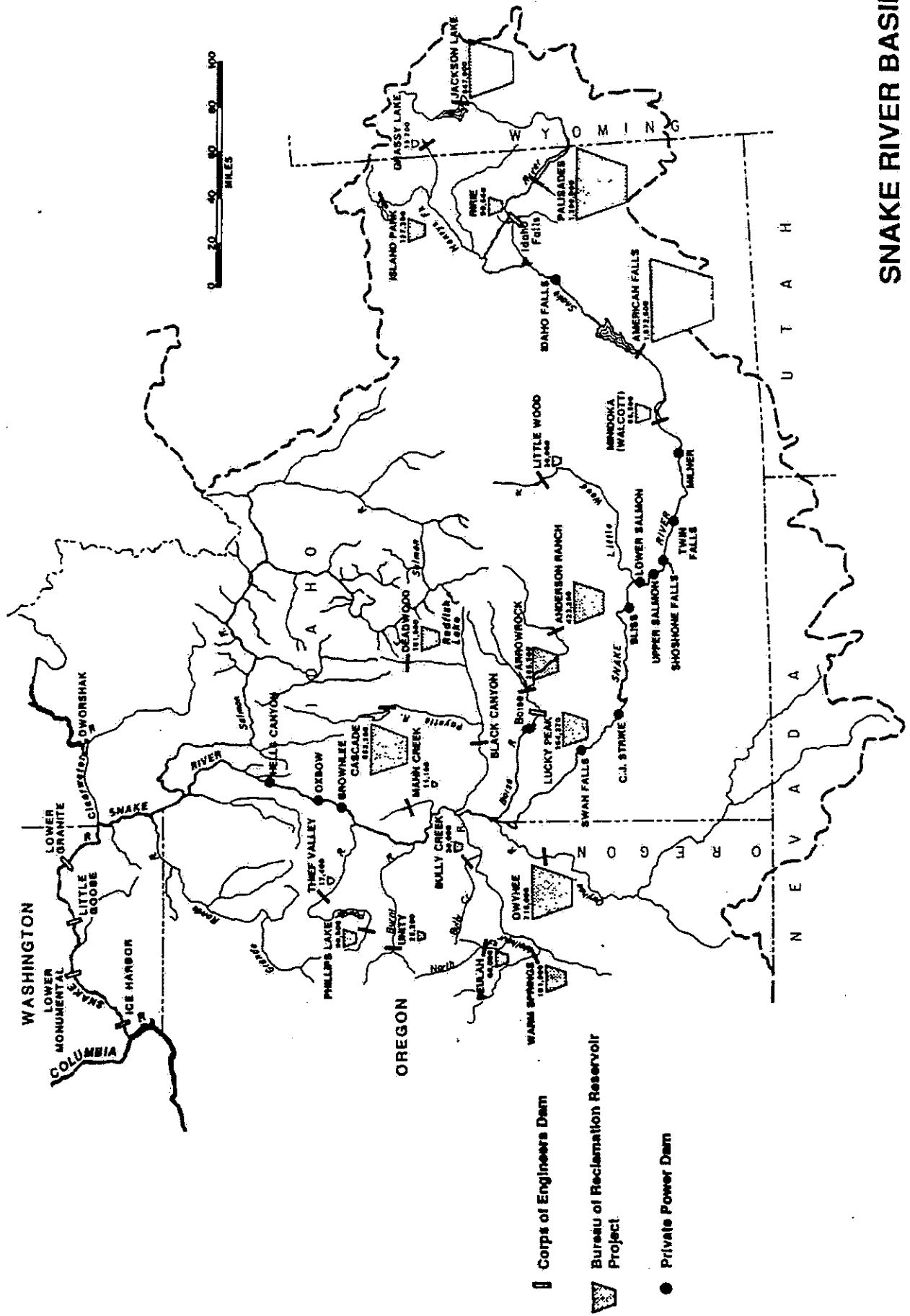
Exhibit K

**The Upper Snake River Basin: A Description
of Bureau of Reclamation System Operations
Above Milner Dam 32–34 (Jan. 1996)**

The Upper Snake River Basin

A Description of Bureau of Reclamation System Operations Above Milner Dam

Bureau of Reclamation
Boise Idaho
January 1996
(revised December 1977)



Acronyms and Abbreviations

BPA	Bonneville Power Administration
cfs	Cubic feet per second
Corps	U.S. Army Corps of Engineers
ESA	Endangered Species Act
FCRPS	Federal Columbia River Power System
FERC	Federal Energy Regulatory Commission
IDFG	Idaho Department of Fish and Game
IDWR	Idaho Department of Water Resources
IPC	Idaho Power Company
IWRB	Idaho Water Resources Board
kW	Kilowatt
NMFS	National Marine Fisheries Service
Reclamation	Bureau of Reclamation
RMP	Resource Management Plan
SOP	Standing Operating Procedures
USFS	U.S. Forest Service
USFWS	U.S. Fish and Wildlife Service
USGS	U.S. Geological Survey

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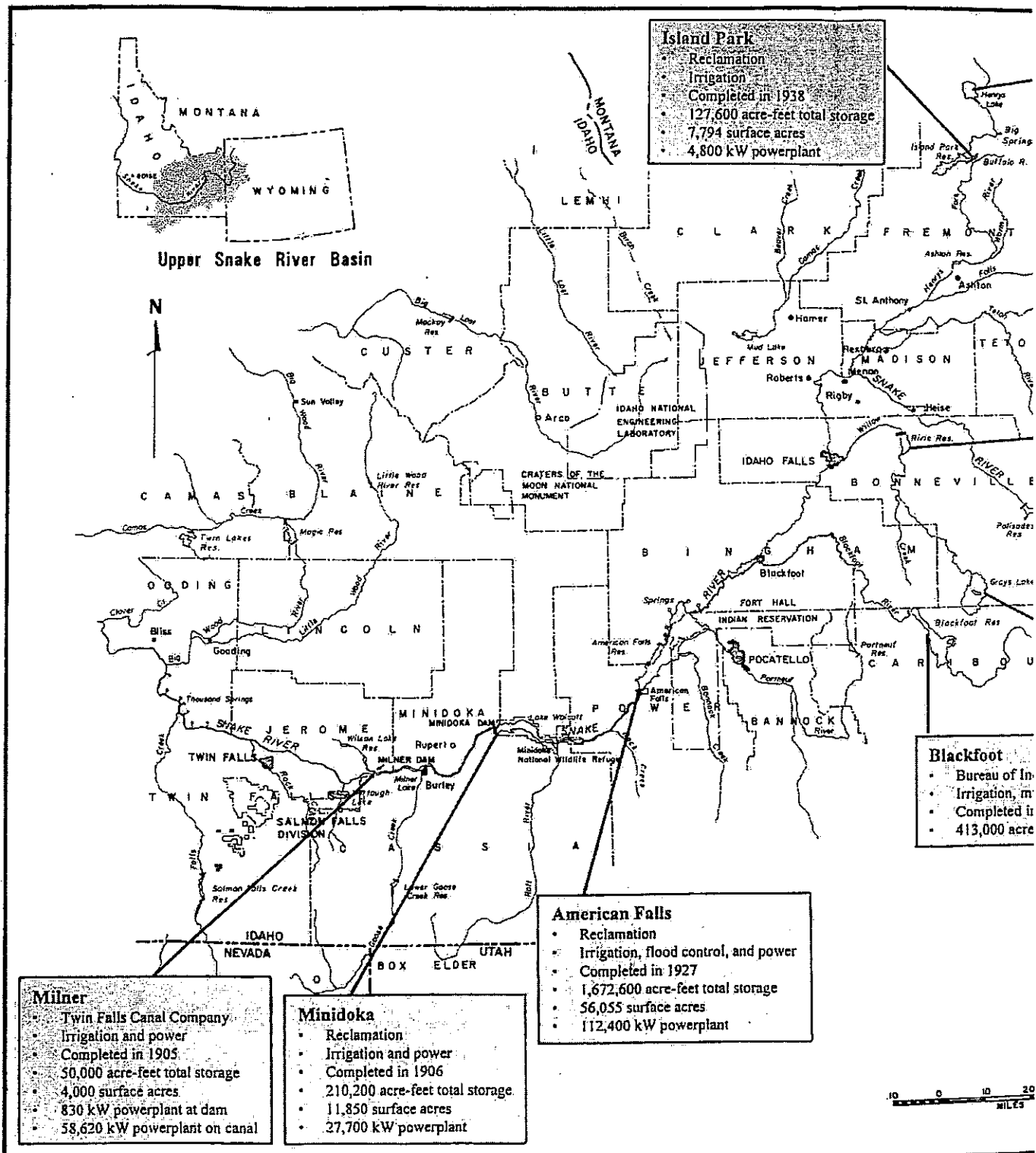
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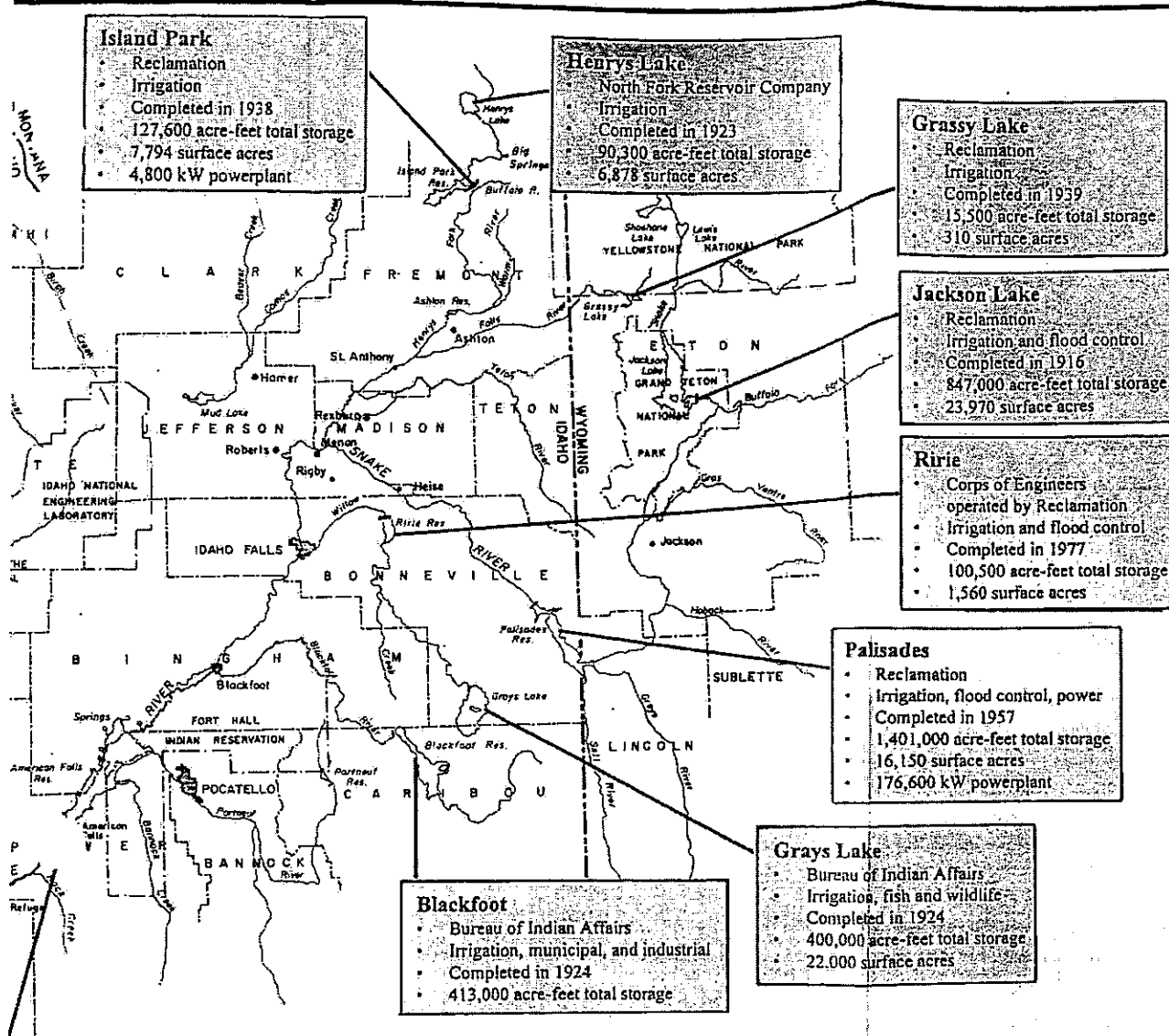
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Upper Snake River Basin
Major Storage Facilities
Above Milner Dam

I. Introduction

This report is intended as an overview of the operation of the Snake River/Federal storage system above Milner Dam. Increasing demands and controversy over the use of Snake River resources require an understanding of the history of water development, river hydrology, characteristics of the dams and reservoirs, and the legal and institutional requirements for operation of the current system. Water operations in the past focused on out-of-stream diversions to irrigate land and flood control. In recent years, additional demands on the water resource have focused primarily on instream uses including recreation and recovery of endangered species. Since 1991, the Bureau of Reclamation (Reclamation) has been asked to provide water to augment flows in the lower Snake River for enhancement of endangered salmon. Part of this water is being provided from the upper part of the Snake River basin. Reclamation also has been asked to modify operations to accommodate other species listed under the Endangered Species Act (ESA). Groups representing resident fishery, white water rafting, and water quality interests are asking for system operation changes to better accommodate their concerns.

This document focuses on the Snake River in the reach upstream from Milner Dam which is located near Burley, Idaho. This region is designated as Water District 01 by the State of Idaho and closely corresponds to the reach of the Snake River where a majority of the diversions from the main stem are for irrigation of lands and where most of the main stem reservoir storage is located. Irrigated lands further downstream in the Snake River basin, except those watered by diversions from the Milner pool, are watered from tributaries and storage development on those tributaries, e.g., the Boise, Little Wood, Owyhee, and Payette Rivers in Idaho and several streams in eastern Oregon. This document does not consider system operation of the Snake River downstream from Milner Dam.

Consumptive use of the Snake River is primarily for agriculture. However, it is important to recognize that less than one-half of the irrigated land in the upper Snake River basin¹ was developed under Federal authorities. The majority of the irrigation development in the upper Snake River basin is private development which relies on natural flow rights and ground water pumping. Federal irrigation development, in contrast, applies to those lands that were mostly privately developed but rely on storage rights for either a supplemental water supply or a full water supply. Several points, which are further developed throughout this document, should be kept in mind in considering Reclamation operation of the upper Snake River system:

- Irrigation water rights are appurtenant to the land, and the Federal Government does not hold most of these. Reclamation does hold storage rights at Reclamation dams.
- Water rights are administered by the State; Reclamation law, beginning with the 1902 Reclamation Act, requires Reclamation to comply with state law with regard to control, appropriation, use, and distribution of waters.
- Use of federally developed storage is closely controlled by three factors:
 - Federal authority for operation of the Federal facilities as enacted by the Congress
 - State water rights
 - Contracts for storage.

¹Upper Snake River basin and upper Snake River are used throughout this report to indicate the Snake River and basin located upstream from Milner Dam. See chapter VII (Glossary) for additional definitions.

- Of almost 2.5 million acres irrigated upstream from Milner Dam, less than 1.1 million acres receive water from Reclamation storage, and only 210,000 acres receive a full water supply from Reclamation storage.

This paper is organized to provide more detailed information in succeeding chapters. Chapter II provides a description of the area, and chapter III provides a short history of water resource development upstream from Milner Dam. Major

Federal and private facilities and water rights are discussed in chapter IV. Chapter V adds a general discussion of river system operations and includes a series of graphs of reservoir levels and river flows to illustrate the effects of water supply. River operations by function are expanded in chapter VI. Chapter VII identifies several issues related to operation of the Snake River/reservoir system. A list of acronyms and abbreviations appears at the front of this document and a glossary of hydrologic and other terms follows chapter VII as an aid to the reader.

II. Description of Area

Geography

The Snake River originates in Yellowstone National Park at an elevation in excess of 9,500 feet, flows south through western Wyoming, turns west and curves north in Idaho, and north of Idaho Falls curves south to make an arc through southern Idaho (see Snake River Basin and Major Storage Facilities above Milner Dam maps). At the Oregon border, the Snake River turns north, forming much of the border between Idaho and Oregon and a short portion of the border between Idaho and Washington. From Lewiston, the river makes an arc to join the Columbia River near the tri-cities of Richland, Pasco, and Kennewick, Washington. The Snake is the largest tributary of the Columbia River.

In Wyoming, the major tributaries to the main stem Snake River (sometimes referred to as the South Fork) are the Buffalo Fork, Gros Ventre, Hoback, Greys, and Salt Rivers. North of Idaho Falls, the main stem is joined by the Henrys Fork (often referred to as the North Fork) which flows from the north. The Henrys Fork originates in the northeast corner of Idaho at Henrys Lake, and flows south through Island Park Reservoir and to the confluence of the Warm River. After this confluence, the flow of the Henrys Fork is generally southwest to the confluence with the

main stem. The major tributaries of the Henrys Fork are the Warm, Falls, and Teton Rivers.

Downstream to Milner Dam, most of the surface inflow is from streams that flow northward to join the main stem. These streams include the Blackfoot, Portneuf, and Raft Rivers and Willow Creek.

In addition to streams, springs provide a significant contribution to the Snake River. Many of these springs flow directly into the Snake River and are hidden. The largest contribution to the river is the highly visible Thousand Springs located downstream from Milner Dam.

Water Supply and Historical Change of Flows

Figure 1 shows the estimated annual water supply for the upper Snake River basin for the period from 1928 to 1989; the average supply during this period was about 10 million acre-feet. The estimated natural flow at Milner is the amount of water that would pass Milner Dam if there were no storage reservoirs and no irrigation or other diversion of the basin water supply. These estimates of natural flow were derived using the State of Idaho Monthly Planning Model and require adjusting observed runoff for the effects

of upstream storage, diversions, and return flows. Estimates of natural flow for the years following 1989 are not available at this time. The most difficult part of making this estimate is the determination of return flow and reuse which are affected by a complex relationship between surface flows and ground-water flows. The Snake Plain Aquifer intersects the river and provides significant water. Timing of this

ground-water influence is difficult to assess, and data on ground-water movement does not provide exact results.

Natural flow in figure 1 is contrasted with the observed flow past Milner. This contrast shows the effect of operating the river/storage system with storage of water and out-of-stream diversions.

Figure 1.—Annual Discharge of the Snake River at Milner, Idaho.

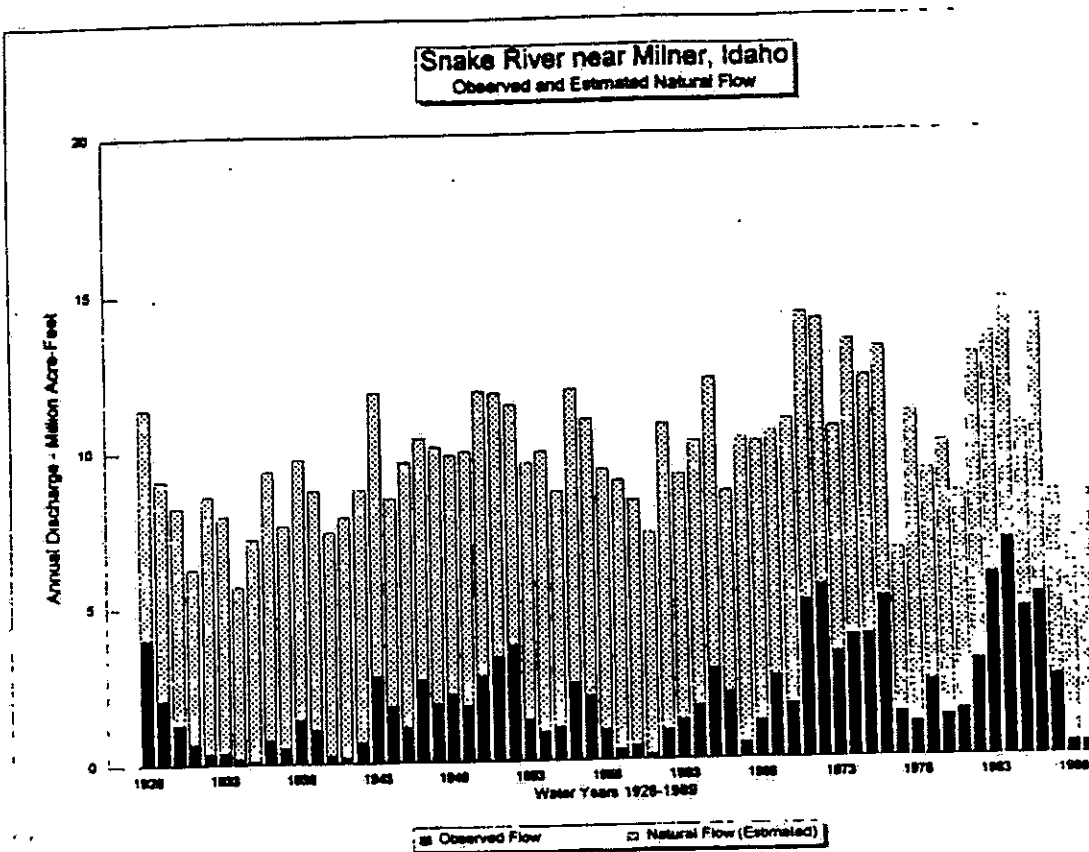
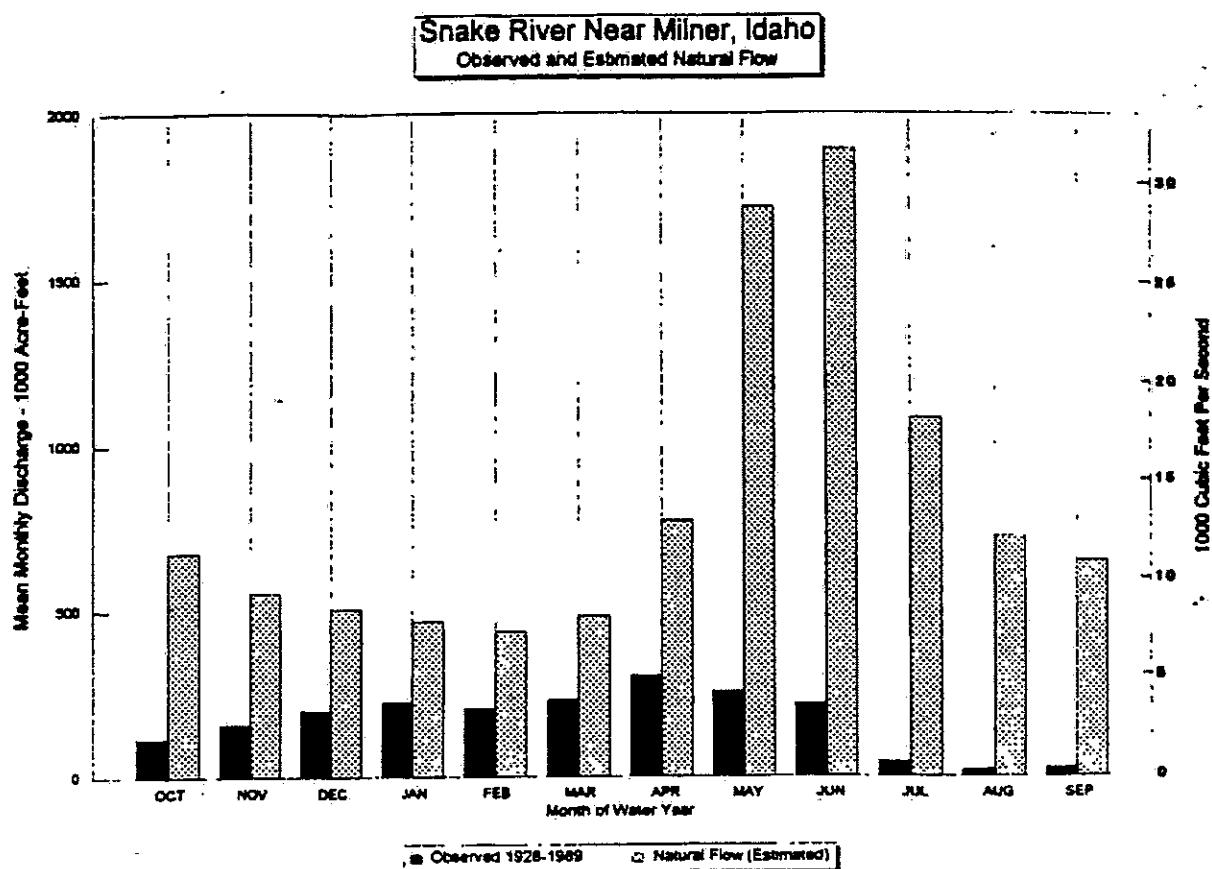


Figure 2 shows the average monthly flow past Milner for natural flow (no water development and no diversions) for the period 1928-1989. Natural flow past Milner would peak in June at a level of nearly four times the natural flow in February. With the current irrigation and

reservoir development, flows peak in April and decline to minimums in August and September. Average monthly flows past Milner with system development are lower in all months than the average monthly flow for the lowest flow month without development (natural river flow).

Figure 2.—Average Monthly Discharge of the Snake River at Milner, Idaho



During early development of irrigation, but before major storage was developed, the natural flows during the winter changed very little, whereas, summer flows were substantially diminished by diversions for irrigation. With the current level of storage development, winter flow as well as summer flow are substantially altered.

It is important to note that the Minidoka Project was initiated because irrigated agriculture was already highly developed and experienced shortages in summer months. Project storage was designed and developed to capture excess winter and spring season flows for use in the summer, because the river was being severely depleted. Summer flows at Blackfoot were sometimes reduced to zero. Also, the aquifer was in an early stage of charging, and springflows and other

subsurface return flows were smaller than they are today.

Although this report focuses only on the Snake River upstream from Milner Dam, upstream diversions and water use affect the downstream reach of the river. Some of those effects are complex. For instance, a minimum flow of 200 cubic feet per second (cfs) past Milner Dam is quickly augmented by irrigation return flows and to a much larger extent by the discharge of the Snake Plain Aquifer at Thousand Springs. Average discharge at Thousand Springs was around 4,000 cfs in the early 1900's and increased to almost 7,000 cfs in the 1950's. It has since decreased to about 5,000 cfs.

III. History of Water Resource Development

In the late 19th century, Utah farmers were attracted to the Snake River Valley upstream from American Falls, Idaho because of the relative abundance of water. The area where the two forks of the Snake River join (north of Idaho Falls) was especially attractive because of the fertile plain and many natural water channels. This interest led to extensive construction of canal systems around American Falls prior to 1900. Due to arid conditions in the west, the riparian doctrine of water rights that developed in the more humid east was discarded throughout the west as inappropriate, and the prior appropriation doctrine of water rights was developed. Under the prior appropriation doctrine, a person could use water from a stream without ownership of abutting land provided that the use did not interfere with an earlier use. Priority of appropriation became the recognized principle, with the courts ultimately determining the priority sequence and the amount of water of each appropriation. A law regulating the appropriation of water and affirming the prior appropriation doctrine was passed in Idaho in 1881. The Idaho State Constitution affirmed the principle that the stream belonged to the State, and a procedure was established through which future appropriation of water was to be made by application to the State Engineer (currently the Director of the Idaho Department of Water Resources). For administrative purposes, the State of Idaho has divided the Snake River into three sections. Water District 01 extends from Milner Dam to Palisades Reservoir including all of the Snake River drainage in Idaho above Milner Dam.

In Idaho, public land was acquired largely under the Homestead Act (1862), the Desert Land Act (1877), and the Carey Act (1884). The Carey Act was used quite extensively in the development of lands for irrigated agriculture production in the upper Snake River system. Under the Carey Act, each state, where irrigation was feasible, was to select up to 1 million acres of arid Federal lands to secure their reclamation by inducing private

capital to construct the works necessary for irrigation. The Secretary of the Interior was authorized to "... donate, grant, and patent to the State free of cost for survey or price ..." desert land for reclamation, cultivation, and settlement. The State Land Board was to approve the plans for development, set a price to be charged by the developing company, and provide supervision for the projects. The promoting company was to acquire a lien upon the lands of the settlers as security for payment of the obligation due for the water rights.

The first project constructed under the Carey Act was the Aberdeen-Springfield Canal completed in 1895 to divert 1,230 cfs from the Snake River at a point 3 miles downstream from the Firth bridge. Further to the west, the Twin Falls Land and Water Company was formed to provide for the development of Milner Dam and for the construction of the Twin Falls Canal to convey water to lands south of the Snake River. Upon completion in 1905, the Twin Falls tract included 202,000 acres.

Although the Desert Land Act and the Carey Act were somewhat effective in promoting irrigation development by private enterprise, development was limited by the financial resources of the individual promoters and the state. As the less complex irrigation projects were completed, the Federal Government was pressured to participate in development of irrigation by providing financing and water through storage development. Early settlers often overestimated the available water supply, not realizing that natural flows in August and September were insufficient to dependably irrigate crops.

At about the same time, the U.S. Geological Survey (USGS) had been formed and was actively classifying public lands and examining the geologic structure, mineral resources, and products of the national domain. The USGS reviewed opportunities for storage of water and

irrigation of lands. Included in this evaluation were lands for a proposed Minidoka Project, lying to the north and south of the Snake River and extending up to 35 miles west from Minidoka Rapids (situated 6 miles south of the town of Minidoka) and water storage facilities in the upper basin. In 1902, the Reclamation Act was passed and work on the proposed Minidoka project was assigned to the newly created Reclamation Service. At the time that the Reclamation Service became involved in the investigation of irrigation potentials, Snake River flows were being used to irrigate some 275,000 acres upstream of Minidoka Rapids. Construction of Minidoka Dam and carriage facilities began in 1904, and a rockfilled crib dam was constructed at Jackson Lake in 1907. By 1912, 110,000 acres of the Minidoka Project could be irrigated.

As irrigation development proceeded, it became clear that the water supply was not as abundant as had once been thought. The irrigation season of 1905 was the first time that the Snake River canals experienced a serious water shortage. During the summer, the Snake River was dry for a distance of 10 miles in the vicinity of Blackfoot. Irrigation diversion came under the jurisdiction of the court which mandated the closing and opening of the headgates to only partially fulfill water claims so that a total loss of crops in the Blackfoot area was averted.

Completion of the Twin Falls North Side Project under the Carey Act to irrigate up to 180,000 acres on the north side of the Snake River was delayed until storage could be obtained from an enlarged Jackson Lake. In 1919, Jackson Lake (by then reconstructed to a capacity of 847,000 acre-feet) failed to fill, and a serious water shortage occurred. In 1924, another water shortage occurred, and crops on the North Side Twin Falls tract were in jeopardy.

The dry years and the resulting loss of agricultural production and financial instability provided the impetus for construction of additional Federal storage capacity. Additional storage capacity

became available with the completion of American Falls Dam in 1927. While both Jackson Lake Dam and American Falls Dam were constructed by Reclamation, up front funding was secured from the participants to supplement Federal appropriations so that construction could proceed.

Federal irrigation development continued with the Gooding Division of the Minidoka Project in 1927, the Upper Snake River Division in 1935, the North Side Pumping Division in 1950, and other irrigation projects in the upper Snake region.

Reclamation involvement in irrigation development of the region is the response of the Congress to requests for Federal participation. Federal involvement began primarily with the USGS, which began classification of public lands at the request of Congress. The 1902 Reclamation Act provided the broad authority under which the Reclamation Service (later the Bureau of Reclamation) operates to identify and pursue irrigation potentials. The Reclamation Project Act of 1939 provided additional broad authorities particularly in the area of expending funds and recovering construction charges on Federal reclamation projects. The Federal Water Project Recreation Act of 1965 (Public Law 89-72) further broadens authorities by essentially authorizing recreation and fish and wildlife enhancement as a function at all existing reservoirs. More recently, Title XXVIII of Public Law 102-575 provides some additional broad authorities. Other public laws, especially the various flood control acts, provide further authorities for consideration and authorization of other functions. Specific authorizations of projects, divisions, and units or specific facilities are contained in a variety of individual project or facility authorizing acts and in some appropriation acts.

A USGS study in 1990 indicates that there are about 2,470,000 acres of irrigated land upstream of Milner Dam. This includes about 60,000 acres of the Fort Hall Indian Project which is irrigated

with natural flows, ground water, and storage in Blackfoot Reservoir and Grays Lake.

About 1,070,000 acres are part of Reclamation's Minidoka and Michaud Flats Projects with about 210,000 acres receiving a full water supply and about 860,000 acres receiving a supplemental water supply from Reclamation storage. The remaining 1,340,000 acres are outside Federal projects and much of this acreage is irrigated from

ground water; none receive storage water developed by Reclamation.

Annual withdrawal of water is about 14,365,000 acre-feet, of which 6,581,000 acre-feet are from ground water and 7,784,000 acre-feet are from surface water. The annual consumptive use of water (net use of water) totals about 4,661,000 acre-feet.

IV. Overview

Federal Projects

There are five major Federal projects associated with development of irrigation and water and land resources in the upper Snake. The Federal projects include the following:

Fort Hall Indian Project, constructed and operated by the Bureau of Indian Affairs

Minidoka Project, constructed and operated by Reclamation

Michaud Flats Project, constructed and operated by Reclamation

Palisades Project, constructed and operated by Reclamation

Ririe Project¹, constructed by the U.S. Army Corps of Engineers (Corps) and operated by Reclamation

Minidoka Project lands extend discontinuously along the Snake River from the town of Ashton on the Henrys Fork to the town of Bliss in south-central Idaho, about 300 miles downstream. Project lands downstream from Milner Dam are served by diversions from the Milner Pool.

Project facilities furnish a full or supplemental water supply to more than 1 million acres of land from five reservoirs that have a combined active storage capacity of about 2.8 million acre-feet (Note: this does not include the storage of the Palisades and Ririe Projects). Major project works consist of Minidoka Dam and Powerplant, Jackson Lake Dam, American Falls Dam, Island Park Dam, and Grassy Lake Dam. In addition, there are thousands of miles of canals, laterals, and drains and many water supply wells.

The Fort Hall Indian Project is an irrigation project constructed primarily on the Fort Hall Indian Reservation. The water supply is provided from Blackfoot Reservoir, which has an active capacity of about 350,000 acre-feet; Grays Lake, which has an active capacity of about 40,000 acre-feet; and the Snake River. Operation of Blackfoot Reservoir and Grays Lake are not integrated into the operation of other Federal reservoirs in the upper basin.

The Michaud Flats Project is an irrigation project developed by Reclamation for irrigation of about 11,000 acres of land adjacent to the town of American Falls. There was no storage facility constructed specifically for the project which gets its water supply from storage space in American Falls and Palisades Reservoirs and from ground water.

¹Ririe Dam and Reservoir are considered to be Reclamation facilities for the purposes of this document.

The Palisades Project consists of Palisades Dam and Reservoir which were constructed to provide additional storage of 1,200,000 acre-feet in the upper basin. (Palisades Project is often combined in common speech with Minidoka Project, e.g., "the Minidoka-Palisades Project" because the two are so closely related. Often, a speaker includes the operation of the Palisades Project when the stated subject is the Minidoka Project.)

The Ririe Project consists of Ririe Dam and Reservoir and was constructed for flood control and irrigation. The reservoir has an active storage capacity of more than 80,000 acre-feet.

Reclamation Project Authorizations

Most of the Reclamation reservoirs in the upper Snake River basin were authorized as part of the Minidoka Project under the 1902 Reclamation Act with subsequent authorization of specific facilities by the Secretary of the Interior or the President. From 1902 to 1910, the Secretary of the Interior had authority to approve construction after a finding of feasibility. The Act of June 25, 1910 modified the procedure to require the President to approve the authorization. The 1939 Reclamation Act returned authorization authority to the Secretary of the Interior but a finding of feasibility had to be submitted to the President and the Congress. Authorizing legislation sometimes clearly states the authorized purpose of the project or facility but often indicates only that the project is to be constructed in accordance with a cited report.

The authorized purpose is an important consideration because it determines the limits within which a Federal facility can be operated. Flood control, as a project function, was authorized after most facilities were constructed. Recreation, including fish and wildlife

enhancement, is an authorized function at projects and reservoirs generally through legislation that was passed after the facilities were constructed. However, the general authorizations for recreation apply to management of water and land surfaces and the development of facilities for recreation or safety purposes; they do not authorize reallocation of water supply for other purposes.

The Minidoka Project was authorized by the Secretary of the Interior on April 23, 1904, under the 1902 Reclamation Act. Investigation and construction funds for the Gooding Division (Gravity Extension Unit) were provided by the Act of January 12, 1927, and the Secretary's finding of feasibility dated July 2, 1928 was approved by the President on July 3, 1928. The Upper Snake River Division was authorized by a finding of feasibility of the Secretary and approved by the President on September 20, 1935. The North Side Pumping Division was authorized for construction by the Act of September 30, 1950. Replacement of American Falls Dam was authorized by the Act of December 28, 1973 (Public Law 93-206).

The Palisades Project was initially authorized by the Secretary of the Interior on December 9, 1941 under the Reclamation Project Act of 1939. It was reauthorized by the Act of September 30, 1950 (Public Law 81-864).

The Michaud Flat Project was authorized by the Act of August 31, 1954 (Public Law 83-741) and the Ririe Dam and Reservoir Project was authorized by the Act of October 23, 1962 (Public Law 87-874).

Table 1 shows the original authorization associated with each reservoir.

Table 1.—Authorization of Reclamation Storage Facilities		
Facility and Construction ¹	Authorization	Original Authorized Purpose ²
Minidoka Dam 1904-1906	Secretary of the Interior on April 23, 1904 (under the 1902 Reclamation Act)	Irrigation and power
Jackson Lake Dam, 1907, 1910-11, 1916	Secretary of the Interior on April 23, 1904 (under the 1902 Reclamation Act)	Irrigation
American Falls Dam 1925-27, 1976-78	(under 1902 Reclamation Act ³). Replacement by Act of December 28, 1973	Irrigation and power
Island Park Dam 1935-38	President on September 20, 1935 (under 1902 Reclamation Act)	Irrigation
Grassy Lake Dam 1932-39	President on September 20, 1935 (under 1902 Reclamation Act)	Irrigation
Palisades Dam 1951-57	Secretary of the Interior on December 9, 1941. Reauthorized by Act of September 30, 1950	Irrigation, power, flood control, and fish and wildlife
Ririe Dam ⁴ 1970-77	Act of October 23, 1962	Flood control, irrigation, and recreation.

¹Multiple construction periods indicate reconstruction or additional construction to reach the current storage capacity.

²The Act of September 30, 1950, by reference, appears to authorize the upper Snake River Reservoir system to be operated for flood control. In addition, several flood control acts have essentially authorized flood control at all Reclamation reservoirs. Public Law 89-72 along with Public Law 102-575 have essentially authorized recreation (including fish and wildlife enhancement) at all Reclamation projects. However, this authorization is primarily for construction of facilities and management of lands and does not authorize a change in the use of storage space in a reservoir.

³Legislation in 1924 addresses purchase of Indian lands and expenditure of monies for construction of the reservoir; however, a specific document authorizing construction has not been identified.

⁴Constructed by the Corps, but operated by Reclamation.

History and Operation of Reclamation Dams

The major Reclamation dams are discussed below in the approximate order in which they were constructed. Table 2 summarizes the capacities

of Reclamation reservoirs located upstream of Milner Dam. (Additional information on reservoir space is included in Appendix A.)

Table 2.—Capacities of Federal Reservoirs					
Reservoir	Elevation at Full Pool (feet above sea level)	Capacity (Acre-Feet)			
		Active ¹	Inactive ²	Dead ³	Total
Minidoka	4,245	95,200	115,000	—	210,200
Jackson Lake	6,769	847,000	—	—	847,000
American Falls	4,354.5	1,672,590	—	—	1,672,590
Grassy Lake	7,120	15,200	—	270	15,470
Island Park	6,302	127,265	381	—	127,646
Palisades	5,620	1,200,000	157,000	44,000	1,401,000
Ririe	5,119	80,500	6,000	4,000	⁴ 90,500
Total	Not Applicable	4,037,755	278,400	48,270	4,364,406

¹Water that can be released for specific purposes.

²Water that can be released from the reservoir but is normally retained for a specific purpose, e.g., Island Park and Ririe--sediment control; Palisades and Minidoka--power or operational head (see also Appendix A).

³Water that cannot be released by gravity flow because it is below the elevation of the outlet.

⁴Does not include 10,000 acre-feet of exclusive flood control space.

Minidoka Dam

Construction of Minidoka Dam began in 1904 and was completed in 1906; Minidoka Powerplant was completed in 1909. In 1909, the overflow spillway section was raised 5 feet with the addition of 334 stop-log piers and bays. Development of Minidoka Project lands began with diversion of water from Minidoka Dam to the Minidoka Irrigation District and the Burley Irrigation District. Lands around Lake Walcott (the impoundment formed by Minidoka Land) are withdrawn by Reclamation and managed by the U.S. Fish and Wildlife Service (USFWS) as part of the Minidoka National Wildlife Refuge which was established in 1909.

Several activities have recently taken place at Minidoka Dam. The spillway radial gates were replaced in 1989-90. The original gates were installed in 1913 and were in need of complete replacement. Rehabilitation and construction activities at the powerplant have been initiated and are expected to be completed in 1997. The "old" Minidoka Powerplant is being replaced with a new, two unit powerplant built near the left

abutment of the embankment dam. Units 1 through 5 will be retired and preserved as museum pieces in the old powerplant. Existing Unit 6 will be completely replaced and Unit 7 will have modern controls installed. The new powerplant will house Units 8 and 9. With this construction, generation nameplate capacity will be increased from 13,4 kilowatts (kW) to about 28 kW.

Minidoka Dam is primarily a diversion dam and a power generating facility. Lake Walcott is the easiest reservoir to fill because it is relatively small and winter flows in the Snake River at Minidoka are always sufficient to fill it. An early priority storage right means that the storage right must be physically filled somewhere in the system before junior storage rights can be filled (see additional discussion under "Water Rights").

Normal spring/summer operation is to raise the elevation to 4245 feet and to maintain that level to provide adequate flow to the main canals of the Burley and the Minidoka Irrigation Districts. Flows from American Falls Reservoir are diverted to the canals and/or passed through Minidoka Dam downstream to Milner Dam. In late summer,

deliveries are made from storage if needed. In the fall, when irrigation deliveries will not be affected, the reservoir is drawn down and maintained at elevation 4240 feet or lower. This protects the concrete overflow spillway stop-logs, piers, and bays from ice damage. Winter inflow includes any releases from American Falls plus reach gains that normally total 250 to 350 cfs.

Jackson Lake Dam

The original Jackson Lake Dam (rockfilled crib) was completed at the outlet of a large existing lake in 1907 but partially failed in 1911; the size of the original lake is unknown but may be as much as 2 million acre-feet. A concrete gravity structure with earth embankment wings was built at the site in 1911 and further raised in 1916. Safety concerns were identified at the dam in the mid-1970's, and from 1977 to 1989 the level of Jackson Lake was maintained at a lower than normal level because of concerns for possible dam failure during an earthquake. In 1989, reconstruction was completed under the authority of the Reclamation Safety of Dams Acts making the full capacity again available. Lands around the lake are withdrawn by Reclamation. Since the lands are inside the boundary of Grand Teton National Park, they are managed by the National Park Service. (See also "Snake River Compact.")

Jackson Lake is operated in conjunction with Palisades Reservoir for flood control. In the late summer or early fall, flood control space is evacuated, lowering the lake to 647,000 acre-feet of storage; normal summer operation sometimes empties the flood control space. Winter inflow, minus outflow, is stored until the 647,000 acre-feet is reached and then passed to maintain that level; however, additional flood control releases may be made in the late winter or early spring. Winter flow releases are generally above 200 cfs. In the spring and summer, inflow is stored until full pool is reached or released as needed to meet irrigation demands.

American Falls Dam

American Falls Dam was completed in 1927 and rebuilt in 1977. Idaho Power Company (IPC) owns and operates a powerplant under a Federal Energy Regulatory Commission (FERC) license at the dam. Lands around American Falls Reservoir were withdrawn and acquired and are managed by Reclamation; lands located on the Fort Hall Indian Reservation are managed by the Shoshone-Bannock Tribes.

A winter minimum release of at least 300 cfs is maintained from November until spring; in recent years the release from December to February has averaged 4,050 cfs. The magnitude of the winter flow depends principally on the amount of carryover storage in American Falls Reservoir and the system upstream. If American Falls is nearly drained at the end of the irrigation season, a flow of about 350 cfs is commonly released to maintain water quality downstream. If carryover storage is good, estimates are made of the amount of unstorable flow expected prior to the irrigation season. This unstorable flow is then released as uniformly as feasible to provide higher flows throughout the winter.

The primary winter operation goal is to fill American Falls by April 1 or the onset of the irrigation season. IPC often moves some of its American Falls storage water (total of 44,276 acre-feet) in December and this may increase the flow for a short time. If inflows to American Falls are much higher than normal or if the carryover storage is substantial, winter releases may range from 1,000 to 5,000 cfs. Some flood control operations may be made at American Falls but are incidental to irrigation operations. Summer releases from American Falls are dictated by downstream irrigation demands and downstream water rental pool leases below Milner Dam.

Island Park Dam

Island Park Dam was completed in 1938, primarily for irrigation of land in the St. Anthony to Rexburg area. Safety of Dams work was completed in the early 1980's. In 1991, the Fall River Rural Electric Cooperative (FRREC) received a FERC license to construct and operate a small powerplant at the dam; generation began in 1994. FRREC also received approval in 1995 to modify the spillway to enhance hydropower generation. This modification will increase the active storage capacity to 135,000 acre-feet and improve water temperature conditions downstream in the Henrys Fork that will benefit its world famous rainbow trout fishery. A combination of withdrawn and acquired lands around Island Park Reservoir are managed by the U.S. Forest Service (USFS).

Winter releases are established in late October and November of each year and are dependent on carryover storage and fall inflows. Although there is no requirement for a minimum release, Reclamation has worked with spaceholders and others to try to maintain a release of 300 cfs between irrigation seasons. Recent winter releases have ranged from 100 to 300 cfs. With good carryover and normal to above normal runoff, a release of about 500 cfs is maintained. Close communication is maintained with the Henrys Fork Foundation (a private conservation group) and the Idaho Department of Fish and Game (IDFG) on all release operations, and consideration is given to fish and swan habitat.

Island Park is operated to provide additional flow in the winter months using water that was adversely stored (storage accumulated adverse to a senior storage priority) in the fall after the irrigation season. In the spring and early summer, water is stored with the goal of filling the reservoir in April. Some incidental flood control operation may occur if the forecast dictates. In the past, Island Park Reservoir was managed to maintain a surcharge of one additional foot above the dam's spillway lip to meet contractual

irrigation storage obligations. With the spillway modification and resultant increase in active capacity, this water will no longer be in surcharge.

Grassy Lake Dam

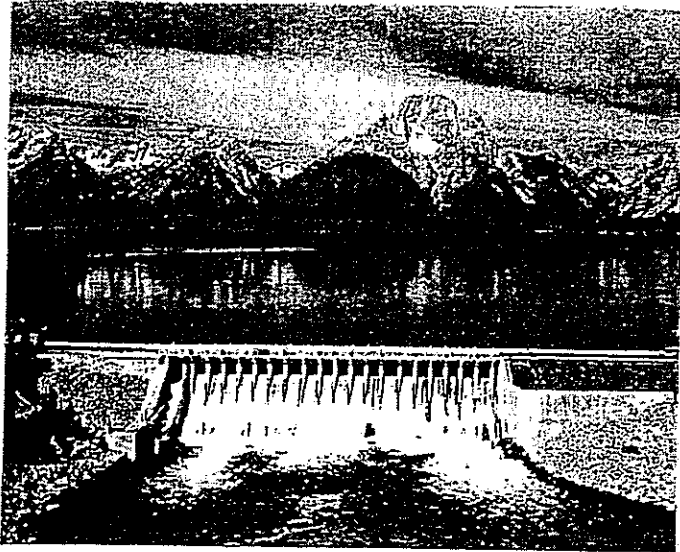
Grassy Lake Dam was completed in 1939. Grassy Lake is a small reservoir located in Wyoming just outside the southwest corner of Yellowstone Park. Lands around Grassy Lake are withdrawn by Reclamation and managed by the USFS.

Water is diverted from Cascade Creek to Grassy Lake in the fall, winter, and early spring. No water is diverted during periods of high inflow, full reservoir conditions, or during the summer months. Grassy Lake does not normally release water in the winter. Diversions into the lake begin in late winter and early spring with the goal of filling Grassy Lake in early summer. Releases are made on demand, normally in July and August. Additional releases are made if necessary to reach the winter operation level. Grassy Lake is difficult to fill the following spring if drawn down to 7,000 acre-feet or lower.

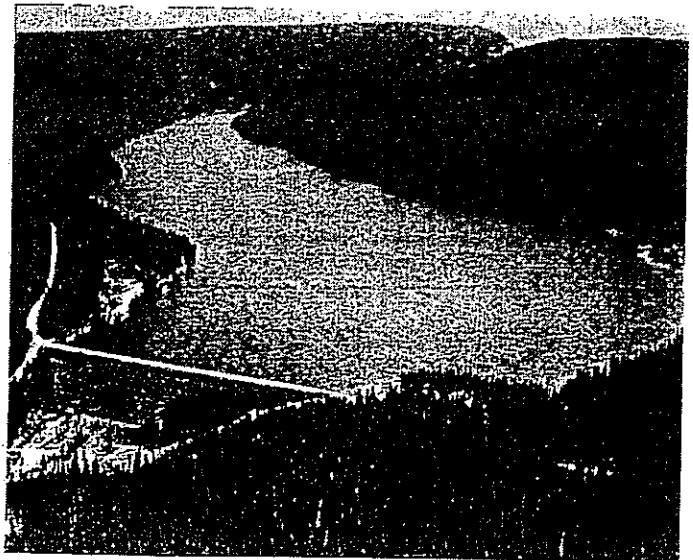
Palisades Dam

Palisades Dam was completed in 1957. The powerplant was uprated in 1994 and all four units were rewound increasing the nameplate rating from the original 118,750 kW to 176,600 kW. As part of the mitigation for the powerplant uprate, a fish screen was constructed on an irrigation diversion on Palisades Creek, a small tributary which joins the Snake River approximately 3 miles downstream from the dam. The acquired and withdrawn lands around Palisades Reservoir are managed by the USFS.

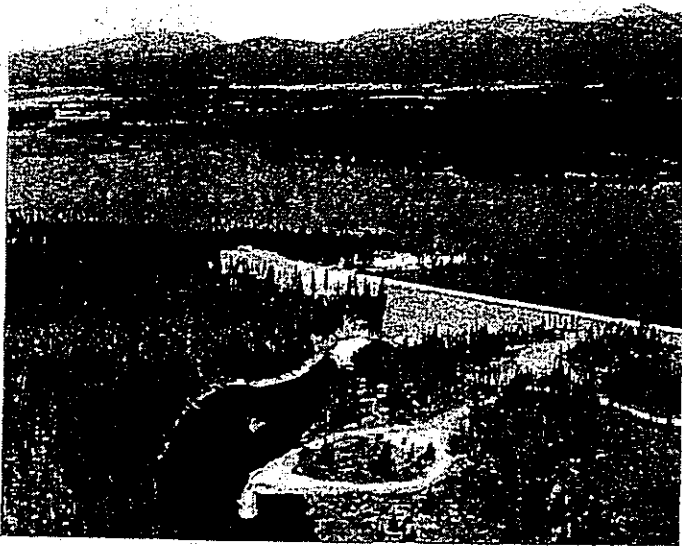
At Palisades, winter minimum releases are established in early November on the basis of fall carryover storage and fall inflow and are maintained throughout the winter. A minimum flow of 550-750 cfs is usually maintained depending on the severity of drought conditions. The usual minimum flow is 1,100-1,200 cfs. If



Jackson Lake Dam



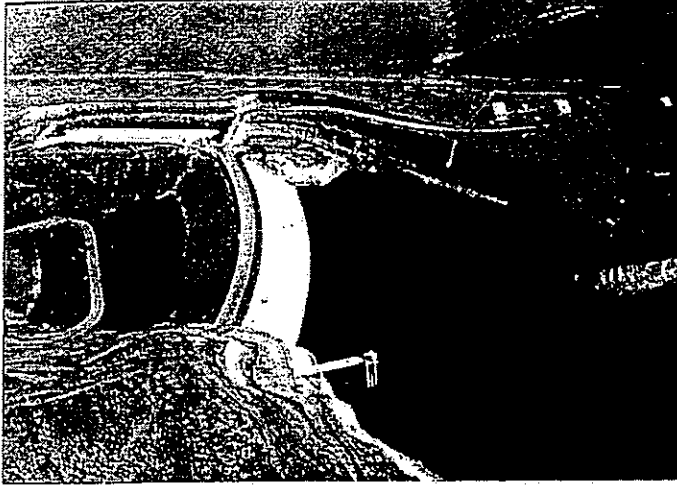
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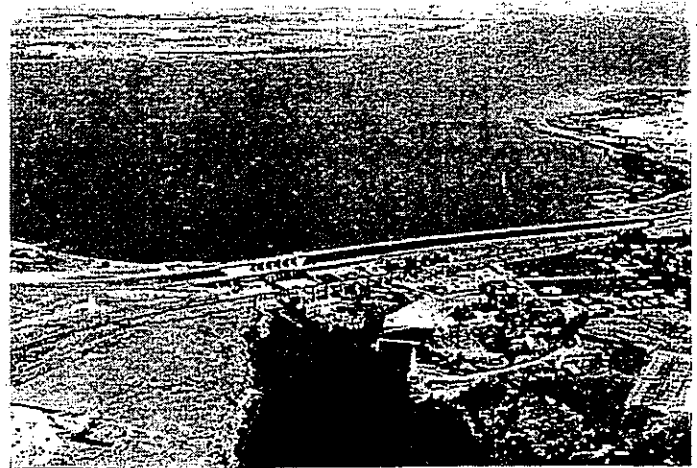
Island Park Dam



Palisades Dam



Ririe Dam



American Falls Dam



Minidoka Dam

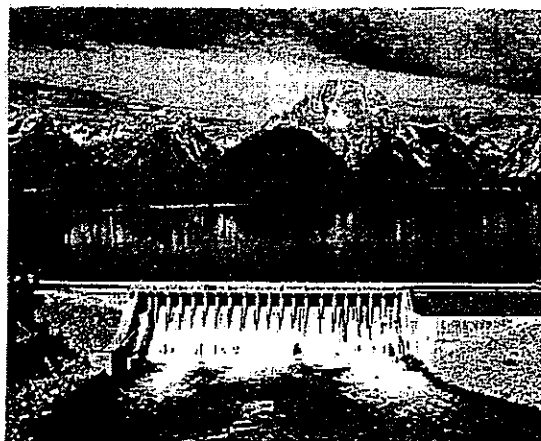
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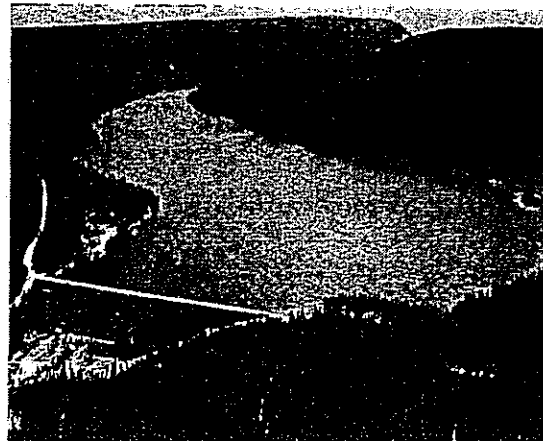
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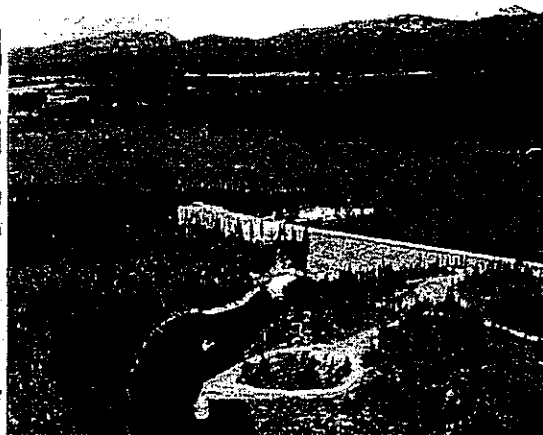
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Jackson Lake Dam



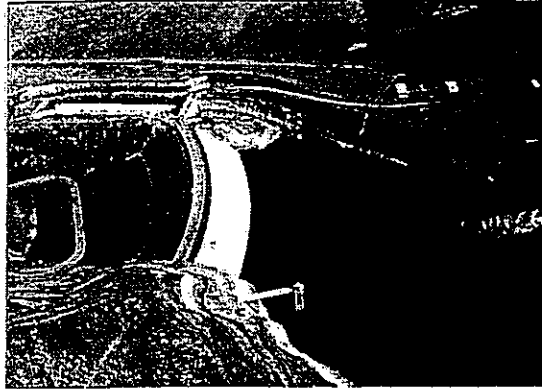
Grassy Lake Dam



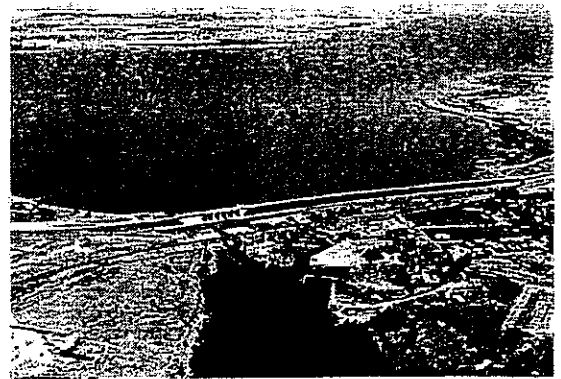
Island Park Dam



Palisades Dam



Ririe Dam



American Falls Dam



Minidoka Dam

carryover storage is good, higher releases may be needed around the end of the calendar year to create or maintain flood control space.

During the spring runoff, Palisades is operated in combination with Jackson Lake under flood control rules which may require increased releases depending on the forecast. The goal is to fill Palisades when flood potential subsides; after the peak spring runoff. Releases are made throughout the summer and fall to meet downstream irrigation demands. To the extent possible, releases are directed through the powerplant but storage is not specifically released for power production.

Ririe Dam

Ririe Dam and flood control channel were completed by the Corps in 1977 and were turned over to Reclamation for operation. The reservoir is operated primarily for flood control.

Uncontracted storage in Ririe Dam is part of the 1990 Fort Hall Indian Water Rights Agreement (see chapter VII) which is in the process of being approved. Lands around Ririe Reservoir are managed by the IDFG with recreation facilities managed by Bonneville County.

Water is stored at Ririe throughout the winter, spring, and early summer. There is no winter minimum flow because of possible ice formation in the flood channel. After spring, the reservoir is maintained as high and as stable as possible for recreation with a release of at least 30 cfs to provide water for natural flow right demands. After Labor Day the reservoir is drawn down to the flood control pool for the winter, releasing as much as 45,000 acre-feet by November 1.

Other Major Dams and Reservoirs

There are four other major dams and reservoirs in the upper Snake River basin. Two are operated by the Bureau of Indian Affairs and two are owned and operated by non-Federal entities.

Milner Dam

Milner Dam is owned and operated by the Twin Falls Canal Company and was constructed for irrigation in 1905. Because of safety concerns, the dam was rebuilt in 1991-1992. Although the reservoir has about 50,000 acre-feet of storage, the primary purpose of the dam is to raise the pool to a level adequate to divert water to the several irrigation canals and pumping plants and for operation of the powerplants. Associated with the dam are two powerplants owned and operated by IPC and operated under FERC licenses, under which IPC is required to pass 200 cfs whenever water is available. The smaller powerplant discharges directly to the stream downstream from the dam. Water for the larger powerplant is diverted from the Twin Falls Canal to penstocks for the powerplant located 1 mile downstream from the dam. Discharge is to the Snake River.

Blackfoot Reservoir and Grays Lake

Blackfoot Reservoir and Grays Lake are owned and operated by the Bureau of Indian Affairs as part of the Fort Hall Indian Project. Blackfoot Reservoir, completed about 1913 and raised to its current capacity by an auxiliary dam, has a total capacity of about 413,000 acre-feet and an active capacity of about 350,000 acre-feet. It is the main source of water for irrigation and municipal and industrial water supply on the Fort Hall Indian Reservation. Grays Lake, constructed in 1924, has a total capacity of about 400,000 acre-feet and a surface area of about 22,000 acres, but provides only 40,000 acre-feet of active storage. A canal diverts water from Grays Lake to Blackfoot Reservoir. Because of the small active storage capacity and large wetland area, Grays Lake is operated primarily for wildlife benefits.

Henrys Lake

Henrys Lake Dam is owned and operated by the North Fork Reservoir Company. The dam was completed at the outlet of a natural lake of unknown capacity in 1923 and has an active storage capacity of about 90,000 acre-feet. Storage in the lake is used to irrigate private lands.

Reclamation Spaceholder Contracts

Reclamation Projects are authorized with the intent of recovering the capital and operating costs from the direct beneficiaries. Over time and with experience in developing large projects, the Congress has changed the procedures and rules to achieve this goal. Currently, the capital and operating costs of a project are allocated among the benefiting functions, e.g., irrigation, flood control, power, fish and wildlife, etc. In some cases, the benefiting entities are widespread and cannot easily be identified or there is a national interest in the benefit, e.g., flood control, anadromous fish enhancement, and migratory bird enhancement. These costs are made nonreimbursable meaning that the people of the United States pay these costs through general taxes. Where costs are assigned to functions that benefit specific entities, the costs are made reimbursable, and repayment contracts to recover the reimbursable costs are signed with the benefiting entities. Capital costs assigned to the irrigation function are to be fully repaid without interest over a specific time period (as low as 10 years in the early 1900's to about 50 years at present depending on the type of contract). Reclamation irrigation repayment contracts are generally spaceholder contracts or water service contracts. Annual operating costs (operation, maintenance, replacement, and power costs) are included in the repayment contracts.

Project capital costs are seldom reallocated, a process that requires the Congress to reauthorize the project. However, annual operating costs are adjusted from time to time not only to reflect

changing economic conditions but changes in benefits. Changes in the contracts must be approved by all of the signing entities.

All of the repayment contracts for Reclamation storage in the upper Snake River basin are spaceholder contracts that include an annual payment for the reimbursable cost of construction and for operation and maintenance. A spaceholder contract means that Reclamation sold each contractor (spaceholder) a share of the reservoir space, not a specific amount of water to be delivered each year. Carryover rights were also established, meaning that spaceholders could retain unused stored water from one year to the next. Under this system a water user's supply of storage water is a function of the space contracted, carry-over storage from previous years, and accrual to storage in the current year. However, the total amount of water due a spaceholder cannot exceed the volume of the contract space. Spaceholder contracts are held in perpetuity but can be sold to another entity with approval of Reclamation under Idaho State water law.

The Fremont-Madison Irrigation District is the only contracting entity for Island Park Reservoir and Grassy Lake. The District is served primarily by the Henrys Fork and Teton River. Some 64 other contracting entities hold space in one or more of the following reservoirs: Jackson Lake, American Falls Reservoir, and Palisades Reservoir. A total of 31 contractors hold space only one reservoir, 12 contractors hold space in two reservoirs, and 21 contractors hold space in three reservoirs. A list of spaceholders in these three reservoirs and the capacities and contracted space for all of the Federal reservoirs is included as appendix A.

These spaceholder contracts are in marked contrast to conventional repayment and water service contracts often used at other Reclamation Projects. With water service contracts, Reclamation essentially delivers a specific amount of water or an entitlement and all water that

remains in a reservoir after delivery of the specified entitlements is under Reclamation's control. With spaceholder contracts, Reclamation's control is limited to water in the uncontracted space and the inactive space. If all the active reservoir space has been marketed or contracted, all of the water in the active space of the reservoir is under control of spaceholders. That is the case for the Federal reservoirs upstream from Milner Dam. All of the active space has been marketed except for the following: 500 acre-feet in Palisades Reservoir and 10,000 acre-feet of exclusive flood control in Ririe. Reclamation has recently purchased about 22,400 acre-feet of storage space for salmon flow augmentation. Technically, this latter space can be included in uncontracted total, but the space is assigned to a specific use.

Spaceholder contracts make possible another concept—water banking. Under these contracts, the spaceholders can accumulate water in their contracted space and they may rent that water. To avoid problems with possible forfeiture of use (under State law a water right holder retains the right only if the water is used for a beneficial purpose), the State authorized creation of a water bank and defined the water bank as a beneficial use under State law.

In poor water years, when not all of the spaceholder storage is filled, each spaceholder gets his/her carryover from previous years and an amount of the accrued water supply proportionate to the contracted storage space. During normal and above normal years, the spaceholder storage space usually fills and the supply may exceed the amount used by the spaceholder who may carry over the excess or market it to a rental pool.

Spaceholder contracts are an important part of reservoir operations as the contract language, in part, defines the operating limits. For example, the contracts often stipulate that Reclamation will maximize the storage of water for irrigation use.

Reclamation Reservoir Cost Allocations

Construction Costs

As indicated earlier, the facilities of the Project were essentially for single purpose irrigation facilities; power at Minidoka Dam and American Falls Dam was intended primarily for operation of the dams and pumping water for irrigation. As a result almost all of the cost of these dams and reservoirs were to be repaid by irrigation interests. The capital cost of the Palisades Project was allocated to flood control (47 percent), irrigation (20 percent), power (32 percent), recreation (0.2 percent) and fish and wildlife (0.8 percent). The capital cost of Ririe Dam was allocated to flood control (74.30 percent), irrigation (14.33 percent), and recreation and sport fishery (11.37 percent). Costs assigned to flood control are considered nonreimbursable. All of the capital costs assigned to fish, wildlife, and recreation for these facilities are nonreimbursable. The only reimbursable costs of these facilities are the costs allocated to irrigation and power.

The repayment obligation for construction of the Reclamation facilities (dams, canals, etc.) of the Minidoka and Palisades Projects have for the most part been paid except for the obligation incurred for recent safety of dams work at Jackson Lake Dam. The Fremont-Madison Irrigation District has repaid the construction obligation for Island Park Reservoir and Grassy Lake. At present, most of the original contracting entities for the Minidoka and Palisades Projects have little or no repayment obligation remaining. As a result, annual payments to Reclamation are primarily for operation and maintenance.

Annual Operating Costs

Annual operating costs include operation, maintenance, replacement, and power costs needed to operate and maintain the facility over an extended period. Most of the reservoirs were single purpose at the time of construction and annual costs were to be repaid by irrigation interests. Later, other purposes, including flood control, recreation, and fish and wildlife were recognized and in some cases authorized. At present, all of the reservoirs provide multipurpose benefits. This change is recognized by allocating annual operating costs among several functions.

Allocation of annual operating costs for the older reservoirs uses the Lineweaver allocation method which recognizes that all reservoirs provide substantial benefits to recreation and fish and wildlife (e.g., flatwater boating, water skiing, reservoir fishery, wetlands, etc.). The annual operating costs of Palisades and Ririe Dams and Reservoirs are allocated to project functions following standard Reclamation procedures. Table 3 summarizes annual operating cost allocations. None of the annual costs allocated by the Lineweaver method to recreation and to fish and wildlife are reimbursable.

Table 3.—Allocation of Annual Operating Costs for Reclamation Reservoirs (percent of total cost)					
Reservoir	Flood Control	Recreation	Fish and Wildlife	Irrigation	Power
American Falls	33.5	4.0	4.0	58.5	0.0
Grassy Lake	0.0	4.0	4.0	92.0	0.0
Island Park	13.0	4.0	4.0	79.0	0.0
Jackson Lake	29.5	4.0	4.0	62.5	0.0
Minidoka Dam	0.0	4.0	4.0	42.0	50.0
Palisades Dam	27.57	4.0	4.0	27.57	36.86
Ririe Dam	77.2	1.7	0.0	21.1	0.0

Water Rights

Hydraulic mining in the west was an early activity that required diversion of a large amount of water for transport to another place of use. As a result, the prior appropriation doctrine of water rights was developed in the west. Because of the arid conditions, this doctrine was also adapted for irrigation, and the riparian doctrine of water rights that developed in the more wet climate of the east was discarded throughout much of the west as inappropriate.

Under the prior appropriation doctrine, a person could use water from a stream without ownership of abutting land provided that the use did not interfere with an earlier use. Priority of appropriation became the recognized principle, with the courts ultimately determining the priority sequence and the amount of water of each appropriation. A law regulating the appropriation of water and affirming the prior appropriation doctrine was passed in 1881 while Idaho was a Territory. The Idaho State Constitution affirmed that streams belong to the State. Legislation has

established a procedure through which appropriation of water is made by application to the State Engineer (currently the Director of the Idaho Department of Water Resources).

Water rights are administered by the State and are issued by date of appropriation for specific quantities, diversion points and places of use, and purposes. The 1902 Reclamation Act and subsequent Federal legislation affirm that the states are responsible for administering appropriative water rights within their borders. The earliest water rights for irrigation in the Boise and Payette River basins predate any storage development and are for diversion of flow at a specific rate (often called natural flow rights). Under the prior appropriation doctrine, natural flow rights are satisfied in order of priority based on date. When the water supply is limited, a water right holder with an earlier natural flow right is likely to receive a greater supply than a water right holder with a later date.

Development of storage facilities led to water rights for storage of a quantity of water (storage rights). Storage rights, along with natural flow rights, are satisfied in order of priority based on the date of the appropriation, i.e., the earliest rights must be met first. If earlier rights cannot be met, then water cannot be stored. All of the storage in a reservoir may have one priority date, but if a reservoir was increased in size at a later date, there may be a second priority date associated with the increase. As an example, Jackson Lake has storage priorities with three dates, each associated with an increase in the storage capacity of Jackson Lake. In addition, there are some cases where natural flow rights were exchanged for storage rights that may have a priority that predate the construction of the reservoir.

In the case of storage, the relative priority among spaceholders is established in the repayment contracts. In general, spaceholders have equal access to storage accruals, however, unequal access and priorities may be established in the

contracts (see "District 01 Water Rental Pool" in chapter VI).

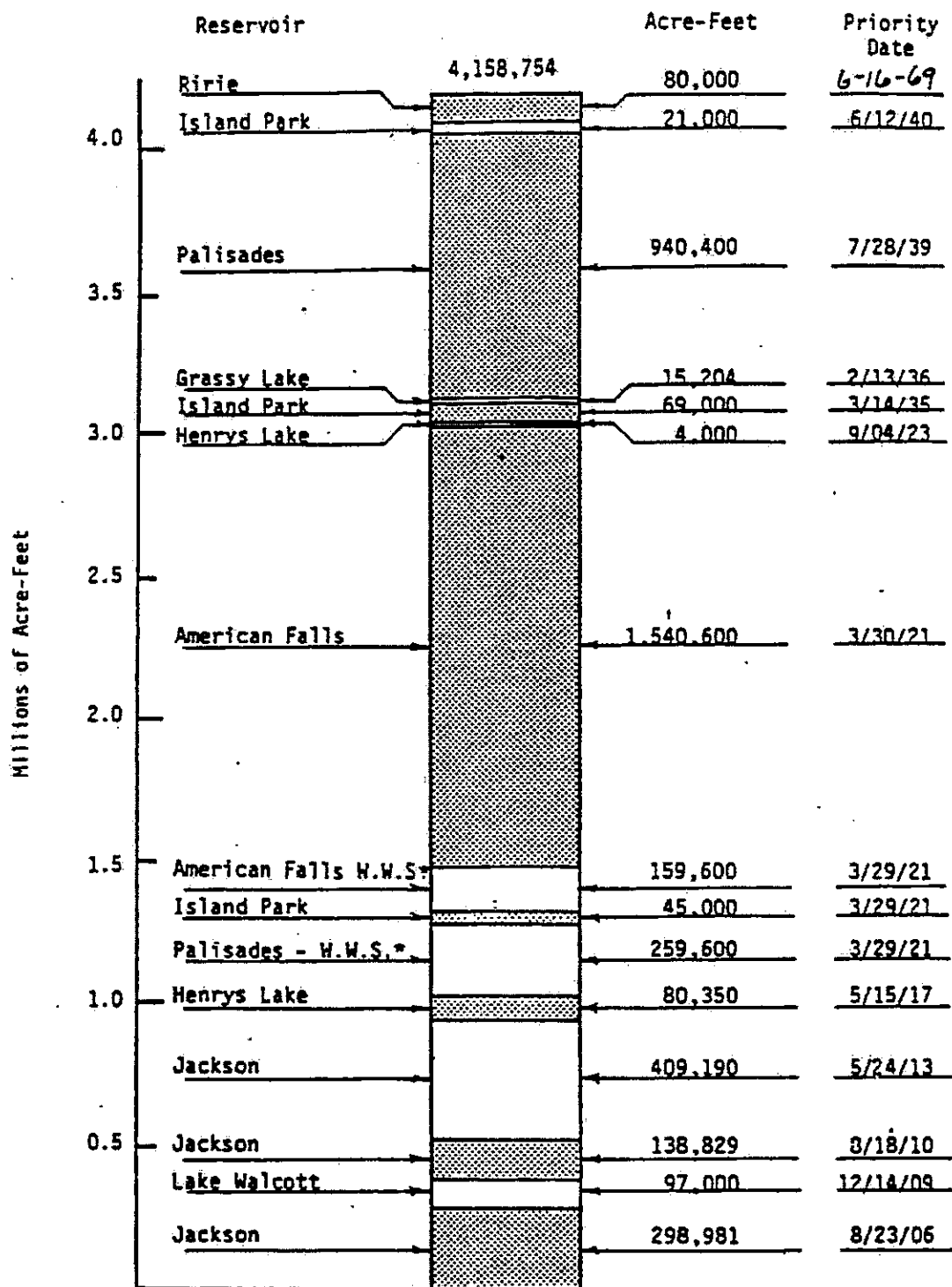
The right to use water for irrigation is an appurtenance to the lands served, whereas water rights for other purposes such as power and municipal and industrial (M&I) water supply are generally not. Water rights for irrigation are often managed collectively by some entity such as an irrigation district.

The total of the natural flow rights above Milner Dam is considerably greater than the estimated natural flow (no storage and no diversions) at Milner Dam. This is one reason that storage development in the upper Snake River basin became necessary to adequately support irrigation that was developed primarily on the basis of natural flows. Resolution of this problem is of concern to the State and to water users and is part of the impetus for the Snake River basin water rights adjudication (see chapter VII).

In the water rights process in Idaho, a permit is issued as a temporary right during development and a license is issued later. When a court takes action to settle water rights, the resulting decision on water rights converts the earlier permits and licenses to decreed water rights.

Reclamation holds title to the storage rights for all Reclamation storage facilities in the Snake River basin above Milner Dam. These rights were acquired in accordance with the laws of Idaho and Wyoming. A compact between the State of Wyoming and the State of Idaho allows water stored in Jackson Lake and Grassy Lake to be used as though the reservoirs were located in Idaho. The earliest storage rights are at Jackson Lake and the latest are at Ririe Reservoir. Some 98 water right claims have been filed by the Minidoka Project in the ongoing Snake River Basin Adjudication. Most of these claims are consistent with presently held water rights. These water rights are for uses or purposes including storage for irrigation, power, flood control,

Figure 3.—Upper Snake River Reservoir Storage Rights



* Winter Water Savings Contracts

recreation, and fish and wildlife and for direct diversion for irrigation and power. In addition, as part of the legislation and planning for the Palisades Project and to make that project feasible, a concept known as "winter water savings" was introduced. In brief, water users ceased diverting water in the winter (thus the name) in exchange for an earlier storage priority in a reservoir. There are "winter water savings" storage priorities in American Falls and Palisades Reservoirs. Figure 3 illustrates the storage rights by priority date for Reclamation storage rights and the storage rights in Henrys Lake.

Changes in water rights, such as diversion point or use, require an application to and approval by the Idaho Department of Water Resources (IDWR). If the change exceeds 50 cfs or 5,000 acre-feet, the change must also be approved by the Idaho State Legislature.

Snake River Compact

The Snake River Compact between Wyoming and Idaho was signed October 10, 1949, and approved by Congress on March 21, 1950. It allocates the waters of the Snake River to each state

(96 percent to Idaho, and 4 percent to Wyoming) for storage or direct diversion exclusive of Wyoming water rights established prior to July 1, 1949. The 4 percent has been quantified to be about 200,000 acre-feet per year based on average annual runoff at the Wyoming/Idaho State line.

The Compact allows for future direct diversion or storage development in Wyoming. Idaho is to be compensated with storage by Wyoming if certain "trigger" criteria are exceeded. The Compact allows one-half of the 200,000 acre-feet to be used without restriction. However, use in Wyoming of the remaining 100,000 acre-feet requires replacement storage in the amount of one-third of such use for the benefit of existing Idaho water users. Therefore, 33,000 acre-feet of space in Palisades Reservoir has historically been identified for that purpose. This space, called Wyoming Compact Space, has now been contracted to Wyoming by Reclamation. It is to be used to meet Wyoming's obligations under the Compact. By exchange, Wyoming may use the space to maintain higher lake levels in Jackson Lake or increase releases from Jackson Lake to supplement low fall and winter streamflows.

V. General System Operation

This chapter provides an overview of operation of the upper Snake River/reservoir system. More detailed description by function is provided in chapter VI.

Climatic conditions of the area produce low precipitation in the summer and early fall, and higher precipitation during the late fall, winter, and spring. Much of the winter precipitation accumulates as snowpack. This produces natural riverflows that can peak at very high levels as snow melts in the spring and early summer, decline throughout the summer to a minimum, and remain low during the fall and winter.

Storage reservoirs are constructed and operated to change the flow regime for some purpose. Based on project authorities, the reservoir system of the upper Snake River is operated for two primary purposes—irrigation water supply and flood control. Hydroelectric power generation, recreation, and fish and wildlife functions (such as maintaining trumpeter swan habitat) are secondary or incidental to the primary operating considerations, i.e., generally, water is not specifically released from storage except for irrigation and flood control purposes.

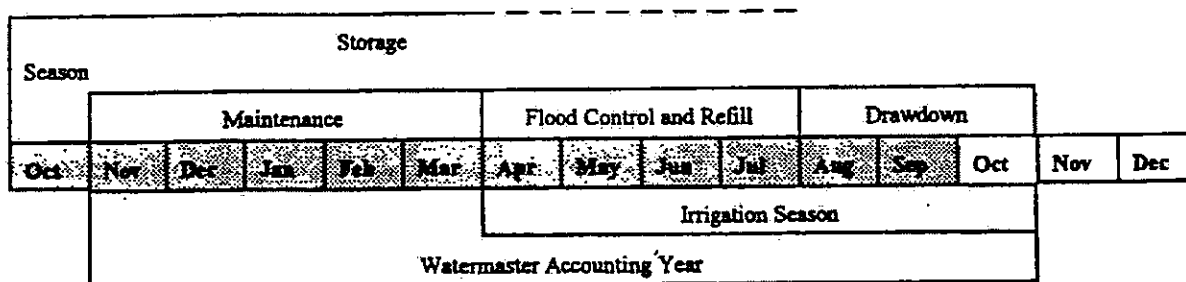
The upper Snake River reservoirs are operated as a unified storage system where water is stored and released in a manner to maximize the capability of the storage reservoirs. This means that water is physically stored in those reservoir that are most difficult to fill and is released from the reservoirs that are most likely to refill in the following year. There are two major operating principles: (1) in general, water is stored as far upstream as possible regardless of storage right priorities and (2) water is released first from the reservoirs that are easiest to refill. A water rights accounting is maintained to assure that, regardless of where water is stored or from where releases are made, the storage and use of water is properly accounted to the appropriate rights and spaceholders. This allows the system to be operated more efficiently than strictly following individual storage right priorities and functions, provides a much greater chance that reservoirs will fill, and allows releases that would otherwise violate water rights.

Water operations are not defined on a calendar year and there are several "seasons" or "years" of reference. For most purposes, a water year is used and is defined as running beginning on October 1 and ending the following September 30, e.g., the 1994 water year began on October 1, 1993 and ended on September 30 of 1994.

Spaceholder contracts for upper Snake River basin specify that the storage season begins on October 1 and extends until there is no more water to be stored and that the irrigation season begins on April 1 and extends to October 31. In keeping with the end of the contract irrigation season, the water accounting system used by the Watermaster runs from November 1 to October 31.

There are three general operating seasons based on climatological pattern and irrigation demand: (1) Maintenance from November through March, (2) Flood Control and Refill from April through July, and (3) Drawdown from August through October. This general pattern coincides with the Watermaster's accounting period. Drawdown for flood control, storage release for irrigation demand, and reservoir refill may occur in the same time frame for different reservoirs because of elevation difference and the demand for irrigation at lower elevations. Also, it is important to recognize that the beginning and ending of the three operating seasons can vary widely with climate and the water supply. The various operating seasons and the accounting period are shown in figure 4.

Figure 4.—Operating Periods and Seasons
(Water year shown by shaded blocks)



Maintenance Period

The primary function of reservoir operation during the Maintenance period of November through March is to carryover and store water to the extent allowed by flood control requirements. By the beginning of November, the reservoirs have been drawn down as the result of meeting summer irrigation needs and/or to meet a maximum elevation that provides the required flood control space. Inflow is stored, if there is more space than needed for flood control, or released as needed to maintain the general winter flood control space. Accrual of water is normally very slow as streamflows are low because of the cold temperatures at the elevation of the reservoirs. Water is released from some reservoirs to meet minimum streamflows for protection or enhancement of fish and other wildlife. After January 1, anticipated spring flooding becomes a factor. Depending on the size of the snowpack the flood control space will be decreased, maintained, or increased.

Flood Control and Refill Period

Spring snowmelt and irrigation demand at lower elevations may begin in April. During the Flood Control and Refill period of April through July, reservoir storage is continuously adjusted on the basis of runoff forecast to provide space for flood control as needed and to assure refill of the reservoirs. Irrigation demands during the early part of this season are usually met from streamflows but may require some release of storage from lower reservoirs. As snowmelt increases, irrigation demands may be met entirely from natural flows, and unstorable flows in excess of irrigation demand may pass Milner Dam. During the latter part of this period, irrigation demands may again be met by a combination of natural streamflow and release of storage. In recent years, some water has also been released downstream to meet requirements for augmentation flows in the lower Snake for ESA-listed salmon (see chapter VI for more detail).

Drawdown Period

During the Drawdown period of August through October, storage is released to meet irrigation demands or to reach a reservoir elevation that provides the required flood control space in November. Irrigation demands must be met in varying degrees from storage releases, and there is constant adjustment of reservoir releases to maintain water as high in the system as possible and to use water from reservoirs with the greatest refill capability. In very poor water years the Drawdown period may begin as early as April.

An important consideration in all of the phases of operation of the reservoirs is travel time. The travel time for water released from Jackson Lake to reach Minidoka Dam is about seven days. As a result, system operators must constantly anticipate irrigation demands and often release water up to 2 days before anticipated use. Ending the irrigation season with water stored as high in the system as possible increases the ability to maintain streamflows throughout the winter. During the flood control season, releases for flood control must also anticipate possible local weather events downstream.

Standing Operating Procedures

Standing Operating Procedures (SOP's) are documents that contain instructions and all of the necessary information for a damtender to correctly operate the dam and reservoir. Reclamation prepares an SOP for each Reclamation dam and reservoir primarily for the use of the damtender and the immediate supervisor. The SOP usually includes (1) an emergency preparedness plan that provides instructions to follow in the event of various emergencies, (2) a directory of personnel including those of emergency services and cooperators for communications purposes, (3) general information on the facility, (4) technical data on structural, mechanical and electrical details, and (5) information on reservoir operations including filling and release of water, inflow forecasting, and specific operating criteria.

These documents are controlled and numbered, which allows additions, corrections, and updates to be tracked carefully. Deviation from the SOP is a serious matter which requires concurrence of upper management.

General Operating Activities

Table 4 shows general operating activities for Reclamation reservoirs located upstream from Milner Dam. Jackson Lake, Palisades Reservoir, American Falls Reservoir and Lake Walcott (Minidoka Dam) are operated in a closely integrated manner.

Ririe Reservoir is operated for flood control and recreation as there are no contracts for storage at present. However, the uncontracted storage is part of the Fort Hall Indian Water Rights Agreement (see chapter VII). The operations of Island Park Reservoir, Grassy Lake, and Henrys Lake are somewhat coordinated among the three and with downstream reservoirs, but not to the degree of coordination among the main stem reservoirs.

Table 4.—Summary of Reservoir Operating Activities				
Activity	American Falls Reservoir	Grassy Lake	Island Park Reservoir	Jackson Lake
Refill target	April 1	None	April 1	Mid-May to July 1
Flood control operation	Informal	None	Informal rule curve	Yes. Rule curve with Palisades Reservoir
Minimum flood control space ¹	None	None	None	200,000 acre-feet October 1 to May 1
Average winter release (Dec-Feb 1966-1995)	4,050 cfs	0 cfs	350 cfs	415 cfs
Minimum winter release (unofficial)	300 cfs	None	100 cfs	Smaller of inflow or 280 cfs
Minimum or conservation pool	0 acre-feet	270 acre-feet	380 acre-feet	Large natural lake ²

¹Until spring forecasts are available

²Larger than the active storage capacity

Table 4.—Summary of Reservoir Operating Activities (Continued)

Activity	Minidoka (Lake Walcott)	Palisades Reservoir	Ririe Reservoir
Refill target	April 1	Mid-June to early July	None
Flood control operation	None	Yes. Rule curve with Jackson Lake	Yes. Rule curve
Minimum flood control space ¹	None	None	50,000 acre-feet
Average winter release (Dec-Feb 1966-1995)	4,350 cfs	2,260 cfs	0 cfs since 1987
Minimum winter release	300 cfs plus reach gain	550 cfs	0 cfs
Minimum or conservation pool	115,000 acre-feet	201,000 acre-feet	10,000 acre-feet

Typical Reservoir Contents and Riverflows

At any given time, the contents of the upper Snake River reservoirs and the flows in various reaches of the river will vary depending on a large number of factors. These factors, include the amount of precipitation in the previous year as well as in the past few weeks or days, the contents of the reservoirs at the end of the storage season, the temperature, the amount of irrigation demand, etc. The content of reservoirs and the amount of streamflow at any instant provide limited information on the system operation as reservoir contents and riverflows could markedly differ in a few weeks or even a few days. In addition, riverflows may change greatly in a few hours and reservoir contents and riverflows can vary greatly with the water supply. However, charts of riverflows and reservoir contents can provide a general overview of the range of operations.

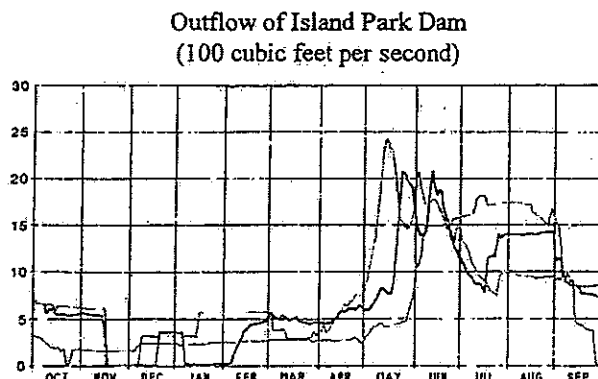
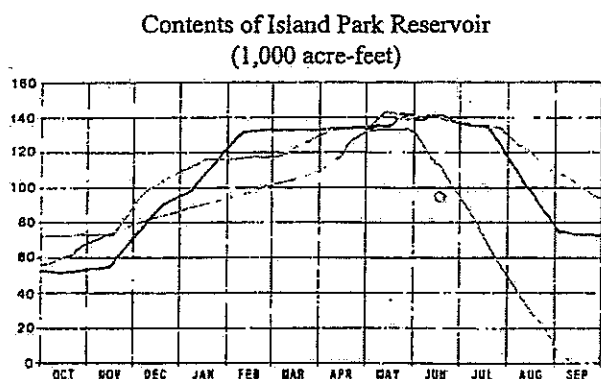
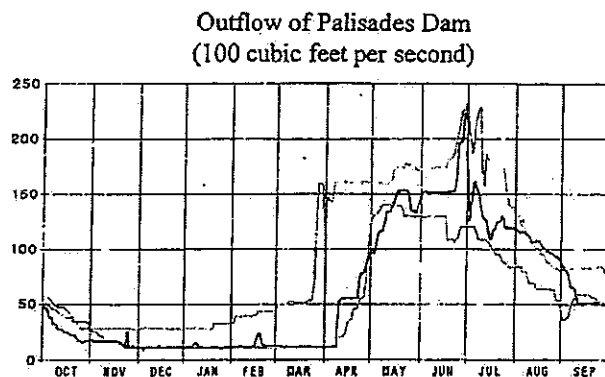
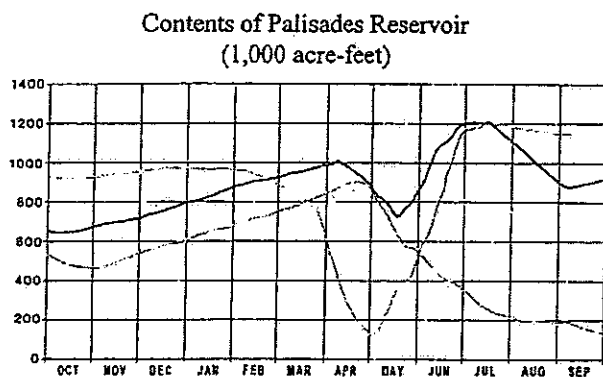
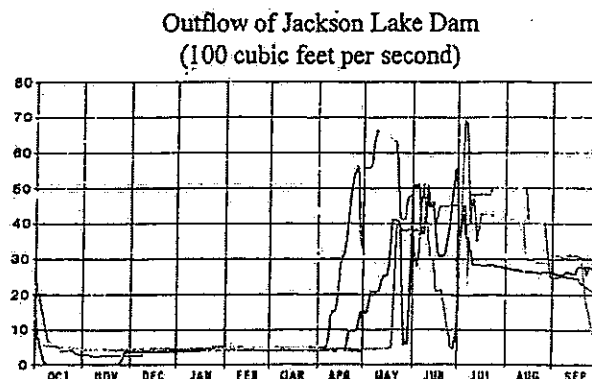
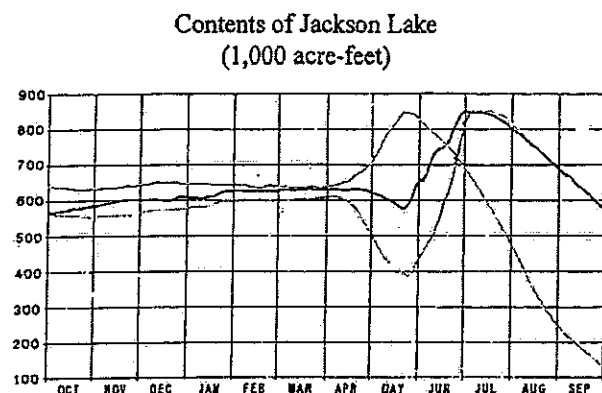
The contents of five reservoirs and the outflow at six dams were selected for a good, average, and poor water supply year. The 1992 water year was selected as a recent, very poor water supply year. However there is no year since 1989 that would show a typical average water supply and a good water supply, and Jackson Lake content was restricted from 1977 to 1989. As a result, the

1970 water year was selected for an average supply, and the 1971 water year was selected to illustrate a good water supply. Figure 5 illustrates typical reservoir content and outflows for good, average, and poor water years.

The reader is cautioned that several significant developments have occurred since the early 1970's. American Falls Dam was under reconstruction from 1976 to 1978 and Ririe Dam was not completed until 1977. In addition, significant conservation measures in irrigation have been implemented since the early 1970's. None of these changes are reflected in the average water year (1970) and good water year (1971) data. The most significant change—conservation effects during a poor water supply—are reflected in the poor water year (1992) data.

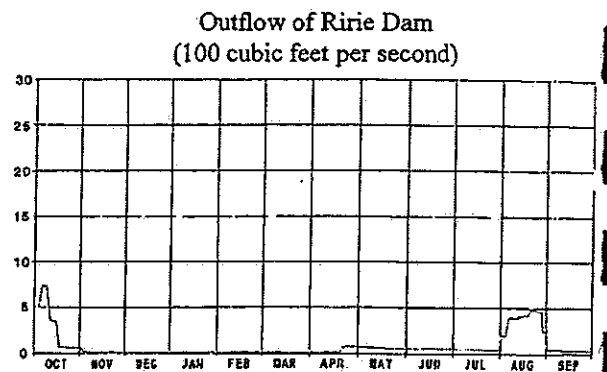
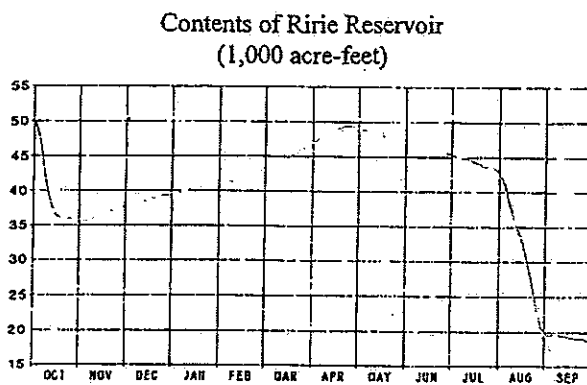
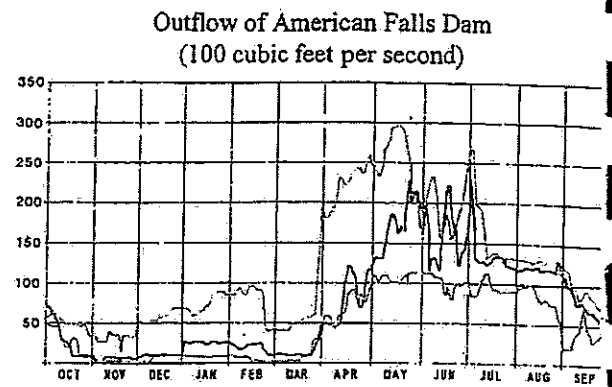
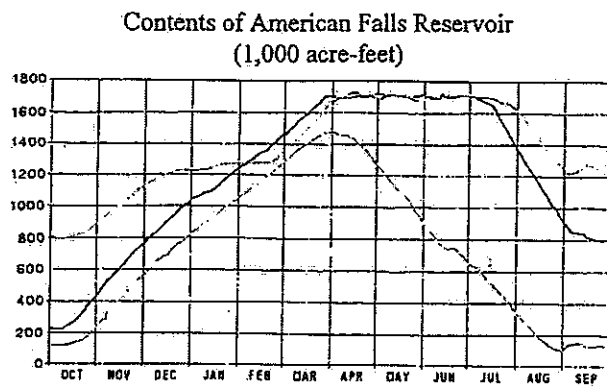
The reader is also cautioned that riverflow may be composed of many elements. During the irrigation season, these are primarily (1) natural flows to meet demands for natural flow rights, and (2) storage releases to meet spaceholder demands for a full or supplemental water supply. Early in the spring, riverflow may also include releases from storage for flood control operation. In the summer and fall, part of the flow may be releases from storage to reach the minimum flood control level for fall and winter operation.

Figure 5.—Typical Content and Outflow of Upper Snake River Reservoirs

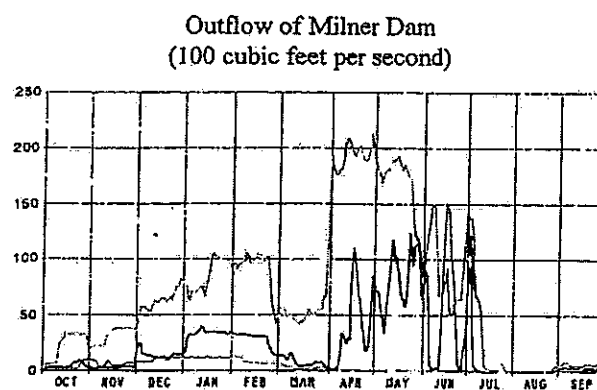


— 1971 (Good water supply)
— 1970 (Average water supply)
— 1992 (Low water supply)

Figure 5.—Typical Content and Outflow of Upper Snake River Reservoirs (continued)



(Note: No data available before 1978; Ririe Dam and Reservoir were completed in 1977)



— 1971 (Good water supply)
— 1970 (Average water supply)
— 1992 (Low water supply)

VI. Detailed Operation By Function

Early Reclamation storage facilities were developed for a single purpose—irrigation—or for dual purposes—irrigation and power. As additional storage was added, flood control became a potential operating function and was authorized. The passage of laws that required consideration of other functions at existing facilities and new facilities also helped change the character of Reclamation project development in the upper Snake River basin. Passage of a variety of Federal and State laws that require greater consideration of environmental and other factors combined with a general change toward more consideration for fish and wildlife protection has helped mold the operation of the present system.

The upper Snake system has evolved into a true multipurpose operating system; however, irrigation and flood control remain the dominant operating functions. Water rights administered by the State, project authorizations defined by the Congress, and storage contracts with the water users define the operating boundaries. It is important to recognize that although storage space and the use of water are dedicated to specific purposes, the way the water is moved among reservoirs can accommodate other purposes. To the extent possible, reservoir releases are passed through hydroelectric powerplants for the generation of electricity. Within Federal and State statutes and contract law and with the consent of water users, reservoir and river operations are implemented to protect fish and wildlife populations and to provide recreation benefits.

There is a marked contrast in the operation of the Snake River at Milner Dam. Except for salmon flow augmentation water, Reclamation does not release storable water that can be controlled above Milner Dam. In addition, Reclamation has no storage on the main stem downstream from Milner Dam. Below Milner, IPC uses riverflows to generate electricity at numerous powerplants. Another contrast is that there is careful accounting

of irrigation water upstream from Milner, and almost no accounting of irrigation water downstream.

Flood Control

Two types of flooding can occur above Milner Dam—spring snowmelt and winter rain on snow. At higher elevations, such as above Palisades, the major threat of flooding is from the spring snowmelt. At lower elevations, such as the Willow Creek basin upstream from Idaho Falls, there is a major threat from floods caused by winter rain on snow.

Jackson Lake, Palisades Reservoir, and Ririe Reservoir provide the major flood control above Milner Dam. Jackson Lake and Palisades Reservoir are operated as a system to limit the maximum flow at the Heise stream gauge (about 48 miles below Palisades Dam) to 20,000 cfs. Ririe Reservoir is operated to limit Willow Creek flows to a maximum of 1,200 cfs. Island Park Reservoir is operated informally for flood control. Other reservoirs above Milner are operated for irrigation and incidentally provide space for flood control. In addition, there are channel restrictions of 20,000 cfs at Burley, Idaho. (A list of stream gauges is included as appendix B.)

Rain on Snow

A rain-on-snow on frozen ground event occurs when a saturated basin is subjected to cold, snowfall, and warm rain, in that order. An extremely damaging flood occurred in February 1962 in the Willow Creek basin above Idaho Falls. Ririe Dam was built to prevent a recurrence of this type of flood, as well as to control spring snowmelt floods.

It is generally not possible to anticipate a rain-on-snow event far enough in advance to provide an appropriate amount of flood control space. Therefore, reservoir pools are lowered to a

predetermined elevation in the fall and maintained throughout the winter months to provide adequate storage space for possible rain-on-snow events. The reservoir space provided by this action is often referred to as the winter minimum flood control space and is based on studies of historical runoff.

Spring Snowmelt

After January, space is maintained in the reservoirs (i.e., the water surface is held at a lower elevation) according to the amount of inflow anticipated. This requires forecasts of runoff at Heise and Ririe Dam. As forecasts of spring runoff become available, the reservoir pool is adjusted to provide the appropriate amount of flood control space based on criteria for that reservoir—the larger the runoff forecast, the more space required.

The present statistical technique used for forecasting runoff above Milner Dam is a step-wise multiple regression analysis. Forecasts are based on a comparison of the current basin conditions (including observed precipitation and runoff and snowpack moisture) with historical conditions and the resulting runoff. Forecasts are made which assume subsequent precipitation amounts below normal, at normal, and above normal. Reclamation and the Corps independently make runoff forecasts and coordinate to produce one operating forecast. (A sample of a Reclamation forecast for Heise is included as appendix C)

Reservoir operators try to balance flood control and refill needs, since providing too much flood control space jeopardizes reservoir refill, and providing too high a refill probability jeopardizes flood control. Ordinarily, it is possible to maintain a high probability of controlling flooding while also maintaining a high probability of reservoir refill. A large forecast error, however, can occasionally result in flows in excess of the goals or a reservoir failing to refill. Large errors are generally caused only when a low-probability

condition occurs that, with hindsight, would have required operating entirely for either flood control or refill. Examples of low probability conditions include exceptionally large or small amounts of precipitation over a long period, exceptionally large amounts of precipitation over a short period, lengthy periods when temperatures are above or below normal, and rapid or extreme shifts in temperature. Forecasts are made as needed, but at least once a month, beginning on January 1 and extending to the end of the spring runoff.

Flood control rule curves are used to determine the amount of storage space required to adequately control runoff. Formal flood control rule curves have been developed for Palisades Reservoir (combined operation with Jackson Lake) and Ririe Reservoir, while informal flood control rule curves have been developed for Island Park Reservoir. A formal flood control curve is jointly developed by the Corps and Reclamation according to Congressional directives, and the Corps has ultimate authority to implement a formal flood curve operation. An informal flood control curve is developed by Reclamation to serve as a guideline in providing flood control benefits below a Reclamation reservoir. Generally, an informal curve will provide a higher chance of reservoir refill than a formal curve.

These rule curves are included as appendix D, and indicate how much space must be maintained by date based on the forecast of runoff. The formal rule curves must be followed and operations agreed to by the Corps which has authority under the Flood Control Act of 1949 to direct some Reclamation reservoir operation to reduce flooding. In actual operation, there is a high level of cooperation and mutual concern for both flood control and reservoir refill.

Irrigation

Most of the Reclamation storage above Milner Dam is used as a supplemental water supply for irrigation; only 210,000 acres depends on Reclamation for a full water supply. As a result,

most irrigators are using a combination of water supplies that includes storage, natural flows, and ground water. To provide a sufficient amount of water in the river for out-of-stream diversion without spilling at Milner Dam requires a high degree of coordination among irrigators, storage operators, and the State Watermaster.

Irrigation and flood control operations overlap during much of the reservoir filling season. Spaceholder contracts specify that the storage season begins on October 1 and ends when no more water is available for storage. That point is reached when the riverflow equals or falls below the total amount of natural flow demand for irrigation water. The end of the storage season depends on irrigation demand and the amount and rapidity of snowmelt, varies from April 6 to July 24, and occurs most often in June.

Henrys Lake and the two northern Reclamation reservoirs—Island Park and Grassy Lake—serve only the Fremont-Madison Irrigation District. Jackson Lake, American Falls, and Palisades serve the southern part of the basin. Minidoka has some storage that is used for diversion and powerhead and to enhance storage in American Falls, Island Park, and Palisades Reservoirs. At present, Ririe has no storage contracts for irrigation and is used exclusively for flood control and recreation (but see chapter VII, "The 1990 Fort Hall Indian Water Rights Agreement").

Throughout the irrigation season, water is released from the reservoirs as needed to meet irrigation demands. Reservoir releases in the segment of the Snake River from Palisades Dam downstream to the Blackfoot gauge are determined by diversion demands of some 50 canals, the need to maintain a sufficient flow in the river at Blackfoot, and the desire to move stored water from Palisades Reservoir to American Falls Reservoir so that an adequate amount of water will be available to complete the irrigation season. Frequent consultations with the Watermaster (see "Watermaster" in this section) are necessary to

determine the flow requirements and the amount of stored water that needs to be released.

Irrigation demands in the reach from American Falls Dam to Milner Dam are met by releasing water from American Falls Dam through the IPC powerplant. Through most of the irrigation season, the water surface at Lake Walcott is maintained at or near maximum elevation to ensure water deliveries to the Minidoka Irrigation District and the Burley Irrigation District and to provide maximum hydraulic head for hydropower generation at Minidoka Powerplant.

Irrigation demand is determined by weather, crop consumptive use requirements, and cropping patterns. In daily operations, individual irrigators request water from local "ditch riders" who report needs to irrigation district managers. The irrigation districts accumulate the totals and request water from the District 01 Watermaster or Reclamation's Burley office. The Watermaster then requests that water be released from the reservoirs to satisfy the accumulated requests. Operating personnel in Reclamation's Burley office determine how much water to release from each reservoir and the timing of the releases and provide specific instructions to each damtender.

Reclamation coordinates and works with water users throughout the basin including the Committee of Nine and some 64 irrigation districts and canal companies that contract for storage space in the Reclamation facilities. Reclamation personnel in the Burley office work with the Watermaster of Water District 01 in Idaho Falls to meet daily demands for irrigation and instream flows. The Watermaster of Water District 01 is responsible for the natural flow determination and accounting, and Reclamation is responsible for the storage water accounting and allocation. The Watermaster and Reclamation's Burley office operating personnel work very closely to account for all water use and to meet the demands.

Committee of Nine

The Committee of Nine was created in 1919 by the Governor of Idaho to address and help solve water problems in the Snake River basin above Milner. That year, a serious water shortage developed. Upstream diverters of natural flow contested with downstream owners of storage over the flows in the river. As a result, the Committee of Nine was tasked to devise a plan for distribution of water in the Snake River.

The Committee is comprised of representatives elected by canal companies and irrigation districts in that area. Reclamation's Snake River Area Manager and the District 01 Watermaster are advisors to the Committee. Officially recognized by the State of Idaho, the Committee is also recognized in all Minidoka and Palisades Project reservoir spaceholder contracts as an advisory body. The Committee of Nine provides a forum for discussion, consultation, and advice on reservoir and river operation and administration. Reclamation considers the advice of the Committee in making reservoir operation decisions. In addition, the Committee is a decisionmaking body in its function as the local committee for the District 01 Water Rental Pool (also known as the upper Snake River Rental Pool).

District 01 Water Rental Pool

Spaceholder contracts and Idaho State law allow operation of rental pools. These pools allow spaceholders to offer water for rent to other entities that are in short supply.

Water rental pools (as they are now called) operate under State of Idaho law and at the direction and under the rules of the Idaho Water Resources Board (IWRB). Prior to 1991, the rental pools were often called water banks, but that term is now used as the official umbrella name for all water rental pools in the State. The water rental pool concept has been unofficially in

existence since 1937 in the upper Snake. In 1979, the State Legislature authorized the establishment of water banks and rental pools statewide as a means to share water. Reclamation's Snake River Area Manager is a member of the Committee of Nine water rental pool subcommittee. Local water rental pool rules and leasing prices are determined by the local water rental pool organization and then subsequently approved or denied by the IWRB. In Water District 01, the Committee of Nine is the local water user committee and proposes rules for approval by the IWRB. The Watermaster administers the rental pool under guidance of the committee. Reclamation as the storage facility owner and contractor is also involved and must approve the rules and rates for Federal storage as well.

Spaceholders who offer water for rent before July 1 receive a proportionate share of proceeds from any such water that sells. Spaceholders who offer water for rent after July 1 receive proceeds from any sales on a "first come" basis after all water offered before July 1 is sold.

District 01 Water Rental Pool procedures stipulate a priority basis for acquiring water from the rental pool. The first priority is for irrigators with storage space in Reclamation reservoirs and the second priority is for irrigators who use the water in the Reclamation project area. The third priority is for other beneficial uses.

In order to protect spaceholders who do not sell storage water, a "last-to-fill" rule was adopted. This rule says that any water sold for use below Milner Dam will be the last to fill the next year. This was imposed to prevent spaceholders who have good overall water supplies from profiting at the expense of overall refill the following year (each spaceholder accrues water proportionately to his owned space). If water is sold through the rental pool, the reservoir space drafted must be refilled the next year. Without the "last-to-fill" rule, all spaceholders would have to contribute to the refill of the rented water.

The price for rented water is set by the Committee of Nine. In 1997, irrigation water for use above Milner Dam sold for \$2.95 an acre-foot which included \$0.75 for District 01 administration and \$0.20 for the IWRB surcharge. Non-irrigation water for use below Milner Dam includes the same administration and surcharge fees and sold for a base price of \$7.00 an acre-foot plus per acre-foot charges of \$0.75 for District 01 administration, \$0.70 for the Water Resources Council, and \$2.05 to be held to secure water for Reclamation through 1999 for a total of \$10.50 per acre-foot. If this last-to-fill water is filled in

the following year the contingency fee will be refunded to the buyer.

Table 5 summarizes District 01 Water Rental Pool contributions and sales for the period 1979-1997. In most years, there was much more water consigned than sold. Prior to 1991, most of the non-irrigation purchases were made by IPC for power generation. Since 1991, Reclamation has purchased most of the non-irrigation water for salmon flow.

Table 5.—District 01 Water Rental Pool Activity, 1979-1997 (Acre-Feet)				
Year	Consigned	Total Purchases ¹	Irrigation Purchases	Not Sold
1979	88,870	73,960	23,960	14,910
1980	72,190	14,575	14,575	57,615
1981	170,107	149,039	24,039	21,068
1982	290,426	203,515	3,515	86,911
1983	540,606	353,084	3,084	187,522
1984	809,400	277,433	2,433	531,967
1985	497,302	362,169	12,169	135,133
1986	895,642	159,735	9,735	735,907
1987	365,006	192,506	42,506	172,500
1988	235,325	159,215	109,215	76,110
1989	416,994	115,736	15,736	301,258
1990	306,463	124,525	68,000	181,938
1991	205,113	184,677	85,677	20,436
1992	9,954	9,954	9,954	0
1993	408,240	287,974	38,974	120,266
1994	432,171	432,171	75,889	0
1995	605,658	303,944	37,828	301,714
1996	637,134	303,369	20,055	333,765
1997	0 ²	0 ²	0 ²	0 ²

¹Prior to 1991, purchases other than for irrigation were for power, beginning in 1991, Reclamation purchased this water for lower Snake River flow augmentation to enhance salmon migration.

²Not available

Watermaster

The State of Idaho issues and administers water rights in the State. The Watermaster of District 01 is elected each year by the water users, is a State Government employee and the State representative for administering water rights throughout the year, and is currently also the Manager of the Eastern Office of the IDWR. He supervises an office of about 15 part-time and full-time employees in Idaho Falls. The Watermaster tracks and reports water use, and notifies water right holders when they do not have a right to use water, e.g., the water supply is insufficient to provide water for their water right. This is a difficult task requiring monitoring of a great deal of water data and extensive computations especially since many water right holders have both natural flow and storage rights. During the course of a year, the natural river runoff declines to the point that flow becomes insufficient to supply all natural flow rights. Holders of later date priority then must switch to storage rights and the Watermaster must also track the storage used. The Watermaster also provides day-to-day operation of the rental pool on behalf of the Committee of Nine.

Water Accounting

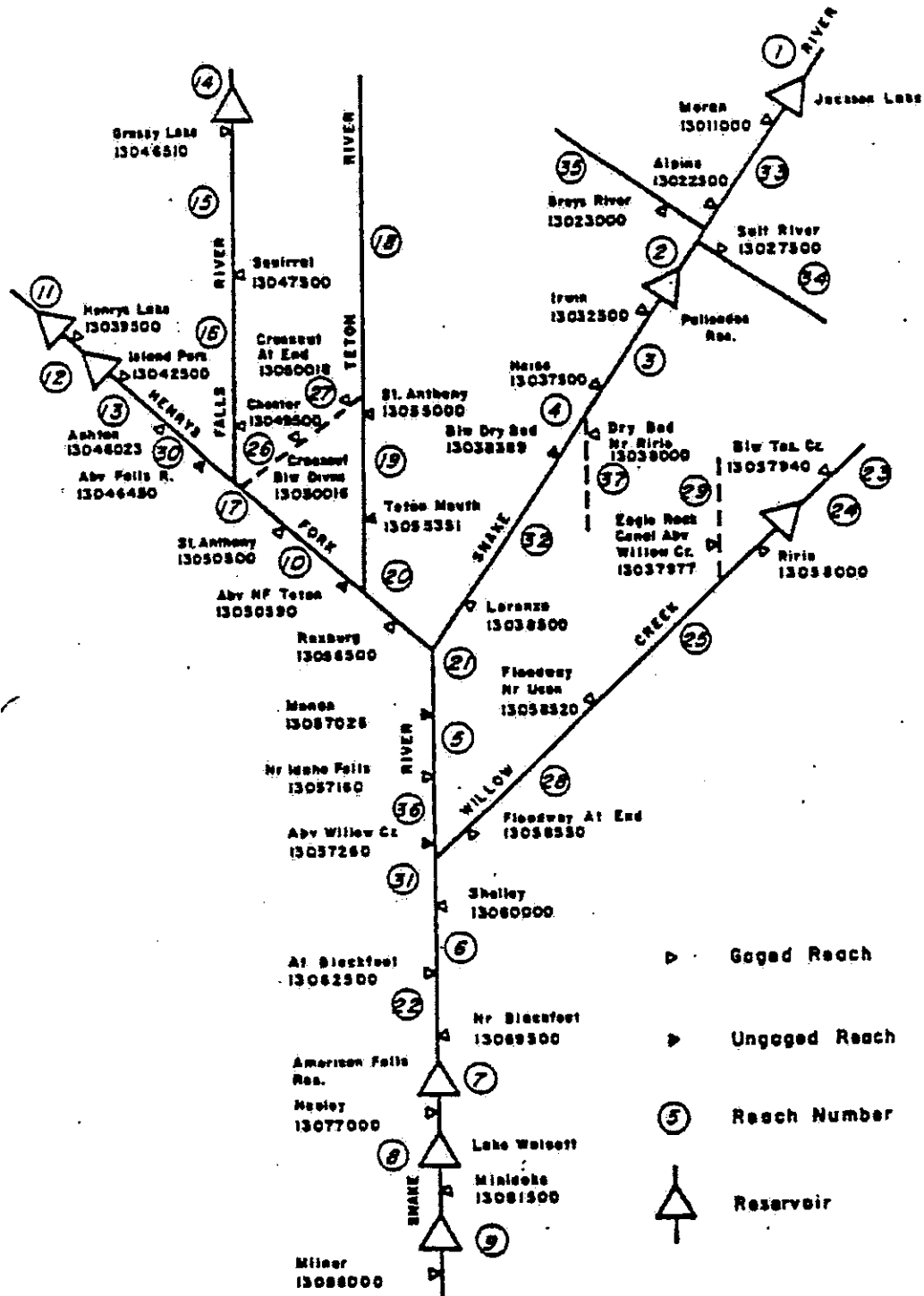
Water data collection and accounting is administered by Water District 01 pursuant to an agreement with the IDWR and in cooperation with Reclamation. The majority of the data is collected by automated data collection platforms that are part of a satellite based telemetry system, referred to as HYDROMET, operated by Reclamation for the collection of hydrologic and meteorologic data on a real-time basis. All important river gauges and the majority of the canal diversions are monitored by the HYDROMET system. Data from canal diversions which are not on this system are obtained by telephone from the canal managers and water district river riders.

The major role of Water District 01 activities under the direction of the Watermaster is to account for the diversions of natural flows, ensure that water right holders are complying with their rights, both in quantity and priority, and determine the amount of stored water used by each spaceholder. On a daily basis, the Watermaster computes the amount of natural flows available in the system and the total diversions by calculating reach gains or losses in 37 reaches of the Snake River and tributaries upstream of Milner Dam (figure 6). These reaches are segments of river lying between two stream gauging stations. Gains are due to inflow from tributaries, springs, and irrigation return flows. Losses are caused by surface flow entering the ground water, evaporation and transpiration of riparian vegetation, and out-of-stream diversions. From this, and the diversion data, the Watermaster determines which water rights are being filled on each day and accounts, on a daily basis, for the amount of stored water that is being used by each of the diverters and from which reservoir account it is being taken. This provides the basis for determining each spaceholder's water storage account of stored water accumulated, used, and carried over. To the extent possible, the debiting for stored water use takes into consideration (1) the need to lower Jackson Lake by October 1 to provide 200,000 acre-feet of flood control space and (2) the location of the diversion demands and the refill potential of American Falls Reservoir, Palisades Reservoir, and Jackson Lake. The accounting year for Water District 01 is November 1 through October 31. A final accounting is made after the end of the accounting period and documented in the Watermaster's annual report.

Power

There are Federal powerplants and non-Federal powerplants located at Federal Dams and there are non-Federal powerplants at several non-Federal dams. Power generation is secondary or

Figure 6.—Upper Snake System for Water Right Accounting



incidental to flood control and irrigation water supply at Federal dams and no water is released from Reclamation facilities specifically for power generation except for water held under spaceholder contracts (IPC is the only electric utility that has a spaceholder contract and that contract amount is 44,275 acre-feet in American Falls Reservoir).

Federal Powerplants

Power generation was included as an authorized function at Minidoka and Palisades Dams. Currently there are Federal power generation facilities at Minidoka Dam and Palisades Dam. Some of the power generated at the Reclamation facilities is used directly for facility operation and irrigation pumping and the remainder is marketed in the Federal Southern Idaho Power System administered by the Bonneville Power Administration (BPA). Minidoka Powerplant, the oldest powerplant in the region is currently being rehabilitated and expanded to a capacity of 27,000 kW. Palisades Powerplant has recently undergone major rehabilitation with an increase in capacity to 176,600 kW.

Idaho Power Company

In the Snake River basin above Milner Dam, IPC owns and operates powerplants at American Falls Dam and Milner Dam; a third IPC powerplant uses water from the Milner pool and is located on the Twin Falls Canal just downstream from Milner Dam.

IPC powerplants at Milner are operated as run-of-the-river plants, i.e., available reservoir inflow is passed through the powerplants up to the capacity of the powerplants and riverflows are not controlled for power generation. The only control that IPC can use to regulate river flows is to release water from the 44,275 acre-feet of its contract space in American Falls Reservoir. IPC would normally release this water only when it could be released through the American Falls Powerplant (i.e., Reclamation releases are less

than the powerplant capacity) and this water would also produce power at the Milner powerplants.

The American Falls Powerplant, owned and operated by IPC, recently underwent a rewind/uprate to a capacity of 112,400 kW. At American Falls, Reclamation directs the IPC powerplant operator to release the water necessary for flood control or irrigation operations. If the required release is in excess of powerplant capacity (about 13,500 cfs), Reclamation uses the low level outlet gates to supplement powerplant flow. At Milner Dam, IPC releases water to the extent possible through the small powerplant which discharges water to the stream immediately downstream from the dam. About 200 cfs are released directly to the river for minimum streamflow maintenance. When the flow entering Milner pool exceeds irrigation diversion requirements and exceeds the capacity of the small powerplant, flow is directed to the larger powerplant. The larger powerplant takes flows from Twin Falls Canal and discharges flows to the river about 1 mile downstream from the dam.

IPC has provided help in shaping salmon augmentation flows at its downstream dams (see ESA section).

Other Powerplants

In addition to the Federal powerplants and the IPC powerplants, there are other powerplants owned by public agencies and private utilities. All are run-of-the-river powerplants, i.e., flow of the river up to the capacity of the powerplant is passed through the generating units.

In 1991, approval was granted by the FERC for the Fall River Rural Electric Cooperative (FRREC) to construct powerplant with a capacity of 4,800 kW at Island Park Dam. Power generation began in June of 1994. The powerplant operates between a minimum of 190 cfs and a maximum of 960 cfs and utilizes

only water that is released to meet irrigation demands or during flood control operations. During late 1995, FRREC also secured approval to modify the spillway with an adjustable lip to allow water that was previously spilled during irrigation surcharge to be passed through the powerplant to provide additional power generation. The FRREC also has a license for a powerplant with a capacity of 1,900 kW located on the Teton River near Felt. This powerplant was leased to Bonneville Pacific Corporation which filed for bankruptcy in the early 1990's.

Marysville Hydro Associates owns and operates a powerplant with a capacity of 9,100 kW located on the Falls River near Marysville. Utah Power and Light Company owns and operates two powerplants on the Henrys Fork. Its powerplant near Ashton has a capacity of about 5,000 kW and its powerplant near St. Anthony has a capacity of 500 kW. The city of Idaho Falls has three powerplants with a total capacity of about 24,000 kW located upstream from American Falls

Reservoir. Lower Valley Power and Light Incorporated owns and operates a 1,500-kW powerplant on Strawberry Creek, a tributary of the Salt River which flows into Palisades Reservoir.

Powerplant Summary

There are two federally owned and operated powerplants and 12 non-federally owned and operated powerplants located upstream from Milner Dam. The total nameplate capacity of these facilities is about 423,000 kW. The nameplate rating of the two Reclamation powerplants is nearly half of the total. IPC is the major non-Federal power producer and owns and operates one powerplant located at a Reclamation dam in addition to two powerplants associated with Milner Dam. FRREC is the only other electric utility that owns and operates a powerplant at a Reclamation dam. Powerplants at Federal Dams and at Milner Dam are summarized in table 6.

Table 6.—Powerplants Located at Milner and Reclamation Dams in the Upper Snake River Basin		
Site	Nameplate Rating	Owner/Operator
American Falls Dam	112,400 kW	Idaho Power Company
Island Park Dam	4,800 kW	Fall River Rural Electric Cooperative
Milner Dam	At dam: 830 kW On canal: 58,620 kW	Idaho Power Company
Minidoka Dam	127,700 kW	Bureau of Reclamation
Palisades Dam	176,600 kW	Bureau of Reclamation

¹When new powerplant is completed in 1997.

Fish and Wildlife

Authorities under which the Reclamation dams and reservoirs were constructed do not generally include fish and wildlife enhancement except for Palisades Reservoir. Existing provisions for fish and wildlife enhancement do not include managing the water supply for that purpose, i.e., fish and wildlife enhancement is generally limited to managing land surfaces and providing protective measures.

Storage contracts in general limit water operations to those that provide benefit to contract holders. Operations that would diminish the water supply are prohibited without the approval of the contractors. State water law limits appropriation of water to beneficial uses and defines those uses. Furthermore, appropriation of water and change of use are strictly regulated by the State. Nonetheless, there remains sufficient flexibility to address some fish and wildlife enhancement concerns and to provide some improvement.

Wyoming Contract

In 1991, the State of Wyoming entered into a contract with Reclamation for the purchase of 33,000 acre-feet of joint-use space in Palisades Reservoir. The water that accrues to this space is allowed to be "shifted" upstream to Jackson Lake. Under the contract provisions, Wyoming has the option of requesting that the water be held in the Jackson Lake to benefit lake trout spawning or released between October and March 31 to increase flows in the Snake River to improve habitat for the fine-spotted Snake River cutthroat trout population.

Releases From Palisades Dam

In 1988, Trout Unlimited brought a court challenge against Reclamation for releasing winter flows of less than 1,000 cfs from Palisades Dam. In most winters, Reclamation provides a minimum release of about 1,200 cfs, but had decreased the release due to drought conditions. The court

ultimately decided that Reclamation could reduce flows without writing an environmental impact statement. After the court decision, Reclamation funded IDFG to assess the flows needed to sustain and protect the blue ribbon trout fishery. Field studies, conducted between 1990 to 1992, emphasized evaluation of flows needed for overwintering juvenile trout and found that flows of at least 1,500 cfs are needed to better protect juvenile trout. Flow above that level could provide significant additional fish habitat improvements, but, in many years, that level of release could significantly reduce the likelihood of Palisades refill. This study defined the biological flow needs of the main stem and provides Reclamation with a basis for considering flow levels to benefit the fishery in water years when greater winter releases may be possible.

Trumpeter Swans on the Henrys Fork

Trumpeter swans have been eradicated from all of their historic wintering areas in the United States except for the area around the tri-state junction of Montana, Wyoming, and Idaho. About 40 percent of the population winters on the Henrys Fork downstream from Island Park Dam. Open water during the winter is vital for the survival of the birds as the swans feed on underwater vegetation. This wintering area is characterized by very cold temperatures but the water remains open near springs and when warmer reservoir water is released. In the 1987-1988 drought, fall and winter releases from Island Park were reduced to 100 cfs in accordance with previous operating agreements. Low flows combined with cold temperatures caused the river to ice over, and emergency releases were made several times to create open water. Even with this effort, more than 50 swans (about 10 percent of the population wintering on the Henrys Fork) died of starvation.

This problem was approached from two directions. First, an instream flow study was conducted to determine flow requirements to maintain depth and velocity for successful swan

foraging. Second, research into methods to aid in expanding the winter range of the Rocky Mountain population of trumpeter swans has been initiated. The USFWS will continue trapping and moving trumpeter swans to other areas in an effort to establish new wintering areas. This program has been very successful with about 20-25 percent of the swans returning to the area to which they were moved.

Minidoka Wildlife Refuge

The surface of Lake Walcott and much of the surrounding land constitutes the Minidoka Wildlife Refuge which was created in 1909 and is operated by the USFWS. The Minidoka Wildlife Refuge was created in 1909. Reclamation notifies the USFWS when the pool is going to be lowered for winter operation. Raising the pool in the spring and maintaining a constant pool level throughout the irrigation season is consistent with migratory wildfowl needs and use of the refuge.

Tex Creek

The Tex Creek Wildlife Management Area continues to be a successful multi-agency effort. Originally an area purchased and managed as part of Teton Dam mitigation, it has expanded with additional State and Federal lands and is managed by the IDFG for wildlife. Elk, moose, deer, and other animals winter in the area which is also important for sharptail grouse.

Recreation

The upper Snake River basin provides recreation opportunities ranging from high mountain to desert settings. Together, the seven Reclamation reservoirs host approximately 1.4 million days of use annually. Primary reservoir activities include boat fishing, water skiing, camping, and picnicking.

Flowing water recreation use is an extremely important component of the recreation mix, providing opportunities for floating, canoeing,

fishing, picnicking and other uses (use figures are unavailable). The river reaches between Jackson Lake Dam and Palisades Reservoir and between American Falls Dam and Lake Walcott are being analyzed for inclusion in the National Wild and Scenic Rivers system. Other stretches are also regionally and nationally recognized for exceptional whitewater and blue ribbon trout fishing opportunities. The growth in private and licensed guided river trips has become economically important to surrounding communities.

The reach of the river from the head of Jackson Lake to Palisades Reservoir is operated to the extent possible to accommodate local recreation interests including boating on Jackson Lake and downstream whitewater rafting and stream fishing. In most years, this involves passing inflow plus release of at least 200,000 acre-feet of water to evacuate the flood control space in Jackson Lake. Various recreation interests meet with Reclamation in the spring of each year to provide information on desired flow levels. Reclamation uses this information along with available water supply data to establish a flow regime for the summer and fall.

Municipal and Industrial Water Supply

Most of the municipal and industrial water supply in the upper Snake River basin is pumped from ground water and has no significant effect on reservoir operations.

Endangered Species Act (ESA)

In recent years, Reclamation has modified water operations in the Snake River basin above Brownlee Reservoir to help protect and recover species that have been listed under the ESA. By April 1992, Snake River sockeye salmon and spring/summer and fall chinook salmon stocks were listed by the National Marine Fisheries Service (NMFS) under the ESA. In January 1993, five species of aquatic snails that inhabit the

middle Snake River, were also listed (four endangered and one threatened) by the USFWS. Reclamation, BPA, and the Corps (the operating agencies), have participated in ESA Section 7 consultations with NMFS and USFWS on the effects that operation of the Federal Columbia River Power System (FCRPS) may have on the listed salmon and snails. The upper Snake River has been tied to these consultations because of requirements to release reservoir storage to improve salmon migration conditions in the lower

S Snake River and Columbia River reaches. Since 1991, Reclamation has provided salmon flow augmentation storage releases from the Payette, Boise, and upper Snake River basins. Table 7 summarizes information on the source and volume of storage that has been provided annually from above Brownlee Dam. Table 8 summarizes similar information for that portion of the water released from the upper Snake River basin (above Milner Dam).

Table 7.—Flow Augmentation Provided from the Snake River Basin above Brownlee Dam				
Year	Volume (acre-feet)			
	Natural Flow	Reclamation Noncontracted and Powerhead	Rental Pools	Total
1991	-	40,000	160,000	200,000
1992	-	90,000	-	90,000
1993	-	324,000	100,000	424,000
1994	-	383,000	45,000	428,000
1995	-	141,000	286,000	427,000
1996	16,000	155,000	251,000	422,000
1977	18,000	156,000	253,000	427,000

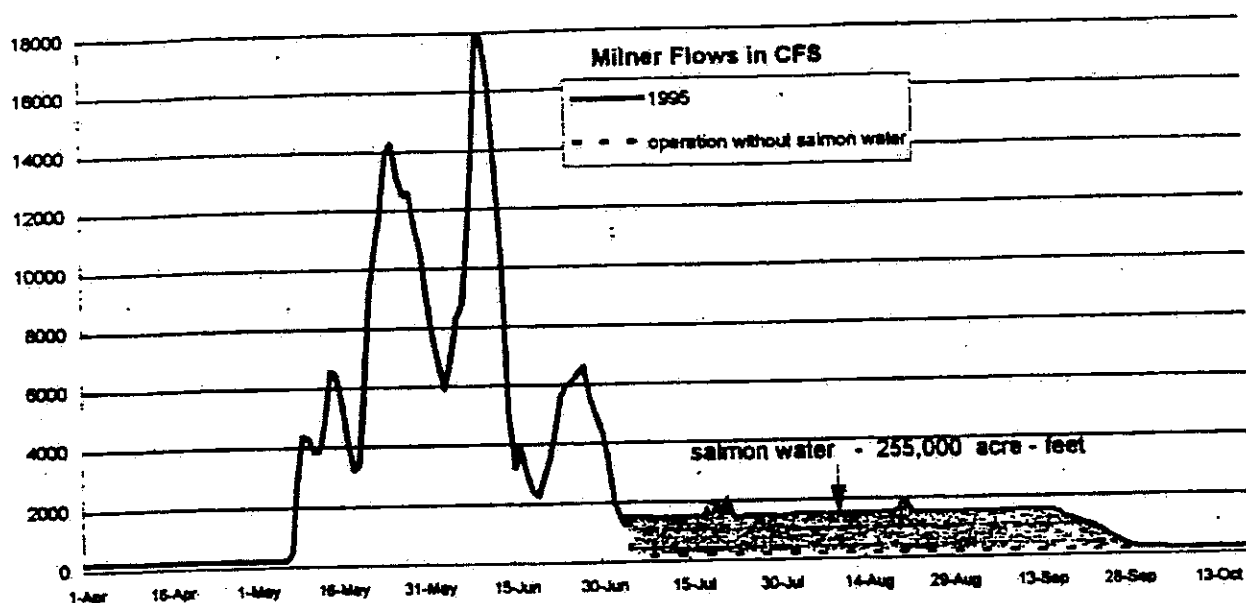
Table 8.—Flow Augmentation Provided from the Snake River Basin above Milner Dam				
Year	Volume (acre-feet)			
	Reclamation Noncontracted	Reserved Powerhead	Water Rental	Total
1991	-	-	99,000	99,000
1992	-	-	-	-
1993	100,000	106,000	65,000	271,000
1994	33,200	252,800	44,300	330,300
1995	22,400	-	232,800	255,200
1996	22,400	-	194,700	217,100
1997	22,900	-	193,300	216,200

Under ESA Section 7 requirements, Reclamation consults with NMFS and the USFWS on the effects of the salmon water releases on listed snails and salmon. The 1995 Biological Opinion, issued by NMFS and USFWS, directs Reclamation to provide 427,000 acre-feet of water for salmon flow augmentation each year through 1998 and to concurrently use a release regime that will not jeopardize listed snail species in the middle reach of the Snake River. This requires that Reclamation consult with NMFS and USFWS each year once water supply/sources are firm.

IPC has in the past agreed to release some of the 427,000 acre-feet from Brownlee Reservoir in a pattern to provide a greater instantaneous flow for salmon in the lower Snake River and Columbia River than could otherwise be furnished by directly passing the water from upstream Reclamation reservoirs. In return, Reclamation

has seasonally scheduled its upstream releases to backfill Brownlee in such a way as to benefit hydropower generation at various IPC powerplant facilities. At the same time, Reclamation must coordinate with the USFWS to assure that upper Snake River water releases for salmon avoid damaging ESA listed snail colonies downstream of Milner Dam. This requires that Reclamation's salmon water release regimes be tailored to reduce flow fluctuations in middle Snake reaches to afford better protection to snail colonies. Flows are measured and controlled at Milner Dam to stabilize and minimize flow swings during the salmon water release period. A slow down-ramping regime is provided at the end of the release to reduce the chances of snail stranding. This is illustrated in figure 7 which shows the 1,500-cfs flow and down ramping past Milner Dam during the 1995 upper Snake River salmon water release period.

Figure 7.—1995 Salmon Water Release at Milner Dam
(Release made between July 2 and September 29, 1995)



VII. Other Issues

All of the water resources of the Snake River above Milner are currently being used in some way, and all of the active space in Reclamation reservoirs has been contracted or assigned to specific uses. Water sustains crops, maintains riparian vegetation, provides habitat for fish and wildlife, sustains human life, and provides opportunities for recreation. Some water is diverted out of stream under natural flow rights; some is stored and later released to be diverted out of stream; some is run through powerplants, and some remains in the river.

Irrigation, power, fishery, wildlife, recreation, ecological and other interests have concerns and most want more water. But more water is not possible; the only possibility is change in the use of the current water supply. It is important to recognize that many uses of water are mutually exclusive, i.e., an increase in one use requires a decrease in some other use. As an example, an increase of instream flows requires out-of-stream uses to be decreased, storage reservoir elevations to be lowered, or both.

In addition to requests for more water, there are requests for different operations. Any change in river/reservoir operation will have negative effects on some uses and positive effects on other uses. Releasing water for a shorter period at a greater rate may benefit one type of recreation while diminishing another type of recreation or diminishing recreation at another site.

Snake Plain Aquifer

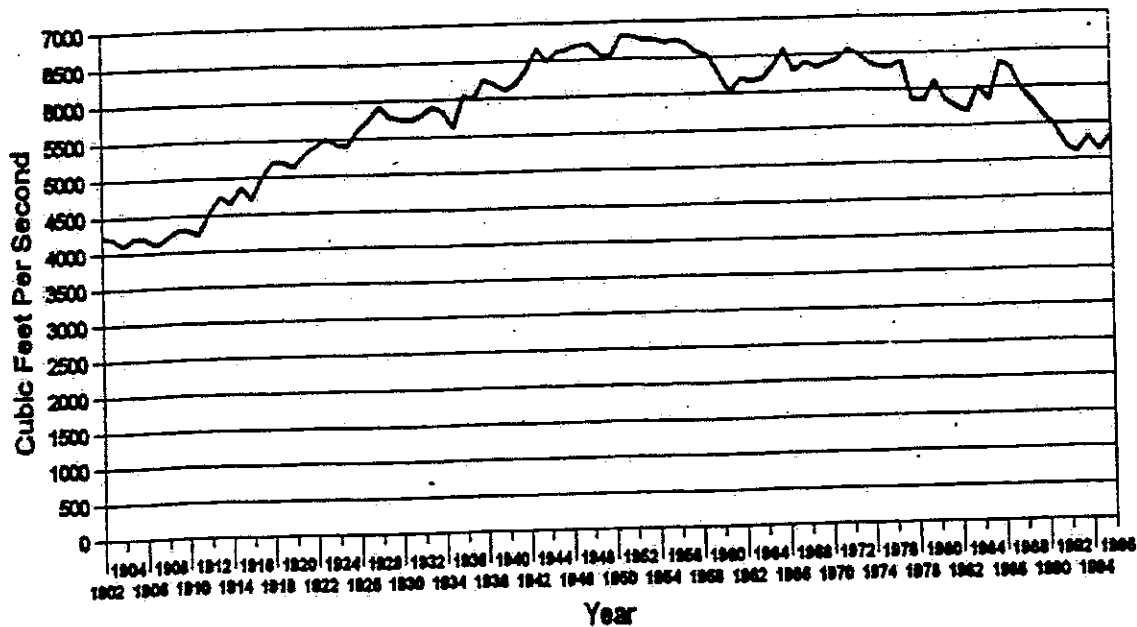
The Snake Plain Aquifer, located north of the Snake River from about Bliss to Island Park Dam, is one of the largest aquifers in the continental United States. The water level of the Snake Plain Aquifer reached an all time high in the early

1950's because of aquifer recharge due to surface irrigation applications and a wet climatic period.

Following the early 1950's, the ground-water levels have shown a net decline reaching an all time low in 1994. This decline is caused primarily by (1) increased ground-water pumping for irrigation and (2) increased water conservation by upstream irrigators. These factors combined with the 7-year drought from 1987 to 1994 have caused a dramatic decline of the ground-water level in recent years. Conservation efforts of reservoir spaceholders contributed to reducing irrigation shortages over a series of years, but the reduced application of water also appears to have reduced the flows at Thousand Springs. The decline in ground-water levels has prompted a water rights call by the A&B Irrigation District, located near Rupert, Idaho, on the IDWR to deliver water based on the district's water right priority date. This call could result in restrictions on ground-water pumping located throughout the plain for water rights junior to the A&B water rights.

The condition of the Snake Plain Aquifer is critical to Snake River flows below Milner as most of the inflow to the river in the reach between Milner and King Hill, Idaho is due to the discharge of the aquifer at Thousands Springs. The springflow has been recorded by the USGS since 1902. The volume of springflow is related to the Snake Plain Aquifer level although there is a lag between recharge changes and springflow changes. Figure 8 shows the flow increasing and peaking in 1951 and then generally declining. The volume of spring flow is currently about the same volume as recorded in 1921.

Figure 8.—Annual Mean Discharge of Thousand Springs Between Milner Dam and King Hill (cfs)



Snake River Basin Water Rights Adjudication

A general adjudication of water rights in the Snake River basin was filed on December 19, 1987, and is ongoing in the 5th District Court of the State of Idaho for the County of Twin Falls, Case Number 39576, (The State of Idaho, *ex rel.* v. The United States; the State of Idaho; and all claimants to the use of water from the Snake River Basin Water System). Reclamation claims use of water in the Snake River basin for several Reclamation projects. The adjudication of water rights includes Federal reserved water rights associated with the Nez Perce Tribe and the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation. The adjudication is ongoing, without an identifiable date for a conclusion.

Included in the adjudication are all water rights (surface and ground water) claimed by individuals and entities in the Snake River basin. There are more than 62,000 separate claimants, including landowners, irrigation districts, canal companies,

State and Federal agencies, and municipalities. Previous court decisions, Federal treaties, Federal contracts, and Acts of Congress have bequeathed a legacy of uncertainty, confusion, and a multitiered system of irrigation delivery priorities. Tribal claims for instream flows (fish habitat, channel, and riparian maintenance) with a time immemorial priority date are for greater than 36 million acre-feet of water, an amount greater than the average annual flow of the Snake River at Lewiston, Idaho.

The 1990 Fort Hall Indian Water Rights Agreement

The 1990 Fort Hall Indian Water Rights Agreement was signed on July 10, 1990, in settlement of litigation involving claims made by the United States on behalf of the Shoshone-Bannock Tribes to water rights in the upper Snake River basin and its tributaries. The Agreement is by and between the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, the State of

Idaho, the United States, and certain Idaho water users.

In general the agreement does the following:

- The date of natural flow rights of Shoshone-Bannock Tribes is revised to become the earliest date on the Snake River.
- The Shoshone-Bannock Tribes retain their storage space.
- Other water users may join an entity that represents the water users (Mitigation, Inc.) and be compensated for losses sustained by the change in water right priority dates.
- Uncontracted space in Ririe and Palisades Reservoir is contracted to Mitigation, Inc. without a requirement to pay the investment costs.

A "Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin" was based on the Agreement and was signed by Judge Hurlbutt on August 2, 1995. The Fort Hall Water Users Association appealed a ruling regarding the 1990 Fort Hall Indian Water Rights Agreement to the Idaho State Supreme Court, and this appeal was heard on December 6, 1995. Until this appeal is resolved, the Agreement and the Partial Decree are not final. In addition, there may be questions whether the Mitigation Inc. contract for the water accruing to Ririe and Palisades space should be viewed as in full force and effect.

If the Agreement stands as written, the Partial Decree will be the controlling document in the allocation of water rights of the Shoshone-Bannock Tribes. One condition of the Agreement is that it shall be effective only when the Reclamation has entered into a storage contract with the IWRB or designee of the Committee of Nine in accordance with Article 12.3.

Accordingly, the United States has agreed to contract with Mitigation, Inc. for the

80,500 acre-feet of noncontracted storage space in Ririe Reservoir and the 18,980 acre-feet of noncontracted storage space in Palisades Reservoir. This space is estimated to provide an average of approximately 45,000 acre-feet of water per year.

Unauthorized Use

Unauthorized use is defined as the use of Reclamation project water in ways, in amounts, or in locations that are not authorized by Federal law or Reclamation contract. Unauthorized use is commonly called water spreading. Unauthorized use includes (1) applying project water to lands outside the boundaries defined by the project's authorizing legislation or a contract, (2) applying project water to lands that have not been classified by Reclamation as eligible to receive water or to lands classified by Reclamation as nonirrigable, (3) any change of use, such as from irrigation to municipal and industrial use without the prior written approval of Reclamation, (4) applying project water without the necessary state water right, or (5) irrigating more acreage than allowed by contract or law.

Meetings were recently held in August and September of 1995 to discuss internally how Reclamation will address unauthorized use. A directive is anticipated from the Commissioner of Reclamation containing the principle that Reclamation will carry out a program to resolve cases of substantial unauthorized use of project water in a cost-effective manner. Implementation of the program will be the responsibility of each Regional Director. Each Regional Director will (1) prepare a plan for identifying all cases of substantial unauthorized use in the region; (2) take interim actions to avoid additional unauthorized uses and address known cases of unauthorized use; (3) prepare a report identifying all cases of substantial unauthorized water use in the region; (4) prepare a plan for resolving these cases; and (5) prepare a long-term plan to provide reasonable assurance that water use conforms to law and contract.

Water Acquisition for ESA Considerations

In accordance with the Reasonable and Prudent Alternative found in the March 2, 1995 NMFS Biological Opinion on FCRPS operations, Reclamation is required to annually provide 427,000 acre-feet of water from the Snake River basin for salmon flow augmentation in the lower Snake River and Columbia River. Reclamation is obligated to take such actions as are necessary to ensure, by 1998, a high likelihood of providing that amount of water each year. Accordingly, Reclamation has initiated a program to acquire reservoir storage space and natural flow rights throughout the drainage above Lower Granite Dam so that a reliable water supply can be obtained to meet the 427,000 acre-feet requirement. To date, Reclamation has purchased about 22,500 acre-feet of storage space in Jackson Lake and Palisades and American Falls Reservoirs. Under this program, Reclamation will purchase natural flow and storage space rights only from those willing to sell, at a fair market value, and in accordance with State water rights. This water, along with annual water rentals, will be combined to meet the salmon flow augmentation requirement of 427,000 acre-feet.

Title Transfer

As part of the second phase of the Administration's National Performance Review, Reclamation is undertaking a program to transfer title of facilities that could be efficiently and effectively managed by non-Federal entities and are not identified as having national importance. This effort is a recognition of Reclamation's commitment to a Federal Government that works better and costs less. The transfer of title will divest Reclamation of the responsibility for operation, maintenance, management, regulation, and liability for the project. The transfer of title to a project will, in effect, sever Reclamation's ties with that project.

A set of criteria and procedures are being developed to assure that transfers will safeguard national interests and will benefit the nation.

Resource Management Plans

Reclamation is conducting a multi-year program to prepare resource management plans (RMP) for all major facilities. These plans are intended to address the management of water and land surfaces including protection of archeological, historical, and other resources. Reservoir operations are generally excluded, but adjustments in reservoir operations that do not diminish benefits to the spaceholders or major project functions can be considered.

This program is guided by Federal law (Public Law 102-575) and policies aimed at ensuring that Federal lands are managed to serve a wide range of public purposes. These coordinated management plans are prepared to clearly set goals, objectives, policies, and priorities related to competing uses, guide decision-making, and resolve conflicts.

Reclamation's resource management policy is to ensure and encourage resource protection, conservation, and multiple use. Management practices and principles, in accordance with existing Federal laws, regulations, and policies, are to be applied to protect fish, wildlife, and other natural and cultural resources. The policy also provides for public health and safety, public access, and a wide variety of outdoor recreational opportunities to accommodate the increasing public demand to utilize Reclamation land and water areas.

An RMP for American Falls was completed in 1995. As funding allows, RMP's will be developed for other facilities in the upper Snake River basin; however, none are scheduled through fiscal year 1998.

Snake River Resources Review

Reclamation is conducting a comprehensive review of the multipurpose operations and related resources in the Snake River basin above Brownlee Dam. The goal of the review, which will take place over the next 4 years, is to develop a set of management tools/models that can integrate the operation of the 10 Reclamation projects and indicate resource tradeoffs with various system scenarios. The review will enhance, refine, and confirm Reclamation's ability to make sound resource decisions in the Snake River basin. The management tools to be developed will improve Reclamation's ability to analyze operations for traditional uses, such as irrigation, flood control, and power generation, while considering other requests such as releasing water for recovery of endangered salmon in the lower Snake and Columbia Rivers, protecting in-basin ESA listed species, recharging aquifers, providing water for municipal and industrial use, improving water quality, improving recreation opportunities, protecting cultural resources and Indian trust assets, and protecting and enhancing fish and wildlife habitat.

Coordination with other Federal and State agencies and Tribal governments that are gathering data or conducting studies within the basin is an important component. This review will serve to consolidate basin information so it can be shared and used more efficiently. Appropriate information will be linked together in a form than can be used to analyze the Snake River/reservoir system. The general public, water users and other State, local and Federal agencies are invited to participate in the review.

Reservoir Conservation Pools

Establishing a conservation (minimum) reservoir pool is intended to maintain valuable reservoir resources such as good water quality, reservoir fish populations, wildlife habitat, and/or recreation uses that would be lost if a reservoir were completely drained. These resource assets often

evolve over a period of time but are secondary to the original purposes for which a reservoir was constructed. Virtually all reservoirs above Milner Dam offer these kinds of resource values which could be enhanced by establishment of conservation pools. None of these reservoirs have an official conservation pool; however, there are de facto minimum pools at Minidoka (Lake Walcott), Palisades Reservoir, and Jackson Lake. The upper Snake River system was authorized and is operated principally for flood control and irrigation purposes. In dry years, storage supplies are more heavily used to meet irrigation demands, and other uses may suffer accordingly.

The designs of most contemporary dam and reservoir projects now incorporate conservation pools. In the upper Snake, there is a need to review the options available for retroactively establishing conservation pool operations to better maintain reservoir based biological communities while meeting the contractual obligations. Information compiled through the Snake River Resources Review and subsequent modeling may help define seasonal reservoir pool elevations needed to enhance fish, wildlife, water quality, and recreation values. There may be opportunities in the future to modify system operations to include conservation pools. Establishment of official minimum pools could benefit recreation and fish and wildlife at Jackson Lake and Island Park, Palisades, American Falls, and Ririe Reservoirs.

Conservation pools would compete directly with irrigation water supplies, possibly some flood control operations and, resource values in other reservoirs. Establishment of conservation pools would require active participation and negotiation by all interests.

Instream Flow Management

High quality trout fisheries are found below Jackson Lake, Palisades, and Island Park Dams. These valuable tailwater fisheries are sustained by year-round reservoir releases. There is controversy and disagreement on the adequacy of

those releases, and there have been incidents of fish losses below Palisades and Island Park Dams associated with drought conditions and related water management decisions. Low flows below these projects during the late fall and winter may limit trout populations by limiting available instream habitat during this period. The potential of other upper Snake fisheries may not be realized because optimal winter reservoir releases are not routinely provided. The minimum flows that Reclamation administratively provides below the various dams in the upper Snake are covered in chapter V.

It is normally not possible for Reclamation to operate the upper Snake River/reservoir system to provide optimal trout flows while meeting contractual obligations to irrigation water users. In addition, increasing minimum flows could conflict with the establishment of reservoir conservation pools. However, on a case-by-case basis, there may be potential for various interests to reach solutions that are mutually beneficial and which could improve instream flow conditions. For instance, Reclamation's salmon water acquisition initiative could result in positive and negative effects on resident fish, water quality in the middle Snake, and power generation. The Nature Conservancy is seeking to establish a winter flow release at Henrys Lake through purchase of reservoir storage rights and a water exchange in the upper Snake River system.

Water Quality

Numerous investigations have demonstrated that water quality in the upper and middle Snake River has deteriorated from nutrient-laden organic and inorganic material inputs, sediment, altered streamflows, and periodic droughts. Several segments of the middle Snake have been designated as "water quality limited." Benefits to recreational contact and cold water biota are impaired by poor water quality that violates State water quality standards. The Idaho Department of Health and Welfare, Division of Environmental Quality, has recently released a draft nutrient management plan for the middle Snake (downstream from Milner Dam) which outlines many management actions that need to be taken to improve conditions. This report indicates that middle Snake water quality may be directly influenced by the quantity of water which flows past Milner Dam. Future studies will better define the relationship between flow and water quality conditions. Water quality benefits could be expected if flow augmentation could be provided from upstream storage sources, but such a solution would be difficult since the waters have already been appropriated for other uses.

VIII. Glossary

Active Capacity or Storage—Amount of storage space that can be filled and released for specific purposes.

Carey Act (1894)—Donated lands to states for reclamation purposes. Tracts sold by states were limited to 160 acres to be used for irrigated farming.

Conservation Pool—A reservoir pool elevation or volume of water that is to be considered a minimum. Conservation pools are usually established to maintain fish and wildlife resources, water quality, or recreation capability.

Consumptive Use—Use that permanently removes the water from the system.

Cost Allocation—A method of distributing the construction costs and the annual operating costs of Federal reservoirs among the benefitted functions. This is a first step to identifying the amount of annual payment needed to recover the Federal costs for construction and operation of a project.

Dead Storage—Water that lies below the outlet of a dam and cannot be released by gravity flow.

Desert Land Act of 1877—Authorized the sale of 640-acre tracts of arid lands in four States and eight territories to persons who would irrigate them within 3 years. Changed to 320-acre tracts in 1890.

Federal Water Project Recreation Act of 1965 (Public Law 89-72)—Provides for recreation and fish and wildlife enhancement at water resource developments.

Flood Control Act of 1944—Set forth statutory procedures for future coordination of plans with the Corps, Reclamation, and the states. Gave Congress the responsibility for coordinating work of the Corps and Reclamation. Caused Reclamation to discontinue using the authority of the Secretary of the Interior to authorize large projects. Virtually all reclamation projects were subsequently authorized by Congress.

Homestead Act (1862)—Provided free farmland to settlers who would live on and cultivate the land.

Inactive Capacity or Storage—Amount of storage space that is not normally released from a reservoir but is maintained for a specific purpose such as hydraulic head for power generation or a conservation pool.

Irrigation Season—Defined in spaceholder contracts as April 1 to October 31.

Minimum Flood Control Space—The space maintained in reservoirs during the winter months to be able to hold the rapid runoff of rain-on-snow events.

Minimum Reservoir Pool—The lowest reservoir elevation or pool volume reached with normal operations.

Non-reimbursable Costs—These are costs identified through a cost allocation where the beneficiary is generally the nation, e.g., anadromous fish protection and enhancement and migratory bird protection and enhancement.

Operational Head—Hydraulic head (elevation of water) needed to operate the facilities, especially the flow of water to canals and powerplants.

Power Head—Hydraulic head (elevation of water) for operation of hydroelectric generators.

Prior Appropriation Doctrine—The water rights system used throughout the western United States. Under this doctrine, water diverted for a beneficial use is based on the principle of "first in time is first in right."

Public Law 102-575, Title XXVIII—Extends some of the authorities on recreation and fish and wildlife enhancement at water resource developments.

Reach Gain/Loss—Amount of water that enters (or leaves) a river reach between two points, i.e., the amount of flow at a downstream point minus the flow at an upstream point equals the reach gain (loss).

Reclamation Act of 1902—Established a Reclamation Fund and authorized the Secretary of the Interior to use the fund to make examinations and surveys and to locate and construct irrigation works in the 16 western states (later 17 western states). Requires the Secretary to comply with State water law.

Reclamation Act of 1939—Authorized the Secretary of the Interior to plan and construct projects for multiple purposes in addition to irrigation. These included navigation, flood control, water power, municipal water supply, and other miscellaneous purposes.

Reimbursable Costs—These are costs allocated to a function that are required to be repaid by the beneficiary. The amount of reimbursability depends on the function and is governed by various public laws. As an example, costs allocated to an irrigation function are to be repaid without interest while costs assigned to power are to be repaid with interest.

Riparian Doctrine—A system of water rights developed whereby only landowners with property abutting the stream could divert water.

River Basin—The geographic area drained by a river.

River Rider—An field employee of the water district.

SNAKE River Basin Adjudication—An ongoing legal proceeding to identify all of the water rights in the basin.

Storage Season—Begins on October 1 and extends to the date that no more water is available for storage.

Spaceholder Contract—A type of repayment contract in which storage space is purchased in contrast to purchasing a specific amount of water. The amount of water that accumulates in that storage space belongs to the purchaser.

Upper Snake River—The reach of the Snake River extending from Milner Dam to the headwaters. The middle Snake River is usually described as the reach from Milner Dam downstream to Brownlee or Hells Canyon Dam. The lower Snake River is the reach from Hells Canyon Dam to the confluence with the Columbia River.

Water District 01—One of the State administration districts for the Snake River. Extends from Milner Dam upstream to the Wyoming border.

Waterbank—All of the water rental pools (see Water Rental Pool) and all of the natural flow water rights market. Also used to indicated the IWRB marketing process of that water.

Water Rental Pool—State authorized mechanism to allow more efficient use of water. Spaceholders are allowed to consign water to the water rental pool which sells the water. Water District 01 rental pool is managed by the Committee of Nine.

Water Service Contracts—A type of repayment contract where the buyer contracts to receive a specific amount of water each year.

Water Rights—A type of property right administered by the state for use of state waters.

Water Year—Begins on October 1 and extends to September 30 the following year. Water years are designated the same as the calendar year they end in, i.e, water year 1995 began on October 1, 1994 and ended on September 30, 1995.

Withdrawn Lands—Federal lands that are taken from the public domain for specific uses.

Appendix A
Spaceholder Contracts

Current Spaceholder Contracts ¹ (November 1995) (acre-feet)				
Spaceholder	American Falls	Jackson Lake	Palisades	Total
Lower Valley Organizations with American Falls Space				
A&B Irrigation District	46,826		90,800	137,626
American Falls Reservoir District ²	445,577	13,042		458,619
American Falls Reservoir District No. 2	393,550			393,550
Burley Irrigation District	155,395		39,200	194,595
Hillsdale Irrigation District	40,482			40,482
Idaho Power Company (nonirrigation)	44,275			44,275
Milner Irrigation District	44,951		44,500	89,451
Minidoka Irrigation District	82,216	186,030	35,000	303,246
North Side Canal Company, Ltd. ³	116,471	312,007	116,600	545,078
Upper Valley Organizations				
Aberdeen-Springfield Canal Company ³	29,771	57,661	143,278	230,710
Andrus, Ray	187	110		297
Artesian Irrigation, Inc.	2,794			2,794
Blackfoot Irrigating Company	12,558	7,370	4,050	23,978
Burgess Canal & Irrigating Company	9,343	10,603	31,400	51,346
Butte & Market Lake Canal Company	4,591	2,695	44,000	51,286
Clement Brothers, a partnership	70	196		266
Corbett Slough Ditch Company	3,342	1,961	6,300	11,603
Dilts Irrigation Company, Ltd.	871	511	1,200	2,582
Enterprise Canal Company, Ltd.	8,779	11,252	19,600	39,631
Enterprise Irrigation District	10,024	5,883		15,907
Falls Irrigation District	22,925		40,900	63,825
Harrison Canal & Irrigation District	11,832	11,943	23,500	47,275
Idaho Irrigation District	22,541	13,230	58,800	94,571
Lenroot Canal Company	3,805	5,234	7,850	16,889
Michaud Div, Fort Hall Indian Reservation	46,931		83,900	130,831
New Sweden Irrigation District	27,290	22,516	37,000	86,806
Osgood Canal Company, Ltd.	3,930	7,771		11,701
Peoples Canal & Irrigation Company	21,070	20,365	35,000	76,435
Poplar Irrigation District	662	1,589	1,550	3,801

Current Spaceholder Contracts ¹ (November 1995) (acre-feet)				
Spaceholder	American Falls	Jackson Lake	Palisades	Total
Progressive Irrigation District	12,284	7,209	28,500	47,993
Reid Canal Company	2,507	1,472	3,150	7,129
Rudy Canal Company, Ltd.	2,606	3,530	15,700	21,836
Snake River Valley Irrigation District	25,942	30,225	35,300	91,467
Trego Ditch Company	1,293	758	3,200	5,251
Woodville Canal Company	5,949	3,491	6,000	15,440
Organizations Without American Falls Space				
Butler Island Canal Company, Ltd.			250	250
City of Pocatello			50,000	50,000
Clark & Edwards Canal or Irrigation Company			800	800
Craig-Mattson Canal Company			1,440	1,400
Danskin Ditch Company			2,350	2,350
F.M.C. Corporation			5,000	5,000
Farmers Friend Canal Company, Ltd.		2,000	9,400	11,400
Island Irrigation Company			4,700	4,700
J.R. Simplot Company			2,500	2,500
Labelle Irrigation Company			800	800
Liberty Park Irrigation Company			2,350	2,350
Long Island Irrigation Company			5,000	5,000
Lower Slough Canal Company, Ltd.		1,040	1,600	2,640
Mitigation, Inc. ⁴			18,980	18,980
New Lava Side Ditch Company			11,750	11,750
North Rigby Irrigation & Canal Company			1,200	1,200
Owners Mutual Irrigation District		200		200
Palisades Water Users, Inc.			53,630	53,630
Parks & Lewisville Canal Irrigation Company			5,500	5,500
Parsons Ditch Company, Ltd.			994	994
Rigby Canal & Irrigation Company			6,300	6,300
Riverside Ditch Company			1,500	1,500
Sunnydell Irrigation District		4,000	6,300	10,300

Current Spaceholder Contracts ¹ (November 1995) (acre-feet)				
Spaceholder	American Falls	Jackson Lake	Palisades	Total
Texas Slough Irrigation Canal Company			2,350	2,350
Twin Falls Canal Company ³		97,183		97,183
Watson Slough Irrigation Company, Ltd & Watson Slough Ditch Company, Ltd			2,056	2,056
Wearyrick Ditch Company			600	600
West Labelle Irrigation Company			1,000	1,000
West Side Mutual Canal Company			2,350	2,350
Wyoming, State of			33,000	33,000
Contract Space Totals	1,663,640	843,077	1,189,978	3,696,695
Uncontracted Space Totals ⁵	8,951	3,923	10,022	22,896
TOTAL ACTIVE CAPACITY¹	1,672,590	847,000	1,200,000	3,719,590

¹ Lake Walcott, Minidoka Dam impoundment, Island Park Reservoir, Grassy Lake, and Ririe Reservoir are not accounted in this table. Minidoka Dam is operated primarily for irrigation diversions and power. Winter power releases may be curtailed by Reclamation and stored in its active storage capacity of 95,200 acre-feet to make additional water available for storage purposes in American Falls, Island Park, and Palisades Reservoirs in any year when these reservoirs fail to fill. The first 45,000 acre-feet of such curtailed saved water is credited to Island Park Reservoir, contingent upon spaceholders paying for power replacement.

Fremont-Madison Irrigation District holds all 142,400 acre-feet of the active storage capacity of Island Park Reservoir (127,200 acre-feet) and Grassy Lake (15,200 acre-feet) which are not accounted in this table and make up the Upper Snake River Storage Division of the Minidoka Project.

Mitigation, Inc. holds 80,500 acre-feet in Ririe Reservoir in the 1994 contract (see footnote 4)

² American Falls Reservoir District holds: 22,492 acre-feet in American Falls Reservoir and 13,042 acre-feet in Jackson Lake for Aberdeen-Springfield Canal Company; 274,338 acre-feet in American Falls for North Side Canal Company; and 148,747 acre-feet in American Falls for Twin Falls Canal Company.

³ Also has space through American Falls Reservoir District.

⁴ Held in a 1994 contract which becomes operative upon the announcement by the Secretary of the Interior that the 1990 Fort Hall Indian Water Rights Agreement is in effect. Mitigation, Inc. also holds 80,500 acre-feet in Ririe Reservoir in the 1994 contract.

⁵ Totals for American Falls and Total Space do not add due to rounding.

Reservoir Space in Bureau of Reclamation Reservoirs Above Milner Dam (Acre-Feet)

Reservoir	Total Capacity	Active Capacity				Inactive	Flood Surchage ¹	Dead
		Total	Contracted ²	Formally Assigned To Other Uses	Formally Assigned to Flow Augmentation			
STATE OF WYOMING								
Grassy Lake	15,500	15,200	15,200				740	300
Jackson Lake	847,000	847,000	843,077		3,923		94,740	(*)
STATE OF IDAHO								
American Falls	1,672,590	1,672,590	1,663,640		8,951			
Island Park	127,600	127,200	127,200			400	42,000	
Minidoka (Walcott)	210,200	95,200	95,200			115,000	10,000	
Palisades	1,401,000	1,200,000	1,189,978		10,022	157,000	16,000	44,000
Ririe	100,500	90,500	80,500	10,000		16,000		4,000
TOTALS	4,374,390	4,047,690	4,014,795	10,000	22,896	278,400	163,480	48,300

1. Above the spillway and not storable.
2. Except for Minidoka, all contracts are spaceholder (share of reservoir capacity) repayment contracts. Minidoka storage is included in the original Minidoka Project and addressed in conventional repayment contracts.
3. Purchased by Reclamation for salmon augmentation flow.
4. Dead storage is a natural lake, the volume of which has not been determined but is estimated at about 2 million acre-feet.
5. Purchased by Reclamation for salmon augmentation flow. American Falls numbers do not add due to rounding.
6. Reserved for sediment control.
7. Provides head for north side and south side Minidoka canals and Minidoka Power Plant.
8. All but 500 acre-feet repurchased by Reclamation for salmon flow augmentation.
9. Reserved for power head.
10. Exclusive flood control.
11. Reserved for sediment control.

Appendix C

Sample Runoff Forecast

The natural runoff of the Snake River at Heise is forecasted on a monthly basis beginning January 1 and ending June 1 by the Pacific Northwest Regional Office in Boise. The forecast correlates precipitation stations and snow courses in the area with the expected runoff at Heise. The statistical method used is the step-wise multiple regression which results in the following equation (coefficients as of 1978):

$$Y_{\text{Heise}} = 3.196 X_1 + 11.072 X_2 + 12.771 X_3 + 24.823 X_4 - 1553.$$

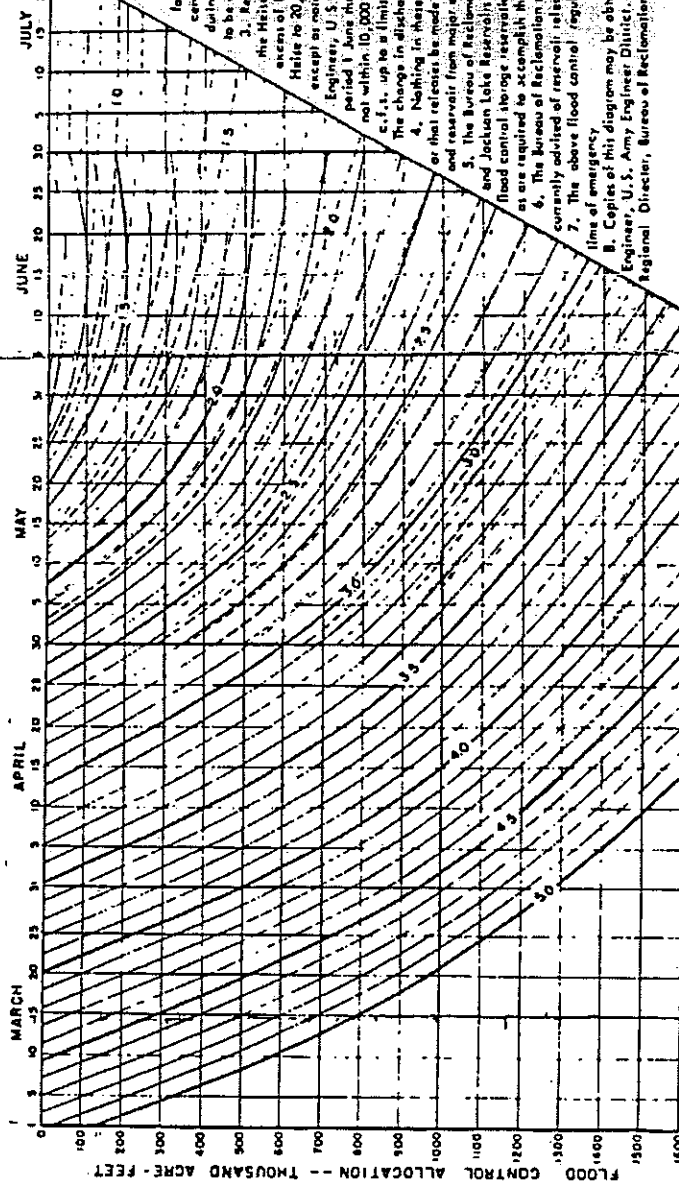
Where:

- Y_{Heise} = October-July natural runoff at Heise (1000 acre-feet)
- X_1 = Antecedent October-November natural runoff at Heise (1000 acre-feet)
- X_2 = October through March precipitation. Afton + Bondurant + Jackson, Wyoming + Moran X_2 + Palisades + Snake River (inches)
- X_3 = April 1 snow water content. East Rim Divide + Huckleberry Divide + Lewis Lake Divide + Poison Meadows X_2 + Salt River Summit X_2 + Thumb Divide + Togusofee Pass (inches)
- X_4 = April-May + 2/3 June precipitation. Same stations and weights as in X_2 (inches)

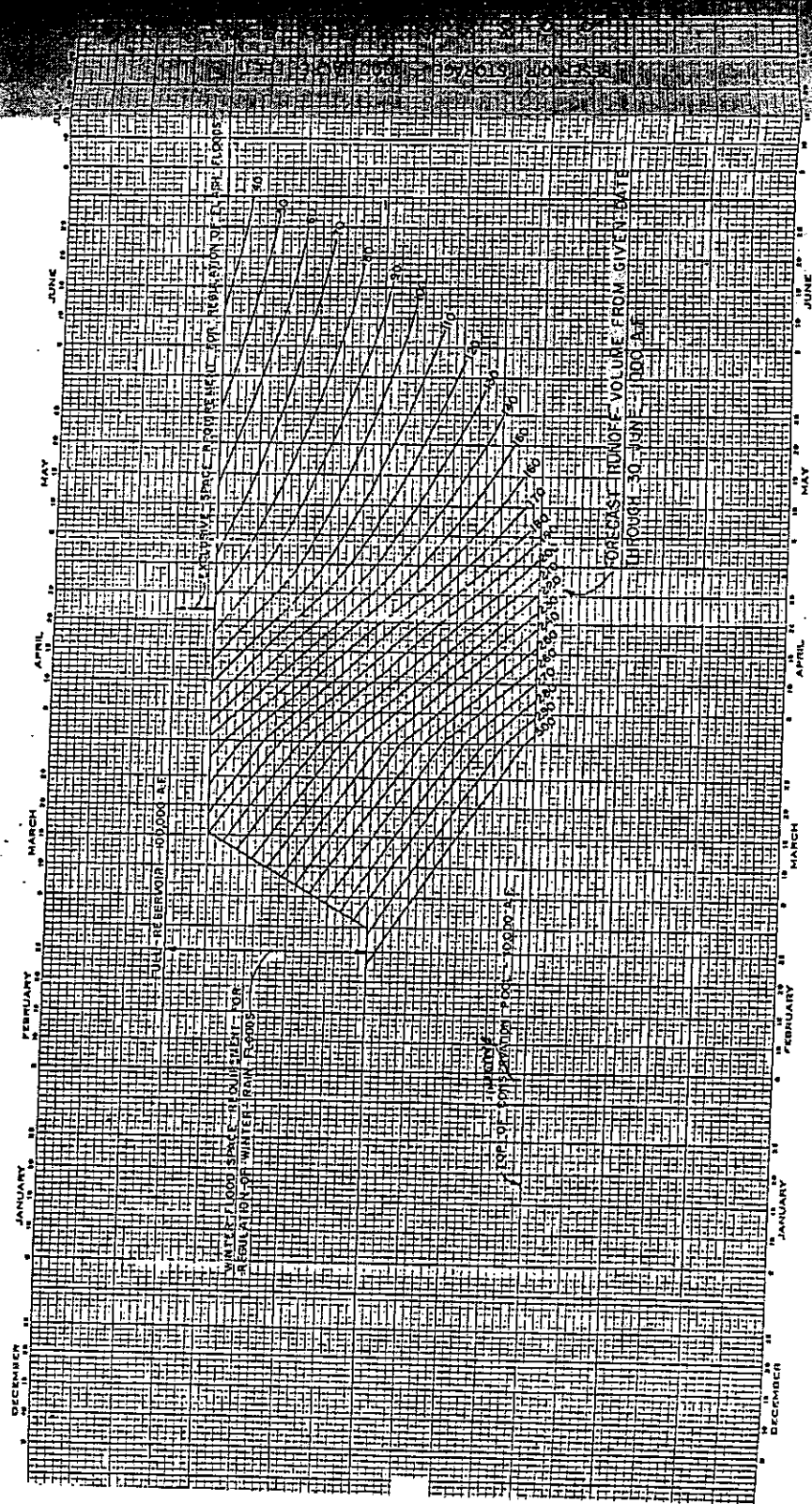
The precipitation and snow courses used will be part of the Hydromet reporting network. The runoff that occurs after October 1 is subtracted from the October-July forecast to obtain a residual forecast. The coefficients in the equation change slightly on an annual basis as each new year of data is entered in the regressions.

Appendix D

Flood Control Rule Curves



1. The minimum flood control storage space indicated on the diagram is the amount of storage space available for flood control purposes in the Snake River Basin from any given date to July 1, 1957. The Jackson Lake will be held at a level of 10,000 c.f.s. until the storage space in the Snake River Basin is sufficient for flood control purposes in the Snake River Basin.
2. Storage space in the Snake River Basin for flood control purposes will be used during evacuation and until no longer needed for flood control purposes.
3. Releases from the Snake River Basin will be made at rates of 10,000 c.f.s. or less, except as noted under item 7 or as may be determined by the U.S. Army Engineer District, Boise, Idaho, during the period from June 1 through July 1, 1957. The change in discharge will be made in such manner as to avoid damage to the Snake River Basin or that releases be made at rates or in a manner that will cause damage to the Snake River Basin or that releases be made at rates or in a manner that will cause damage to the Snake River Basin.
4. The Bureau of Reclamation shall operate current flood control storage regulations in accordance with procedures as are required to accomplish the flood control objectives.
5. The Bureau of Reclamation shall keep the District Engineer, U.S. Army Engineer District, Boise, Idaho, currently advised of reservoir releases, reservoir storage and such other data as may be required for flood control purposes.
6. The above flood control regulations are subject to temporary modification in case of emergency.
7. Copies of this diagram may be obtained from the District Engineer, U.S. Army Engineer District, Walla, Walla, Washington, and the Regional Director, Bureau of Reclamation, Boise, Idaho.



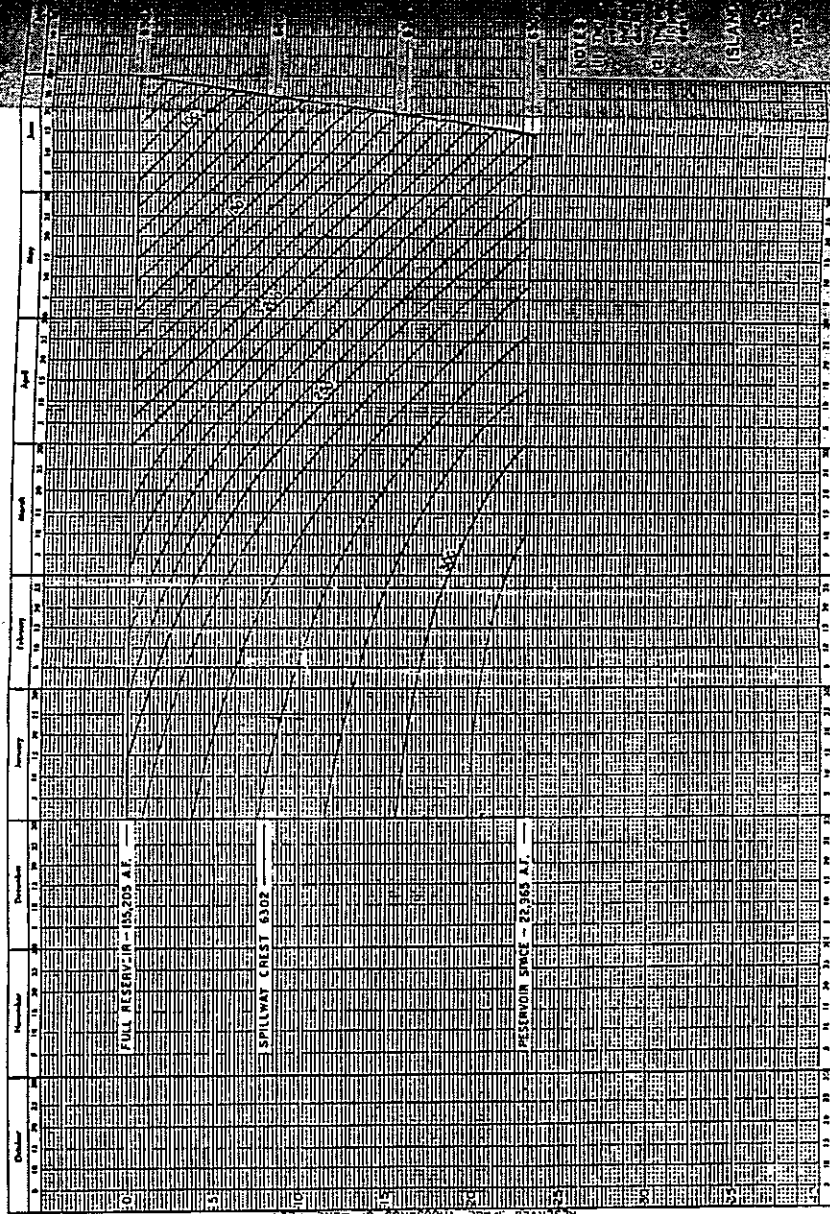


Exhibit L

**Brief of Intervenor-Appellees, Upper Snake
River Chapter of Trout Unlimited v. Hodel
(July 20, 1989)**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UPPER SNAKE RIVER CHARTER OF
TROUT UNLIMITED, IDAHO
ENVIRONMENTAL COUNCIL, IDAHO
SPORTSMAN COALITION, SOUTH
FORK COALITION AND MARV HOYT,

Plaintiffs - Appellants,

vs.

DONALD HODEL in his official
capacity as SECRETARY OF THE
INTERIOR, C.-DALE DUVALL in his
official capacity a CHIEF OF
THE BUREAU OF RECLAMATION,

Defendants - Appellees,

vs.

TWIN FALLS CANAL CO; COMMITTEE
OF NINE; ABERDEEN SPRINGFIELD
CANAL CO., ET. AL.,

Defendants - Intervenor -
Appellees.

Case No. 89-35142

On Appeal From The United States District Court
For The District of Idaho

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UNITED STATES COURT OF APPEALS
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Defendants - Appellees,)

vs.)

TWIN FALLS CANAL CO; COMMITTEE)
OF NINE; ABERDEEN SPRINGFIELD)
CANAL CO., ET. AL.,)

Defendants - Intervenor -)
Appellees.)

CERTIFICATE REQUIRED BY CIRCUIT RULE 28.2.1

The undersigned, counsel of record for Appellees, certify
that the following have an interest in the outcome of this case:

Upper Snake River Chapter of Trout Unlimited

Idaho Environmental Counsel

South Fork Coalition

Idaho Sportsman Coalition

Marv Hoyt

Donald P. Hodel, in his official capacity as Secretary of the Interior

D. Dale Duvall, in his official capacity as Chief of the Bureau of Reclamation

Committee of Nine. The Committee of Nine is a representative body of water users in Southeastern Idaho consisting in part, of irrigation districts and canal companies holding contract storage rights in the Bureau of Reclamations Minedoka Project, which includes the Palisades Dam and Reservoir. A list of some of those canal companies and irrigation districts is set forth below:

Twin Falls Canal Company
Northside Canal Company
Millner Irrigation District
Minedoka Irrigation District
Idaho Irrigation District
Progressive Irrigation District
Snake River Valley Irrigation District
New Sweden Irrigation District
Farmers Friend Canal Company
Enterprise Canal Company
Butte & Market Lake Canal Company
Parsons Ditch Company
Watson Slough Ditch Company
Watson Slough Irrigation Company
Fremont-Madison Irrigation District
Riverside Canal Company
Rudy Canal Company
Rigby Canal Company
Clark & Edwards Canal Company
Harrison Canal Company
Dilts Irrigation Company
Palisades Water Users, Inc.
Parks & Lewisville Canal Company
East Labelle Canal Company
Long Island Canal Company
Island Irrigation Company
Aberdeen Springfield Canal Company
A & B Irrigation District Company
Falls Irrigation District
Wearyrick Ditch Company
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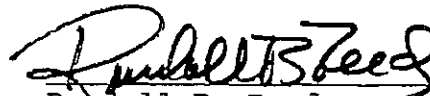

Randall B. Reed

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Is the United States Department of Interior, acting through the Bureau of Reclamation, required to prepare an Environmental Impact Statement before adjusting the outflow from Palisades Dam, a congressionally approved federal project constructed prior to the enactment of the National Environmental Policy Act (NEPA), 42 USC §4332(2)(C), which has been operated consistent with its authorizing legislation.

II. Under the facts available to the Bureau of Reclamation in the fall of 1988 regarding projected needs for water storage in Palisades Reservoir, including existing weather and soil moisture conditions, contracts between the United States and the beneficial owners of the stored water, and the provisions of Idaho state water law, did the Bureau of Reclamation lack discretion to maintain flows below Palisades Dam at the level sought by Plaintiffs.

III. Did the District Court properly exclude evidence proffered by Plaintiffs on alleged impacts of the Bureau of Reclamation's actions on endangered species.

STATEMENT AS TO REQUESTED ATTORNEYS FEES

Intervenors/Appellees request attorneys fees if determined to be a prevailing party under 28 U.S.C. §2412(b) and on the additional basis that the relief sought by Plaintiffs, both in the district court and on appeal, are not available by law nor supported by the facts advanced by Plaintiffs.

Intervenors/Appellees also request costs under Federal Rule of Appellate Procedure 39 and Circuit Rule 39-1.

STATEMENT OF JURISDICTION

The cause of action asserted by Plaintiffs under the National Environmental Policy act, 42 U.S.C. §4321 et. seq. confers jurisdiction as a federal question under 28 U.S.C. §1331. Plaintiffs have sought declaratory relief under 28 U.S.C. §2201, and mandamus and injunctive relief under 28 U.S.C. §1361 and 28 U.S.C. §2202.

The District Court entered its Memorandum Decision denying the relief sought by Plaintiffs January 24, 1989, and its final Judgment February 3, 1989. Plaintiffs filed a Notice of Appeal February 21, 1989. This Court obtains jurisdiction as an appeal from a final decision of a District Court pursuant to 28 U.S.C. §1291.

STATEMENT OF THE CASE

This case was commenced by a named individual, Marv Hoyt, and several sportsman and environmental organizations. Plaintiffs Complaint, filed October 11, 1988, commenced this action by seeking mandamus, declaratory and injunctive relief to compel Donald Hodel as Secretary of the United States Department of the Interior, and C. Dale Duvall as Chief of the Bureau of Reclamation ("BOR") to prepare an environmental impact statement before reducing flows out of the Palisades Dam on the South Fork of the Snake River.

Plaintiffs' Complaint originally alleged that the federal Defendants had undertaken major federal action significantly affecting the quality of the human environment when flows out of the Palisades Dam were reduced below 2,000 cubic feet per second (cfs).

The Intervenorors in this action are the contract holders of stored water in Palisades Reservoir. The District Court granted leave for these water users to intervene in the action, and because of the large number of intervenors, allowed them to be designated in the pleadings as the "Committee of Nine", an elected body which represents, among others, the holders of all contract storage rights in Palisades Reservoir.

The Palisades Dam and Reservoir are part of the United States Bureau of Reclamation Minidoka Project, a series of dams

and reservoirs providing stored irrigation water to approximately 1.2 million acres of farm land in southeastern and southcentral Idaho. The Palisades Dam and Reservoir was authorized by the Secretary of the Interior on December 9, 1941, under the Reclamation Project Act of 1939. The Project was subsequently reauthorized by the Act of September 30, 1950. Incorporated into the authorizing legislation is House Document No. 720, 81st Cong., 2d Sess. See Def. Ex. 7.

Palisades Dam and Reservoir is a multiple-use facility which provides storage of water for irrigation, flood control, power production, fish and wildlife and recreation. Tr. Vol. II, p. 6-7. The Palisades Dam was completed and placed in operation in 1956. Tr. Vol. II, p. 1941. Palisades Reservoir has a storage capacity of approximately 1,200,000 acre feet of water, and comprises a substantial portion of the total storage capacity of 4,151,490. acre feet for the entire Minidoka Project. Approximately 225,000. acres of irrigated farm ground receive their full irrigation water supply from Minidoka Project Reservoirs. Approximately 1,173,000. acres of irrigated farm ground receive at least part of their required irrigation water from Minidoka Project facilities. Tr. Vol. II, p. 8.

If sufficient water is not stored in Palisades Reservoir during the winter storage season, there may be time periods in exceptionally dry years (such as 1987 and 1988) when the demand

on the natural flow of the South Fork of the Snake River would cause sufficient amounts of water to be diverted from the main channel so as to cause approximately 19 to 20 miles of the river channel below Heise, Idaho, to become virtually dry. Tr. Vol. II, p. 141.

The United States Government, through the Bureau of Reclamation has entered contracts with various individuals and water-user entities for the storage of water in Palisades Reservoir and delivery of that stored water during the irrigation season. The BOR stores water in Palisades Reservoir under an Idaho state law-based storage right to divert and store the natural flow of the South Fork of the Snake River. Tr. Vol. II, p. 125. The individuals and entities holding water storage contracts with the BOR (the "spaceholders") hold contract rights which include:

- a. The right to have stored to their individual credit a certain percent of all water stored in Palisades Reservoir;
- b. The right to have stored to their individual credits, water to which some of them are entitled through curtailment of winter season diversions ("winter water savings clauses");
- c. The right to carry over to the next irrigating season certain excess stored water from a prior irrigation season which was not diverted during that prior irrigation season; and
- d. The right to delivery of their stored water during the irrigation season, typically commencing in April and concluding in mid to late October of each calendar year.

The spaceholders having a "winter water savings clause" in their contracts with the Bureau of Reclamation have agreed to forego certain pre-existing rights to divert water during the winter months in exchange for a priority interest in water stored in Palisades Reservoir. Tr. Vol. II, p. 42-43.

While the BOR is charged with the responsibility and discretion for the ongoing operation of the Palisades Dam and Reservoir, the BOR does not have discretion as to whether or not it will fulfill its contractual obligations with the spaceholders. Tr. Vol. II, p. 16-17.

House Document No. 720, (Def. Ex. 7) is a Bureau of Reclamation Supplemental Report which became part of the authorizing legislation for Palisades Dam and Reservoir addressed concerns for fish and wildlife as part of the congressional planning process for the Palisades Dam. The House Document concludes that the fishery would benefit by construction of the dam and reservoir. Def. Ex. 7, p. 37.

Ronald D. Carlson is the elected watermaster of Water District No. 01 for the State of Idaho. Water District No. 01 is a geographical area designated by Idaho State law for the administration of water rights existing under state law. As watermaster, Carlson is responsible to distribute water from the Snake River and its tributaries according to the priorities legally established by court decree, or by permits or licenses granted by the Idaho Department of Water Resources. Carlson is

charged with the legal responsibility to distribute water among various holders of water rights according to the principal of "first in time, first in right." The right to use water by any holder of a water right must be protected in order of priority according to state law. Idaho state law determines the allocation of water to storage in reservoirs operated by BOR and delivery to the water users who have contracted with BOR for the stored water. Tr. Vol. II, p. 124-125.

Although Idaho law allows for applications to establish minimum stream flows, the Plaintiffs have made no request for, and the Idaho Water Resource Board has not granted, a minimum stream flow for the South Fork of the Snake River. Tr. Vol. I, p. 108.

Current information on reservoir levels, snow surveys, weather forecasts and stream flow data are essential to the Bureau of Reclamation in operating the Palisades Dam and Reservoir in a manner consistent with the Bureau's statutory and contractual obligations. Because of the very short time span between the receipt of that information and the time for taking any necessary action, the preparation of an EIS would severely impair the flexibility and efficiency necessary for the proper operation of the Palisades Dam and Reservoir. Tr. Vol. II, p. 40. BOR has not prepared an Environmental Impact Statement (EIS) for the ongoing operation of the Palisades Dam and Reservoir.

A portion of the South Fork of the Snake River below Palisades Reservoir is recognized as a "Blue Ribbon" trout fishery, but it has become known as such since the construction of the Palisades Dam and Reservoir.

Testimony at the two day hearing held before the District Court established that a reduction in flows from Palisades Dam below 1,000. cfs will affect the downstream fishery. Some of the shallow side channels may be de-watered, and some loss of cutthroat and brown trout may result. Plaintiffs fishery expert, Mr. Elle, recognized the ability of the fishery to regenerate itself, even after periods of substantially reduced flows, Tr. Vol. I, p. 106, and further testified that such flow reductions do not cause an irreparable injury to the fishery. Tr. Vol. I. p. 100, 109, 112.

During the two day hearing, Plaintiffs introduced a report prepared by Bio-West, Inc. Pl's Ex. 3. That report was submitted to the Bureau of Reclamation to evaluate certain effects of a dam restoration project at the Jackson Lake Dam. The Bio-West, Inc. report was never accepted nor acted upon by the Bureau of Reclamation, and the Bureau of Reclamation terminated its contract with Bio-West, Inc. because Bio-West failed to adhere to the contract specifications and used unsound data or techniques. Tr. Vol. I, p. 132-133. In particular, the Bio-West, Inc. report failed to address the impact of certain water conservation measures discussed in the

report upon other water rights, particularly those directly affected by decreasing the rate of recharge to the Snake River Plain Aquifer.

Plaintiffs used the Bio West, Inc. report to allege that certain conservation efforts could occur in the irrigated lands within the Minidoka Project. Although some water conservation may be accomplished through the lining of certain canals or other measures within the project, the economic cost for such water savings is prohibitive and there have been no studies on the impacts to down stream water users whose water rights are dependent upon seepage or percolation that recharges the Snake River Plain Aquifer. Water which seeps from the surface to the Snake River Plain Aquifer is not wasted as it provides recharge to the aquifer to fill the water rights of down stream water users. Portions of the Snake River Plain Aquifer provide flow to the springs in the American Falls reservoir area which provide the natural flow of the Snake River below the American Falls dam in the irrigation season, and constitute the majority of the water flows available to fill the American Falls reservoir in the non-irrigation season. Tr. Vol. II, p. 73, 81, 87, 119-120.

From the period of 1957 through 1988, discharge flows from the Palisades Reservoir of less than 1,000. cfs have been recorded on 46 separate occasions, totalling approximately 555 days. Tr. Vol. II, p. 68.

Because of an unusually dry year and minimal spring run-off, the flows released from the Palisades Dam were reduced to 750 cfs during the winter months of 1987-1988.

Notwithstanding the BOR's efforts to maximize storage during the 1987-1988 winter water storage season, the water stored in Palisades Reservoir was at an unprecedented low of 200,000. acre feet in October of 1988. Overall precipitation levels caused the years of 1987 and 1988 to be the two driest consecutive years recorded in Idaho. Because of concerns over managing the outflows of Palisades Dam to mitigate any adverse effects on the fishery in the South Fork of the Snake River, the Bureau of Reclamation and the Idaho Fish and Game Department have entered into a Memorandum of Understanding providing for notice and consultation between the agencies before BOR reduces outflow levels below 1,000 cfs. The Idaho Department of Fish and Game was notified prior to BOR reducing flows below 1,000. cfs in the fall of 1987 and again in the fall of 1988.

In the Fall of 1988, flows below Palisades Dam were reduced by the Bureau of Reclamation to approximately 750 cfs. The additional water which would have been required to maintain a flow of 2,000 cfs as originally demanded by Plaintiffs for that same time period totals 422,321 acre feet. After the parties had completed the presentation of all evidence, Plaintiffs, by oral motion, moved to amend their Complaint to

substitute "1,000 cfs" wherever "2,000 cfs" appeared in the original Complaint. Consequently, the majority of the evidence presented by the parties addresses the 2,000 cfs minimum flow requested in Plaintiffs' original Complaint. Plaintiffs' amendment to request a minimum flow of 1,000 cfs reduces the potential for lost water storage, but a 250 cfs per day decrease in flow will result in 90,000 acre feet less storage over the 180 day period normally available for water storage. If a flow of 2,000 cfs below Palisades had been maintained during the 1987-88 winter storage period, the available storage in the Minidoka Project would have been depleted in late August of 1988.

The water stored in Palisades Reservoir is used late in the irrigation season, typically to finish late maturing crops. Tr. Vol. II, p. 136-137. Insufficient water to finish a crop can result in total crop failure. Because of the necessity for stored water at the end of the growing season, loss of one acre foot of water is likely to impact the crop upon one acre of irrigated farm land. Tr. Vol. II, p. 137.

At the conclusion of the evidentiary hearing, the parties stipulated that the entire case could be submitted on the basis of the evidence presented at the November 8th and 9th hearing, together with the Affidavits and other materials already in the Court file. Tr. Vol. II, p. 177-179. The Defendants withdrew their pending Motions to Dismiss with the understanding that

the Memoranda, Affidavits and other materials in the Court file regarding the Motions to Dismiss could be utilized by the Court in the disposition of the case. At the conclusion of the hearing the Court orally denied preliminary injunctive relief, Tr. Vol. II, p. 180, and later issued its Memorandum Decision filed January 24, 1989. The District Court concluded that reduction of flows below 1,000 cfs did not trigger the need for an Environmental Impact Statement under NEPA because there was no new proposed federal action. The Court further concluded that the Bureau of Reclamation had undertaken no action which it had not already taken in the past, and that the flow reductions were routine or ministerial actions by the Bureau of Reclamation.

ARGUMENT

I. IS THE UNITED STATES DEPARTMENT OF INTERIOR, ACTING THROUGH THE BUREAU OF RECLAMATION, REQUIRED TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT BEFORE ADJUSTING THE OUTFLOW FROM PALISADES DAM, A CONGRESSIONALLY APPROVED FEDERAL PROJECT CONSTRUCTED PRIOR TO THE ENACTMENT OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA), 42 U.S.C. §4332(2)(C), AND WHICH HAS BEEN OPERATED CONSISTENT WITH ITS AUTHORIZING LEGISLATION.

A. NEPA requires preparation of an Environmental Impact Statement only when agency action effects a change in the status quo.

NEPA requires preparation of an Environmental Impact Statement only if an agency proposes "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332 (2)(C). Palisades Dam was constructed, and reservoir operations began, many years before Congress enacted NEPA. There is no dispute that the precipitation in the watershed upstream from Palisades Dam was atypically low during 1987 and 1988. However, the Bureau did not deviate from its standard procedures for forecasting and regulating the flows from Palisades Dam in order to maximize reservoir storage during those short water years. Consequently, there was no change in the "status quo" because the agency's actions were consistent with past operations and procedures. In a District of Columbia circuit case, Committee for Auto Responsibility v. Solomon, 603 F.2d 992 (D.C. Cir. 1979), cert. denied, 445 U.S. 915 (1980), the General Services Administration's decision to lease a facility for parking, consistent with the use of the same facility since the 1930's, did not trigger duties under

NEPA. The Court observed that the "duty to prepare an EIS normally is triggered when there is a proposal to change the status quo." 603 F.2d 1002-03. This circuit reached the same conclusion in Burbank Anti-Noise Group v. Goldschmidt, 623 F.2d 115 (9th Cir. 1980). In that case, this Court concluded that an EIS was not required for use of federal funds by a city airport authority to acquire an airport because the sale would cause no change in the status quo.

A "major Federal action" has also been interpreted as an action requiring substantial planning, time, resources or expenditures. See Natural Resources Defense Counsel, Inc. v. Grant, 341 F.Supp. 356 (E.D.N.C. 1972). No additional planning, time, resources or expenditures were required for BOR to continue to operate the Palisades Dam in the Fall of 1988.

B. Prior cases reviewing changes in water flows from federal facilities have not required an Environmental Impact Statement.

The regulation of water flows from an existing Federal facility is typically held to not require preparation of an EIS or other affirmative action under NEPA. For example, in League of Women Voters of Tulsa, Inc. v. Corp. of Engineers, 730 F.2d 579 (10th Cir. 1984), a reservoir constructed by the U.S. Army Corp. of Engineers prior to NEPA did not require an EIS prior to entry of municipal water storage contracts. In a lower court decision much like the present one, the District Court for the Eastern District of California concluded that NEPA did

not apply to continuing operations of a completed Bureau of Reclamation reservoir. County of Trinity v. Andrus, 438 F.Supp. 1368 (E.D.Cal. 1977). That case involved a disagreement between the Bureau of Reclamation and a county government over the Bureau's operating policy for the California Central Valley project during a drought period in California. The county maintained that the Bureau should maintain 837,600 acre feet of water in Clair Engle Lake to provide for local usage, and a two year reserve for fish releases. The Bureau contended that the reservoir should be drawn down to 204,000 acre feet to provide those holding storage contracts with twenty-five to seventy-five percent of the normal water supplies. The county sought an injunction requiring completion of an EIS before releasing water from the reservoir. In Trinity, the District Court concluded that no EIS need be prepared where the Bureau

neither enlarged its capacity to divert water from the Trinity River nor revised its procedures or standards for releases into the Trinity River, and the standards for releases into the Trinity River and the draw-down of reservoirs. It is simply operating the division within the range originally available pursuant to the authorizing statute, in response to changing environmental conditions

438 F.Supp at 1389. The facts in the Trinity case are essentially the reverse of the present Palisades dispute. Here, Trout Unlimited and the other Plaintiffs are attempting to compel releases from a reclamation reservoir, and finding no other legal tool at their disposal, have attempted to fashion a remedy out of NEPA.

The Trinity decision also addresses the problems associated with any requirement that the Bureau of Reclamation prepare an EIS given the complexities of operation of a large water system in the face of constantly changing circumstances. The Court characterized the burden of such a requirement upon the agency as amounting to "an endless round of paperwork." 438 F.Supp. at 1390.

In another decision addressing a reclamation project, Lake Berryessa Tenants Council v. United States, 588 F.2d 267 (Ninth Circ. 1978), the Bureau of Reclamation banned privately owned floating structures and restricted house boats on a reclamation reservoir. This Court likewise concluded that this change in policy did not constitute major federal action requiring preparation of an EIS.

C. The legislative history for the Palisades Project demonstrates congressional authority to reduce flows below 1,000 cfs.

One factor heavily influencing the District Court for the Eastern District of California in County of Trinity v. Andrus, 438 F.Supp. 1368 (E.D.Cal. 1977), was the presence of a congressionally authorized range of operations. Similar management authorization is contained in a supplemental report adopted by the Secretary of Interior in the legislation authorizing the Palisades Dam and Reservoir Project. This supplemental report and recommendations appear as House Document No. 720, 81st. Cong. 2d Sess. (1950). Congress is

assumed to have adopted legislation with the same intent evidenced by an accompanying report unless the language of the statute clearly indicates otherwise. See Johansen v. United States, 343 U.S. 427, (1952). The Secretary of Interior approved the Commissioner's recommendation that the Fish and Wildlife Service's comments contained in the appendix to the report be carried out "to the extent practical having regard for the primary purposes of the Palisades project." Defendants Exhibit No. 7 at page 26. The purposes of the project, in order of priority, are irrigation, power, flood control, maintenance of Jackson Lake levels for esthetic concerns, and enhancement of Grays Lake national wildlife water supply. Id. at page 6-16. The supplemental report also analyzed the anticipated minimum flows to be released from Palisades Reservoir. Those anticipated flows are characterized in the report as "an average daily flow of 1,000 second-feet, and a minimum of approximately 500 second-feet would be provided below the dam as compared with a present minimum flow of 1,700 second-feet. Id. at page 37.

II. UNDER THE FACTS AVAILABLE TO THE BUREAU OF RECLAMATION IN THE FALL OF 1988 REGARDING PROJECTED NEEDS FOR THE STORED WATER IN PALISADES RESERVOIR, EXISTING WEATHER CONDITIONS, CONTRACTS BETWEEN THE UNITED STATES AND OWNERS OF THE STORED WATER, AND WATER RIGHTS CREATED AND ADMINISTERED UNDER IDAHO STATE LAW, DID THE BUREAU OF RECLAMATION LACK DISCRETION TO MAINTAIN FLOWS AT PALISADES DAM AT THE LEVEL SOUGHT BY PLAINTIFFS.

A. BOR procedures for determining flows out of Palisades Dam.

To properly and completely evaluate the inappropriateness of the relief sought by Plaintiffs, the Court should direct careful attention to the testimony of Max Van Den Berg and Ronald Carlson. BOR must administer the Palisades Dam in coordination with other storage facilities, as directed by Congress in the authorizing legislation, and consistent with obligations under contracts requiring storage and delivery of water for farming purposes.

Mr. Van Den Berg works as the project superintendent for the Minidoka Irrigation Project. The Minidoka Project is composed of several dams and reservoirs providing irrigation water to approximately 1.2 million acres of irrigated farm ground. Tr. Vol. II, p. 3. Van Den Berg and the BOR are charged with responsibility to manage the Minidoka Project for multiple purposes, namely "irrigation, flood control, power generation, recreation and fish and wildlife". Tr. Vol. II, p. 7. Viewing the entire Minidoka Project from the headwaters of the South Fork of the Snake River and continuing downstream, the Palisades Dam is situated below Jackson Lake Reservoir, but

is upstream from other Bureau storage facilities. See Def's. Ex. 8.

Van Den Berg emphasized that any action at any one of the dams in the project must be coordinated with similar actions at other project facilities, keeping in mind the overall objective of storing water upstream whenever possible to avoid the loss of any water past the Milner diversion point, which is the last point in the system where water can be diverted and used on Minidoka Project lands. Tr. Vol. II, p. 19.

The Bureau of Reclamation is allowed to store water because it holds a water right to do so under Idaho state law. Tr. Vol. II, p. 30-31. Ultimately, it is the law of the State of Idaho that determine all rights in the water of the South Fork of the Snake River as it passes through Idaho, including any rights to that water held by the BOR. Tr. Vol. II, p. 125. Although the right to store water in Palisades is held by the BOR it holds that water right in a representative capacity, and is obligated to use that water right according to certain storage contracts with the end-users of the water. Tr. Vol II, p. 20. The spaceholders having such contracts with the Bureau include not only irrigators, but also municipalities and utilities. Id.

Mr. Van Den Berg described in great detail the difficult and multifaceted forecasting process which must be followed in order to manage the Minidoka Project in order to fulfill both

its congressionally mandated multiple-use objectives and to satisfy the BOR's contractual obligations to the spaceholders. On the Minidoka Project, diversions to irrigators typically begin April 1 and continue through November 1 of each year. Tr. Vol. II, p. 125-126. Therefore, the "storage season" encompasses the remaining portion of the year, namely, from November 1 through April 1. Tr. Vol. II, p. 29. The Bureau must store water to the greatest extent possible prior to April 1 of each year because a large run-off cannot be anticipated. For example, the available run-off in 1987 and 1988 was approximately one-half that which occurred in 1986. Also, because the irrigating season has already begun, the available run-off is typically consumed by irrigation uses as the water flows downstream, and does not significantly increase the available storage except in the very large run-off years in which the Minidoka system is operated to control flooding. Tr. Vol. II, p. 54-55.

Against this backdrop of managing for multiple uses and contractual obligations to the spaceholders, the Bureau found itself facing the driest "back to back" years on record. Tr. Vol. II, p. 18. During the winter storage season of the fall of 1987 through early spring of 1988, even after the spring run-off, the Minidoka Project was not "filled" to the extent that all possible water rights had received delivery of their water entitlement. Tr. Vol. II, p. 23. In the fall of 1988,

the Minidoka Project was faced with extremely drawn down reservoirs as shown by Plaintiffs' Exhibit 8. Only through the process of cutting flows to a low of 750 cfs during a portion of the storage season prior to the 1988 irrigation demand was the BOR able to provide any substantial delivery of stored water to the spaceholders. Tr. Vol. II, p. 22-23. In the fall of 1988, the BOR was faced with perhaps one of the most challenging forecasting problems in the history of the operation of the Minidoka Project. Storage in the system was at an all time low. Unless all reasonably available water was stored, it was likely that the system would be depleted of storage waters before the end of the growing season, and, in the extreme, a portion of the South Fork of the Snake River may be dewatered, as often occurred prior to the construction of Palisades Reservoir due to heavy water diversions.

While the Palisades Dam must be operated in "normal" years where water is typically available to fill, or nearly fill the system, the system was principally designed to protect against "drought years", especially the years like 1987 and 1988. Tr. Vol. II, p. 46-47. In fact, according to Mr. Van Den Berg, it was precisely the conditions of 1987 and 1988 that the Palisades Dam was designed to protect against, contrary to Plaintiffs' assertions that these years were somehow outside the permissible operating range for that facility. In forecasting the available water for the 1989 growing season,

the BOR incorporated all information available to it to forecast the available water supply. In particular, the BOR analyzed the level of precipitation, anticipated snow pack, soil conditions on the water shed and carry over storage from the prior season. Tr. Vol. II, p. 17. Decisions must be made regarding the optimum outflow from Palisades in order to fulfill the BOR's duty under the storage contracts. Snow pack records are typically not available until January 1 of each year, well after the storage season begins. Tr. Vol. II, p. 19. In the opinion of Mr. Van Den Berg, any failure to cut flows in either the fall of 1987, or the fall of 1988, would have violated the BOR's obligations under the contracts with the Palisades spaceholders. Tr. Vol. II, p. 21-22.

The BOR has drafted and implemented certain standard operating procedures, of which Section 22 addresses "General Filling and Release Procedures." Tr. Vol. II, p. 25. Mr. Van Den Berg, as the project director, testified that these operating procedures are guidelines only, and are not intended to be "hard-line rigid requirements." Tr. Vol. II, p. 24. The operating procedures do prescribe that certain actions be taken before discharges from Palisades Dam are reduced below 1,000 cfs. While the operating procedures do not themselves outline the steps which the Bureau desires to take to mitigate any impact on the South Fork fishery, the Agency has entered a Memorandum of Understanding which demonstrates how the standard

operating procedures are to be put into effect. Tr. Vol. II, p. 26.

Plaintiffs spend a substantial portion of their brief arguing that the BOR's operating procedures prevent releases below 1,000 cfs. However, that is simply not the case, as demonstrated by the Memorandum of Understanding which has been entered between the Bureau and the Idaho Department of Fish and Game. Pursuant to that Memorandum of Understanding, the Bureau has agreed to provide notice to and consult with the Idaho Department of Fish and Game before reducing levels below 1,000 cfs. If the operating procedures somehow prevented the Bureau from reducing flows below that level, there would be no point in entering the Memorandum of Understanding. Mr. Van Den Berg clearly testified that the standard operating procedures are not intended to provide any particular minimum flow from Palisades Dam. Tr. Vol. II, p. 44.

Mr. Van Den Berg then identified the problems he saw, as project director, by imposing on BOR a requirement of performing an Environmental Impact Statement before taking the necessary, and sometimes day to day, actions to regulate the flow from Palisades Reservoir. In particular, Van Den Berg testified that preparation of an Environmental Impact Statement would not allow any deviation from the storage contracts, which BOR views as creating binding obligations to the spaceholders and which would effectively prevent the BOR from performing the

very duties required to be performed, both by Congress and by the space holder contracts.

The spaceholders have played a key role in both the construction and operation of the Palisades Dam. First, a substantial portion of the construction costs for that reservoir came from annual assessments made on the spaceholders each year since construction of the dam. Some of the spaceholders also substantially modified their water diversion practices in order to accommodate the storage activities at Palisades. "Many of the spaceholder contracts contain what are called "winter-water savings clauses." Tr. Vol. II, p. 42-43. Under these clauses, certain water users forego winter diversion rights previously exercised prior to construction of the dam in order to increase the available water for storage. Id. In exchange, the spaceholders received a priority position in waters stored in Palisades Dam. To replace the water no longer diverted during the winter months, these spaceholders were required, at their own expense, to drill private domestic or stock water wells. Plaintiffs now ask, under the guise of compliance with NEPA, that BO~~R~~ release water, including the water required to be stored under these "winter water savings clauses", irrespective of the actions historically taken by spaceholders in reliance upon the continued availability of this winter-water savings storage.

Plaintiffs place great reliance on the conclusions of a study prepared by Bio-West, Inc., although the BOR never accepted that study and found its analysis unsound. Tr. Vol. II, p. 33-34, 89. In particular, the BOR officials concluded that the Bio-West study failed to adequately assess the effect of incorporating the water conservation measures mentioned in that study on the effect of percolating irrigation waters in recharging the Snake River Plain Aquifer.

The Snake River Plain Aquifer is a massive body of water underlying a large portion of southeastern Idaho. Dr. Charles Brockway testified as a hydrologist who has prepared an elaborate ground water model for the Snake River Plain Aquifer. According to Dr. Brockway, percolation from irrigation uses is the primary source of recharging this aquifer. Plaintiffs would have the court believe that huge decreases could be made in irrigation season diversions, and therefore there would be a reduced need for storage in the Minidoka Project system, if certain conservation measures were undertaken in the Minidoka Project.

However, none of the conservation measures discussed in the Bio-West study could not be undertaken by BOR. In fact, those measures typically include irrigation scheduling and lining of irrigation canals, both of which are activities requiring substantial private involvement which could neither be mandated nor controlled by BOR. Lest Plaintiffs leave the

court with the impression that no conservation measures are occurring, Mr. Van Den Berg identified several water conservation efforts being made by BOR in cooperation with the spaceholders. Ronald Carlson, the water master of Water District 01, further testified that the water users in District 01 received an award at a recent convention of the National Water Resources Association for their efforts in conserving waters diverted from the Snake River System.

B. The Court should not substitute its judgment for the operating procedures and expertise of the Bureau of Reclamation.

Plaintiffs would ask that the Court not impose and substitute its judgment for that exercised by the Bureau of Reclamation, pursuant to both Federal and Idaho State law in regulating flows out of Palisades Dam to meet the BOR's statutory and contractual obligations.

Plaintiffs have also presented the facts as if the Palisades Reservoir could be operated without regard to either Idaho State water laws or the other reclamation reservoirs in the Minidoka Project. Perhaps the greatest falacy of the Plaintiffs' analysis can be seen from testimony of Ronald Carlson, the water master who regulates and allocates water in the water district encompassing the land served by the Minidoka Project. Carlson testified that he is responsible for administering the water right by which the Bureau stores water in Palisades Dam. Tr. Vol. II, p. 125. Even if BOR elects to

discharge water out of Palisades Reservoir at a rate greater than that necessary to reasonably store the maximum amount of water for the upcoming season, the water master will show on his records that the water was diverted and stored. Tr. Vol. II, p. 142. Consequently, the water master will allocate water to the spaceholders in the subsequent irrigating season as if BOR had stored the water. If, because the Bureau has released greater amounts out of Palisades Dam and into lower portions of the system, those spaceholder rights are not able to be met to the greatest extent allowed by weather, snow pack and run-off conditions, then BOR will have failed to exercise its rights under State water law, and would be potentially liable under its contracts with the spaceholders.

C. Releasing flows from Palisades Dam in the amounts demanded by Plaintiffs would violate BOR's operating procedures and the purposes for which the dam was constructed.

Plaintiffs ask the Court to believe that because the Bureau of Reclamation "owns" the Palisades Dam and Reservoir, it has wide discretion in the storage activities at that reservoir. In fact, because of the spaceholder contracts, the agency is under a mandatory duty to store water in the greatest amounts possible.

Such mandatory actions have been held to be outside the requirements for preparation of an environmental impact statement. In South Dakota v. Andrus, 614 F.2d 1190 (8th Circ. 1980) the Court found no requirement to prepare an EIS for

ministerial acts or mandatory Federal actions.

Ministerial acts, however, have generally been held outside the ambit of NEPA's EIS requirement. Reasoning that the primary purpose of the Impact Statement is to aid agency decision making, courts have indicated that nondiscretionary acts should be exempt from the requirement.

614 F.2d at 1193.

A similar result was reached in National Resources Defense Fund, Inc. v. Berklund, 609 F.2d 553 (D.C. Cir. 1980), where the Eighth Circuit found that the Secretary of the Interior had a mandatory duty to issue a coal lease to a qualified applicant. 609 F.2d at 558. Other cases finding mandatory government actions as being outside the requirements for an EIS under NEPA include Pacific Legal Foundation v. Andrus, 657 F.2d 829 (6th Cir. 1981); N.A.A.C.P. v. Medical Center, Inc., 584 F.2d 619 (3rd Cir. 1978).

Plaintiffs have provided to the Court no authority that the injunction they seek against BOR's storage activities is an available remedy, even under the broad scope of NEPA, especially where the government is under strict contractual obligations to private parties to perform exactly the acts which the Plaintiffs seek to enjoin.

III. DID THE DISTRICT COURT PROPERLY EXCLUDE EVIDENCE
PROFERRED BY PLAINTIFFS ON ALLEGED IMPACTS OF THE BUREAU OF
RECLAMATION'S ACTIONS ON ENDANGERED SPECIES?

Plaintiffs' Complaint alleges that the South Fork of the Snake River is "both a wintering and breeding habitat for Bald Eagles and Peregrine Falcons (both endangered species)." Plaintiffs then continue in their Complaint to speak of an impact on "endangered species." Because of this repeated mention of an impact on an endangered species, the Intervenor moved to limit testimony on this issue at the injunction hearing. Plaintiffs had not requested relief under the Endangered Species Act, nor had they complied with the procedural prerequisites of sixty (60) days prior written notice pursuant to 16 U.S.C. §1540(g) before filing the Complaint.

At the injunction hearing the Court ruled that it would not accept testimony regarding the allegations of impact on an endangered species. The only motion before the Court to limit testimony was that of the Intervenor, which merely sought to limit the Plaintiffs' ability to assert a cause of action under the Endangered Species Act without first complying with its procedural requirements. Plaintiffs made no effort to resist the motion, nor was there any effort by Plaintiffs at the time the Court granted the Intervenor's motion to deny that the Complaint sought relief under the Endangered Species Act. Plaintiffs also failed to identify to the Court the reasons for

proffering the testimony on endangered species, and did not specifically argue to the Court that the evidence of impact on bald eagles and peregrine falcons was intended by Plaintiffs as evidence of impact upon the environment under NEPA.

Consequently, although Plaintiffs now argue at length that the evidence was relevant and should have been admitted, Plaintiffs waive the right to produce that evidence by specifically demonstrating to the Court how the evidence has relevance to the causes of action asserted in the Plaintiffs' Complaint. Plaintiffs cannot now be heard to complain of the Court's ruling when they made no effort to resist the Motion in Limine, or to clarify for the Court whether their Complaint was intended to assert a cause of action under the Endangered Species Act.

The district court specifically addressed the offer of proof in its memorandum decision. The Court stated:

At the hearing the Court granted the defendants/intervenors' motion to limit testimony concerning bald eagles and peregrine falcons. Although the Court refused the testimony, it allowed the plaintiffs to offer proof as to the proposed witnesses' testimony. After reviewing the offer of proof, the Court is convinced that even if it had considered the testimony concerning the bald eagles and the peregrine falcons that such would not have affected its final judgment in this matter.

Memorandum Decision, p. 10.

Even if the district court had allowed the evidence on impact to endangered species, the outcome would be unchanged because Plaintiffs cannot establish any violation of NEPA by BOR.

IV. CONCLUSION.

Plaintiffs have failed to demonstrate how the operations of the Bureau of Reclamation in administering the Minidoka Irrigation Project, and specifically the Palisades Dam and Reservoir, constitutes "major Federal action" under NEPA. The only change from the status quo which can be demonstrated by Plaintiffs is what they call a "historically low flow" from the reservoir. However, their conclusion totally ignores the factors causing the Bureau of Reclamation to reduce discharges to that level, and the Plaintiffs have never shown how BOR has departed from its storage procedures in reducing flows to 750 cfs during the storage seasons preceding the 1988 and 1989 irrigation seasons.

When the Court carefully reviews the intricate operations undertaken by the Bureau of Reclamation in managing the Minidoka Project, the interrelationship of the various dams and reservoirs on that system, together with the impact of State law based water rights and the contractual obligations of the Bureau of Reclamation, it should be readily apparent that BOR undertook the only action prudent and permitted under the circumstances, namely, to reduce flows to an amount resulting in the greatest possible storage, while still recognizing and attempting to mitigate any impacts upon the fishery in the South Fork of the Snake River below Palisades Dam. Plaintiffs'

witnesses admitted that the Bureau of Reclamation acted in good faith in reaching its conclusions to reduce water flows, and that it adhered to its own operating procedures, including the Memorandum of Understanding with Idaho State fish and game officials. The Plaintiffs should not now be heard to complain that the Bureau has failed to conform with the requirements of NEPA, when the agency has merely operated its Minidoka Project reservoir system consistent with past precedent, congressional authorization, and the circumstances existing at the time.

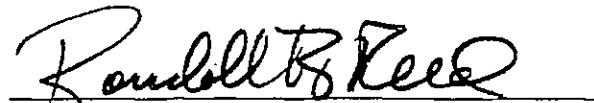
Plaintiffs argue at length that the Court incorrectly prohibited the proffered testimony on endangered species. However, the Court need not reach that issue because there clearly was no duty under NEPA to prepare an Environmental Impact Statement before making management decisions regarding the Palisades Dam and Reservoir consistent with BOR's long established procedures and authority.

Plaintiffs repeatedly describe their attempts to maintain a "surgical" lawsuit directed only against the Bureau of Reclamation and requesting only that the Bureau of Reclamation recognize its duties under NEPA. However, the entire thrust of Plaintiffs' Complaint was a requested injunction prohibiting the storage of water in Palisades Reservoir, which would have severely impacted hundreds of State law based water rights, and potentially deprived 1.2 million acres of irrigated farm land in southeastern Idaho of stored water to which it is entitled

under both State water law and contracts between the holders of those water rights and the Bureau of Reclamation.

For the foregoing reasons, the judgment of the District Court should be affirmed in its entirety.

DATED this 19TH day of July, 1989.


Randall B. Reed

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UPPER SNAKE RIVER CHARTER OF)
TROUT UNLIMITED, IDAHO)
ENVIRONMENTAL COUNCIL, IDAHO)
SPORTSMAN COALITION, SOUTH)
FORK COALITION AND MARV HOYT,)

Plaintiffs - Appellants,)

No. 89-35142

vs.)

DONALD HODEL in his official)
capacity as SECRETARY OF THE)
INTERIOR, C. DALE DUVAL in his)
official capacity a CHIEF OF)
THE BUREAU OF RECLAMATION,)

Defendants - Appellees,)

vs.)

TWIN FALLS CANAL CO; COMMITTEE)
OF NINE; ABERDEEN SPRINGFIELD)
CANAL CO., ET. AL.,)

Defendants - Intervenor -)
Appellees.)

STATEMENT OF RELATED CASES
(Circuit Rule 28-2.6)

Counsel for Defendants-Intervenor-Appellees hereby state that they are unaware of any related case pending in this Court, as defined in Circuit Rule 28-2.6.

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CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering or by mailing, with the correct postage thereon, a true and correct copy thereof on this 20th day of July, 1989.

Document Served: Brief of Intervenor-Appellees

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Randall B. Reed
HOLDEN, KIDWELL, HAHN & CRAPO

RBR/bjr/1493h
4015.

IV. CONCLUSION.

Plaintiffs have failed to demonstrate how the operations of the Bureau of Reclamation in administering the Minidoka Irrigation Project, and specifically the Palisades Dam and Reservoir, constitutes "major Federal action" under NEPA. The only change from the status quo which can be demonstrated by Plaintiffs is what they call a "historically low flow" from the reservoir. However, their conclusion totally ignores the factors causing the Bureau of Reclamation to reduce discharges to that level, and the Plaintiffs have never shown how BOR has departed from its storage procedures in reducing flows to 750 cfs during the storage seasons preceding the 1988 and 1989 irrigation seasons.

When the Court carefully reviews the intricate operations undertaken by the Bureau of Reclamation in managing the Minidoka Project, the interrelationship of the various dams and reservoirs on that system, together with the impact of State law based water rights and the contractual obligations of the Bureau of Reclamation, it should be readily apparent that BOR undertook the only action prudent and permitted under the circumstances, namely, to reduce flows to an amount resulting in the greatest possible storage, while still recognizing and attempting to mitigate any impacts upon the fishery in the South Fork of the Snake River below Palisades Dam. Plaintiffs'

witnesses admitted that the Bureau of Reclamation acted in good faith in reaching its conclusions to reduce water flows, and that it adhered to its own operating procedures, including the Memorandum of Understanding with Idaho State fish and game officials. The Plaintiffs should not now be heard to complain that the Bureau has failed to conform with the requirements of NEPA, when the agency has merely operated its Minidoka Project reservoir system consistent with past precedent, congressional authorization, and the circumstances existing at the time.

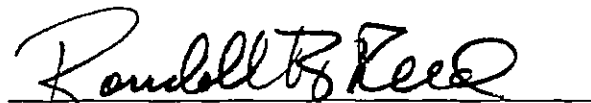
Plaintiffs argue at length that the Court incorrectly prohibited the proffered testimony on endangered species. However, the Court need not reach that issue because there clearly was no duty under NEPA to prepare an Environmental Impact Statement before making management decisions regarding the Palisades Dam and Reservoir consistent with BOR's long established procedures and authority.

Plaintiffs repeatedly describe their attempts to maintain a "surgical" lawsuit directed only against the Bureau of Reclamation and requesting only that the Bureau of Reclamation recognize its duties under NEPA. However, the entire thrust of Plaintiffs' Complaint was a requested injunction prohibiting the storage of water in Palisades Reservoir, which would have severely impacted hundreds of State law based water rights, and potentially deprived 1.2 million acres of irrigated farm land in southeastern Idaho of stored water to which it is entitled

under both State water law and contracts between the holders of those water rights and the Bureau of Reclamation.

For the foregoing reasons, the judgment of the District Court should be affirmed in its entirety.

DATED this 19th day of July, 1989.


Randall B. Reed

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UPPER SNAKE RIVER CHARTER OF)
TROUT UNLIMITED, IDAHO)
ENVIRONMENTAL COUNCIL, IDAHO)
SPORTSMAN COALITION, SOUTH)
FORK COALITION AND MARV HOYT,)
Plaintiffs - Appellants,)
vs.)
DONALD HODEL in his official)
capacity as SECRETARY OF THE)
INTERIOR, C..DALE DUVAL in his)
official capacity a CHIEF OF)
THE BUREAU OF RECLAMATION,)
Defendants - Appellees,)
vs.)
TWIN FALLS CANAL CO; COMMITTEE)
OF NINE; ABERDEEN SPRINGFIELD)
CANAL CO., ET. AL.,)
Defendants - Intervenor -)
Appellees.)

No. 89-35142

STATEMENT OF RELATED CASES
(Circuit Rule 28-2.6)

Counsel for Defendants-Intervenor-Appellees hereby state that they are unaware of any related case pending in this Court, as defined in Circuit Rule 28-2.6.

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Attorneys for Defendants-Intervenor-Appellees


Randall B. Reed

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering or by mailing, with the correct postage thereon, a true and correct copy thereof on this 20th day of July, 1989.

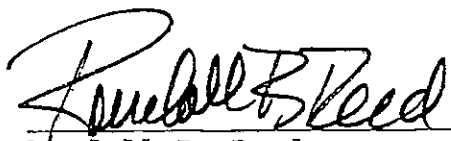
Document Served: Brief of Intervenor-Appellees

Attorneys Served:

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Randall B. Reed
HOLDEN, KIDWELL, HAHN & CRAPO

RBR/bjr/1493h
4015.

Exhibit M

Certificate of Appointment (Mar. 28, 1969)

STATE OF IDAHO
office of the
DEPARTMENT OF RECLAMATION

Certificate of Appointment

This is to certify that I have this day appointed HENRY C. EAGLE as

Watermaster

Water District 36
Snake River for

1969 Irrigation Season until his successor is appointed and qualified

under the provisions of Section 42-605 Idaho Code, at such rate of compensation as established by applicable law.

Witness my hand and seal of my office at Boise, Idaho, this 23 day of March 1969.

State Reclamation Engineer

RECEIVED

NOV 12 2009

DEPARTMENT OF
WATER RESOURCES

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG (ISB No. 2207)
Deputy Attorney General
Chief, Natural Resources Division

DAVID I. STANISH (ISB No. 7310)
Deputy Attorney General
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Counsel for the State of Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA.

Case No. 39576

**Subcase Nos. 01-00217, 01-00218,
01-04024, and 01-04025
(Minidoka Power Rights)**

Subcase Nos. 01-02068 and 01-04054
(Palisades Power Rights)

AFFIDAVIT OF LYLE SWANK

State of Idaho)
)ss
County of Ada)

LYLE SWANK, being first duly sworn, deposes and states:

1. I am a competent adult over the age of eighteen years, and the statements made

herein are based upon my own personal knowledge of the events described.

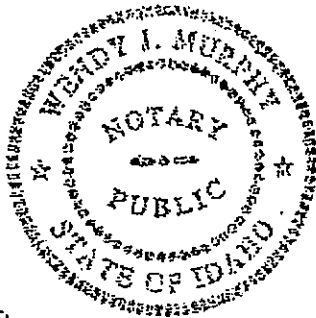
2. I am employed as the Watermaster for Water District No. 1. My work address is 900 N. Skyline Drive, Suite A, Idaho Falls, Idaho 83402.

3. Prior to 1977, the Water District No. 1 Watermaster position was held by a U.S.G.S. engineer and was appointed by the Director of the Idaho Department of Water Resources or its predecessor agency.

4. Further your affiant sayeth naught.

Lyle Swank
LYLE SWANK
Watermaster
Water District No. 1

Subscribed and sworn (or affirmed) to before me, a notary public in and for the State of Idaho this ⁹10th day of November 2009.



Wendy J. Murphy
Notary Public for Idaho
Residing at Idaho Falls
My Commission expires: 11/6/2013

CERTIFICATE OF SERVICE

I certify that on this 10th day of November 2009, I caused to be served the original and/or copy of this **AFFIDAVIT OF LYLE SWANK** on the following persons by the methods indicated:

1. Original to:

CLERK OF THE DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
253 THIRD AVENUE NORTH
PO BOX 2707
TWIN FALLS, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: (208) 736-2121
- ☐ Statehouse Mail

2. Copies to:

IDAHO POWER COMPANY
Represented by:
JAMES C TUCKER
IDAHO POWER CO
PO BOX 70
BOISE, ID 83707

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☐ Statehouse Mail

IDAHO POWER COMPANY
Represented by:
JIM LOCHHEAD
BROWNSTEIN HYATT ET AL
410 17TH STREET, SUITE 2200
DENVER, CO 80202

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- ☐ Federal Express
- ☐ Facsimile:
- ☐ Statehouse Mail

AMERICAN FALLS RESERVOIR
Represented by:
C THOMAS ARKOOSH
301 MAIN ST
PO BOX 32
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- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☐ Statehouse Mail

ABERDEEN AMERICAN FALLS GWD
BINGHAM GWD
BONNEVILLE JEFFERSON GWD
CAREY VALLEY GWD
IGWA INC
JEFFERSON CLARK GWD
MADISON GWD
MAGIC VALLEY GWD
NORTH SNAKE GWD
Represented by:

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☐ Statehouse Mail

CANDICE MCHUGH
101 CAPITOL BLVD., STE. 208
BOISE, ID 83702

CITY OF POCA TELLO
Represented by:
JOSEPHINE P BEEMAN
409 W JEFFERSON ST
BOISE, ID 83702

A&B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
FALLS IRRIGATION DISTRICT
Represented by:
ROGER D LING
615 H ST
PO BOX 396
RUPERT, ID 83350-0396

MILNER IRRIGATION DIST
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY
Represented by:
JOHN SIMPSON
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485

MINIDOKA IRRIGATION DISTRICT
Represented by:
W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318

NEW SWEDEN IRRIGATION DISTICT
FREMONT-MADISON IRR DIST
Represented by:
JERRY R. RIGBY
25 N 2ND E
PO BOX 250
REXBURG, ID 83440-0250

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☐ Statehouse Mail

USDI BUREAU OF RECLAMATION
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

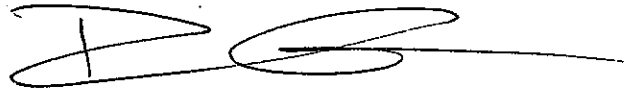
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- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

UNITED STATES OF AMERICA
REGIONAL DIRECTOR PN REGION
BUREAU OF RECLAMATION PN-3100
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234

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- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

IDWR DOCUMENT DEPOSITORY
PO BOX 83720
BOISE, ID 83720-0098

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- ☐ Hand Delivery
- ☐ Federal Express
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