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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

Case No. 39576

)
) Subcase No. 01-02064

)
) (American Falls Storage Subcase)

)
) **AFFIDAVIT OF**
) **MICHAEL C. ORR**
)

STATE OF IDAHO)

COUNTY OF ADA)

) s.s.

MICHAEL C. ORR, being first duly sworn upon his oath, deposes and states that:

1. I am a Deputy Attorney General in the Idaho Office of the Attorney General and one of the attorneys of record for the State of Idaho in the above-entitled proceedings.

2. The following is based upon my own personal knowledge.
3. Attached to this affidavit are true and correct copies of the following

documents:

- Exhibit 49 "Memorandum In Support Of State of Idaho's Motion For Partial Summary Judgment Re: Milner Zero Minimum Flow," filed on October 19, 2009, in Subcases Nos. 00-92002GP, 02-00200, 02-00201, 02-00223 and 02-00224.
- Exhibit 50: Letter from Barry Dibble, Minidoka Project Manager, to Chief Engineer of the U.S. Reclamation Service, April 16, 1920. This document was also submitted to this Court as Exhibit 44 to the "Affidavit Of Michael C. Orr," filed on October 19, 2009, in Subcases Nos. 00-92002GP, 02-00200, 02-00201, 02-00223 and 02-00224 ("Milner Zero Flow Aff.").
- Exhibit 51: Letter from James L. Boone, Attorney, Idaho Power Company, to W.R. Putnam, Vice President & General Manager, Idaho Power Company, November 8, 1926.
- Exhibit 52: Letter from C. C. Boswell, Electric Bond and Share Company, to W.R. Putnam, Vice President & General Manager, Idaho Power Company, November 16, 1926.
- Exhibit 53: Letter from James L. Boone, Secretary, Idaho Power Company, to Mr. Hibbard, Vice President, Idaho Power Company, May 29, 1931. This document was also submitted to this Court as Exhibit 53 to the Milner Zero Flow Aff.
- Exhibit 54: Excerpted pages of "Federal Power Commission, License on Government Lands, Project No. 18, Idaho, Idaho Power Company," May 11, 1934. This document was also submitted to this Court as Exhibit 56 to the Milner Zero Flow Aff.
- Exhibit 55: Idaho Power Company, Minutes of Special Meeting of Board of Directors, May 11, 1934. This document was also submitted to this Court as Exhibit 55 to the Milner Zero Flow Aff.

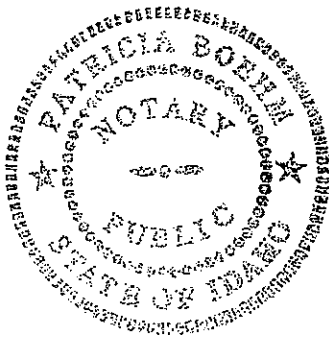
- Exhibit 56: Letter from D.F. McGee, Electric Bond and Share Company, to M.L. Hibbard, Vice President and General Manager, Idaho Power Company, September 30, 1931.
- Exhibit 57: Letter from B.E. Stoutemyer, District Counsel, United States Bureau of Reclamation, to the Commissioner of the United States Bureau of Reclamation, March 20, 1934.
- Exhibit 58: Expert Report of David B. Shaw, P.E., *Idaho Power Co. v. United States*, No. 07-730C (Fed. Cl.), November 2009.

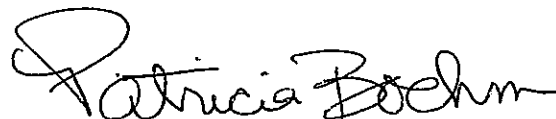
Further your affiant sayeth naught.

DATED this ^{15th}~~16th~~ day of November 2010.


MICHAEL C. ORR

SUBSCRIBED AND SWORN to before me this ^{15th} day of November 2010.




Notary Public for Idaho
Residing at: Boise, ID
My commission expires: 2/5/16

CERTIFICATE OF SERVICE

I certify that on this 16th day of November 2010, I caused to be served the original and copies of the **AFFIDAVIT OF MICHAEL C. ORR** on the following persons by the methods indicated:

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MICHAEL C. ORR
Deputy Attorney General

the desirability of holdover storage for irrigated areas which under normal climatic and run-off conditions have a reasonably adequate water supply.”¹¹³ In 1936 the Secretary of the Interior found that “the very serious water shortages which have occurred in large sections of the Snake River Valley during the last five years” demonstrated “the urgent importance of having every acre foot of the winter flow of Snake River which it is possible to save, and storing the water for use during the next irrigation season.”¹¹⁴

The measure of potential winter water conservation and storage efforts, and their success, was the amount of water that spilled over Milner Dam. As the 1935 Department of the Interior water supply paper stated: “Present or future power rights not being taken into account, the amount of water that passes the Milner diversion dam is an index of the present utilization of the Snake River for irrigation above Milner and a measure of future possibilities.”¹¹⁵ Watermaster Lynn Crandall made similar points in a 1934 letter to the United States Commissioner of Reclamation:

Inasmuch as all water passing Milner is waste as far as irrigation is concerned Only by decreasing present discharge past Milner dam can the supply for American Falls reservoir be increased Sooner or later the need for irrigation water on Snake River will require the elimination of any discharge past Milner in years of deficient runoff ¹¹⁶

¹¹³ Orr Aff., Exhibit 37 at 7-8 (Hoyt report “Water Utilization In The Snake River Basin” at 65-66).

¹¹⁴ Orr Aff., Exhibit 62 at 1-2 (T.A. Walters, Acting Secretary of the Interior, “Findings of the Secretary of the Interior as to net profits from the Black Canyon and the Minidoka Power Plants, through sales of power on the Minidoka project and towns adjacent thereto, during the year 1935” at 1-2) (United States Department of the Interior, Bureau of Reclamation) (Mar. 12, 1936).

¹¹⁵ Orr Aff., Exhibit 37 at 9 (Hoyt report on “Water Utilization In The Snake River Basin” at 167); see also Orr Aff., Exhibit 63 at 10 (Thomas R. Newell, U.S. Geological Survey engineer, *Newell On Administrative Water Problems*, 94 TRANSACTIONS OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS 321 (1930) (Newell’s comments on Baldwin, *Transmission and Delivery of Reservoir Water in Administrative Water Problems: A Symposium*) (“The small percentage of ultimate wastage (flow past Milner during regulation period) is a real index of the excellence and efficiency of the control system of river operation as a whole.”); see also Orr Aff., Exhibit 61 at 8 (Debler & Riter report at 204) (“any winter use below the [American Falls] Reservoir is a total loss as far as irrigation is concerned”) (quoting Lynn Crandall report).

¹¹⁶ Orr Aff., Exhibit 64 at 2, 3 (Letter from Lynn Crandall to Elwood Mead, Commissioner, U.S. Bureau of Reclamation at 2-3) (Feb. 21, 1934).

In his report on water distribution and hydrometric work for Water District No. 36 during the first good water year after the drought, Lynn Crandall wrote "[i]t is a matter of regret that lack of storage facilities resulted in the waste of 620,000 acre-feet of surplus flood waters past Milner during 1936."¹¹⁷ He explained that surplus water "wasted" past Milner Dam was a lost opportunity to store supplies against future shortages: "Dry years to be expected in the future will require all the water that can be made available from any source at reasonable cost if the established irrigated agriculture is to be adequately maintained in the Snake River Valley."¹¹⁸

In addition to demonstrating the need for new storage above Milner to hold the surplus flows of high water years, the 1930s drought also focused attention on the need to conserve winter flows of normal and below-average years. Winter flows routinely had been diverted for power generation at Minidoka Dam¹¹⁹ and for domestic and stockwater purposes above Milner Dam. Curtailing these winter uses to allow further conservation of winter flows above Milner was seen as a means of ensuring the filling of American Falls Reservoir on a regular basis. The State Commissioner of Reclamation reported that the reservoir repeatedly failed to fill during the drought and that winter water uses, including winter power generation at the Bureau of Reclamation's Minidoka Dam and winter diversions for domestic and stockwater uses, "might be looked to to supply this

¹¹⁷ Orr Aff., Exhibit 65 at 5 (Lynn Crandall, Watermaster for Water District No. 36, "Water Distribution And Hydrometric Work – Water District No. 36 – 1936" at 9).

¹¹⁸ Id.; see also Orr Aff., Exhibit 66 at 2 (Letter from District Engineer Lynn Crandall to District Counsel B.E. Stoutemyer at 2) (Sept. 8, 1939) ("there have been over 3,000,000 acre-ft. of surplus water spill to waste over Milner Dam during the past 4 years and that if the So. Fork Reservoir was in existence over a million acre-ft. of this wasted water would today be in the reservoir waiting to be used in future dry years").

¹¹⁹ See Orr Aff., Exhibit 67 at 1 (Letter from B.E. Stoutemyer to U.S. Commissioner of Reclamation at 1) (Mar. 12, 1940) (stating that the Minidoka power plant was constructed "for reclamation purposes" and "irrigation pumping requirements").

deficiency.”¹²⁰ In a 1934 letter to the president of the Aberdeen-Springfield Canal Company, District Counsel Stoutemyer discussed closing down the Minidoka power plant in the non-irrigation season and reducing water users’ winter diversions for domestic and stockwater purposes: “Such a saving of winter flow would assure the filling of American Falls Reservoir practically every year.”¹²¹

A 1934 contract between the United States and Idaho Power Company paved the way for conserving the winter flows that had long been used for power generation at Minidoka Dam. Among other things, the contract provided for Idaho Power to furnish winter power to the Minidoka Project, which allowed the United States to shut down the Minidoka power plant in the non-irrigation season and thereby retain at American Falls Reservoir the winter flows that otherwise would have been sent downstream to generate power at Minidoka.¹²²

¹²⁰ Orr Aff., Exhibit 36 at 4-5 (Faris report at 3-4) (“the American Falls Reservoir has filled but twice since it was placed in operation, in 1926 The rights that might be looked to to supply this deficiency are . . . the right of the Minidoka project to divert something like 2,000 second feet, continuously, for the operation of its power plant at Minidoka dam, and that of the canals diverting water at the Milner Dam for domestic purposes during the non-irrigation season”).

¹²¹ Orr Aff., Exhibit 68 at 1 (letter from B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation, to W.H. Philbrick, President of Aberdeen-Springfield Canal Company at 1) (June 6, 1934). District Counsel Stoutemyer had also pointed out in previous years that winter flow should be used to fill the American Falls Reservoir before giving any consideration to potential power uses:

In years like 1924 and 1926 there is little or no flood water available for storage in the spring. Whatever storage is secured must be secured out of the winter flow. . . . In the event that we have another low water year, the winter flow which can be stored in American Falls reservoir is far more valuable for irrigation than for power and we should store all the water we can and rent the Government’s share to the projects which will need it. When we have stored enough water in the American Falls reservoir to take care of all the irrigation needs of Snake River valley, we can then consider dickering with the Power Company to release some water for power development, but not before that time.

Orr Aff., Exhibit 69 at 1, 2 (letter from B.E. Stoutemyer, District Counsel, U.S. Reclamation Service to the Chief Engineer at 1-2) (“Subject: Use of American Falls Storage – Minidoka Project”) (Aug. 16, 1926).

¹²² See Orr Aff., Exhibit 70 at 12 (“Contract between United States and Idaho Power Company for conservation of Snake River Water and furnishing transmission service” at 11) (Symbol Ilr-801) (Oct. 1, 1934) (“ . . . the water conserved and made available by the terms of this agreement is for storage in the American Falls Reservoir . . .”).

The Secretary of the Interior found that "the public interest requires that the water supply needed for irrigation purposes should not be sacrificed for the purpose of providing increased power profits . . . It has therefore been found necessary (in order to avoid the waste of water for irrigation purposes) to limit the operation of the Minidoka Power Plant during the non-irrigation season" ¹²³ District Counsel Stoutemyer raised the same public interest concerns in a letter to the State Commissioner of Reclamation in 1937, when Idaho Power sought to perfect additional hydropower water rights at Twin Falls and Lower Salmon Falls. Mr. Stoutemyer's letter recited the Article 14 stipulation and explained "[w]hen the license in question was under consideration, we insisted on the above quoted stipulation for the protection of the present and future irrigators of the Snake River Valley." ¹²⁴ It further explained:

It seems to us that it would be contrary to sound public policy to allow any additional power rights to attach for use in the Snake River Canyon to such an extent as would require the waste of water over Milner Dam, since all the water available in Snake River above the Milner Dam is needed for irrigation purposes even at the present time (especially so in low water years when there have been serious water shortages even for the lands now under irrigation) and with increasing irrigation requirements, and construction of additional reservoirs to store flood water and to carry over excess water of high water years for use in low water years, the need to conserve all the available water above Milner Dam for irrigation purposes will become more and more evident as the years go on Any additional power rights which would require the waste of water over Milner Dam would conflict with both of these propositions ¹²⁵

¹²³ Orr Aff., Exhibit 62 at 2 (findings of the Secretary of the Interior at 2) (parentheses in original).

¹²⁴ Orr Aff., Exhibit 71 at 3 (Letter from B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation, to R.W. Faris, Idaho State Commissioner of Reclamation at 2-3) (June 21, 1937).

¹²⁵ Id. at 3, 4 (parentheses in original). Mr. Stoutemyer's letter also forwarded a copy of a letter he had received from Watermaster Lynn Crandall, which notified Mr. Stoutemyer of Idaho Power's new water right filings and stated Mr. Crandall's view that under the Article 14 stipulation,

any water rights acquired would not be adverse to future storage rights above Milner. . . . I suppose the [Federal license] would control anyhow but it seems to me that it would be desirable to have it reaffirmed in the State water right license so that it will be clearly evident that the date of priority applies only to rights below Milner and is not adverse to subsequent developments above Milner.

The United States Court of Appeals for the District of Columbia Circuit also endorsed the United States' decision to store winter flows above Milner. In rejecting Burley Irrigation District's challenge to the Secretary of the Interior's accounting methodology for the Minidoka power plant under the winter water conservation program, the court stated: "Water passing [Minidoka Dam] 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."¹²⁶

E. The Palisades Project And Winter Water Savings Contracts.

Further winter water conservation measures were necessary to ensure a reliable water supply for additional storage projects that were contemplated even further upstream. This need led to proposals to link new storage projects to commitments by water users to reduce or eliminate winter diversions for domestic and stockwater uses. District Counsel Stoutemyer stated in a 1939 letter to the United States Commissioner of Reclamation: "[A]s the Chief Engineer reports that such saving of winter water is essential to the feasibility of the Grand Valley project I think that we have no alternative but to insist that such contracts must be executed before the new reservoir is constructed."¹²⁷ Thus, the reduction or elimination of winter domestic and stockwater diversions became a pre-condition for acquiring storage space in the next large reservoir the Bureau proposed above Milner, the Palisades Project: "the Bureau has adopted the

Ort Aff., Exhibit 72 (Letter from Lynn Crandall, U.S. Geological Survey District Engineer, to B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation) (June 18, 1937).

¹²⁶ Burley Irr. Dist. v. Ickes, 116 F.2d 529, 535 (D.C. Cir. 1940).

¹²⁷ Ort Aff., Exhibit 73 (letter from B.E. Stoutemyer, District Counsel, U.S. Bureau of Reclamation, to Commissioner, U.S. Bureau of Reclamation) (Sept. 5, 1939).

requirement that all companies purchasing space in the Palisade Reservoir will have to agree to cease winter water diversions within 5 years from the date that construction starts on the dam."¹²⁸

The Palisades Project was originally authorized in 1941, placed on hold during World War II, and reauthorized in 1949. In his statement in support of the 1949 Palisades legislation, Idaho Congressman John Sanborn stated that it dealt with "the control and use of water in the entire watershed of the Snake River above Milner Dam. . . The proposed legislation will authorize the construction of units for the storage and use of nearly all of the water not now utilized in the upper Snake River Valley."¹²⁹ He also stated that the Bureau of Reclamation had been conducting studies for more than 20 years "for the purpose of developing a plan to place under beneficial use all available water in the Snake River Valley above Milner, Idaho."¹³⁰ The 1949 Palisades legislation retained the winter water savings requirement,¹³¹ as the Assistant Reclamation Commissioner explained:

Commissioner Page of the Bureau of Reclamation, whom many of you remember, presented the original plan for Palisades Dam in 1941, but its construction was regarded then, as now, as being dependent on the working out of assurances of a minimum water supply through the curtailment of certain wasteful winter diversions in the upper Snake River Valley. The Palisades Dam project was authorized in December 1941 upon the basis that these negotiations be worked out prior to construction. The negotiations and plan of operation, together with the plans for

¹²⁸ Ort Aff., Exhibit 74 at 1 (letter from Watermaster Lynn Crandall to E.V. Berg, Idaho State Commissioner of Reclamation at 1) (Sept. 25, 1941).

¹²⁹ Ort Aff., Exhibit 60 at 5 (Palisades hearings at 4) ("Statement of Honorable John Sanborn, a Representative in Congress from the State of Idaho").

¹³⁰ Id. at 5 (Palisades hearings at 5) ("Statement of Honorable John Sanborn, a Representative in Congress from the State of Idaho").

¹³¹ Pub. L. No. 81-864 § 4(a), 64 Stat. 1083-84 (1950) ("The continuation of construction of Palisades Dam beyond December 31, 1951 . . . is hereby made contingent on there being a finding by the Secretary by the controlling date that contracts have been entered with various water users' organizations of the Upper Snake River Valley in Idaho that, in his opinion, will provide for an average annual savings of one hundred and thirty-five thousand acre-feet of winter water.").

facilities to accomplish the desired operation, have now been completed.¹³²

Because the practice of diverting winter flows for stockwater and domestic uses was "deep rooted and difficult to alter," the Palisades winter water savings agreements embodied a compromise.¹³³ The compromise included a number of important elements, including, among others: conservation of water for storage above Milner through elimination of winter diversions for stockwater and domestic uses and curtailment of winter power generation; coordination of reservoir operations for maximum storage; exchanges of storage rights between certain reservoirs; and clarification of diversion and storage rights and holdover storage privileges.¹³⁴ The Bureau of Reclamation concluded that the Palisades contracts "resulted in better distribution and utilization of the waters of the Snake River":

The elimination of winter water runs for stock and domestic use, the establishing of uniform storage water holdover privileges, the coordinated system-wide operation of reservoirs, the subordination of winter power production to conserve storage, and the exchange of storage space to effectuate its use closer to points of diversion, all have resulted in better distribution and utilization of the waters of the Snake River.¹³⁵

F. The Hells Canyon Project.

The need to conserve winter and flood flows above Milner for irrigation purposes was also recognized in the FPC proceedings on Idaho Power's Hells Canyon project in the 1950s. In his report analyzing future depletions above Hells Canyon, which Idaho

¹³² Orr Aff., Exhibit 60 at 8 (Palisades hearings at 11) ("Statement of Wesley R. Nelson, Assistant Commissioner, Bureau of Reclamation").

¹³³ Orr Aff., Exhibit 75 at 3 ("Status Report – Workings of Palisades Water Savings Agreement" at 2) (U.S. Bureau of Reclamation) (Boise, Idaho) (Aug. 5, 1968).

¹³⁴ *See generally id.* at 3-6 (status report at 2-5).

¹³⁵ *Id.* at 9 (status report at 8).

Power offered in support of its FPC application,¹³⁶ watermaster Lynn Crandall stated that "flood waters in years of ample runoff will be stored in new reservoirs such as Palisades and will be fed out onto the lands in dry years."¹³⁷ His report stated that future development would probably eliminate spills past Milner: "Except in years of well above normal runoff it is quite likely that future years will see the flow of upper Snake River controlled so as to practically eliminate spills past Milner except for storage rights owned by the Idaho Power Company"¹³⁸

Mr. Crandall's report also pointed out the possibility of diverting "surplus flows that would otherwise spill past Milner" for purposes of recharging "the ground-water reservoir."¹³⁹ When examined on this point during the FPC proceedings, Mr. Crandall testified that it would be possible "to provide greater storage and offset to some extent depletions arising out of ground water pumping"¹⁴⁰ by recharging the ground water using "waters that would otherwise spill down past Milner into the Columbia."¹⁴¹

Subsequent analyses also recognized ground water recharge as a means of conserving winter and flood flows above Milner Dam. A 1955 report by the Bureau of Reclamation referred to "the possibility of using the lavas under this plain as a ground-water storage reservoir which would outlet into the Snake River."¹⁴² In discussing opportunities for obtaining new irrigation water supplies above Milner Dam, a joint report in 1960 by the Bureau of Reclamation and the Army Corps of Engineers pointed

¹³⁶ See Orr Aff., Exhibit 58 at 17 (Crandall Examination at 10146) ("This report, which is his direct testimony, was offered by the applicant . . .").

¹³⁷ Orr Aff., Exhibit 59 at 7 (Crandall Report at 5).

¹³⁸ Id. at 8 (Crandall Report at 6).

¹³⁹ Id.

¹⁴⁰ Orr Aff., Exhibit 58 at 34 (Crandall Examination at 10317).

¹⁴¹ Id. at 35 (Crandall Examination at 10318).

¹⁴² Orr Aff., Exhibit 38 at 6 (special report on upper Snake River basin at 16).

out: "In a sense, the ground water is storage. In considering future development it could be used much as a conventional storage reservoir."¹⁴³ The joint report pointed out "the possibility of artificially recharging [the underground reservoir] by diverting surplus flows, beyond requirements of existing and future developments, from the Snake River during the flood season into highly permeable areas of raw volcanics."¹⁴⁴ Governor Smylie also pointed out in a 1966 letter to the Secretary of the Interior the potential to use flows above Milner Dam for "ground water recharge."¹⁴⁵ In a 1967 letter to the Board, the Assistant Regional Director of the Bureau of Reclamation stated: "Artificial recharge would consist of diverting surplus surface flows of wet years from Snake River or Henrys Fork to infiltration areas where this water would enter the porous materials of the Snake Plain aquifer," and thereby "[p]ut underground in an evaporation-free reservoir, surplus flows of Henrys Fork and Snake River that would otherwise spill past Milner unused."¹⁴⁶ In a 1972 Board meeting, Board Director Dr. Robert Lee stated that recharge "really represents an alternative to capture waste water that is now spilling down the Snake It is an alternative to future dams in the area."¹⁴⁷

G. The 1960s.

The need to conserve surplus water above Milner was reaffirmed a number of times in the years following the approval of the Palisades and Hells Canyon projects. In

¹⁴³ Orr Aff., Exhibit 76 at 7 ("Information Bulletin On A Study Of Water Resource Development Possibilities - Upper Snake River Basin" at 5) (U.S. Army Corps of Engineers & U.S. Department of the Interior, Bureau of Reclamation) (Sept. 29, 1960).

¹⁴⁴ Id. at 11 (information bulletin at 9).

¹⁴⁵ Orr Aff., Exhibit 46 at 2 (Governor Smylie letter to U.S. Secretary of Interior at 1).

¹⁴⁶ Orr Aff., Exhibit 77 at 3 (letter from Norman H. Moore, Assistant Regional Director, U.S. Department of the Interior, Bureau of Reclamation, to Dr. Robert E. Lee, Director, Idaho Water Resource Board at 2) (Oct. 27, 1967).

¹⁴⁷ Orr Aff., Exhibit 78 at 3 ("Minutes of Meeting No. 4-72" at 7) (Idaho Water Res. Bd., Jun. 13, 1972).

a December 1960 meeting between the Committee of Nine of Water District No. 1 and representatives of the Bureau of Reclamation, R.P. "Pat" Parry, counsel for Idaho Power as well as several irrigation entities such as the Twin Falls and North Side Canal Companies,¹⁴⁸ presented two criteria for river operations: "1. Have water at the beginning of the irrigation season in those reservoirs where the best use can be made of it. 2. Spill no water to waste past Milner."¹⁴⁹

In a 1962 letter to the FPC commenting on Idaho Power's application for a single FPC license to cover its previously constructed facilities at American Falls, Upper Salmon Falls and Shoshone Falls, the Assistant Secretary of the Interior pointed out that the Department "has constructed upstream from Milner a reservoir system in excess of 4,500,000 acre-feet, all of which is operated with the objective of conserving the water to minimize spills past Milner Dam," and emphasized the "long history of the obvious need for the conservation of water above Milner Dam."¹⁵⁰ In a 1968 letter to Idaho Senator Len Jordan regarding the proposed enlargement of American Falls Reservoir, Bureau of Reclamation Commissioner Floyd Dominy discussed the need "[t]o utilize fully the water resource in the upper Snake River above Milner Dam."¹⁵¹ He stated that if it was

¹⁴⁸ See, e.g. Orr Aff., Exhibit 58 at 12 (Crandall Examination at 10141) (Mr. Parry speaking on behalf of Idaho Power); see also 1955 WL 60750 at *2 (syllabus page of Federal Power Commission order issuing Hells Canyon license) (listing R.P. Parry as counsel for Idaho Power Company); Orr Aff., Exhibit 79 at 2 (Minutes of the Meeting on Snake River Flood Control Problems at 8) (Dec. 16, 1957) ("Mr. R.P. Parry then spoke as representative of the water users in the lower Snake River Valley below American Falls Reservoir.").

¹⁴⁹ Orr Aff., Exhibit 80 at 2 ("Minutes of Meeting, Bureau of Reclamation and Advisory Committee" at 1) (Dec. 29, 1960).

¹⁵⁰ Orr Aff., Exhibit 81 at 5 (letter from Assistant Secretary of the Interior Kenneth Holum to Joseph C. Swidler, Chairman, Federal Power Commission at 4) (Aug. 30, 1962).

¹⁵¹ Orr Aff., Exhibit 82 at 2 (letter from U.S. Bureau of Reclamation Commissioner Floyd Dominy to Senator Len Jordan at 2) (January 5, 1968).

determined that American Falls Dam should not be enlarged, then "alternatives should be investigated to control and utilize uncommitted flows passing Milner Dam."¹⁵²

The policy of conserving winter flows and flood waters for irrigation use above Milner applied even when irrigation developments were proposed downstream from Milner. In his 1966 comments to the Secretary of the Interior regarding the proposed Southwest Idaho Water Development Project, which would have relied on diversions below Milner Dam, Governor Robert Smylie discussed a number of proposed projects that were intended to realize the "tremendous potential for irrigation development" in the Snake River Basin above Milner Dam.¹⁵³ The Governor pointed out that these projects were feasible only if the water supply for Southwest Idaho Water Development Project "is not dependent upon spills past Milner Dam," and stated: "We are assured by Region 1, Bureau of Reclamation that inflows below Milner are sufficient to meet Southwest Idaho Project requirements."¹⁵⁴ Idaho Water Resource Board member Evan Kackley reported to the Board the next year that he was "glad to note" that according to the Department of the Interior's report to the Governor, "the Southwest Idaho Water Development would not require the spills of Milner."¹⁵⁵

H. The Rebuilding Of American Falls Dam.

The primary objective of reserving flows above Milner for irrigation use was again reaffirmed in the 1970s with the replacement of American Falls Dam. By 1972 an alkali-aggregate reaction and deteriorating concrete had compromised it to the point that the Bureau of Reclamation restricted the reservoir to no more than two-thirds of its 1.7

¹⁵² Id.

¹⁵³ Orr Aff., Exhibit 46 at 2 (Governor Smylie letter to U.S. Secretary of Interior at 1). The Governor's list of irrigation development projects included "ground water recharge."

¹⁵⁴ Id. at 2-3 (Governor Smylie letter to U.S. Secretary of Interior at 1-2).

¹⁵⁵ Orr Aff., Exhibit 47 at 4-5 ("Statement" of Evan Kackley at 4-5).

million acre-foot storage capacity.¹⁵⁶ Legislation authorized the American Falls Reservoir District ("Reservoir District") to reconstruct the dam in lieu of waiting for a federal appropriation that would have enabled the Bureau of Reclamation to do so.¹⁵⁷ The Reservoir District was authorized to contract with an electrical utility for hydroelectric use of the falling water at the new dam, which would help defray the cost of reconstruction, and Idaho Power Company expressed interest in such a falling water contract.¹⁵⁸

Under the Internal Revenue Service's interpretation of then-existing law, Idaho Power's use of falling water from the new dam for commercial power generation meant that any bonds the Reservoir District issued would not be tax-exempt,¹⁵⁹ which presented a significant financing obstacle. Thus, federal legislation was proposed to provide tax-exempt status for bonds issued to support the construction of "a dam which furnishes waters for irrigation purposes which has a subordinate use in connection with the generation of electrical energy," where the "subordinate use of water for generating electric energy means that less than 10 percent of the normal supply of stored water may contractually be scheduled for release by the power company and used for generating electric energy."¹⁶⁰

¹⁵⁶ Ort Aff., Exhibit 83 at 2-3 (H.R. Rep. No. 94-531, at 2-3) (1975) (House Ways And Means Committee) ("Tax Exempt Status Of Obligations Used To Provide Certain Irrigation Facilities").

¹⁵⁷ Id. at 3 (H.R. Rep. No. 94-531 at 3).

¹⁵⁸ Id.

¹⁵⁹ See id. ("If it were not for the use of the water by the Idaho Power Company for hydroelectric power generation, any bonds issued by the Reservoir District would presently qualify for tax-exempt status").

¹⁶⁰ Id. at 4 (H.R. Rep. No. 94-531 at 4); see also Ort Aff., Exhibit 84 at 3-4 (Sen. Rep. No. 94-570, at 3-4) (1975) (Senate Finance Committee) ("Tax Exempt Status Of Obligations Used To Provide Certain Irrigation Facilities") (same).

With the new federal legislation making tax-exempt bonds available, the United States, the Reservoir District and Idaho Power executed the contracts necessary for reconstruction of the American Falls Dam: the "Government Contract" between the Reservoir District and the United States, the "Falling Water Contract" between the Reservoir District and Idaho Power, and the "Spaceholder Contract" among all three parties. All three contracts were dated March 31, 1976.

The "Government Contract" and the "Falling Water Contract" established that power generation was to be subordinate to irrigation purposes. The Government Contract provided that the United States would operate and maintain the new dam "as a part of the Minidoka Project for the beneficial use of the water on the land within the service areas of the Spaceholders pursuant to Section 8 of the Reclamation Act of June 17, 1902."¹⁶¹ Article 16 of the Government Contract further provided that "the primary irrigation purpose and the incidental purposes of the Minidoka Project shall not be impaired by the subordinate utilization for power generation,"¹⁶² and that the United States "is not obligated to operate the Replacement Dam in a manner to have water in the Replacement Dam at elevations for power generation or to operate to increase the head in the Replacement Dam for power generation."¹⁶³ Article 18 of the Government Contract provided that "less than 10 percent of the water accruing to the active storage capacity in the Replacement Dam may be contractually scheduled for release by the Idaho Power

¹⁶¹ Orr Aff., Exhibit 85 at 6 ("Contract between The United States Of America and The American Falls Reservoir District for Construction And Operation And Maintenance Of The American Falls Replacement Dam Program Dated as of March 31, 1976" at 10) ("Government Contract").

¹⁶² Id.

¹⁶³ Id.

Company.”¹⁶⁴ Idaho Power acknowledged and agreed to these provisions in the Falling Water Contract.¹⁶⁵

Thus, the Milner “zero minimum flow” principle reflects the long-established objective of maximizing the conservation and storage of non-irrigation season flows and flood waters above Milner Dam for use above Milner. This objective has been an integral part of water resources development policy, planning and practice in the Snake River Basin since long before the first Idaho State Water Plan. Then, as now, the underlying policy and principle is to allow for complete storage and utilization of winter flows and flood waters for irrigation purposes above Milner Dam.

CONCLUSION

The Idaho Legislature codified the Milner zero flow principle in chapter 38 of the 1997 Idaho Session Laws and in Idaho Code § 42-203B(2). The Board and the Legislature memorialized the zero minimum flow at Milner in every revision of the Idaho State Water Plan. Thus, as a matter of law, the State is entitled to summary judgment that General Provision No. 4 should provide that the flow of the Snake River above Milner Dam may be reduced to zero, and that water rights using water downstream from Milner Dam have no right to call for the delivery, or seek the administration, of the flow of the Snake River or surface and groundwater tributary to the Snake River upstream from Milner Dam. A corresponding remark should be inserted in water right 02-0200 for the same reasons.

¹⁶⁴ *Id.* at 7 (Government Contract at 14).

¹⁶⁵ See *Orr Aff., Exhibit 86 at 10* (“Falling Water Contract Dated as of March 31, 1976 by and between American Falls Reservoir District and Idaho Power Company” at 19) (“Falling Water Contract”) (“The Idaho Power Company agrees to the provisions of the Government Contract governing operation and maintenance of the Replacement Dam.”).

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Respectfully submitted this 16th day of OCTOBER 2009.

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Milner. The Twin Falls south and north side projects were constructed by the Twin Falls and North Side Canal Companies under the 1894 Carey Act, and the federal Minidoka Project was developed by the U.S. Reclamation Service (later the Bureau of Reclamation) under the 1902 Reclamation Act.⁵⁶ The Minidoka Project built dams and large reservoirs at Lake Walcott (Minidoka Dam) and Jackson Lake in Wyoming.⁵⁷ The Twin Falls companies constructed a large dam and diversion works at Milner,⁵⁸ the lowest point on the river at which large irrigation diversions were practicable.⁵⁹ As a result of this development, the reliable summer flow of the river at Milner was fully appropriated soon after the end of the nineteenth century.⁶⁰

B. Early Recognition Of The Need To Conserve And Store Winter Flows Above Milner.

The full appropriation of irrigation season flows at Milner was a turning point in the development of the Snake River Basin. From that point on, storage reservoirs and the waters to fill them were necessary for further irrigation development. As the Director of the U.S. Reclamation Service emphasized in a 1920 letter to Idaho Power Company regarding the proposal to build a reservoir at American Falls:

⁵⁶ See *id.*; Orr Aff., Exhibit 32 at 6 (W.G. Hoyt, "Report Relative to Water Power Resources of Snake River and Status of Public Lands Between Milner and Weiser, Idaho" at 42) (U. S. Geological Survey) (Aug. 1922).

⁵⁷ See Erik A. Stene, "Minidoka Project History" at 2, 5-10 (U.S. Bureau of Reclamation) (1997), http://www.usbr.gov/projects/ImageServer?imgName=Doc_1245093434100.pdf, (link located on webpage: http://www.usbr.gov/projects/Project.jsp?proj_Name=Minidoka%20Project&pageType=ProjectHistoryPage).

⁵⁸ Orr Aff., Exhibit 33 at 5 (C.E. Tappan, "Report Covering Water Measurements and Studies of Stream Flow of Snake River Between Milner and Shoshone Falls" at 8) (Idaho Power Company 1923).

⁵⁹ Orr Aff., Exhibit 29 at 6 (transmittal letter from I.W. McConnell, Chairman of the Board of Engineers, to Chief of Construction, U.S. Reclamation Service, at 2) (Apr. 10, 1920) (transmitting Board of Engineers Report).

⁶⁰ See Orr Aff., Exhibit 34 at 5 ("State of Idaho Response to Federal Energy Regulatory Commission Request for Additional Information" at 2) (*In the Matter of Petition for Declaratory Order by Idaho Power Company*) (FERC Docket no. EL85-38-000) (Jan. 30, 1987) ("The reliable natural flow during the summer month period was fully developed by the end of the 19th century.").

The time has already passed when the natural flow of the river was sufficient to irrigate the lands under cultivation along its shores and storage reservoirs have been recognized as a necessity for many years past. . . . without additional storage no new areas at all can be made productive and habitable and even the present projects will suffer occasional serious losses.⁶¹

The great drought of 1919, the driest year on record in the Snake River Valley to that point, provided the catalyst for the development of the storage facilities needed to support continued agriculture development within the basin. In a report to the Governor in June of that year, the State Commissioner of Reclamation stated that there had been an "extreme shortage of water, occasioned by a very light precipitation and snow-fall."⁶²

The Commissioner further reported:

During seasons of normal flow, the Snake River is at this time at flood stage and a considerable quantity of water has heretofore, at this time of

⁶¹ Orr Aff., Exhibit 35 at 1 (Letter from A.P. Davis, Director of U.S. Reclamation Service, to Idaho Power Company at 1) (Nov. 2 1920). The inadequacy of natural flow for further irrigation development, and the need for additional storage, was recognized repeatedly in subsequent years. In 1934 the State Commissioner of Reclamation reported:

The limit of the development of the irrigation resources of the State from the natural flow of streams has long since been reached, and resort has been had to storage, pumping from lakes and streams, and the development of subterranean water to supplement and augment the supply necessary to irrigate the lands under cultivation.

Orr Aff., Exhibit 36 at 2 (R.W. Faris, State Commissioner of Reclamation, "Supplementary Water For Irrigation In Idaho, With Particular Reference To Boise And Snake River Valleys" at 1) (Oct. 15, 1934) (revised). A 1935 U.S. Geological Survey water utilization report stated: "Irrigation development has reached a point in the Snake River Basin beyond which there can be no large increase in acreage without the construction and utilization of additional storage reservoirs or through the development of additional water supply by pumping." Orr Aff., Exhibit 37 at 7 (W.G. Hoyt, "Water Utilization In The Snake River Basin" at 65) (U.S. Department of the Interior, Water Supply Paper 657) (1935). The Idaho Supreme Court also took notice of the fact that natural flow had been fully appropriated: "The normal flow of our streams has been appropriated, and therefore the limit of development by irrigation from that source has been reached." State Water Conservation Board v. Enking, 56 Idaho 722, 738, 58 P.2d 779, 785-86 (Holden, J., concurring) (1936); see also Orr Aff., Exhibit 38 at 7 ("Special Report - Upper Snake River Basin (Above Powder River) - Irrigation And Associated Developments" at 63) (U.S. Dept. of the Interior, Bur. of Reclamation, Regional Office, Boise, Idaho) (February 1955) ("Large scale irrigation of new lands or providing supplemental supplies in the upper portion of Snake Basin would depend upon development of a water supply in the river above Milner Dam.").

⁶² Orr Aff., Exhibit 39 at 1 (W.G. Swendsen, Idaho State Commissioner of Reclamation, "Departmental Report No. 2 from May 1 To June 1, 1919 - To His Excellency C.C. Moore, Acting Governor Of The State Of Idaho" at 1).

the year, been wasting over the Milner Dam, whereas during this season the stream has been entirely used for irrigation purposes at this point for some weeks past.⁶³

The Commissioner also issued a notice in June to the water users on the Snake River, notifying them of the run-off shortage and the unusually low storage in Jackson Lake Reservoir, and stating that it was "highly important that the greatest economy be exercised in the use of water during this season."⁶⁴ The District Counsel for the U.S. Reclamation Service, B.E. Stoutemyer, reported to the Chief Counsel of the U. S. Reclamation Service: "The water situation on Snake River is extremely critical this year . . ."⁶⁵ "There is a great shortage of water in Snake River this year, this being the lowest year in thirty years, the Snake River at this time being about 3,000 second-feet lower than ever known before at this time of the year."⁶⁶

After the 1919 drought, "[i]t became obvious to all that additional storage facilities had to be built to provide water when short supplies occurred in the future."⁶⁷ As the State Commissioner of Reclamation reported to the Governor in 1923: "The shortage of water experienced in the Snake River valley in 1919 and the subsequent crop loss from drouth during that year acted to stimulate interest in and created a demand for additional storage on the Snake River."⁶⁸ Because the river was fully appropriated above Milner during the irrigation season, the only waters available for storage in new

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Id.

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Orr Aff., Exhibit 40 at 2 (W.G. Swendsen, Commissioner of Reclamation, Department of Reclamation, "Re: Water District No. 36, To the Water Users on the Snake River") (June 2, 1919).

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Orr Aff., Exhibit 41 at 2 (Letter from B.E. Stoutemyer, U.S. Reclamation Service District Counsel, to the Chief Counsel, U.S. Reclamation Service at 2) (June 26, 1919).

⁶⁶

Orr Aff., Exhibit 42 at 1 (Letter from District Counsel B.E. Stoutemyer, U.S. Reclamation Service, to Chief Counsel, U.S. Reclamation Service, Washington D.C. at 1) (June 30, 1919).

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Orr Aff., Exhibit 31 at 6 (Arrington article at 7).

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Orr Aff., Exhibit 43 at 1 (Letter from W.G. Swendsen, State Reclamation Commissioner, to Governor C.C. Moore at 1) (July 9, 1923).

reservoirs were non-irrigation season flows and flood waters. The location most often proposed for a new reservoir to store such flows was American Falls.

In 1920, the United States Director of Reclamation A.P. Davis and Idaho Governor D.W. Davis designated a joint federal-state Board of Engineers to consider water projects in the Snake River Valley, particularly those affecting the proposed American Falls Reservoir.⁶⁹ The engineers selected to serve on the board represented governmental and private interests: the U.S. Reclamation Service, the Idaho Department of Reclamation, the Twin Falls Canal Company, and the Twin Falls North Side Land & Water Company (the predecessor to North Side Canal Company).⁷⁰

The Board of Engineers quickly recognized that the water supply situation called for comprehensive planning and coordinated development. During the Board's first meeting, Idaho State Commissioner of Reclamation W.G. Swendsen said that State officials believed "the time had come for the formation of a definite plan for the development of the remaining resources of the Snake River water supply on a broad and comprehensive basis which would insure to the state the maximum utility of the possibilities of the stream."⁷¹ Further, as the Board of Engineers reported: "It became apparent from preliminary consideration of the subject that no one of the principal problems involved could be properly considered without taking into account its effect upon the general problem of the conservation of the waters of Snake River."⁷² Thus, the Board of Engineers considered "[t]he total water supply available in the Snake River basin for irrigation," the "quantity of storage required for the utilization of the water

⁶⁹ Orr Aff., Exhibit 29 at 10 (Board of Engineers Report at 1).

⁷⁰ Id. at 11 (Board of Engineers Report at 2).

⁷¹ Id. at 11-12 (Board of Engineers Report at 2-3).

⁷² Id. at 12 (Board of Engineers Report at 3).

supply and the relation of that supply to the size of the American Falls Reservoir and other reservoirs which may be necessary," and the loss of hydropower rights at American Falls through "the appropriation of all waters available for irrigation."⁷³ The Board of Engineers issued a much-anticipated report in April 1920 ("Board of Engineers Report").⁷⁴

The Board of Engineers Report concluded that "the greatest use of the water of Snake River will be found in the dedication of the entire flow of the stream to irrigation in so far as the water can be economically appropriated," and that it was possible "with the requisite storage to utilize a very large percentage of all the waters originating in the watershed above Milner dam."⁷⁵ The Report also stated that because there was an excess of irrigable land and "the amount of water available in the river is the limiting factor,"⁷⁶ that "[t]he net effect of this condition will be to dry up the river below Milner Dam during the irrigation season, also to as great an extent as possible below American Falls Reservoir, during the non-irrigation season."⁷⁷

While high-lift pumping would eventually make large-scale irrigation possible in the section downstream from Milner Dam,⁷⁸ at the time of the Board of Engineers Report

⁷³ *Id.*

⁷⁴ See Orr Aff., Exhibit 44 (letter from Barry Dibble, Minidoka Project Manager, to the Chief Engineer of the U.S. Reclamation Service) (Apr. 16, 1920) ("There is considerable demand for this report, and I believe some of the papers will be interested in printing parts of it.").

⁷⁵ Orr Aff., Exhibit 29 at 14 (Board of Engineers Report at 5); see also *id.* at 6 (transmittal letter at 2). ("The board is of the opinion that all of the water of Snake River susceptible of economical diversion should be dedicated to irrigation. . . . The unappropriated water of Snake River can be made available by the development of approximately 3,900,00 acre-feet of storage capacity.").

⁷⁶ *Id.* at 14 (Board of Engineers Report at 5); see also *id.* at 7 (letter of transmittal of report at 2). ("The available water supply is not sufficient for the irrigation of all the land which can be reached from the river.").

⁷⁷ *Id.* at 14 (Board of Engineers Report at 5).

⁷⁸ See Orr Aff., Exhibit 45 at 9-11 (Susan M. Stacy, Legacy of Light: A History of Idaho Power Company at 135-37) (Idaho Power Co. 1991) (discussing high-lift pumping developments in the 1960s).

hydropower was the only feasible use of any significance below Milner.⁷⁹ Thus, for purposes of considering the downstream effects of maximizing winter flow storage above Milner, the Report focused on hydropower impacts:

The principle involved therefore is to secure as nearly as possible a total use of the waters for irrigation above Milner Dam, and to secure the greatest possible use for power below Milner Dam. To a moderate extent these interests conflict with each other but fortunately on account of the large accretions to the stream below Milner Dam the power resource is restored at Upper Salmon Falls and the injury to that resource which would be susceptible of future development is relatively not very great.⁸⁰

Similarly, the Board of Engineers Report emphasized that the storage of winter flows that would otherwise be used for power purposes was key to sustaining irrigation development:

It is recognized generally that the establishment of the American Falls Reservoir is essential to the further development of dependable irrigation possibilities on the Snake River, also that the development of that reservoir will shut off the winter flow at that point which will thereby to a very large extent deprive the remaining power sites of the winter water which now passes American Falls.⁸¹

⁷⁹ See Orr Aff., Exhibit 29 at 14 (Board of Engineers Report at 5) ("The waters flowing in the stream below Milner Dam are not susceptible of diversion to any considerable amount, and therefore become of primary use in connection with the production of power.").

⁸⁰ Id. at 14-15 (Board of Engineers Report at 5-6). Hydraulic Engineer W.G. Hoyt, of the U.S. Geological Survey, came to the same conclusions in a report issued the following year:

In general the river may be divided into two main sections. First, that portion upstream from Milner, and second, the portion downstream from Milner. In the portion of the river upstream from Milner the use of water for irrigation will predominate over power use, while in the section downstream the use of water for power purposes will undoubtedly predominate, since the larger portion of the land adjacent to the river is at such an elevation that it cannot feasibly be irrigated by water pumped or diverted below the Milner dam.

Orr Aff., Exhibit 30 at 4 (Hoyt report on preliminary permit application for Upper Salmon Falls at 3).

⁸¹ Orr Aff., Exhibit 29 at 17 (Board of Engineers Report at 23); see also id. at 16 (Board of Engineers Report at Table 5, "Power Possibilities on the Snake River from American Falls to Swan Falls, inclusive") ("Proposed Conditions: All flow stopped at American Falls in non-irrigation season. All flow except waste waters to be diverted at Milner Dam or above in all seasons") (underlining in original).

The Board of Engineers Report also recognized that hydropower water rights for the use of winter flows might attach or perfect before irrigation development had been completed because "the complete utilization of the Snake River water supply above Milner Dam for irrigation purposes will, under normal conditions require a considerable length of time."⁸² The Board of Engineers therefore advised: "In granting power rights in the future the Federal Government and the State should so far as possible provide restrictions requiring its eventual surrender when and as the waters are required for application to the land."⁸³ Similarly, when large reclamation projects were eventually proposed downstream from Milner, State and Federal authorities made it clear that such projects would not be permitted to interfere with the conservation and storage of winter flows above Milner Dam.⁸⁴

C. The American Falls Reservoir And The Twin Falls Power Site.

The principles proposed in the Board of Engineers Report were soon put into effect in the negotiations and agreements for construction of the American Falls Dam and the Twin Falls power project. Idaho Power Company owned land, hydropower facilities

⁸² Id. at 18 (Board of Engineers Report at 30).

⁸³ Id. at 19 (Board of Engineers Report at 31). The Idaho State Commissioner of Reclamation made this same point in a report to the Federal Power Commission:

it is extremely important that any power permits granted in connection with these applications shall be conditioned upon the State's present and future right to divert, use and impound as much water as may be necessary for a complete development of its agricultural resource, both for irrigation, domestic and other consuming uses.

Orr Aff., Exhibit 28 at 5 (Swendsen "Report and Recommendations" at 2).

⁸⁴ See Orr Aff., Exhibit 46 at 2-3 (letter from Idaho Governor Robert Smylie to U.S. Secretary of Interior Stewart L. Udall at 1-2) (Dec. 7, 1966) (stating that further irrigation development above Milner was possible provided that the proposed Southwest Idaho Water Development Project did not require water to be spilled over Milner Dam); Orr Aff., Exhibit 47 at 5 ("Statement" of Evan Kackley, Idaho Water Resource Board Member from District 4, to the Idaho Water Resource Board at 5) (June 1967) (Idaho Falls) (stating that the Southwest Idaho Water Development Project would not require spills over Milner Dam).

and water rights at American Falls and also below Milner Dam,⁸⁵ and had applied for a preliminary permit to develop the Twin Falls power site just downstream from Milner.⁸⁶

Thus, the proposed American Falls Reservoir could not be built until a resolution was reached with Idaho Power Company regarding its property interests at the American Falls site. Equally important, the American Falls and Twin Falls projects bracketed Milner and squarely presented the question of whether downstream uses would be allowed to require the spilling over Milner Dam of winter and flood flows that otherwise could be stored upstream for irrigation.

Federal and state authorities entered into negotiations with Idaho Power on these subjects and eventually an agreement was reached.⁸⁷ The resulting contract, dated June 15, 1923 (the "American Falls Contract"), recognized that "the United States contemplates the construction of a large reservoir at American Falls, Idaho, to store the flood water and winter flow of Snake River and make the same available for the reclamation of large areas" in public and private irrigation projects in the Snake River

⁸⁵ Orr Aff., Exhibit 43 at 2-3 (Swendsen letter to Governor C.C. Moore at 2-3) ("The construction of the [American Falls] reservoir will ultimately interfere with the power rights and property of the Idaho Power Company at American Falls and at other down river points on the Snake River. For example, Shoshone Falls, Lower Salmon Falls and Swan Falls.").

⁸⁶ See Orr Aff., Exhibit 48 (letter from U.S. Reclamation Service Director A.P. Davis to the Executive Secretary of Federal Power Commission forwarding a copy of a report by George L. Hoffman, U.S. Reclamation Service Engineer, on Idaho Power Company's application to the Federal Power Commission regarding the Twin Falls power site) (Apr. 5, 1921); see also Orr Aff., Exhibit 49 at 1 (George L. Hoffman, U.S. Reclamation Service Engineer, "Report on Application Before Federal Power Commission by Idaho Power Company, Serial No. 18, For Preliminary Permit covering Twin Falls site, on Snake River") (Mar. 15, 1921); see also Orr Aff., Exhibit 50 at 2 (Idaho Power Company, "Project No. 18 - Application For License - Twin Falls Project - Snake River, Idaho") (Feb. 1, 1922).

⁸⁷ Orr Aff., Exhibit 43 at 3 (Swendsen letter to Governor C.C. Moore at 3) ("Negotiations were opened with the Power Company some two or three years ago, with the result that after considerable study and deliberation, involving many conferences in which the writer participated, as the representative of the State of Idaho, an agreement was finally reached . . .").

valley.⁸⁸ The American Falls Contract also recognized that “the storing by the United States of winter flow at American Falls will interfere with certain power and other rights of company at American Falls and points below.”⁸⁹

The contract limited Idaho Power Company’s right “to demand the turning out of water from the reservoir for release by and use below Milner,”⁹⁰ and granted the United States “[t]he right to limit all other rights of the company on Snake River . . . insofar as and no farther than the rights allowed and granted to the United States to store and use water as herein provided may interfere with any rights of the company at any lower points on Snake River.”⁹¹ The State Commissioner of Reclamation informed the Governor that “the contract between the power company and the government provides for the regulation of Snake River in the interest of irrigation, adequate to the needs of a million and a half acre feet, reservoir capacity.”⁹² The contract cleared the way for the construction of the American Falls Dam, which was completed in 1927.⁹³

Negotiations regarding Idaho Power Company’s proposal to develop the Twin Falls power site proceeded in tandem with the American Falls negotiations because both projects raised the question of the extent to which storable winter flows would be spilled over Milner Dam. A 1921 Reclamation Service report to the Federal Power Commission (“FPC”) on Idaho Power’s application for a preliminary permit for the Twin Falls site stated that “from a power standpoint, the Snake River is divided into two sections, that

⁸⁸ Orr Aff., Exhibit 51 at 3 (“Contract Between the United States and the Idaho Power Company Relative to Power Rights at American Falls Reservoir, Idaho – Dated June 15, 1923”) (Symbol Ilr-733) (“American Falls Contract” at 1).

⁸⁹ Id. at 4 (American Falls Contract at 2).

⁹⁰ Id. at 7 (American Falls Contract at 21) (“Company’s Rights below Milner Dam”).

⁹¹ Id. at 6 (American Falls Contract at 11).

⁹² Orr Aff., Exhibit 43 at 4 (Swendsen letter to Governor C.C. Moore at 4) (July 9, 1923).

⁹³ Orr Aff., Exhibit 31 at 2 (Arrington article at 1).

above and that below Milner Dam. . . . During the irrigation season . . . the Snake River is turned dry at the Milner dam, all of the water being diverted into the irrigation canals”⁹⁴ The report also stated: “The further development of this site—in fact even the present development would interfere seriously with the storage of water in the American Falls reservoir, which reservoir is the key to the full development of the Snake river for irrigation purposes.”⁹⁵ The report explained:

Plans for storage reservoirs are now being made by the U.S. Reclamation Service, working in conjunction with the State of Idaho and the different water users associations along the Snake River, that will ultimately conserve all the water of Snake river susceptible of economical diversion for irrigation purposes. The lowest point on the river at which diversion is practicable in large amounts is at Milner dam.⁹⁶

Idaho Power’s license application for the Twin Falls project recognized these plans: “The effect of the Milner diversion is to completely stop the natural flow of water at Milner during a part of the irrigation season In the near future the flow will be further affected by the construction of a storage reservoir at American Falls by the U.S. Reclamation Service”⁹⁷ The application stated that upon completion of the reservoir, “the only natural flow available at the site” from the beginning of the irrigation

⁹⁴ Orr Aff., Exhibit 49 at 1 (Hoffman report at 1) (March 21, 1921). Similar comments were made in a U.S. Geological Survey report on Idaho Power’s application for a preliminary permit at the Upper Salmon power site. See Orr Aff., Exhibit 30 at 4 (Hoyt report on preliminary permit application for Upper Salmon Falls at 3).

⁹⁵ Orr Aff., Exhibit 49 at 2 (Hoffman report at 2).

⁹⁶ Id. at 3 (Hoffman report at 3). The Director of the U.S. Reclamation Service made the same points in a letter to the Federal Power Commission regarding the Upper Salmon power project:

[The American Falls] reservoir will completely control and utilize Snake River above Milner dam and it would manifestly be opposed to the public interest to grant to a private company rights which might enable them to handicap seriously, if not prohibit, the otherwise feasible complete development of the power and irrigation resources of the Snake River Basin.

Orr Aff., Exhibit 52 at 1 (letter from A.P. Davis, Director, U.S. Reclamation Service, to Mr. Merrill, Executive Secretary, Federal Power Commission at 1) (Mar. 26, 1921).

⁹⁷ Orr Aff., Exhibit 50 at 8 (Idaho Power application for Twin Falls license at Exhibit H).

season until the reservoir began to spill, "which in an average year will be about December 1st, and in a minimum year not until March or April, will be make-up from Milner to Twin Falls."⁹⁸

Nonetheless, in the Twin Falls negotiations (which extended several years after the signing of the American Falls Contract) Idaho Power continued to seek rights to winter flows above Milner Dam. The Reclamation Service steadfastly opposed these efforts, as Idaho Power's corporate secretary made clear in a 1931 status report to the company's vice president and general manager: "we may expect little concession from the Department of Reclamation in the way of further prior rights to the use of the waters of Snake River so far as the same may be available for irrigation use at, or at points above, Milner Dam."⁹⁹ "It was very clear to me that it is not [District Counsel Stoutemyer's] nor the Reclamation Department's intention that we shall gain, without his or their serious protest, any further prior rights to water of Snake River which may be used for irrigation purposes at or above Milner Dam."¹⁰⁰

Ultimately, a stipulation confirmed that power use at the Twin Falls site was subordinate to existing and future irrigation uses and strictly limited the water supply to flows below Milner Dam, with the exception of 45,000 acre-feet of "primary storage" Idaho Power held under the American Fall Contract. The stipulation was incorporated into the FPC license for the Twin Falls site as Article 14:

⁹⁸

Id.

⁹⁹

Orr Aff., Exhibit 53 at 1 (letter from James L. Boone to Mr. Hibbard at 1) (May 29, 1931). Mr. Hibbard and Mr. Boone were, respectively, the vice president and the corporate secretary of Idaho Power Company. See Orr Aff., Exhibit 54 (letter from M.L. Hibbard, Vice President and General Manager of Idaho Power Company, to E.B. Darlington, Superintendent, U.S. Reclamation Service) (Apr. 7, 1931); Orr Aff., Exhibit 55 at 3 ("Idaho Power Company Minutes of Special Meeting of Board of Directors" at 2) (May 11, 1934) (certification of corporate secretary James L. Boone).

¹⁰⁰

Orr Aff., Exhibit 53 at 1 (Boone letter to Hibbard at 1).

Article 14. As a condition of this license, the Licensee, for itself, its successors and assigns, hereby stipulates and agrees that all rights to the use of water for power purposes heretofore or hereafter acquired for the development of power at the site of this project shall be held and considered at all times to be subject, inferior and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation purposes, except (a) the right to use for power development at this project the water from the 45,000 acre-feet of primary storage capacity which the Licensee holds in American Falls Reservoir under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923, and the discharge of which it may control under the terms of said contract; (b) the right to use for power development at this project the seepage, percolation, drainage, spring or springs, waste, and/or other influent waters which do not flow or spill over Milner Dam but which enter in, arise in, and flow in and along the channel of Snake River between the down-stream toe of Milner Dam in Snake River, Idaho, and the site of the project covered by this license.¹⁰¹

The Article 14 stipulation also provided that it was "a covenant running with the title to the said power plant at Twin Falls, and all rights in connection therewith" and "effective to bind the Licensee and its successors and assigns."¹⁰² Idaho Power agreed to "to execute and acknowledge under authority of a suitable resolution of its board of directors" a recordable contract or deed embodying the stipulation,¹⁰³ and the company's Board of Directors unanimously approved a corresponding resolution on the same date the license was approved.¹⁰⁴ In the meantime, the Snake River Basin was experiencing another devastating drought.

¹⁰¹ Orr Aff., Exhibit 56 at 13 ("Federal Power Commission, License on Government Lands, Project No. 18, Idaho, Idaho Power Company" at 11) ("Article 14") (May 11, 1934).

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ See Orr Aff., Exhibit 55 at 2-3 ("Idaho Power Company, Minutes of Special Meeting of Board of Directors") (May 11, 1934). Two years later, in a technical journal article describing the Twin Falls project, an Idaho Power engineer confirmed that the project "may be said to be dependent for its water supply upon that water returning to, or arising within, the 22 miles of river bed between Milner Dam and that plant, with the addition of such limited amounts of water permitted under contract to flow by Milner Dam." Orr Aff., Exhibit 57 at 3 (H.L. Senger, Idaho Power Company, *Twin Falls Hydroelectric Development*, ELECTRICAL WEST - Vol. 76, No. 4 at 19) (April 1936).

D. The 1930s Drought And Renewed Efforts To Conserve Winter Flows.

The drought of the early 1930s was worse than the 1919 drought. Lynn Crandall, watermaster for Water District No. 36 (the area upstream from Milner Dam - later renumbered Water District No. 1), wrote in 1953:¹⁰⁵ "The drought during the early 1930's was the most severe and prolonged of any that have occurred during the 62 past years of stream-flow records on Snake River."¹⁰⁶ The State Commissioner of Reclamation reported in late 1934: "We have just passed through the most serious and disastrous drouth in the history of the State. . . . The situation is acute and disaster confronts many heretofore prosperous and self-sustaining communities unless supplementary and additional water can be provided to afford relief."¹⁰⁷

As in 1919, the drought resulted in a clamor for new storage projects to protect against short water years. "Shortly after American Falls was built we had an unprecedented drought in the Snake River Valley which lasted over 5 years, 1931, 1932, 1933, 1934, and 1935. In two or three of those years the reservoir did not fill. . . . The settlers immediately started a request for investigations for further storage."¹⁰⁸ The State responded by enacting legislation providing for "the construction of a system of works, in

¹⁰⁵ Mr. Crandall was watermaster during the 1930s drought, and was still watermaster in 1953 when he wrote of the drought. See Orr Aff., Exhibit 58 at 7 (transcript of examination of Lynn Crandall in Federal Power Commission proceedings on Idaho Power Company's proposed Hells Canyon project at 10136) (Jan. 12-13, 14-15, 1954) ("Crandall Examination").

¹⁰⁶ Orr Aff., Exhibit 59 at 8 (Lynn Crandall, "Future Upstream Depletion Above Hells Canyon" at 6) (Apr. 6, 1953) ("Crandall Report").

¹⁰⁷ Orr Aff., Exhibit 36 at 2-3 (Faris report at 1-2).

¹⁰⁸ Orr Aff., Exhibit 60 at 14 ("The Palisades Dam And Reservoir Project -- Hearings before a Subcommittee On Irrigation And Reclamation Of The Committee On Public Lands, House of Representatives and a Special Subcommittee Of The Committee On Interior And Insular Affairs, United States Senate -- Eighty-First Congress -- First Session on H.R. 5506" at 23) (United States Government Printing Office, Washington) (1949) (statements of Robert J. Newall, former regional director of the Bureau of Reclamation in Boise, Idaho).

the manner hereinafter provided, for the conservation, development, storage, distribution and utilization of water for irrigation purposes.”¹⁰⁹

Federal authorities redoubled their efforts to develop storage sites and water supplies above Milner Dam, as the State Reclamation Commissioner reported in 1934: “The United States Bureau of Reclamation, during the past two years, has made surveys and investigations in an effort to discover ways and means of relieving this situation by providing storage on the upper reaches of both the North Fork and South Fork of Snake River.”¹¹⁰ In 1935, the Bureau of Reclamation published a report on its upper Snake River basin storage investigations, the purpose of which was “to determine the surplus water for contemplated future storage developments.”¹¹¹

A 1935 Department of Interior water supply paper reported that there could be no significant increase in irrigation in the Snake River Basin without additional storage or pumping,¹¹² and that “the recurrence of years of abnormal low run-off has demonstrated

¹⁰⁹ 1935 Idaho Session Laws 162. Although the Idaho Supreme Court subsequently declared this legislation unconstitutional because of the powers it purported to confer on the State Water Conservation Board, see generally State Water Conservation Board v. Enking, 56 Idaho 722, 58 P.2d 779 (1936), the Court recognized the legitimacy of the underlying legislative purpose:

More than half the people of the state depend, either directly or indirectly, upon irrigation. The normal flow of our streams has been appropriated, and therefore the limit of development by irrigation from that source has been reached. Hence the need of providing additional water by storage or otherwise is great, and the purpose of the statute under consideration most commendable.

Id. at 738, 58 P.2d at 785-86 (Holden, J., concurring). The Idaho Supreme Court later overruled Enking to the extent it was inconsistent with the holdings in two subsequent decisions. Dept. of Parks v. Dept. of Water Admin., 96 Idaho 440, 443, 530 P.2d 924, 927 (1974); Idaho Water Res. Bd. v. Kramer, 97 Idaho 535, 555, 648 P.2d 35, 55 (1976).

¹¹⁰ Off Aff., Exhibit 36 at 4 (Faris report at 3).

¹¹¹ Off Aff., Exhibit 61 at 7 (E.B. Debler, Hydraulic Engineer & J.R. Riter, Associate Engineer, “Report on Upper Snake River Storage Investigations – Volume I – Snake River Above Idaho Falls” at 158) (U.S. Department of the Interior, Bureau of Reclamation) (June 1935).

¹¹² Off Aff., Exhibit 37 at 7 (Hoyt report on “Water Utilization In The Snake River Basin” at 65). The State Commissioner of Reclamation also recognized that “[t]he limit of the development of the irrigation resources of the State from the natural flow of streams has long since been reached.” Off Aff., Exhibit 36 at 2 (Faris report at 1).

Affidavit of Michael C. Orr
In re SRBA Case No. 39576
Subcase No. 01-02064 (American Falls Storage Subcase)

EXHIBIT 49:

“Memorandum In Support Of State of Idaho’s Motion For Partial Summary Judgment Re: Milner Zero Minimum Flow,” filed on October 19, 2009, in Subcases Nos. 00-92002GP, 02-00200, 02-00201, 02-00223 and 02-00224.

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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

Case No. 39576

) Subcase nos. 00-92002GP, 02-00200,
) 02-00201, 02-00223 and 02-00224
)
) **MEMORANDUM IN SUPPORT OF**
) **STATE OF IDAHO'S MOTION FOR**
) **PARTIAL SUMMARY JUDGMENT**
) **RE: MILNER ZERO MINIMUM**
) **FLOW**

MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: MILNER
ZERO MINIMUM FLOW

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INTRODUCTION

The Director's recommendations, objections and responses for water right 02-0200 and General Provision No. 4 for Basin 02 demonstrate that the principal substantive issue in subcases 02-0200 and 00-92002GP is the question of the meaning and effect of the "zero minimum flow" at Milner Dam. This question is controlled by the Idaho State Water Plan and Idaho statutes.

The Idaho State Water Plan and the 1997 Idaho Session Laws provide that "[t]he exercise of water rights above Milner Dam has and may reduce flow at the dam to zero." Idaho State Water Plan at 17 (Idaho Water Res. Bd., Dec. 1996) ("1996 State Water Plan");¹ 1997 Idaho Sess. Laws 71. The purpose of this provision, as Fifth District Judge John M. Melanson recently stated, is to allow for full utilization of the Snake River above Milner Dam: "In brief terms, the State Water Plan sets a 'zero flow' at Milner Dam to allow for full development of the River above Milner." Order On Petition For Judicial Review at 40 n.12, Clear Springs Foods, Inc. v. Idaho Ground Water Appropriators, Inc. (Fifth Jud. Dist., Gooding County) (Case. No. 2008-444) (Jun. 19, 2009). Further, the Idaho Code provides:

For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

Idaho Code § 42-203B(2). This provision ensures that, as a matter of Idaho law, uses of water below Milner shall not interfere with the use and storage of flows upstream from Milner Dam, even to the point of reducing the flow at Milner Dam to zero c.f.s.

¹ See Affidavit of Michael C. Orr ("Orr Aff."), Exhibit 1 at 11 (1996 State Water Plan at 17).

These principles are firmly embedded in the long history of water resource development and settled property rights expectations in the Snake River Basin. Because the Snake River enters a canyon at Milner and becomes inaccessible for gravity irrigation, early agricultural development had appropriated the reliable summer flow of the river above Milner shortly after the end of the nineteenth century. Thereafter, water supplies for further development and for protection against devastating droughts that periodically occur could be secured only by conserving and storing winter flows, spring runoff and flood waters above Milner. This objective has been the principal basis of water resource policy, planning and development in the Snake River Basin for the last century, and is commonly referred to as the Milner "zero minimum flow" principle or the "Two Rivers" doctrine. Under either name, the Snake River is physically, developmentally and legally divided at Milner into two different systems: all flows of the river may be fully developed above Milner Dam, and uses downstream from Milner Dam may not interfere with or prevent such upstream development.²

The State's Motion for Partial Summary Judgment seeks a determination that as a matter of law under the State Water Plan and controlling Idaho statutes, the zero minimum flow established at Milner Dam means that the flow of the Snake River above Milner Dam may be reduced to zero, and that water rights using water downstream from Milner Dam have no right to call for the delivery, or seek the administration, of the flow of the Snake River or surface and ground water tributary to the Snake River upstream from Milner Dam. Granting the State's Motion is necessary for purposes of the

² Even when the entire flow of the river above Milner is diverted for agricultural and storage purposes, significant river flows remain available for use and development in the canyon below Milner as a result of inflows, especially from the numerous springs discharging from the canyon walls.

definition and administration of water rights in Basin 02, and will simplify the remaining issues and expedite the resolution of this subcase.

STATEMENT OF FACTS

I. The Milner "Zero Minimum Flow" Provisions Of The State Water Plan And Statutes.

In 1964, the voters of the state of Idaho approved a constitutional amendment providing for a state water resource agency authorized to develop a plan for "optimum development" of the State's water resources: "There shall be constituted a Water Resource Agency . . . [that] shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest." Idaho Const. art. XV § 7. The amendment was adopted "in response to a publicly recognized need for the state to maintain greater control over its water resources." Idaho Power Co. v. State, 104 Idaho 570, 571, 661 P.2d 736, 737 (1983). The following year, the Idaho Legislature implemented the amendment by establishing the Idaho Water Resource Board ("Board") and directing it to "progressively formulate an integrated, coordinated program for conservation, development and use of all unappropriated water resources of this state." 1965 Idaho Sess. Laws 905; *see also* Idaho Code § 42-1734A(1). This "comprehensive state water plan" was to be based on studies and formulated after public hearings in affected areas at which all interested parties had an opportunity to appear. *Id.*

After nearly a decade of study and public participation, the Board adopted the initial State Water Plan in two parts. The purpose of part one was "to identify and define the policies and objectives which the Idaho Water Resource Board has adopted to govern the planning, development, and conservation of the state's water and related lands." The Objectives – State Water Plan – Part One at v (Idaho Water Res. Bd., June 1974) ("1974

State Water Plan").³ Part two was intended to identify and evaluate the projects and programs necessary to implement the objectives in part one. State Water Plan – Part Two at 4 (Idaho Water Res. Bd., Dec. 1976) ("1976 State Water Plan").⁴

The 1976 State Water Plan established "protected flows" at various points on the Snake River to be "protected against further appropriations." Id. at 116. The "protected flow" for Milner was defined to be "0 cfs." Id. The 1976 State Water Plan further stated: "Studies indicate that sufficient water exists in excess of these flows to provide for additional uses if water conserving and storage facilities are constructed." Id.

In 1978, the Idaho Legislature twice affirmed the "protected flow" of "0 cfs" at Milner. House Concurrent Resolution No. 48 declared the 1976 State Water Plan's "protected flows" to be an expression of "legislative intent." 1978 Idaho Sess. Laws 1011. The same resolution also provided: "it is the policy of the State of Idaho to augment, maintain, enhance and increase available, usable water by additional upstream, off stream and aquifer storage." Id. The Idaho Legislature again affirmed the "protected flow" of "0 cfs" at Milner in a statute recognizing House Concurrent Resolution No. 48 "as the guide for the state water plan," id. at 885, and providing that the "protected flows" of the 1976 State Water Plan were "minimum daily flows." Id. at 886.⁵

³ Orr Aff., Exhibit 2 at 5. The Board had also issued an "Interim State Water Plan – Preliminary Report," in July 1972. This report and all of the State Water Plans referenced herein are viewable at: http://www.idwr.idaho.gov/waterboard/WaterPlanning/StateWaterPlanning/State_Planning.htm.

⁴ Orr Aff., Exhibit 3 at 14.

⁵ Prior to 1983, it was believed that the Legislature had authority to amend the State Water Plan under article XV § 7 of the Idaho Constitution, but the Idaho Supreme Court held otherwise in 1983. See Idaho Power Co., 104 Idaho at 573-74, 661 P.2d at 739-40. The Legislature obtained such authority under a 1984 amendment to article XV § 7: "The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law." Idaho Const. art. XV § 7. In any event, the Idaho Legislature's 1978 and 1982 resolutions and enactments regarding the State Water Plan did not purport to change the zero minimum flow at Milner, but rather strongly endorsed it.

The next revision of the State Water Plan, in 1982, retained the "protected flow" provisions, including the "0 cfs" flow at Milner. Idaho State Water Plan at 42 (Idaho Water Res. Bd., Jan. 19, 1982).⁶ The 1982 State Water Plan also provided: "Applications for future water permits shall not be approved if they are in conflict with the State Water Plan adopted by the Idaho Water Resource Board in the public interest," Id. at 21. The Legislature again endorsed the plan. 1982 Idaho Sess. Laws 944-46.

In 1985 the State Water Plan was amended in connection with the Swan Falls settlement. While the Swan Falls settlement called for increasing the minimum flows at Murphy, the settlement reaffirmed that "[t]he minimum daily flow at the Milner gauging station shall remain at zero c.f.s."⁷ The 1985 amendments provided, in relevant part:

It is the policy of Idaho that the ground water and surface water of the basin be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gauging station The establishment of a zero minimum flow at the Milner gauging station allows for existing uses to be continued and for some new uses above Milner. The zero flow established at Milner means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years. The Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system.⁸

The Legislature approved these amendments. 1985 Idaho Sess. Laws 514.

Although the 1986 revision of the State Water Plan renumbered its "policies," the Milner language of the 1985 amendments was retained, Idaho State Water Plan at 35 (Idaho Water Res. Bd., Dec. 12, 1986) ("1986 State Water Plan") (Policy 5A),⁹ and reaffirmed by the Legislature. 1987 Idaho Sess. Laws 818. Moreover, the 1986

⁶ Orr Aff., Exhibit 4 at 14.

⁷ Orr Aff., Exhibit 5 at 27 (Swan Falls Agreement, Exhibit 6).

⁸ Orr Aff., Exhibit 6 at 4-5 (minutes of Senate Resources and Environment Committee, Mar. 4, 1985, attachment 1 at 1-2) ("A Resolution, *In The Matter Of Policy 32 Of The State Water Plan*) (Idaho Water Res. Bd.) (Mar. 1, 1985).

⁹ Orr Aff., Exhibit 7 at 12.

Legislature amended Idaho Code § 42-203B, one of the statutes enacted the year before in connection with the Swan Falls settlement, to expressly provide:

For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

1986 Idaho Sess. Laws 309; (codified as amended at Idaho Code § 42-203B(2)).

The 1992 revision of the State Water Plan also recognized “that the exercise of water rights above Milner Dam has and may reduce flow at the dam to zero.” Idaho State Water Plan at 28 (Idaho Water Res. Bd., Jan. 1992) (“1992 State Water Plan”) (Policy 5A).¹⁰ The 1992 State Water Plan further stated: “The zero flow at Milner Dam is not a target or goal to be achieved, and may not necessarily be desirable. It is rather, a recognition of the current condition in which zero flow passes Milner Dam during certain periods of time.” Id.¹¹

When the original version of the 1996 State Water Plan was presented to the Legislature for approval without the Milner zero minimum flow provision, the Legislature added it back in by direct amendment. 1997 Idaho Sess. Laws 71. Thus, the current State Water Plan (1996) expressly provides: “The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero.” Idaho State Water Plan at 17 (Idaho Water Res. Bd., Dec. 1996) (“1996 State Water Plan”).¹²

II. The Proceedings.

The Director recommended a quantity of zero c.f.s. for water right No. 02-0200:

¹⁰ Orr Aff., Exhibit 8 at 7 (1992 State Water Plan at 28).

¹¹ The 1992 State Water Plan was submitted to the Legislature for review, but the Legislature took no action on it. Therefore, the plan became effective sixty days following its submission to the Legislature. Idaho Const. art. XV § 7.

¹² Orr Aff., Exhibit 1 at 11 (1996 State Water Plan at 17).

"The quantity of this right is the average daily flow of zero (0) cfs measured by the Milner Dam gaging station at river mile 638.7 downstream."¹³ The Director also recommended a zero c.f.s. minimum flow in General Provision No. 4 for Basin 02: "The minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second."¹⁴

Eight ground water districts jointly filed objections to the Director's recommendations for water right No. 02-0200 and General Provision No. 4 (subcase 00-92002GP), asserting that: (1) zero c.f.s. should be a "maximum" rather than a minimum;¹⁵ (2) water right 02-0200 should be decreed and administered as part of Basin 01 "to ensure maintenance of a flow of zero (0) cfs at Milner Dam";¹⁶ and (3) a general provision is necessary to implement the comprehensive management plan established by the Swan Falls settlement as reflected in the 1986 State Water Plan adopted by the Board and approved by the Legislature.¹⁷ Idaho Power Company also objected to the Director's recommendations, asserting that water right 02-0200 should not exist¹⁸ because the Board did not follow statutory requirements for establishing a minimum instream flow water right,¹⁹ and that General Provision No. 4 should not be included in the Director's Report or in any decree.²⁰

¹³ Part 1 – Director's Report – Irrigation & Other Uses – Reporting Area Basin 02 at Director's Report for water right 02-00200 (Vol. One) (Dec. 29, 2006).

¹⁴ Id. at Basin 02 General Provisions.

¹⁵ Standard Form 1 Objection, Subcase 02-200 and General Provisions at 2 (Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, Fremont Madison Ground Water District, Clark Jefferson Ground Water District) (Jan. 30, 2008).

¹⁶ Id.

¹⁷ Id. at 5.

¹⁸ Standard Form 1 Objection, Subcase No. 02-200 at 2 (Idaho Power Co.) (Jan. 30, 2008).

¹⁹ Motion to File Late Objections and Request for Expedited Hearing at 2 (Idaho Power Co.) (Jan. 30, 2008).

²⁰ Standard Form 1 Objection, General Provision #4 at 2 (Idaho Power Co.) (Dec. 5, 2007).

The City of Pocatello responded to and supported the ground water districts' objection to the Director's Report in subcase 02-0200.²¹ The City of Pocatello also responded to the ground water districts' objection to General Provision No. 4, stating that the ground water districts' proposed general provision should apply to all water rights in the Snake River drainage above Murphy.²² Pocatello also responded to Idaho Power's objection to General Provision No. 4, stating that it provides for administration of water right 02-0200 and that the City understood General Provision No. 4 as applying both above and below Milner Dam.²³ The State of Idaho, the United States Bureau of Reclamation, Idaho Power, and the Twin Falls and North Side Canal Companies also responded to the ground water districts' objections.²⁴ The State, the Bureau of Reclamation, the ground water districts, the Twin Falls and North Side Canal Companies, Jeff C. and Jackie Harper, Basin and Range Resource Co., LLC, and "Interested Water Users" also responded to Idaho Power's objections.²⁵

²¹ Standard Form 2 Response To Objection, Subcase No. 02-200 at 2 (City of Pocatello) (Feb. 5, 2008).

²² Standard Form 2 Response To Objection, Subcase No. 00-92002GP at 2 (City of Pocatello) (Feb. 5, 2008).

²³ Standard Form 2 Response To Objection, Subcase No. 00-92002GP at 2 (City of Pocatello) (Feb. 5, 2008).

²⁴ Standard Form 2 Response To Objection, Subcase No. 02-0200 and General Provisions (State of Idaho) (Feb. 4, 2008); Standard Form 2 Response To Objection, Subcase No. 02-00200 & 00-92002GP#4 (U.S. Bureau of Reclamation) (Feb. 5, 2008); Standard Form 2 Response To Objection, Subcase No. 02-200 (Idaho Power Co.) (Feb. 4, 2008); Standard Form 2 Response To Objection, Subcase No. 00-92002GP (Idaho Power Co.) (Feb. 4, 2008); Standard Form 2 Response To Objection, Subcase No. 02-200 and Basin 02-General Provision #4 (Twin Falls Canal Co., North Side Canal Co.) (Mar. 12, 2008).

²⁵ Standard Form 2 Response To Objection, Subcase No. General Provision no. 4 (State of Idaho) (Feb. 1, 2008); Standard Form 2 Response To Objection, Subcase No. 00-92002GP#4 (U.S. Bureau of Reclamation) (Feb. 5, 2008); Standard Form 2 Response To Objection, Subcase No. General Provision #4 Basin 02 Director's Report (Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, Fremont Madison Ground Water District, Clark Jefferson Ground Water District) (Feb. 4, 2008); Standard Form 2 Response To Objection, Subcase No. 02-200 and Basin 02-General Provision #4 (Twin Falls Canal Co., North Side Canal Co.) (Mar. 12, 2008); Standard Form 2 Response To Objection, Subcase No. General Provision # 4 (Jeff C. & Jackie Harper, Basin and Range Resource Co., LLC, Interested Water Users) (Feb. 5, 2008).

ARGUMENT

I. Legal Standards.

Under the Idaho Rules of Civil Procedure, a party may move for summary judgment upon "any part" of a claim or defense. I.R.C.P. 56(a), (b). "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c).

The purpose of summary judgment "is to avoid useless trials," Bandelin v. Pietsch, 98 Idaho 337, 340, 563 P.2d 395, 398 (1977), and "to eliminate groundless claims and paper issues in cases which would end in directed verdict or other rulings of law." Lipe v. Javelin Tire Co., Inc., 97 Idaho 805, 806, 554 P.2d 1302, 1303 (1976). Summary judgment "helps to separate the real issues and facts from the spurious ones; to eliminate the chaff from the wheat." Stewart v. Arrington Const. Co., 92 Idaho 526, 531, 446 P.2d 895, 900 (1968).

The interpretation of a statute is a question of law over which a court exercises free review. Cowan v. Bd. of Comm'rs of Fremont County, 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006). The objective of statutory interpretation is to give effect to legislative intent. State v. Yzaguirre, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). The best guide to legislative intent is the statutory language itself, therefore the interpretation of a statute must begin with the literal words of the statute. Id. Where the statutory language is unambiguous, the Court does not construe it but simply follows the law as written. Id. The statutory words must be given their plain, usual, and ordinary meaning, and the

statute must be construed as a whole. Idaho Cardiology Assocs., P.A. v. Idaho Physicians Network, Inc., 141 Idaho 223, 225, 108 P.3d 370, 372 (2005).

When a statute is ambiguous, “it must be construed to mean what the legislature intended it to mean. To determine that intent, we examine not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history.” Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 388, 398-99, 111 P.3d 73, 83-84 (2005) (citation omitted). In such cases, a court should consider the “context in which language is used, the evils to be remedied and the objects in view.” Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 307, 312, 109 P.3d 161, 166 (2005).

II. The State Is Entitled To Summary Judgment As A Matter Of Law Under The Plain Language Of Chapter 38 Of The 1997 Idaho Session Laws, The State Water Plan, And Idaho Code § 42-203B(2).

The Idaho Legislature has explained the meaning of the Milner zero minimum flow in unambiguous terms. The Legislature directly amended the current version of the State Water Plan through chapter 38 of the 1997 Idaho Session Laws, to expressly provide: “The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero.” 1997 Idaho Sess. Laws 71 (underlining in original); *see also* 1996 State Water Plan at 17. The purpose of this policy is to allow the Snake River to be completely developed for uses above Milner Dam, as District Judge John M. Melanson recently explained: “In brief terms, the State Water Plan sets a ‘zero flow’ at Milner Dam to allow for full development of the River above Milner.” Order On Petition For Judicial Review at 40 n.12, Clear Springs Foods, Inc. v. Idaho Ground Water Appropriators, Inc. (Fifth

Jud. Dist., Gooding County) (Case. No. 2008-444) (Jun. 19, 2009).²⁶ Thus, as a matter of law under the Idaho State Water Plan and Idaho statute, the exercise of water rights upstream from Milner Dam may reduce the flow of the Snake River at Milner Dam to zero c.f.s.

The Legislature has been equally clear that water rights using water downstream from Milner Dam may not impair or interfere with the full development of the river for uses above Milner Dam:

For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

Idaho Code § 42-203B(2) (emphasis added). Through this language, the Legislature has unambiguously provided that uses downstream from Milner Dam have no legal entitlement to call for any of the water upstream from Milner Dam, and may not interfere with any water rights using water above Milner Dam.

Taken together, section 42-203B(2), chapter 38 of the 1997 Idaho Session Laws, and the State Water Plan leave no doubt that the entire flow of the Snake River may be diverted for uses above Milner Dam, and that water rights using water downstream from

²⁶ Judge Melanson made this statement after having been fully briefed on the question of the effect of the Swan Falls Agreement's requirement that the "zero minimum flow" provision be retained in the State Water Plan, which the State of Idaho and Idaho Power Company addressed in summary judgment briefing in Consolidated Subcase 00-92023. Judge Melanson is withholding his decision on this issue pending the resolution of the State's and Idaho Power's joint motions for entry of partial decrees that contain remarks reciting the relevant language of Idaho Code § 42-203B(2), and providing that the hydropower water rights in question may not be enforced or administered against any diversions or uses of water above Milner Dam. See Orr Aff., Exhibit 9 at 3, 5 (Milner remarks in examples of the partial decrees proposed under *State Of Idaho's And Idaho Power Company's Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37*) (SRBA Consolidated Subcase 00-92023) (June 25, 2009).

Milner Dam have no legal standing to prevent or interfere with such diversions. The plain statutory language forecloses any other conclusion.

Further, nothing in the statutes or the State Water Plan requires the flow at Milner to be maintained at "zero." This is why the Milner zero flow is a minimum and not a maximum; the underlying policy is simply to allow for full utilization of flows above Milner. In other words, the zero minimum flow principle does not require full utilization above Milner and does not bar spills over Milner Dam: it only provides that it is permissible for the flows at Milner to be reduced to zero c.f.s., and that water rights using water downstream from Milner Dam may not call for water to be spilled over the dam.²⁷

The importance of the incorporation of the Milner zero minimum flow principle in the general provisions and the 02-0200 partial decree for purposes of defining and administering Basin 02 water rights is self-evident. The modification to General Provision No. 4 proposed by the State's Motion for Partial Summary Judgment is necessary for the definition and efficient administration of Basin 02 water rights. Idaho Code § 42-1412(6). For the same reasons, a corresponding remark is necessary for the definition and administration of water right 02-0200. Idaho Code § 42-1411(2)(i).

This Court need go no further to determine the question of the meaning and effect of the Milner zero minimum flow in subcases 02-0200 and 00-92002GP. Thus, the State is entitled to summary judgment as a matter of law under chapter 38 of the 1997 Idaho Sessions Laws, the State Water Plan, and Idaho Code § 42-203B(2).

²⁷ The State's Motion for Partial Summary Judgment does not address the issue of whether storage water may be released for use below Milner Dam. The use of storage water below Milner is governed by federal spaceholder contracts and other provisions of state law.

III. The Legislative History Confirms That The State Is Entitled To Summary Judgment.

If this Court determines, however, that the State Water Plan and Idaho Code § 42-203B(2) are ambiguous, it may consider “not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history.” Hayden Lake Fire Prot. Dist., 141 Idaho at 398-99, 111 P.3d at 83-84 (citation omitted). The legislative history of the State Water Plan and Idaho Code § 42-203B(2) confirm their plain meaning.

A. The State Water Plan As Formulated By The Board And Approved By The Idaho Legislature Has Consistently Provided For A Zero Minimum Flow At Milner Dam.

The Board is charged with formulating and implementing the comprehensive State Water Plan, which provides “for optimum development of water resources in the public interest.” Idaho Const. art. XV § 7; Idaho Code §§ 42-1734A(1); 42-1734B(1). The State Water Plan is based upon studies and public hearings in affected areas at which all interested parties have the opportunity to appear or present written testimony. Idaho Code § 42-1734A(1). The Board has discretion to balance all factors relevant to the formulation, adoption and implementation of the State Water Plan, Idaho Code § 42-1734B(2), and the Legislature may approve, amend or reject it. Idaho Const. art. XV § 7; Idaho Code §§ 42-1734B(6), (7); 42-1736. State agencies “shall exercise their duties in a manner consistent with the comprehensive state water plan,” Idaho Code § 42-1734B(4), and “[a]ll future filings, permits and decrees on the unappropriated waters of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river. . . .” Idaho Code § 42-1736B(1).

The State Water Plan has included a Milner zero minimum flow provision since it was first issued in 1976. The 1976 and 1982 State Water Plans designated the flow at Milner to be “protected against further appropriations” as “0 c.f.s.” and stated that there was sufficient excess water “to provide for additional uses if water conserving and storage facilities are constructed.” 1982 State Water Plan at 42; 1976 State Water Plan at 116. The 1985 amendments and the 1986 State Water Plan provided that the Snake River Basin should “be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gauging station.” 1986 State Water Plan at 35. The 1992 State Water Plan provided that “the exercise of water rights above Milner Dam has and may reduce flow at the dam to zero.” 1992 State Water Plan at 28. The 1992 State Water Plan also explained that “[t]he zero flow at Milner Dam is not a target or goal to be achieved” *Id.* The current State Water Plan also provides that “[t]he exercise of water rights above Milner Dam has and may reduce flow at the dam to zero.” 1996 State Water Plan at 17.

The Legislature approved the current State Water Plan and its predecessors, particularly with regard to the Milner “zero minimum flow.” *See* 1978 Idaho Sess. Laws 885-86, 1011;²⁸ 1982 Idaho Sess. Laws 944-46; 1985 Idaho Sess. Laws 514; 1987 Idaho Sess. Laws 818-19.²⁹ Notably, when the Milner “zero minimum flow” provision was omitted from the 1996 State Water Plan as originally forwarded to the Legislature for

²⁸ *See supra* note 5.

²⁹ The Legislature did not pass a statute or resolution formally approving the 1992 State Water Plan, but also did not reject or amend it, and therefore the 1992 State Water Plan became effective as written sixty days after its submission to the Legislature. Idaho Const. art. XV § 7. Further, the Legislature directly amended the 1996 State Water Plan to incorporate the Milner “zero minimum flow” provision of the 1992 State Water Plan. *Compare* 1992 State Water Plan at 28 with 1997 Idaho Sess. Laws 71. This fact suggests that the Legislature viewed the 1992 State Water Plan’s “zero minimum flow” provision favorably, even if it was not specifically endorsed through formal legislative action in 1992.

review, the Legislature directly amended it to include the zero minimum flow provision of the previous revision of the State Water Plan. 1997 Idaho Sess. Laws 71. Thus, the principle that the flows of the Snake River may be completely developed above Milner Dam, even to the point of reducing the flow at Milner to zero c.f.s., has been an element of the State's comprehensive water resource planning in the Snake River Basin since the Idaho Constitution originally called for such planning.

B. The Legislature Specifically Affirmed The Meaning And Effect Of The Milner Zero Minimum Flow Through The 1986 Amendment To Idaho Code § 42-203B(2).

In 1986 the Legislature specifically affirmed that the "zero minimum flow" principle of the State Water Plan means that water rights using water downstream from Milner may not interfere with or impair the full use and development of flows above Milner. The Legislature did so through the 1986 amendment to Idaho Code § 42-203B(2).

The 1986 amendment was a response to the need for clarification regarding the meaning and effect of the Milner zero minimum flow for purposes of implementing the 1984 Swan Falls Agreement. The Swan Falls Agreement was contingent upon, among other things, retention of the Milner zero minimum flow in the State Water Plan: the Agreement required that "[t]he minimum daily flow at the Milner gauging station shall remain at zero c.f.s."³⁰

It was widely understood that retention of the zero minimum flow at Milner Dam meant that surplus flows upstream from Milner such as winter flows and flood waters

³⁰ Orr Aff., Exhibit 5 at 27 (Swan Falls Agreement, Exhibit 6). The Board amended the State Water Plan accordingly in 1985. See Orr Aff., Exhibit 6 at 4-5 (attachment 1 to minutes of Senate Resources and Environment Committee) (Mar. 4, 1985). The Legislature approved the amendments. 1985 Idaho Sess. Laws 514.

would remain available for storage and use above Milner. In a press release on the settlement, Attorney General Jim Jones (who signed the Agreement) stated, among other things, that "[t]he parties have agreed to a zero flow at Milner, which would allow for the filling of present upstream storage facilities, as well as additional new water storage projects."³¹ Idaho Power's attorney Tom Nelson (who negotiated the Agreement on behalf of Idaho Power) explained in the Board's public information meeting on the day the Agreement was signed:

The water plan target minimum flow at Milner Dam is zero, which is a condition realized in the summer all the time, and this agreement does not contemplate any change in that minimum flow. So short of a statement that before new storage is built we should fully utilize existing storage, what goes on above Milner is not affected by this agreement.³²

The Governor's negotiator, attorney Pat Costello, also pointed out in one of the Board's public information meetings that the zero minimum flow provision allowed for future storage projects upstream of Milner Dam: "And on the up-stream storage, I guess it's in here by omission, because by maintaining the zero flow at Milner, it still provides for any future up-stream storage projects that become feasible above Milner."³³

The Committee of Nine of Water District No. 1 passed a resolution supporting the Swan Falls Agreement only if it was clearly understood that there would continue to be no obligation to spill water over Milner Dam:

BE IT FURTHER RESOLVED that in implementation it be clear that the following conditions prevail:

³¹ Orr Aff., Exhibit 10 at 3 ("News Release" at 2) (Office of the Attorney General) (Oct. 1, 1984).

³² Orr Aff., Exhibit 11 at 9 (transcript of Idaho Water Resource Board public information meeting on Swan Falls settlement at 27) (Twin Falls) (Oct. 25, 1984).

³³ Orr Aff., Exhibit 12 at 20 (transcript of Idaho Water Resource Board public information meeting on Swan Falls settlement at 66) (Boise) (Nov. 1, 1984).

1. That there is, and will continue to be, no obligation to provide surface flows for water rights established below Milner Dam and that the “zero” flow at Milner Dam be reaffirmed.³⁴

In the Board’s 1985 hearings on the State Water Plan amendments proposed by the Swan Falls Agreement, the Secretary of the Great Feeder Canal Company stated his understanding “that this entire policy is based on a minimum flow at Milner that anything that can develop or anything that’s affected above Milner should not be affected by this agreement.”³⁵ Board representative Frank Sherman clarified this point during the Board’s 1985 hearings: “The negotiators agreed that above Milner there is a requirement for zero flow back to the dam.”³⁶ “They’re going to continue the zero flow at Milner Dam. . . . there is no requirement for the water to be dumped past Milner Dam.”³⁷

The understanding that winter and flood flows would remain available for storage and development above Milner was thrown into doubt when the Idaho Department of Water Resources (“IDWR”) proposed administrative rules to implement the Swan Falls settlement’s “trust” provisions.³⁸ The proposed rules defined all surface and ground

³⁴ Orr Aff., Exhibit 13 at 3 (“Resolution” of Committee of Nine of Water District 1) (Jan. 17, 1985).

³⁵ Orr Aff., Exhibit 14 at 29 (transcript of Idaho Water Resource Board hearing on proposed State Water Plan amendments at 28) (Idaho Falls) (Jan. 28, 1985, 2:00 p.m.).

³⁶ Orr Aff., Exhibit 15 at 20 (transcript of Idaho Water Resource Board hearing on proposed State Water Plan amendments at 15) (Pocatello) (Jan. 29, 1985, 7:00 p.m.).

³⁷ Orr Aff., Exhibit 16 at 20 (transcript of Idaho Water Resource Board hearing on proposed State Water Plan amendments at 65) (Lewiston) (Feb. 6, 1985, 7:00pm).

³⁸ Pursuant to the Swan Falls Agreement and its implementing legislation—specifically Idaho Code § 42-203B—the State holds in trust certain hydropower water rights located below Milner Dam that formerly were claimed by Idaho Power. *See Memorandum Decision And Order On Cross Motions For Summary Judgment at 31* (SRBA Consolidated Subcase 00-92023) (Apr. 18, 2008) (“This Court holds that Exhibit 7B [of the Swan Falls Agreement] clearly and unambiguously provides that any portion of Idaho Power’s water rights in excess of the minimum flows are held in trust by the State . . .”); *see also Idaho Code § 42-203B(2)* (similar). The flows encumbered by the hydropower water rights held in trust by the State are often termed “trust water.” *See Memorandum Decision And Order On Cross Motions For Summary Judgment at 41* (stating that new appropriators received “a portion of the water freed up and encumbered as a result of the trust arrangement. This is where the reference to ‘trust water’ comes from . . .”). The administrative rules proposed to implement Idaho Code § 42-203B would have defined, among other things, the geographic area in which “trust water” is found. *See Orr Aff., Exhibit 17 at 3* (IDWR publication setting forth proposed rules) (Rule 1.5 and Figure 1).

water flows above Milner as subject to the hydropower water rights held in trust by the State below Milner, despite the retention of the zero minimum flow. While IDWR acknowledged that retaining the zero minimum flow at Milner had been interpreted "by some" to mean the hydropower water rights held in trust by the State did not have any effect on flows above Milner Dam, it nonetheless rejected this view because Idaho Code § 42-203B(2) as originally enacted contained no such limitation:

The adopted minimum flow of zero cfs at Milner has been construed by some as exempting any water passing Milner from the trust water provisions. . . . A simple reading of S1008 (Section 42-203b(2)) indicates that all waters in excess of an established minimum flow up to the amount of the established hydropower right are to be considered trust waters. . . . I propose to draft the rules recognizing all flows tributary to Snake River above Swan Falls including water passing Milner as trust waters ³⁹

Thus, the proposed "rules for water allocation" provided that the entire Snake River drainage above Swan Falls, including the area upstream from Milner Dam, contained "flows subject to the trust water provisions as a result of the agreement and the legislation which implemented it."⁴⁰

IDWR's administrative interpretation was universally rejected. In his written comments on the proposed rules, attorney John Rosholt⁴¹ wrote "its been my understanding all along that trust water flows can only exist between the Swan Falls Dam and the Milner Dam for the reason that the minimum stream flow at Milner is

³⁹ Orr Aff., Exhibit 18 at 3 (internal IDWR memorandum from Norm Young to Director Ken Dunn, "Legal Issues Associated With Senate Bill 1008") (June 14, 1985) (parentheses in original).

⁴⁰ Orr Aff., Exhibit 17 at 3 (IDWR publication setting forth proposed rules) (Rule 1.5 and Figure 1).

⁴¹ John Rosholt represented Idaho Power, Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District in proceedings related to the Swan Falls settlement. See Orr Aff., Exhibit 19 at 1, 4 (letter from John A. Rosholt, as attorney for Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District, to Norman C. Young of IDWR at 1, 4) (Oct. 12, 1988); id. at 10 (Idaho Power's memorandum in support of motion to reconsider and amend summary judgment at 5) (*Idaho Power Co. v. State*, Case No. 62237) (Fourth Jud. Dist., Ada County) (Feb. 19, 1980) (signed by John A. Rosholt).

zero.”⁴² Attorney General Jim Jones stated: “the parties did not intend ground waters or surface waters tributary to the Snake River above Milner Dam to be included within the definition of trust water flows The reason for this conclusion is that the parties retained the minimum streamflow at Milner Dam at zero.”⁴³ The United States Bureau of Reclamation also commented: “[S]ince it is further stated that the minimum flow at Milner is zero, meaning no surface flow is required past Milner for any downstream uses, it would appear to be a misinterpretation to include surface water above Milner.”⁴⁴

A water manager for several upper Snake River valley canal companies pointed out in a hearing on the proposed rules that they threatened to interfere with the established practice of reserving flood waters for uses upstream from Milner:

I'm wishing for more of a clarification of whether flood waters is what – or relationship flood waters has with trust waters. Now, in the past, when we have been having flood waters, we use those flood waters, we could use all we could take care of in the canal system. . . . And so I'd like to make my formal protest or clarification of what flood waters is in relation to the trust waters. And if it was going to change anything that we have been doing in the past 30 or 40 years, it would be detrimental to our canal systems.⁴⁵

The Secretary of the Great Feeder Canal Company emphasized that the settlement had been presented as reserving flows above Milner Dam for existing water rights and new development:

⁴² Ort Aff., Exhibit 20 at 2 (letter from John A. Rosholt to Kenneth Dunn, Director of Idaho Department of Water Resources, at 1) (Oct. 30, 1985). Mr. Rosholt also commented that re-evaluation of permit applications for storage projects upstream of Milner Dam “becomes totally unnecessary . . . since there can be no surface trust water above Milner Dam.” Id. at 4-5.

⁴³ Ort Aff., Exhibit 21 at 3 (“News Release” at 2) (Office of the Attorney General) (Jan. 29, 1986).

⁴⁴ Ort Aff., Exhibit 22 at 2 (letter from John W. Keyes III, Assistant Regional Director, U.S. Bureau of Reclamation, to A. Kenneth Dunn, Director, Idaho Department of Water Resources, at 1) (Jan. 27, 1986).

⁴⁵ Ort Aff., Exhibit 23 at 6 (transcript of IDWR public hearing on proposed rules and regulations for water appropriation at 10-12) (Idaho Falls) (Jan. 14, 1986).

I've been at two meetings in which I specifically asked the question of whether the Swan Falls agreement would affect the flow above Milner. And I was assured that under no circumstances would the Swan Falls agreement affect any of the diversion of water under any circumstances above Milner. . . . The water users that I have talked to feel as if they have been deceived . . . you know, after being promised one thing and here we come and we find that all of our water rights may be in jeopardy – or some of them, at least – or that new development may be minimized because of the rules and regulations and the laws that are now made, it appears to us that it's pure deception. . . . I don't think you realize how the farmers feel, how the people feel, about that very principle.⁴⁶

Mike Crapo, then a state senator, had played a key role in the passage of the 1985 Swan Falls legislation, including Idaho Code § 42-203B. He also emphasized the importance of the Milner minimum streamflow in a hearing on the proposed rules: “zero flow at Milner was very heavily discussed and was the basis upon which the [Swan Falls settlement] legislation was passed. And certainly with regard to surface flow, there are no trust waters above Milner, as my understanding of it goes.”⁴⁷ “[I]t was the understanding of everyone last year that the flow at Milner was zero, and there was no trust water in the flow above Milner.”⁴⁸

The parties therefore proposed a clarifying amendment to Idaho Code § 42-203B(2) to confirm that flows arising above Milner Dam would not be subject to water rights using water below Milner Dam. The amendment proposed to add two sentences to the statute. The first sentence addressed the hydropower water rights held in trust by State pursuant to the Swan Falls settlement. The second sentence of the proposed amendment to Idaho Code § 42-203B(2)—the passage quoted and discussed earlier in this memorandum—clarified that for all water rights downstream from Milner dam, “no

⁴⁶ *Id.* at 7-8 (transcript at 16-18).

⁴⁷ *Orr Aff., Exhibit 24 at 5* (transcript of IDWR public hearing on proposed rules and regulations for water appropriation at 8) (Boise) (Jan. 16, 1986).

⁴⁸ *Id.* at 6 (transcript at 11).

portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered" for purposes of "determination and administration." S.B. 1358, 48th Idaho Leg., 2d Reg. Sess. (1986);⁴⁹ Idaho Code § 42-203B(2).

The parties supported the amendment as a confirmation of the original intent of the Agreement.⁵⁰ The Committee of Nine of Water District No. 1 also passed a resolution endorsing the proposed amendment. The resolution recited the committee's understanding that the parties to the Swan Falls Agreement had agreed "that it was never their intent to force water arising above Milner Dam to be released to fill downstream water rights" and that "the upper Snake has always been managed separately from the lower Snake."⁵¹ The Legislature enacted the proposed amendment to Idaho Code § 42-203B(2). 1986 Idaho Sess. Laws 309 (codified as amended at Idaho Code § 42-203B(2)).

Thus, the legislative history of the 1986 amendment to Idaho Code § 42-203B(2) demonstrates the Legislature specifically affirmed that the zero minimum flow at Milner means not only that the river may be fully developed for storage and use above Milner, but also that water rights using water downstream from Milner Dam have no legal standing to impair or interfere with such development.

IV. The Origin And Implementation Of The Milner Zero Minimum Flow.

While the State's Motion for Partial Summary Judgment can be resolved solely on the basis of the plain language of Idaho Code § 42-203B(2), the 1997 Idaho Session Laws and the State Water Plan, the State submits that the Court may consider the following

⁴⁹ Orr Aff., Exhibit 25 at 3.

⁵⁰ See Orr Aff., Exhibit 26 at 2 (minutes of Senate Resources and Environment Committee, Feb. 19, 1986, at 1) (describing the 1986 amendment as "merely clarification").

⁵¹ Orr Aff., Exhibit 27 at 6 ("Resolution 19") (Committee of Nine and the Water Users of Water District 1) (Mar. 4, 1986).

undisputed historical facts to resolve any alleged ambiguity. These undisputed facts reveal “the public policy behind the statute.” Hayden Lake Fire Prot. Dist. 141 Idaho at 398-99, 111 P.3d at 83-84 (citation omitted)

The zero minimum flow provisions of the State Water Plan and the 1986 amendment to Idaho Code § 42-203B(2) were not created out of whole cloth. Rather, they reflected the long-established practice of conserving and storing non-irrigation season (“winter”) flows and flood waters above Milner Dam for agricultural purposes. The origins of this policy and practice are inextricably intertwined with the development of the water resources of the Snake River Basin during the last century.

As discussed below, the unique geography of the Snake River Basin fostered irrigation development that resulted in the full appropriation of the summer flow of the river at Milner by the early years of the twentieth century. Thereafter, further development was possible only by conserving and storing above Milner the winter flows and flood waters that would otherwise be lost or “wasted” for irrigation purposes. This fact, plus a series of low water years and devastating droughts that resulted in shortages even for existing irrigation projects, made the conservation and storage of winter and flood flows above Milner Dam an imperative that became the primary consideration in water resources planning and development in southern Idaho. State and federal policies aimed at conserving and storing winter and flood flows above Milner Dam to the greatest extent possible were part of the bedrock of Snake River Basin water development and property rights expectations long before the first State Water Plan formally incorporated a “zero minimum flow” at Milner Dam.

A. The Physical Division Of The Snake River Basin At Milner Dam.

"From Heise to Milner, a distance of 219 river miles, the [Snake] river is not deeply entrenched. . . . At Milner, the river enters a deep canyon cut through lava and sedimentary beds and continues for 216 miles in a west and northwesterly direction."⁵² Thus, geography physically divides the Snake River into two sections as it arcs across southern Idaho, and this natural bifurcation dictated the progression of early irrigation development. The section downstream from Milner offered essentially no opportunities for significant agricultural development because the river was largely inaccessible in the deep canyon.⁵³ Prior to the advent of high-lift pumping, the principal use contemplated below Milner was hydropower development.⁵⁴

The river above Milner was readily accessible to irrigate the broad, fertile plains and was quickly developed for this purpose. The area above American Falls was especially well-suited to gravity irrigation diversions and by 1900 private interests had developed many irrigation systems in this area.⁵⁵ After 1900, large-scale irrigation projects were developed with government assistance in the area from American Falls to

⁵² Orr Aff., Exhibit 4 at 13 (1982 Idaho State Water Plan at 5).

⁵³ See Orr Aff., Exhibit 28 at 6 ("Report and Recommendations to the Federal Power Commission by W.G. Swendsen, Commissioner of Reclamation, representing the State of Idaho" at 3) (Oct. 28, 1922) ("Almost immediately below Milner Dam, Snake River enters what ultimately becomes a rather deep rock gorge, from which water can not be diverted by gravity for irrigation uses.").

⁵⁴ See Orr Aff., Exhibit 29 at 14 ("Report of Board of Engineers to Consider Projects in Snake River Valley Which May Affect the Proposed American Falls Reservoir" at 5) (April 10, 1920) ("Board of Engineers Report") ("The waters flowing in the stream below Milner Dam are not susceptible of diversion to any considerable amount, and therefore become of primary use in connection with the production of power."); see also Orr Aff., Exhibit 30 at 4 (W.G. Hoyt, Hydraulic Engineer, U.S. Geological Survey, "Report Relative To Application of Idaho Power Company for Preliminary Permit to Develop Upper Salmon Falls Site on Snake River, Idaho - Permit No. 19, Federal Power Commission" at 3) (July 1921) ("in the section downstream [from Milner] the use of water for power purposes will undoubtedly predominate, since the larger portion of the land adjacent to the river is at such an elevation that it cannot feasibly be irrigated by water pumped or diverted below the Milner dam.").

⁵⁵ See generally Orr Aff., Exhibit 31 at 3 (Leonard J. Arrington, *Irrigation In The Snake River Valley: An Historical Overview*, IDAHO YESTERDAYS, Spring/Summer Issue, 1986, Vol. 30, Numbers 1-2, at 4.)

Affidavit of Michael C. Orr
In re SRBA Case No. 39576
Subcase No. 01-02064 (American Falls Storage Subcase)

EXHIBIT 50:

Letter from Barry Dibble, Minidoka Project Manager,
to Chief Engineer of the U.S. Reclamation Service,
April 16, 1920.

1200000007

X Ref. to 307-17-1-Brunner
X Ref. to 307-17-26-yellowout
Transmitted to the Director with original copy of board report.
Reference is made to office letter of April 16th.

FBI Denver
Chief Engineer.

Affidavit of Michael C. Orr
In re SRBA Case No. 39576
Subcase No. 01-02064 (American Falls Storage Subcase)

EXHIBIT 51:

Letter from James L. Boone, Attorney, Idaho Power Company, to W.R. Putnam, Vice President & General Manager, Idaho Power Company, November 8, 1926.

Boise, Idaho,
November 8, 1928.

Mr. J. B. Putnam,
O. P. I. & S.

Dear Mr. Putnam:

In response to your request for my interpretation of the American Falls contract in respect to our right to use our 300,000 acre feet of stored water, as well as "released" or "wasted" water within the purview of Paragraph 24 of the contract, I confess some embarrassment in the attempt, considering the comparatively short time I have had to investigate this important and rather complicated contract, but advise as follows:

In studying the use and limitations thereon of our 300,000 acre feet, I have approached the same mainly from the standpoint of power rights, storage rights and water and storage capacities.

Power Rights:

The contract by name and classification mentions three power rights, to-wit: (1) primary (Company right), Paragraph 10; (2) secondary (United States), Paragraph 11, and (3) tertiary (Company) or (may be United States), Paragraph 12.

In addition to the two foregoing, there are other Company power rights, two of which vitally concern us now, namely:

(a) That power right growing out of storage water and rights therein and storage capacity and rights therein which we retain by reservation to us of 300,000 acre feet of stored water. (A winter and partial summer power use or right.) Paragraph 13.

(b) That power right growing out of the reservation to us of the right to use released or wasted waters during the winter months. (Another winter power use) Paragraph 24.

Storage Capacity:

Speaking only of Company storage capacities granted, I call attention to the following:

(A) Primary, Paragraph 16.

This is a grant for perpetual use of 45,000 acre feet of storage capacity. To be used for storing water reserved to Company and water referred to in last sentence of Paragraph 10.

11/8/26

(a) Secondary: Paragraph 18.

I grant to use 255,000 acre feet of storage capacity. It is not perpetual. It is available October 1st and only when such capacity is not then required and not being used by the owner of irrigation rights to the use of such capacity; is limited after the reservoir is first filled each season; is limited further by a relinquishment of such capacity except as to 50,000 acre feet on April 1st and as to the 50,000 acre feet capacity relinquished on June 10th. Such capacity is to be used for regulating and controlling water reserved to Cooper and water which may be acquired under last sentence of Paragraph 10.

Storage Waters and Rights:

Of the companies stored waters and rights thereto, I call attention to the following:

(a) 500,000 acre feet is reserved under Paragraph 19. Under Paragraph 18, 195,000 acre feet must have been used or is relinquished between October 1st and April 1st; 50,000 acre feet must have been used or is relinquished between October 1st and June 10th (Paragraph 18); 45,000 acre feet must have been used or is relinquished by November 15th (Paragraph 20). This 200,000 acre feet, so the contract reads, represents the first 200,000 acre feet flowing into the reservoir after October 1st and actually storable therein (Paragraph 19). The right to use any of this storage water is subject to a precedence in the Government for the release through the dam to the amount of water, if any, required to supply the amount of power not exceeding 10,000 kilowatts, half-hour peak, needed to supply the power demands and uses on the Minicopa Project, etc. (Paragraph 19).

If I understand the meaning of the so-called "precedence" clause, then we are not, as a matter of right, entitled to the first 200,000 acre feet flowing into the reservoir, but rather entitled to such 200,000 acre feet after the satisfaction of the Government's right to use water to an amount necessary to develop 10,000 kw. For certainly it is not to be understood that to develop such power the Government may use any of our 300,000 acre feet. This latter conclusion is substantiated, I think, by the right of the Government to store and use for irrigation purposes this amount of water necessary to generate said 10,000 kw.

This amount of water belonging to the Government and which it has precedence to use over our right to use our said 300,000 acre feet reserved to us is water which I think we are entitled to use at any time if any part of the same is available for our use at American Falls (Paragraph 24). An interesting point of issue arises over this so-called "precedence" clause. Mr. Stoutenger takes the position that so far as that clause is concerned, it was inserted only

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to protect the Government against our holding all of the first 500,000 acre feet in the reservoir and thus preventing the operation of the Government power plant and that no interpretation shall be placed thereon which impliedly requires the Government to use a sufficient amount of water to develop the necessary capacity within 10,000 kw for Minidoka. My reply to his argument is this: Even we may not be able to require the Government to use this water to develop power within 10,000 kw, yet if the Government does use the water and any of it is available to us for our use at American Falls, we certainly may use it and the use so made is not chargeable to our 500,000 acre feet (Paragraph 24). Our right to so use this particular water is discussed further on in this memo.

While there are perhaps other storage waters and rights thereto under the contract which may be discussed, I do not think a discussion of the same is pertinent to the present inquiry.

As to what I have herein the power rights indicated in Subdivisions (a) and (b) (Page 1 of this memo), there at this time are a source of controversy. 500,000 acre feet of stored water is reserved to us for power development at American Falls and for power development below Milner dam (Paragraph 19).

This latter use, however is subject to limitations contained in the contract which I will hereinafter discuss. Of this 500,000 acre feet, we reserve a right to use 45,000 acre feet of the same at any time during the year, although it is stated in the contract that as to this specific amount of water, we relinquish all of our rights in any event by November 15th (Paragraphs 18 and 20).

Released Storage Water for use at Points Below Milner:

A distinction is observed in the contract as to our use of our stored water at American Falls for use at points below Milner. And as a necessary part of the discussion relative to such use at American Falls, a discussion of our use at points below Milner must first be had.

The question of our use of the whole or any part of this stored water at points below Milner presents an entirely different situation than the use of this water for our power development at American Falls. The right for use of stored water at points below Milner dam, and by stored water I refer to the 500,000 acre feet, is expressly limited by the terms of Paragraph 21 of the contract which is very specific on this phase. That is to say, two express limitations on our right to demand and have released any portion of this stored water for use below Milner are inserted in this paragraph.

First, we are not entitled to ask for and have released any of this stored water which will result in the total flow at the head of Shoshone Falls

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exceeding the specified amounts set out in Paragraph 21, Lines 534-539.

Second, the release of water for use at points below Milner must be in such a way that the required flow can be maintained at Shoshone Falls by utilization of storage capacity in Lake Tuleliff not to exceed 3,000 acre feet of storage capacity (Lines 539-543).

As to the first limitation, my present understanding is that if the natural flow at the head of Shoshone Falls is, say, one-half of the prescribed amount set forth in the first limitation in Paragraph 21 and the balance of said flow at the head of Shoshone Falls is sufficient to make the total of the prescribed amounts is water which is wasted over Milner dam, then we are not entitled to ask for or have released any portion of the 255,000 acre feet. To state the matter another way, subject to the exception as noted in the succeeding paragraph, I do not see how under this contract we can ask for and have released for use below Milner, any portion of this stored water if the total flow at the head of Shoshone Falls is equal to the prescribed amounts in the first limitation set forth in Paragraph 21.

There is one clear exception for use of stored water below Milner where the prescribed limitations can be exceeded and which I point out for the sole purpose of avoiding confusion, and that is the use of our reserved 45,000 acre feet of water and the use of such water mentioned in the last sentence of Paragraph 10.

There is, however, a possibility of us making use of a portion of this 255,000 acre feet at points below Milner, but that is predicated upon waste, which, in turn, is predicated upon an increased winter out-put at American Falls, plus the amount of water required by diversions at Milner. But this I also deem not to be a pertinent phase of this discussion.

Released Storage Water for Use at American Falls:

This phase of the discussion is, of course, the crux of this memo. It became important because Mr. Patton has proposed to the Government, in answer to their query as to when and in what amounts the Company expects to release its stored water, that as far as the Company is concerned, it will release the stored water when and in those amounts it sees fit and, if need be, will release the whole in one month if physically practicable.

That this answer of Mr. Patton proved unexpected and disconcerting to the Government is apparent to those of us who have consulted with the Government officials.

Mr. Stenographer's answer to such a proposal is, even granting the Company has this right, it is purely a technical advantage and one not contemplated by the framers of the contract. And in any event, when the contract was drawn,

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nothing was thought of other than that our 255,000 acre feet, excepting perhaps 60,000 acre feet of the same, would be withdrawn and used at a fairly uniform rate throughout the fall and winter months and that, aside from the use for our power requirements at American Falls and such use as may be made under the contract for points below Milner, it was contemplated by all that our 255,000 acre feet, together with an equal amount used by a new Government American Falls plant, would and was to take care of all the power requirements, as well as domestic requirements, at Milner.

Looking solely at the face of the contract, I fail to find any express limitation on the Company's right to extraordinarily fluctuate the release of our storage, even to the extent proposed by Mr. Putnam. If there is a limitation, it arises by implication. First, because of the limitation on the use of this stored water for points below Milner (Paragraph 21), and, second, because it is impliedly written into the contract that our use of the stored water shall be consistent with the perpetual program of necessary economy and conservation of water in the reservoir in the interest of summer irrigation, with which program our extraordinary fluctuation in the release of our stored water is inconsistent. Some may differ on what the main purpose of this particular contract is, but, looking at its main purpose as the conservation of water for summer irrigation purposes and looking at our contract as an aid in that program, the second implication above stated is at least something to be considered.

From my present study of Paragraph 21 (the first limitation), looking solely at the face of the contract, I am unconvinced that this paragraph operates as a restriction on our right to greatly fluctuate the flow of released water at American Falls for our power purposes at that point. Rather it seems to me that the contract contemplates such fluctuation. In the first place, out of the 300,000 acre feet, we are entitled to save 60,000 acre feet and use it at any time either before April 1st but, in any event, prior to June 15th (Paragraph 19). We can also save and use 45,000 acre feet at any time prior to November 15th (Paragraph 20). Certainly these two exceptions in themselves do not look to uniform regularity in flow, but rather emphasize and recognize the necessity of a free and unhampered use in the Company of all its stored water for its power necessities, recognizing a greater use at some periods than at others. Further, the contract expressly contemplates a greater Company power development at American Falls than below Milner. In fact, to utilize the grants and reservations of the contract for power development at American Falls, this is required. And if the release at American Falls is governed by the flow at Milner, this greater development at American Falls is seriously hampered so far as a winter use is concerned. And further, the contract contemplates the use of all our stored water beyond what is permitted to go past Milner for other purposes for points at and above Milner. If the Government cannot use it, such is their loss and such will be our resultant gain at points below Milner. So long then, it seems to me, as we do not waste stored water at American Falls, we can use it at any time and in any manner we see fit, and my understanding as to the limitations in Paragraph 21 is simply that they are inserted to conserve for the use of others such of our stored water as is used by us for power purposes at American Falls.

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I do not think it will do to lightly pass without some consideration of my suggested second limitation. If I infer correctly from the conference I had with Mr. Stoutmeyer, there is but little question in his mind that such is the interpretation which ultimately will prevail of our use of our stored water under the contract.

Personally, I think such a construction can only be given in a case a court holds that the contract contemplates some uniformity in the flow of our storage water in the interest of water conservation, and, since the contract is rather indefinite and uncertain on that point, it will resort to extraneous evidence to determine the intent. Just what was contemplated, so far as uniformity of flow is concerned, at the time the contract was negotiated is a matter which I have not gone into, being content at this time to rest my conclusions on the express language of the contract. It may be well, if thought wise, for an investigation to be made as to all preliminary investigations and investigations had by our people at and before the contract was actually executed by us in 1921. Mr. Elogner, no doubt, can shed considerable light on this phase of the matter.

Having concluded then that so far as the express language of the contract is concerned, we can use our stored water in any amount and at any time, we see fit without reserving to its release in fairly uniform flow, a practical problem, as well as another legal question, (Paragraph 24) arises, for it is necessary, of course, that we have water sufficient for our daily needs at American Falls. In such event, unless we resort to stored water, we must look to Paragraph 24, but the Government frankly replies that it is useless to look to this provision for this year at least because there is no water available to us under that paragraph, advancing as the basis of their conclusion the following reasons:

1. We cannot use "released" or "wasted" water except such water as is available in excess of the water required for the Government's power development (lines 584-586), which I take to be an amount of water sufficient to develop 10,000 kw.

2. In any event, "released" or "wasted" water (released and wasted being synonymous words) is defined in Paragraph 24 and for this year under that definition there is no such thing as "released" or "wasted" water.

These reasons, I think, are untenable. In the first place, without advancing my reasons therefor, I do not think "released" and "wasted", as applied to waters under Paragraph 24, or to any other waters under the contract, are synonymous, but rather have distinct meanings. So far as the limitations contained in Paragraph 24 on our right to use released water only in an amount in excess of the amount of water required by the Government for power development at Minidoka is concerned, the very argument which the Government uses relative to the interpretation (see memorandum my conference November 5th with

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Mr. Stoutmeyer) to be placed on the language used in Paragraph 19, to-wit, "except that precedence shall be given for the release through the American Falls Reservoir dam to the amount of water, if any, required to supply the amount of power not exceeding 10,000 kw, may, if need be, be applied to the aforementioned provision from Paragraph 24. In other words, using the Government's own argument (see Stoutmeyer conference memo), all that the restrictive language in Paragraph 24 (lines 584-586) really means is that we cannot require the exclusive use of such "released" or "wasted" water, but must recognize the prior use of the Government to the extent of such an amount of water as is necessary to develop the 10,000 kw capacity for power used at Minidoka.

The reasonable and what I think is the intended interpretation to be placed on Paragraph 24 is that we may use at American Falls all released water from American Falls, which must certainly include water released for irrigators' use at Minidoka and at Milner and also includes such water as the Government may be using at Minidoka for power purposes but which, of course, is available to us at American Falls, if such use does not result in a curtailment of the Government's use of such water to develop the 10,000 kw capacity. So long as any of such water, whether it is released for power purposes or domestic purposes at points at and above Milner, or whether it is wasted water which does not come within the definition of wasted in Paragraph 24, is available, we may use the same. When such water is shut off or curtailed, we must then call on our storage proportionately as the amount of said "released" or "wasted" water is not available to us.

Heretofore, I have discussed the purely legal phases of this matter, but, in conclusion, as a mixed question of law and policy, I make the following suggestions for what they are worth:

This is the first year of operation under the contract. Unfortunately, it is the third year of a series of years of unusual dryness. Real or at least threatened irrigation shortage is apparent. The Reclamation Service, goaded by experience with the farmers in the filling of Arrow Rock reservoir, are apprehensive and will take no chance of not conserving every drop of water possible to store in American Falls reservoir for irrigation purposes. If necessary, the Service may take steps to adjudicate the question of our right to greatly fluctuate the flow of our storage water consistent with the ideas expressed by Mr. Stoutmeyer in my conference with him.

My experience in such irrigation states as Idaho is that actual or threatened irrigation stress sometimes produces strange and rather unexpected judicial holdings.

On the other hand, every possible hold on power which we have reserved or have been granted under this contract should be jealously preserved. It may be that under the contract we have gained even greater power rights than at first blush was apparent. These, if any, should be carefully

To: Mr. F.

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incurred. And it is apparent to me, after my conference with Reclamation officials, if our hand is played right, all rights such as I have discussed herein are apt to be recognized, at least acquiesced in, and, if such is the result on beneficial rights under the contract or rather rights which are not made clear, we will have the advantage of a practical interpretation extending over a period of years, to which practical interpretation courts give weight. Now, it seems to me, in view of the peculiar conditions surrounding the filling of the reservoir for the first time and a most apprehensive attitude on the part of the Reclamation Service that the reservoir will not be filled, even though their apprehensions may be somewhat far fetched, the same demand that we assume a charitable role. This, I believe, may be done without in the slightest affecting our right under the contract or without creating a precedence for operations in future years. While there is perhaps little chance of the Government testing even this year in the courts our interpretation of our use of stored water under the contract, yet it is within the realm of possibility and I do not think that we should take any unnecessary stand which would cause a judicial interpretation of those phases of the contract at a time when the water shortage has any appearance of reality.

Yours very truly,

James L. Boone,
Attorney.

JLB/s

Boise, Idaho,
November 6, 1926.

Mr. W. B. Feltner,
O F F I C E R.

Dear Mr. Feltner:

In response to your request for my interpretation of the American Falls contract in respect to our right to use our 500,000 acre feet of stored water, as well as "released" or "wasted" water within the purview of Paragraph 24 of the contract, I confess some embarrassment in the attempt, considering the comparatively short time I have had to investigate this important and rather complicated contract, but advise as follows:

In studying the use and limitations thereon of our 500,000 acre feet, I have approached the same mainly from the standpoint of power rights, storage rights and water and storage capacities.

Power Rights:

The contract by name and classification mentions three power rights, to-wit: (1) primary (Company right), Paragraph 10; (2) secondary (United States), Paragraph 11, and (3) tertiary (Company) or (may be United States), Paragraph 12.

In addition to the two foregoing, there are other Company power rights, two of which vitally concern us now, namely:

(a) That power right growing out of storage water and rights therein and storage capacity and rights therein which we retain by reservation to us of 500,000 acre feet of stored water. (A winter and partial summer power use or right.) Paragraph 19.

(b) That power right growing out of the reservation to us of the right to use released or wasted waters during the winter months. (Another winter power use) Paragraph 24.

Storage Capacity:

Speaking only of Company storage capacities granted, I call attention to the following:

(a) Primary: Paragraph 10.

This is a grant for perpetual use of 40,000 acre feet of storage capacity. To be used for storing water reserved to Company and water referred to in last sentence of Paragraph 10.

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(b) Secondary: Paragraph 18.

A grant to use 255,000 acre feet of storage capacity. Is not perpetual. Is available October 1st and only when such capacity is not then required and not being used by the owner of irrigation rights to the use of such capacity; is limited after the reservoir is first filled such season; is limited further by a relinquishment of such capacity except as to 60,000 acre feet on April 1st and as to the 60,000 acre feet capacity relinquished on June 15th. Such capacity is to be used for regulating and controlling water reserved to Company and water which may be acquired under last sentence of Paragraph 18.

Storage Waters and Rights:

Of the companies stored waters and rights therein, I call attention to the following:

(a) 500,000 acre feet is reserved under Paragraph 18. Under Paragraph 18, 155,000 acre feet must have been used or is relinquished between October 1st and April 1st; 60,000 acre feet must have been used or is relinquished between October 1st and June 15th (Paragraph 18); 45,000 acre feet must have been used or is relinquished by November 15th (Paragraph 20). This 500,000 acre feet, as the contract reads, represents the first 500,000 acre feet flowing into the reservoir after October 1st and actually storable therein (Paragraph 18). The right to use any of this storage water is subject to a precedence in the Government for the release through the dam to the amount of water, if any, required to supply the amount of power not exceeding 10,000 kilowatts, half-hour peak, needed to supply the power demands and meet in the Minidoka Project, etc. (Paragraph 18).

If I understand the meaning of the so-called "precedence" clause, then we are not, as a matter of right, entitled to the first 500,000 acre feet flowing into the reservoir, but rather entitled to such 500,000 acre feet after the satisfaction of the Government's right to use water to an amount necessary to develop 10,000 kw. For certainly it is not to be understood that to develop such power the Government may use any of our 500,000 acre feet. This latter conclusion is substantiated, I think, by the right of the Government to store and use for irrigation purposes this amount of water necessary to generate said 10,000 kw.

This amount of water belonging to the Government and which it has precedence to use over our right to use our said 500,000 acre feet reserved to us is water which I think we are entitled to use at any time if any part of the same is available for our use at American Falls (Paragraph 24). An interesting point of fact arises over this so-called "precedence" clause. Mr. Stancher took the position that so far as that clause is concerned, it was inserted only

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to protect the Government against our holding all of the first 300,000 acre feet in the reservoir and thus preventing the operation of the Government power plant and that no interpretation shall be placed thereon which implicitly requires the Government to use a sufficient amount of water to develop the necessary capacity within 10,000 kw for Minidoka. My reply to his argument is this: True we may not be able to require the Government to use this water to develop power within 10,000 kw, yet if the Government does use the water and any of it is available to us for our use at American Falls, we certainly may use it and the use so made is not chargeable to our 300,000 acre feet (Paragraph 24). Our right to so use this particular water is discussed further on in this memo.

While there are perhaps other storage waters and rights therein under the contract which may be discussed, I do not think a discussion of the same is pertinent to the present inquiry.

As to what I term herein the power rights indicated in subdivisions (a) and (b) (Page 1 of this memo), these at this time are a source of controversy. 300,000 acre feet of stored water is reserved to us for power development at American Falls and for power development below Milner dam (Paragraph 19).

This latter use, however is subject to limitations contained in the contract which I will hereinafter discuss. Of this 300,000 acre feet, we reserve a right to use 45,000 acre feet of the same at any time during the year, although it is stated in the contract that as to this specific amount of water, we relinquish all of our rights in any event by November 15th (Paragraphs 18 and 20).

Released Storage Water for use at Points Below Milner:

A distinction is observed in the contract as to our use of our stored water at American Falls for use at points below Milner. And as a necessary part of the discussion relative to such use at American Falls, a discussion of our use at points below Milner must first be had.

The question of our use of the whole or any part of this stored water at points below Milner presents an entirely different situation than the use of this water for our power development at American Falls. The right for use of stored water at points below Milner too, and by stored water I refer to the 300,000 acre feet, is expressly limited by the terms of Paragraph 21 of the contract which is very specific on this phase. That is to say, two express limitations on our right to demand and have released any portion of this stored water for use below Milner are inserted in this paragraph.

First, we are not entitled to ask for and have released any of this stored water which will result in the total flow at the head of Shoshone Falls

W. R. F.

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exceeding the specified amounts set out in Paragraph 21, Lines 224-230.

Second, the release of water for use at points below Milner must be in such a way that the required flow can be maintained at Shoshone Falls by utilization of storage capacity in Lake Valerit not to exceed 3,500 acre feet of storage capacity (Lines 231-245).

As to the first limitation, my present understanding is that if the natural flow at the head of Shoshone Falls is, say, one-half of the prescribed amount set forth in the first limitation in Paragraph 21 and the balance of said flow at the head of Shoshone Falls is sufficient to make the total of the prescribed amounts in water which is wasted over Milner dam, then we are not entitled to ask for or have released any portion of the 285,000 acre feet. To state the matter another way, subject to the exception as noted in the succeeding paragraph, I do not see how under this contract we can ask for and have released, for use below Milner, any portion of this stored water if the total flow at the head of Shoshone Falls is equal to the prescribed amounts in the first limitation set forth in Paragraph 21.

There is one clear exception for use of stored water below Milner where the prescribed limitations can be exceeded and which I point out for the sole purpose of avoiding confusion, and that is the use of our reserved 45,000 acre feet of water and the use of such water mentioned in the last sentence of Paragraph 10.

There is, however, a possibility of us making use of a portion of this 285,000 acre feet at points below Milner, but that is predicated upon waste, which, in turn, is predicated upon an increased winter out-put at American Falls, plus the amount of water required by diversions at Milner. But this I also deem not to be a pertinent phase of this discussion.

Released Storage Water for Use at American Falls:

This phase of the discussion is, of course, the crux of this matter. It became important because Mr. Paine has proposed to the Government, in answer to their query as to when and in what amounts the Company expects to release its stored water, that so far as the Company is concerned, it will release the stored water when and in those amounts it sees fit and, if need be, will release the whole in one month if physically practicable.

That this answer of Mr. Paine proved unexpected and disconcerting to the Government is apparent to those of us who have consulted with the Government officials.

Mr. Stettin's answer to such a proposal is, even granting the Company has this right, it is purely a technical advantage and was not contemplated by the framers of the contract. And in any event, when the contract was drawn,

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nothing was thought of other than that our 200,000 acre feet, excepting perhaps 50,000 acre feet of the same, could be withdrawn and used at a fairly uniform rate throughout the fall and winter months and that, aside from the use for our power requirements at American Falls and such use as may be made under the contract for points below Hilar, it was contemplated by all that our 200,000 acre feet, together with an equal amount held by a new Government American Falls plant, would and was to take care of all the power requirements, as well as domestic requirements, at Hilar.

Looking solely at the face of the contract, I fail to find any express limitation on the Company's right to extraordinarily fluctuate the release of our storage, even to the extent proposed by Mr. Nathan. If there is a limitation, it arises by implication. First, because of the limitation on the use of this stored water for points below Hilar (Paragraph 21), and, second, because it is implicitly written into the contract that our use of the stored water shall be consistent with the perpetual program of necessary vacancy and conservation of water in the reservoir in the interest of future irrigation, with which program our extraordinary fluctuation in the release of our stored water is inconsistent. Some may differ on what the main purpose of this particular contract is, but, looking at its main purpose as the conservation of water for some irrigation purposes and looking at our contract as an aid in that program, the second implication above stated is at least something to be considered.

Even my present study of Paragraph 21 (the first limitation), looking solely at the face of the contract, I am unconvinced that this paragraph operates as a restriction on our right to greatly fluctuate the flow of released water at American Falls for our power purposes at that point. Rather it seems to me that the contract contemplates such fluctuation. In the first place, out of the 200,000 acre feet, we are entitled to have 50,000 acre feet and use it at any time either before April 1st but, in any event, prior to June 15th (Paragraph 19). We can also use and use 45,000 acre feet at any time prior to November 15th (Paragraph 20). Certainly since the exceptions in themselves do not look to uniform regularity in flow, but rather emphasize and recognize the necessity of a free and unhindered use in the Company of all its stored water for its power necessities, necessitating a greater use at some periods than at others. Further, the contract expressly contemplates a greater Company power development at American Falls than below Hilar. In fact, to fulfill the grants and reservations of the contract for power development at American Falls, this is required, and if the release of American Falls is governed by the flow at Hilar, this greater development at American Falls is seriously hampered as far as a winter use is concerned. And further, the contract contemplates the use of all our stored water beyond what is permitted to go past Hilar for other purposes for points of and above Hilar. If the Government cannot use it, such is their loss and such will be our resultant gain at points below Hilar. So long then, it seems to me, as we do not waste stored water at American Falls, we can use it at any time and in any manner we see fit, and my understanding as to the limitations in Paragraph 21 is simply that they are inserted to conserve for the use of others such of our stored water as is used by us for power purposes at American Falls.

A. B. C.

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I do not think it will do to lightly pass without some consideration of my suggested second limitation. If I have learned from the conference I had with Mr. Stenberger, there is not a little question in his mind that such is the interpretation which ultimately will prevail of our use of our stored water under the contract.

Personally, I think such a construction can only be given in a case a court holds that the contract contemplated some uniformity in the flow of our storage water in the interest of water conservation, and, since the contract is rather indefinite and uncertain on that point, it will resort to matters extraneous to the contract to determine the intent. Just what was contemplated, so far as uniformity of flow is concerned, at the time the contract was negotiated is a matter which I have not seen here, being content at this time to rest my conclusions on the express language of the contract. It may be well, if thought wise, for an investigation to be made as to all preliminary investigations and investigations had by our people at and before the contract was actually executed by us in 1921. Mr. Stenberger, no doubt, has shed considerable light on this phase of the matter.

Having concluded then that we see no the express language of the contract is concerned, we can use our stored water in any amount and at any time so as to fit without resorting to its release in fairly uniform flow, a practical problem, as well as another legal question, (Paragraph 24) arises, for it is necessary, of course, that we have water sufficient for our daily needs at American Falls. In such event, unless we resort to stored water, we must look to Paragraph 24, but the Government frankly admits that it is useless to look to this provision for this year at least because there is no water available to us under that paragraph, admitting as the basis of their conclusion the following reasons:

1. We cannot use "released" or "wasted" water except such water as is available in excess of the water required for the Government's power development (lines 854-856), which I take to be an amount of water sufficient to develop 10,000 kw.
2. In any event, "released" or "wasted" water (released and wasted being synonymous words) is defined in Paragraph 24 and for this year under that definition there is no such thing as "released" or "wasted" water.

These reasons, I think, are untenable. In the first place, without advancing my reasons therefor, I do not think "released" and "wasted", as applied to waters under Paragraph 24, or to any other waters under the contract, are synonymous, but rather have distinct meanings. As far as the limitations contained in Paragraph 24 on our right to use released water only in an amount in excess of the amount of water required by the Government for power development at Minidoka is concerned, the very argument which the Government uses relative to the interpretation (see Appendix B, Conference November 2nd with

W. R. F.

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Mr. Stentzger) to be placed on the language used in Paragraph 18, to-wit, "except that precedence shall be given for the release through the American Falls reservoir dam to the amount of water, if any, required to supply the amount of power not exceeding 10,000 kw", may, if need be, be applied to the aforementioned provision from Paragraph 24. In other words, using the Government's own argument (see Stentzger conference memo), all that the restrictive language in Paragraph 24 (lines 324-325) really means is that we cannot require the exclusive use of such "released" or "wasted" water, but must recognize the prior use of the Government to the extent of such an amount of water as is necessary to develop the 10,000 kw capacity for power used at Minidoka.

The reasonable and what I think is the intended interpretation to be placed on Paragraph 24 is that we may use at American Falls all released water from American Falls, which most certainly includes water released for irrigators' use at Minidoka and at Milner and also includes such water as the Government may be using at Minidoka for power purposes but which, of course, is available to us at American Falls, if such use does not result in a curtailment of the Government's use of such water to develop the 10,000 kw capacity. So long as any of such water, whether it is released for power purposes or domestic purposes as points at and above Milner, or whether it is wastewater which does not come within the definition of wasted in Paragraph 24, is available, we may use the same. When such water is shut off or curtailed, we must then call on our storage proportionately as the amount of said "released" or "wasted" water is not available to us.

Heretofore, I have discussed the purely legal phases of this matter, but, in conclusion, as a mixed question of law and policy, I make the following suggestions for what they are worth:

This is the first year of operation under the contract. Unfortunately, it is the third year of a series of years of unusual dryness. Real or at least threatened irrigation shortage is apparent. The Reclamation Service, guided by experience with the farmers in the filling of Arrow Rock reservoir, are apprehensive and will take no chance of not conserving every drop of water possible to store in American Falls reservoir for irrigation purposes. If necessary, the Service may take steps to adjudicate the question of our right to greatly fluctuate the flow of our storage water consistent with the ideas expressed by Mr. Stentzger in my conference with him.

In my experience in such irrigation states as Idaho is that actual or threatened irrigation stress sometimes produces strange and rather unexpected judicial holdings.

On the other hand, every possible hold on power which we have reserved or have been granted under this contract should be jealously preserved. It may be that under the contract we have gained even greater power rights than at first blush was apparent. These, if any, should be carefully

W. B. P.

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11/8/28

mutured. And it is apparent to me, after my conference with Reclamation officials, if our hand is played right, all rights such as I have discussed herein are apt to be recognized, at least acquiesced in, and, if such is the result on doubtful rights under the contract or further rights which are not made clear, we will have the advantage of a practical interpretation extending over a period of years, to which practical interpretation courts give weight. Thus, it seems to me, in view of the peculiar conditions surrounding the filling of the reservoir for the first time and a most apprehensive attitude on the part of the Reclamation Service that the reservoir will not be filled, even though their apprehensions may be somewhat far fetched, the same demand that we assume a charitable role. This, I believe, may be done without in the slightest affecting our right under the contract or without creating a precedence for operations in future years. While there is perhaps little chance of the Government testing even this year in the courts our interpretation of our use of stored water under the contract, yet it is within the realm of possibility and I do not think that we should take any unnecessary stand which would cause a judicial interpretation of those phases of the contract at a time when the water shortage has any appearance of reality.

Yours very truly,

James L. Boone,
Attorney.

11/8/28

Affidavit of Michael C. Orr
In re SRBA Case No. 39576
Subcase No. 01-02064 (American Falls Storage Subcase)

EXHIBIT 52:

Letter from C. C. Boswell, Electric Bond and Share Company, to W.R. Putnam, Vice President & General Manager, Idaho Power Company, November 16, 1926.

3-240-2
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Mr. Putnam

ELECTRIC BOND AND SHARE COMPANY

SEVENTY-ONE BROADWAY

NEW YORK

November 16, 1926.

Mr. W. R. Putnam, V.P. & G.M.,
Idaho Power Company,
Boise, Idaho.

AMERICAN FALLS RESERVOIR SITUATION

Dear Mr. Putnam:

We have your letter of November 11th on the above subject; also Mr. Boone's letter of November 8th and copies of Mr. Boone's memos to you dated November 8th and November 6th. We have been particularly interested in Mr. Boone's memo of Nov. 8th.

Since writing Mr. Rankin on November 10th, we have been giving considerable study to the question of the right of the Idaho Power Company to dictate the way in which its secondary storage shall be released. We are of the opinion, based not only on the face of the contract but also on the intent of the contract as we understand it from discussion with Mr. Clogher and review of some of the studies made at the time the contract was negotiated in 1921, that the Idaho Power Company has the right to vary this release as it sees fit even to the extent suggested by you in your discussion with Messrs. Stoutemyer and Banks. As has been pointed out by Mr. Boone, there is no "express limitation on the Company's right to extraordinarily fluctuate the release." As to the implied limitation contained in paragraph 21, we believe this was intended only to state that the only secondary storage water which the Company is entitled to demand should be passed at Milner, is that amount required to bring the flow at Shoshone up to the amounts specified in lines 526 to 530 inclusive of the contract. Let us assume two conditions:

- A. Flow at Shoshone 500 cfs.
The Company may require the release of secondary storage up to the maximum physically possible; but the U.S.R.S. may hold back in Lake Walcott all such release except (in November) 290 cfs.
- B. Flow at Shoshone 900 cfs.
The Company may require the release of secondary storage up to the maximum physically possible; but the U.S.R.S. may hold back all such release in Lake Walcott.

The fact that Lake Walcott may not be drawn down to the point to en-

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Mr. W. R. Putnam

November 16, 1926.

able the U.S.R.S. to catch this water, is as we see it, beside the point. Lines 540 to 543 of paragraph 21 must, of course, be given due weight, meaning, as we interpret them, that the secondary storage water released at American Falls which the Company can demand be passed at Milner shall be released in such a way that the required flow can be maintained at Sheshone by utilizing not to exceed 3,000 acre feet of storage capacity in Lake Walcott.

In support of this interpretation and as an evidence of the intent of this provision, we quote the following from a memo, A. C. Clogher to F. B. Odum dated July 26, 1921:

"The intention of this paragraph is to give to the Company specifically the use of 300,000 acre feet of water through the American Falls Plant and to a certain portion of this 300,000 acre feet at plants below Milner, such 300,000 acre feet of water to be secured from the natural flow of the Snake River and stored in the reservoir in capacity provided for above, and to be used at the pleasure of the Company."

While Mr. Clogher was referring specifically to paragraph 19, the intent is quite pertinent in construing paragraph 21.

While we believe, as set forth above, that the Company has the right to release its secondary storage as it may desire, and feel that this right should be recognized by the U.S.R.S.; there is no apparent reason now why this right should result in any undue waste of water that might otherwise be conserved for summer irrigation. Mr. Boone has brought out that there may be a second implied limitation on the release of the Company's secondary storage in that it "shall be consistent with the perpetual program of necessary economy and conservation of water in the reservoir in the interest of summer irrigation," but we believe the use of this secondary storage can be so handled that however real this "second implied limitation" may be, it need never be tested.

As a possible means to acquire the right to additional storage capacity in Lake Walcott to make possible a greater fluctuation in release at American Falls (and a consequent generation at that point that would result in more efficient absorption by the combined Utah and Idaho Companies of all available power) Mr. Clogher has suggested a plan of operation substantially as follows:

1. Idaho Power Company to have sole control of release at American Falls and Minidoka in winter; agreeing to restrict ~~its~~ ^{the} release at American Falls to the total acre feet that would be released if the U.S.R.S. supplied its load entirely from Minidoka (under full head) and American Falls, plus 255,000 acre feet, plus

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Mr. W. R. Putnam

November 16, 1926.

such water as might be available for waste under the contract.

2. U.S.R.S. to agree to operate its Minidoka Plant to turn out all power possible under conditions of head and release.
3. Idaho Power Company to agree to furnish the U.S.R.S. with such power as they might need beyond the amount actually generated up to but not exceeding 10,000 KW half hour peak.

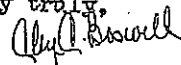
Under such a plan of operation, Lake Walcott could be drawn well down and be used to equalize such varying release at American Falls as might be required to secure the maximum power from the combined systems. Mr. Clogher has suggested this right would be sufficiently valuable as to warrant a cash payment therefor; but since such a plan would relieve the Government of its operating expenses at the Island and West Side Plants and regulation of the release at American Falls could be more satisfactorily handled by Idaho Power Company's employees, thus saving the U.S.R.S. and all the irrigators some expense for this item, it would seem that no cash payment would be necessary. There is, of course, the further argument that such a plan of operation would be more efficient and therefore to be recommended from the standpoint of conservation.

Referring to Mr. Stoutemyer's contention that the words "released" and "wasted" as appearing in line 583, paragraph 24 of the contract, are synonymous; his position on this seems untenable to us. Going back to "intent", Mr. Clogher tells me that this paragraph was written to cover the situation after the U.S. plant at American Falls was completed. At such times there would, of course, be no water available for use by the Company at American Falls except that in addition to the water used by the U.S. for power. The closing sentence of this paragraph however gives the Company the right to use the water granted the U.S. for power purposes "during the development period". The development period surely means the period ending with the installation of the U.S. plant.

All here with whom this matter has been discussed, heartily agree with Mr. Boons that no unnecessary stand should be taken in any of these matters which might either cause friction in the administration of the contract or result in a judicial interpretation of the contract at a time like the present. We have just noted your letter of Nov. 12th advising that the U.S.R.S. officials have acknowledged that that portion of their winter release for power, used by the Company, is not chargeable to the Company's secondary storage and your success in this encourages us in the belief that you will develop a plan of operation that will satisfactorily care for the needs of both parties to the contract.

CCB/R
CC-Messrs. MacLane, Priest
and Clogher

Yours very truly,



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Affidavit of Michael C. Orr
In re SRBA Case No. 39576
Subcase No. 01-02064 (American Falls Storage Subcase)

EXHIBIT 53:

Letter from James L. Boone, Secretary, Idaho Power
Company, to Mr. Hibbard, Vice President,
Idaho Power Company, May 29, 1931.

May 29, 1931.

Mr. Hibbard:

Yesterday evening, I had a conference with Mr. Stoutemyer relating primarily to the Twin Falls Federal Power license and, secondarily, to the agreement which the irrigators are negotiating with the Government for storage water at American Falls. The matters which he volunteered for discussion were so important that I think it quite advisable to reduce them to writing.

The discussion indicated very clearly to me that we may expect little concession from the Department of Reclamation in the way of further prior rights to the use of the waters of Snake River so far as the same may be available for irrigation use at, or at points above, Milner Dam. This view confirms in some respects a conversation I had not long back with Mr. Hoyt May, United States District Attorney, the latter telling me that sooner or later the issue must be drawn and decided between the use of the waters of Snake River for irrigation purposes and the use of those waters for power purposes. Mr. Stoutemyer said that he was firmly of the opinion, and likewise everybody else connected with the Reclamation Department, that it was the duty of that Department, so far as it was within its power to do so, to preserve for Southern Idaho the waters of Snake River for irrigation purposes. He quite frankly stated that necessity may arise which will require the condemnation of such parts of our power rights at American Falls and Shoshone Falls which may be further essential for irrigation purposes.

He said that so far as he and his associates were concerned, they thought we, or anyone else developing power, should be quite well satisfied to make such developments at points below Shoshone Falls, taking advantage of the springs flow and the return flow. I told him that so far as our Twin Falls site was concerned, we had considerable money invested in preliminary developments and we felt it advisable to take any and all necessary steps to perfect our rights at that point. I pointed out particularly the impossibility of financing under the clause for the Twin Falls license which the Reclamation Department had suggested. I asked him if he had taken into consideration the flow between Milner Dam and the Twin Falls site and whether he would have any objection to our superior and prior use to those waters. He said that he did not think so and felt that we might reach some satisfactory agreement in relation to those waters. I told him I thought it was quite necessary that we have some prior and superior rights in addition to the flow between Milner Dam and Twin Falls. It was very clear to me that it is not his nor the Reclamation Department's intention that we shall gain, without his or their serious protest, any further prior rights to water of Snake River which may be used for irrigation purposes at or above Milner Dam. My conclusion is that we may be able to negotiate a clause which will give us a prior and superior right to those waters which originate between Milner Dam and Twin Falls site, but, as to other waters

originating above Milner Dam, I doubt whether we stand much chance in gaining approval of Mr. Stoutsmyer or anyone else in the Reclamation Department. He was very out-spoken in the beginning to say that this clause was not necessarily his own but had received the sanction of everyone concerned, but that he felt that it, as drawn, represented at that time the views of all concerned.

He, incidentally, mentioned Mr. Williamson of the Federal power Commission as a man who has had considerable experience in irrigation and power matters, especially as conflict between the two uses of water may possibly arise. Whether the matter of the Twin Falls license had been discussed with Mr. Williamson, Mr. Stoutsmyer did not say, but he did infer that he felt that Mr. Williamson would be very much given to the Reclamation Department's ideas thereon.

It does occur to me that the question of how far we should go in attempting to press our claims for prior use of water originating at or above Milner Dam presents a very serious question for us. My personal opinion is that we should go very slow before any attempt is made to press claims which will be antagonistic to those expressed in this letter as the views of Mr. Stoutsmyer and the Department of Reclamation.

In reading Mr. Clogher's correspondence and in talking with Mr. Senger, I arrive at the conclusion that a very desirable peak load plant of approximately 15,000 kw capacity can be developed at Twin Falls site, relying primarily on the return flow between Milner Dam and the Twin Falls site and such other waters as may from time to time be released at Milner Dam, but to which we would have no prior call or prior rights therein.

Any further negotiations by us with Mr. Stoutsmyer in this matter will be held in abeyance until further instructions are received.

As to the contract between the irrigators and the Government for further use of the waters at American Falls, I advise that the conference between Mr. Stoutsmyer and Mr. Shepherd had been postponed until Saturday, May 30th. He said that the matter had proceeded to the point of negotiating a contract between the irrigators and the Government which covered (1) the price of the water, (2) the conditions of the use of water, and (3) our consent to the contract so that the instructions of the irrigators to the Government to shut off water in the late fall, or such time thereafter as the irrigators might direct, would be binding on us. He said that so far as he was concerned, our present contract would stand. However, with the new contract between the irrigators and the Government, it occurs to me that, at least for the immediate future, we may well expect that orders will be given to the Government by the irrigators to withhold release of any waters until the reservoir is full. As to the conference which is to be held on May 30th, I asked Mr. Stoutsmyer to give us a memorandum on the same. He said that he would be pleased to do this.

Mr. Stontenyer was also interested in the trade of kilowatt hours, which he said he had taken up with you sometime back and concerning which he had not heard from you. This trade, as I understood him, was a matter of getting kilowatt hours from us for use of irrigators now supplied by them in this section of the state, which kilowatt hours would be returned to us at American Falls. I told him I was not familiar with this matter and that it would necessarily have to await your return.

James L. Boone.

JLB/B

Affidavit of Michael C. Orr
In re SRBA Case No. 39576
Subcase No. 01-02064 (American Falls Storage Subcase)

EXHIBIT 54:

Excerpted pages of "Federal Power Commission,
License on Government Lands, Project No. 18, Idaho,
Idaho Power Company," May 11, 1934.

FR-481

RECEIVED
FEDERAL POWER COMMISSION
JUN 1 - 1964
WASHINGTON, D.C.

FEDERAL POWER COMMISSION

WASHINGTON, D. C.



DEPARTMENT OF GOVERNMENT LANDS

Project No. 13, Idaho

Idaho Power Company



11-1

U. S. GOVERNMENT PRINTING OFFICE: 1954

THE FEDERAL POWER COMMISSION

LICENSE ON GOVERNMENT LANDS

Project No. 18

Idaho

Idaho Power Company

WHEREAS, by Act of Congress, approved June 10, 1920 (41 Stat., 1063) designated therein as "The Federal Water Power Act" and hereinafter called "the Act," the Federal Power Commission, hereinafter called "the Commission," is authorized and empowered, inter alia, to issue licenses for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development, transmission and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam; and

WHEREAS, Idaho Power Company, -----
hereinafter called "the Licensee," a corporation -----
organized and existing under the laws of the State of Maine -----
and having its office and principal place of business in the city of
Boise, ----- in the State of Idaho, ----- has,
pursuant to the provisions of a preliminary permit issued on the 30th day
of April 1924, -----

11-32-b

made application in due and proper form to the Commission for a license for a power project designated as Project No. 18 on the records of the Commission, and for authority to construct, maintain and operate, at on Snake River at Twin Falls, in the vicinity of Jerome and Twin Falls, in the counties of Jerome and Twin Falls. State of Idaho, - - - - - certain project works, as hereinafter described, necessary or convenient for the development, transmission and utilization of power, and to occupy and use therefor certain lands of the United States, as hereinafter described together with all riparian rights appurtenant thereto which are necessary or useful for the purposes of the project; and

WHEREAS, the Licensee has submitted to the Commission satisfactory evidence of its compliance with the laws of the State of Idaho, as required by Section 9, subsection (b) of the Act, and the Commission is satisfied as to the ability of the Licensee to carry out the plans for said project as filed with said application; and

WHEREAS, notice of said application has been given and published by the Commission, as required by Section 4 of the Act; full opportunity has been given to all interested parties to be heard, and no application for said project, or in conflict therewith, has been filed by any State or municipality; and

WHEREAS, the maps, plans and specifications of said project and of said project works, as hereinafter described, have been approved by the Commission, and the Commission has found that said project, as hereinafter described, will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of water-power development and of other beneficial public uses, and that the license will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired; and

WHEREAS, the Commission, by order adopted at its meeting of September 16, 1933, waived Order No. 27, with respect to said project, and, therefore, the determination of the preliminary cost thereof will not be required prior to the issuance of a license; and - - - - -

WHEREAS, the Licensee, on the 12th day of May, 1934, pursuant to an authorization of its board of directors, a copy of the record thereof being hereto attached, accepted in writing all the terms and conditions of the Act and of this license;

NOW, THEREFORE, the Commission hereby issues this license to the Licensee for the purpose of constructing, operating and maintaining upon the lands of the United States hereinafter designated and described, certain project works necessary or convenient for the development, transmission and utilization of power and constituting a part of the project hereinafter described, and of authorizing in connection with and as a part of said project the occupancy and/or use by the Licensee of said lands of the United States and of all riparian rights appurtenant thereto which are necessary or useful for the purposes of the project; said license, including the period thereof, being subject to all the terms and conditions of the Act and of the rules and regulations of the Commission pursuant thereto as amended and made effective on the 23rd day of June, 1930, as though fully set forth herein, which said rules and regulations are attached hereto and made a part hereof, and being subject also to the following express conditions and limitations, to wit:

Article 1. This license is issued for a period of fifty (50) years from the date hereof, and in consideration of such license and the benefits and advantages accruing thereunder to the Licensee it is expressly agreed by the Licensee that the entire project, project area and project works as hereinafter designated and described, whether or not upon lands of the United States, shall be subject to all the terms and conditions of this license, including the terms and conditions of the Act and of the rules and regulations of the Commission pursuant thereto and made a part of this license.

Article 2. The project covered by and subject to this license is located partly on lands of the United States, - - - - - and consists of—

A. All lands constituting the project area and inclosed, or the location of which is shown, by the project boundary, and/or interests in such lands necessary or useful for the purposes of the project, whether such lands or interests therein are owned or held by the Licensee or by the United States; such project area and project boundary being more fully shown and described by certain exhibits which accompanied said application for license and which are designated and described as follows:

Exhibit J: Sheet 1, Map designated "General Map of Entire Project" (F.P.C. No. 18-10);

Exhibit K: Sheet 3, Map designated "General Plan of Development (F.P.C. No. 18-13);

B. All water rights which are more fully described in a certain exhibit, which accompanied said application for license, and which is designated and described as follows:

Exhibit E: One typewritten sheet entitled "Statement of the nature, extent, and ownership of water rights," signed Idaho Power Company by M. L. Hibbard, Vice-President and General Manager, and received in the office of the Federal Power Commission with the application for license on June 21, 1930.

C. All project works consisting of a reinforced concrete dam, a penstock, a power house, and appurtenant works, the location, nature, and character of which are more fully shown and described by certain exhibits which accompanied said application for license and which are designated and described as follows:

Exhibits J and K: Cited above.

Exhibit L: Plans, in 3 sheets, designated:
"Plan of Power House, Intake, and South
Channel Dam" (F.P.C. No. 18-14);
"Dam - Profile and Section" (F.P.C. No. 18-15);
"Power House Plan and Section through Power
House, Penstock, and Intake" (F.P.C. No. 18-16);

Exhibit M: Two typewritten sheets designated "Description
of Mechanical, Electrical, and Transmission
Equipment," signed Idaho Power Company by M. L.
Hibbard, Vice-President and General Manager.

D. All other structures, fixtures, equipment, or facilities used or useful in the maintenance and operation of the project, whether owned by the Licensee or by the United States, and located upon the project area, including such portable property as may be used and useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as a part of the project works is approved or acquiesced in by the Commission; also all other rights, easements, or interests, including said riparian rights, the ownership, use, occupancy or possession of which is necessary or appropriate in the maintenance and operation of the project or appurtenant to the project area.

Article 3. The maps, plans, specifications, and statements designated and described in Article 2 hereof as Exhibits J, K, E, L, and M, respectively, and approved by ~~the Executive Secretary for the Commission in the Commission's~~ accordance with ~~its~~ authorization of December 22, 1933, are hereby made a part of this license, and no substantial change shall hereafter be made in said exhibits, or any of them, until such change shall have been approved by the Commission: Provided, however, that if the Licensee deems it necessary or desirable that said approved maps, plans, specifications and statements, or any of them, be changed there shall be submitted to the Commission for approval amended, supplemental, or additional maps, plans, specifications and statements covering the proposed changes, and upon approval by the Commission of such proposed changes such amended, supplemental or additional maps, plans, specifications and statements shall become a part of this license and shall supersede, in whole or in part, such map, plan, specification, or statement, or part thereof, theretofore made a part of this license as may be specified, respectively, in the order or endorsement of approval.

Article 4. Said project works shall be constructed in substantial conformity with the approved maps, plans and specifications thereof made a part of this license and designated and described in Articles 2 and 3 hereof or as changed in accordance with the provisions of said Article 3. Except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed under this license without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission shall direct. Minor changes in or divergence from such approved maps, plans, and specifications may be made in the course of construction, if such changes will not result in decrease in efficiency, in material increase in cost, or in impairment of the general scheme of development; but any such minor changes made without the prior approval of the Commission which in its judgment have produced or will produce any of such results shall be subject to such alteration as the Commission may direct.

Article 5. The work of construction under this license, whether or not conducted upon lands of the United States, shall be subject to the inspection and approval of the District Engineer, U.S. Geological Survey, Boise, Idaho, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall notify such representative of the date upon which work will begin, and as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of construction for a period of more than one week, and of its resumption and completion.

Article 6. Subject to the provisions of Section 13 of the Act, the Licensee shall begin the construction of the project works on or before May 1, 1935, and shall thereafter in good faith and with due diligence prosecute such construction; and shall on or before November 30, 1937, complete the initial installation with dam crest to elevation 3,507 feet above sea level, and shall complete the dam to a crest elevation of 3,550 feet at such time as the Commission may direct.

Article 7. Upon the completion of the project works, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised maps, plans, specifications, and statements, in so far as necessary to show any divergence from or variations in the project area as finally located or in the project works as constructed when compared with the area shown and the works designated or described in this license or in the maps, plans, specifications, and statements approved by the Commission under the provisions of Article 3 hereof, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variations in or divergence from the approved maps, plans, specifications, and statements. Such revised maps, plans, specifications, and statements shall, if and when approved by the Commission, be made a part of this license and shall, to the extent and in the particulars set forth in the order or endorsement of approval, be substituted for the maps, plans, specifications and statements theretofore approved by the Commission under the provisions of Article 3 hereof. The maps finally approved by the Commission and made a part of this license under the provisions of Article 3 and/or 7 hereof shall show the project area to an adequate scale and the boundary thereof either by legal subdivisions, by metes and bounds survey, or by uniform offsets from center-line survey. Said project area shall include all lands without respect to ownership and whether or not the exact boundaries can be definitely fixed and determined, the use and occupancy of which are or will be valuable or serviceable in the maintenance and operation of the project; on which are located or to which are appurtenant the project works (other than portable property) and the rights, easements, or interests likewise valuable and serviceable; and the ownership or possession, or the right of use and occupancy, of which are subject to acquisition by the United States under the provisions of Section 14 of the Act. Said maps shall show the ownership of each parcel of land in said project area, and with respect to each parcel to which the Licensee has not the fee title, the character of the right of use and occupancy possessed by the Licensee together with the term of such right.

Article 8. For the purpose of determining the stage and flow of the stream or streams from which water is to be diverted for the operation of said project works and of the amount of water held in and drawn from storage, the Licensee shall install a substantial staff gage in the pool, and a standard gaging station equipped with a recording gage below the plant, and

shall provide for the required readings of such gages and for the adequate rating of said station or stations. The Licensee shall also install and maintain standard meters adequate for the determination of the amount of electric energy generated by said project works. The number, character, and location of gages, meters or other measuring devices, and the method of operation thereof may be altered from time to time if necessary to secure adequate determinations, but such alteration shall not be made except with the approval of the Commission or its authorized representative or upon the specific direction of the Commission. The installation of gages, the ratings of said stream or streams, and the determination of the flow thereof, shall be under the supervision of ~~the District Engineer of the U. S. Geological Survey~~ ^{or in cooperation with}

----- having charge of stream gaging operations in the region of said project, and the Licensee shall advance to ~~reimburse the said United States Geological Survey for costs incurred in such supervision or for such part thereof as said District~~ ^{the amounts estimated to be necessary for} ~~may deem equitable in the circumstances.~~ The Licensee shall keep accurate and sufficient record of the foregoing determinations to the satisfaction of the Commission, shall make return of such records annually, at such time and in such form as the Commission may prescribe.

Article 9. The Licensee shall be liable for all damages occasioned to the property of others by the construction, maintenance or operation of said project works, or of the works appurtenant or accessory thereto, and in no event shall the United States be liable therefor.

Article 10. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto constructed under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 11. Timber upon lands of the United States, to be used or destroyed in the construction of the project works, shall be paid for in accordance with the requirements and estimates of the Department concerned.

Article 12. In the construction and maintenance of the project works herein specified, the Licensee shall place and maintain suitable structures to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling and obstructing traffic and endangering life on highways, streets, or railroads.

Article 13. Before beginning construction, the Licensee shall prepare and submit plans for the initial section of the dam to an elevation of 3,507 feet, and before raising the crest of the dam above the initial elevation of 3,507 feet, the Licensee shall prepare and submit plans for preventing erosion below the downstream toe of the structure and shall secure the approval thereof by the Commission.

Article 14. As a condition of this license, the Licensee, for itself, its successors and assigns, hereby stipulates and agrees that all rights to the use of water for power purposes heretofore or hereafter acquired for the development of power at the site of this project shall be held and considered at all times to be subject, inferior, and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation purposes, except (a) the right to use for power development at this project the water from the 45,000 acre-feet of primary storage capacity which the Licensee holds in American Falls Reservoir under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923, and the discharge of which it may control under the terms of said contract; (b) the right to use for power development at this project the seepage, percolation, drainage, spring or springs, waste, and/or other influent waters which do not flow or spill over Milner Dam but which enter in, arise in, and flow in and along the channel of Snake River between the down-stream toe of Milner Dam in Snake River, Idaho, and the site of the project covered by this license. Licensee further agrees, for itself, its successors and assigns, to forego any and all claims which it might otherwise have for damages or other relief, in connection with any power rights at the site of this project, other than those mentioned in (a) and (b) above and which are necessary for irrigation purposes, and it is mutually agreed by the parties hereto that this license neither expressly nor impliedly has modified, relinquished, abandoned, or surrendered, nor does hereby modify, relinquish, abandon, or surrender any of the Licensee's rights and privileges under said contract of June 15, 1923, nor any of its rights and privileges heretofore or hereafter acquired to the use of water or waters for power purposes at any other point or points.

This stipulation and agreement shall be considered as a covenant running with the title to the said power plant at Twin Falls, and all rights in connection therewith, and the Licensee agrees to execute and acknowledge under authority of a suitable resolution of its board of directors, a recordable contract or deed embodying the provisions, conditions, and limitations set out in the foregoing stipulation and agreement, so that the same may be recorded in the counties in which said power sites are located.

This stipulation shall be effective to bind the Licensee and its successors and assigns, without signature or execution by or on behalf of the United States, and shall become effective for such purpose upon the execution of the license.

Article 15. The Licensee shall, before placing any transmission line into operation, make provision satisfactory to the Commission for avoiding inductive interference between such transmission line and any existing telephone line or lines of the United States, or with any such line or lines for which location has been made and specifications prepared but upon which construction has not begun at the time of erection of said transmission line. Such provisions may be applied either to the transmission line or to the telephone line or to both, as may be determined upon the basis of least cost. The Licensee hereby agrees to assent to such changes in the location or design of any of its transmission lines as may in the opinion of the Commission be necessary or desirable in order to avoid inductive interference with any telephone line or lines of the United States hereafter constructed or proposed to be constructed, provided such changes are made at the expense of the United States.

Article 16. The Licensee shall clear the bottoms and margins of all reservoirs up to high-water level, shall clear and keep clear to an adequate width lands of the United States along open conduits and along transmission lines, and shall dispose to the satisfaction of said representative of the Commission of all temporary structures, brush, refuse, or unused timber on lands of the United States resulting from the clearing of lands or from the construction and maintenance of said project works.

Article 17. The Licensee shall allow officers and employees of the United States free and unrestricted access in, through and across the said project and project works in the performance of their official duties.

Article 18. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this license shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of War. Such rules and regulations may include the maintenance and operation by the Licensee at its own expense of such lights and signals as may be directed by the Secretary of War, and such fishways as may be prescribed by the Secretary of Commerce.

Article 19. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of War, as may be necessary for the purposes of navigation and the operations of the Licensee so far as they affect the use, storage, and discharge from storage of waters affected by this license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of War may prescribe in the interests of navigation and as the Federal Power Commission may prescribe in the interests of flood control and of the fullest practicable use of said waters for power purposes.

Article 20. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with said project, the Licensee shall convey to the United States free of cost, such of its lands and its rights of way, and such right of passage through its dam or other structures and permit such control of pools as may be required to complete such navigation facilities.

Article 21. The Licensee shall construct and install such appliances as are necessary for furnishing power for the operation of navigation facilities, including lights and signals, whether constructed by the Licensee or by the United States; and shall furnish free of cost to the United States power for the operation of such navigation facilities.

Article 22. Upon the completion of the construction of said project or of each of the separable parts thereof for which dates of completion are specified in Article 6 hereof, or of any addition to or betterment of said project, the Licensee shall file with the Commission a statement under oath in duplicate showing the actual legitimate cost of construction thereof and the price paid for water rights, lands, or interest in lands appurtenant to such construction as required by Regulation 20, Section 2, of said rules and regulations of the Commission. Any such statement shall include all proper and legitimate costs, whether incurred prior to issuance of license or on and after such date; and the Licensee shall, if requested by the Commission, show separately on any such statement, or on a special report or reports, the items and amounts of cost incurred prior to date of issuance of license, with such other details as the Commission may require. Each and every item of cost included in any such statement shall be supported by proper voucher or other evidence; and any such voucher or evidence or certified copy thereof, in support of any item properly includible in said cost shall become a part of the permanent records of said project and shall be kept and retained by the Licensee in the manner required by the Commission. Any statement or report submitted to the Commission under the provisions of this article shall be subject to the provisions of Section 6 of said Regulation 20.

Article 23. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of such reservoir or other improvement for such part of the annual charges for interest, maintenance and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by the Licensee shall be determined from time to time by the Commission. Whenever such reservoir or other improvement is constructed by the United States the Licensee shall pay similar charges into the Treasury of the United States upon bills rendered by the Commission.

Article 24. The Licensee shall pay to the United States reasonable annual charges for the purpose of reimbursing the United States for the costs of the administration of the Act and for recompensing it for the use, occupancy and enjoyment of its lands or other property hereinbefore described. The payment by the Licensee of such annual charges for any calendar year shall be made to the United States at the end of the year, or within thirty days thereafter, upon bills rendered or approved by the Commission. Such charges shall be determined in accordance with the provisions of Regulation 14 of said rules and regulations of the Commission, and for the purposes of such determination ~~the power capacity of the project shall,~~ subject to the provisions of section 3 of said regulation 14, be taken as 7,670 horsepower.

Article 25 After the first twenty years of operation of said project under this license, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the actual, legitimate investment of the Licensee in said project, all as defined in and determined by the provisions of regulation 17 of said rules and regulations of the Commission, the Licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return shall, subject to the proviso of paragraph A, section 3 of said regulation, be one and one-half ($1\frac{1}{2}$) times the weighted average annual interest rate payable on the par value of the bona fide interest-bearing debt of the Licensee actually outstanding, in whole or in part, on account of project property at the beginning of the period of amortization and of each calendar year thereafter; such weighted average annual interest rate being determined as provided in paragraphs B and C of section 3 of said regulation 17: Provided, That, if at the beginning of the period of amortization or of any calendar year thereafter, the outstanding interest-bearing debt of the Licensee on account of the project or projects under license, together with any other works or property operated in connection therewith, is less than 25 per cent of the actual, legitimate investment of the Licensee in said project or projects, then and in such event for the calendar year next following the specified rate of return shall be two (2) times the legal rate of interest in the State in which the project or major part thereof is located.

Subject to the provisions of section 6 of said regulation, the following proportions of such surplus earnings shall be paid into and held in such amortization reserves: Of all surplus earnings up to and including 2 per cent upon the actual, legitimate investment, 30 per cent thereof shall be so paid; of all surplus earnings in excess of 2 per cent and not in excess of 4 per cent upon such investment, 50 per cent thereof shall be so paid; of all surplus earnings in excess of 4 per cent and not in excess of 6 per cent, 70 per cent thereof shall be so paid, and of all surplus earnings in excess of 6 per cent, 90 per cent thereof shall be so paid: Provided, That if at the end of any calendar year of the amortization period the Commission shall find that the accumulated earnings of the Licensee during the period of operation, including the first twenty (20) years thereof, have not yielded a fair return upon the actual, legitimate investment in the project or projects under license, the proportion of such surplus earnings for such calendar year and for succeeding calendar years to be paid into such amortization reserves shall be ten (10) per cent thereof until such time as the accumulated earnings of the Licensee represent, in the judgment of the Commission, a fair return upon such investment for such period of operation.

Article 26 No lease of said project or part thereof whereby the lessee is granted the exclusive occupancy, possession, or use of project works for purposes of generating, transmitting, or distributing power shall be made without the prior written approval of the Commission; and the Commission may, if in its judgment the situation warrants, require that all the conditions of this license, of the Act, and of said rules and regulations of the

Commission shall be applicable to such lease and to such property so leased to the same extent as if the lessee were the Licensee hereunder: Provided, That the provisions of this article shall not apply to parts of the project or project works which may be used by another jointly with the Licensee under a contract or agreement whereby the Licensee retains the occupancy, possession, and control of the property so used and receives adequate consideration for such joint use, or to leases of land while not required for purposes of generating, transmitting, or distributing power, or to buildings or other property not built or used for said purposes, or to minor parts of the project or project works the leasing of which will not interfere with the usefulness or efficient operation of the project by the Licensee for said purposes.

Article 27. It is hereby understood and agreed that the Licensee, its ~~(his)~~ successors and assigns will, during the period of this license, retain the possession of all project property covered by this license as issued or as hereafter amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and that none of such properties valuable and serviceable to the project and to the development, transmission, and distribution of power therefrom will be voluntarily sold, transferred, abandoned, or otherwise disposed of without the approval of the Commission: Provided, That a mortgage or trust deed or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article. The Licensee further agrees, on behalf of itself ~~(himself)~~, its ~~(his)~~ successors and assigns, that, in the event said project is taken over by the United States upon the termination of this license, as provided in Section 14 of the Act, or is transferred to a new Licensee under the provisions of Section 15 of the Act, it ~~(he)~~ will be responsible for and will make good any defect of title to or of right of user in any such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge or will assume responsibility for payment and discharge of all liens or incumbrances upon said project or project property created by said Licensee or created or incurred after the issuance of this license: Provided, That the provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear, or to require the Licensee for the purpose of transferring the project to the United States or to a new Licensee to acquire any different title or right of user in any such project property than was necessary to acquire for its ~~(his)~~ own purposes as Licensee.

Article 28. The Licensee shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is

rendered or the rate charged; and in case of the development, transmission, distribution, sale or use of power in public service by the Licensee or by its customers engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by the Licensee or by its customers engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of this license that jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: Provided, That the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this Article as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

Article 29. With the written consent of the Licensee, the Commission may by order made under its seal, and after the public notice required by Section 6 of the Act, modify, alter, enlarge or omit, in so far as authorized by law, any one or more of the conditions or provisions of this license.

Article 30. The enumeration herein of any rights reserved to the United States or to any State or municipality under the Act, or of any requirement of the Act or of said rules and regulations of the Commission shall not be construed in any degree as impairing any other rights so reserved by the Act or as limiting the force of any other requirement of said Act or of said regulations.

IN WITNESS WHEREOF, the Federal Power Commission has caused its seal to be hereto signed and affixed by its Frank R. McNinch, its Chairman, this 11th day of June, 1934, pursuant to an order of the Commission issued December 22, 1933, and amended April 24, 1934.

FEDERAL POWER COMMISSION

Frank R. McNinch
Chairman.
Executive Secretary.

Attest:

Grace E. Ferguson
Acting Secretary.

11-82-n

IN TESTIMONY OF ACCEPTANCE of all the terms and conditions of the Federal water power act of June 10, 1920, and of the further conditions imposed in the foregoing license, the Licensee, this 12th day of May, 1934, has caused its name and corporate seal to be here- to signed and affixed by K. M. Robinson, its President, pursuant to a resolution of its board of directors, passed on the 11th day of May, 1934, a certified copy of the record thereof being hereto attached.

IDAHO POWER COMPANY

By K. M. Robinson
President.

Attest:

James L. Brown
Secretary.

U. S. GOVERNMENT PRINTING OFFICE

FFH*EKM
1-11-34

Executed in triplicate.

WWS

Affidavit of Michael C. Orr
In re SRBA Case No. 39576
Subcase No. 01-02064 (American Falls Storage Subcase)

EXHIBIT 55:

Idaho Power Company, Minutes of Special Meeting
of Board of Directors, May 11, 1934.

IDAHO POWER COMPANY
Minutes of Special Meeting
of Board of Directors
May 11, 1934.

A special meeting of the Board of Directors of the Idaho Power Company was held at the office of the Company in the Company's General Office Building at 1220 Idaho Street, Boise, Idaho, on Friday, May 11, 1934, at 10 o'clock A. M., pursuant to a call of the Vice President of the Company and a notice of the meeting duly given in writing more than five days prior to the date of the meeting.

* * * * *

The Chairman then announced that it was necessary to procure authority from the Federal Power Commission to construct, maintain and operate certain project works on Snake River at Twin Falls, in the vicinity of Jerome and Twin Falls, in the Counties of Jerome and Twin Falls, State of Idaho, and that the Federal Power Commission had submitted a proposed form of license. The said proposed license was then presented to the meeting and considered at length. Whereupon, it having been moved by Mr. Dewey, seconded by Mr. Standrod, the following resolution was unanimously adopted:

"RESOLVED that all the terms and conditions of the Federal Water Power Act of June 10, 1920, and all the terms and conditions of the proposed Federal Power Commission license for Project No. 18, giving Idaho Power Company authority to construct, maintain and operate certain project works on Snake River at

Twin Falls, in the vicinity of Jerome and Twin Falls, in the Counties of Jerome and Twin Falls, State of Idaho, be, and the same hereby are, accepted, and the officers of the Company are hereby authorized and directed to execute the said license, thereby accepting, in writing, for and on behalf of the Company the terms and provisions of said act and license; and

"BE IT FURTHER RESOLVED that the officers of this Company are hereby authorized to execute and acknowledge a recordable contract or deed embodying the provisions, conditions and limitations set out in the stipulation and agreement contained in Article 14 of Federal Power Commission license for Project No. 18, Idaho, Idaho Power Company."

* * * * *

STATE OF IDAHO,
COUNTY OF ADA.

} ss.

I, James L. Boone, Secretary of the Idaho Power Company, hereby certify:

Attached hereto is a true and correct copy of a portion of the minutes of the special meeting of the Board of Directors of the Idaho Power Company held on the 11th day of May, 1934.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of said Company this 18th day of May, 1934.

(CORPORATE SEAL)

James L. Boone
Secretary.

Affidavit of Michael C. Orr
In re SRBA Case No. 39576
Subcase No. 01-02064 (American Falls Storage Subcase)

EXHIBIT 56:

Letter from D.F. McGee, Electric Bond and Share Company, to M.L. Hibbard, Vice President and General Manager, Idaho Power Company, September 30, 1931.

C O P Y
ELECTRIC BOND AND SHARE COMPANY
TWO RECTOR STREET
NEW YORK

September 30, 1931

Mr. M. L. Hibbard, V.P. & G.M.,
Idaho Power Company,
Boise, Ida.

Twin Falls License.

Dear Mr. Hibbard:

I am attaching copy of a clause to be inserted in the Twin Falls License to meet the objections of Mr. Stoutemyer to the one which was originally proposed. The attached paragraph was suggested by Mr. A. C. Glogher and submitted to our lawyers, and is the result of their joint work.

I would ask that you and Mr. Boone study this carefully, and if you feel that it satisfactorily meets the situation, that you and Mr. Boone present it to Mr. Stoutemyer with a statement that it has not yet been submitted to the Board of Directors, but that it will be necessary to so submit it before it would be acceptable.

You will note that this clause reserves to the Company the use of 45,000 acre feet at Twin Falls, but relinquishes the claim of the Idaho Power Company to any vested right in the 255,000 acre feet for use at Twin Falls, although of course both the 45,000 and the 255,000 acre feet under the terms of the contract can be used at other plants of the company. I am not sure whether the Board of Directors would approve this clause, but it is the best we can think of at present, and I feel that Mr. Stoutemyer would be willing to allow us the 45,000 acre feet at Twin Falls if we give up the 255,000 acre feet at this site. I think it is very important that we do not relinquish any rights which we have under the contract of June 15th, 1925. After you have studied this matter further, and had an opportunity to discuss it with Mr. Stoutemyer, I shall be glad to have your further ideas on the subject.

Yours very truly,

(Sgd.) D. F. McGee

DFM/vk

Enc.

CC Mr. K. R. MacKinnon
" M. O. Leighton

IPC048597

Affidavit of Michael C. Orr
In re SRBA Case No. 39576
Subcase No. 01-02064 (American Falls Storage Subcase)

EXHIBIT 57:

Letter from B.E. Stoutemyer, District Counsel, United States Bureau of Reclamation, to the Commissioner of the United States Bureau of Reclamation, March 20, 1934.

603 Postoffice Building
Portland, Oregon
March 20, 1934.

From District Counsel
To Commissioner
Subject: American Falls Power Plant and related
matters. Minidoka Project.

1. On March 10 I received a telegram from
Mr. Darlington, reading:

"Attorneys Lowe, Bothwell and Parry meeting
Twin Falls Wednesday to draft form contract
along lines power company proposal. Minidoka
Irrigation District wants you present repre-
senting Bureau interests. Can you come Idaho
Tuesday."

and in response, I started for the Minidoka project
Monday night (March 12).

2. At Boise Judge Cavanah got on the train
en route to Pocatello (where he was to open court
the next day) and I had an opportunity to discuss a
number of matters with him between Boise and Shoshone.
Judge Cavanah expressed himself quite freely in regard
to his views concerning the Schodde case, which has
just been decided by the Circuit Court of Appeals and
concerning which I am writing you a separate letter.

3. Mr. Darlington met me at Shoshone and we
drove across the Gooding project, a part of the Twin
Falls project, and the Minidoka project to Burley.

4. The Minidoka project, in common with all
parts of the Pacific Slope, has experienced a very
unusual winter, with hardly any cold weather and the
season about a month earlier than usual. The snow fall
in the mountains at the head waters of the Snake River
and the Boise River has been very light and it is an-
ticipated that there will be a rather serious water
shortage during the coming irrigation season. On
the Snake River, with the reservoir capacity already

provided, there would be no serious trouble from one very low water year. The difficulty is that we have had so many abnormally low water years, one after another, that the situation is becoming somewhat disturbing and some people, including Mr. Shepherd and Mr. Crandall (water master on the Snake River and deputy state commissioner of reclamation) express a view that we may have to conclude that the extreme low water years which we have had so frequently during the last seven years are the normal condition to be expected rather than the much higher runoff which generally occurred during the 30 years preceding the time that the American Falls reservoir was built.

5. On the way from Shoshone to Burley, Mr. Darlington explained to me that the representatives of the two Twin Falls companies and also the representatives of the Burley district seem to have had a change of heart since our conference at Boise concerning the construction of the American Falls power plant. You will remember that when we met at Boise, the consensus of opinion was very strongly in favor of rejecting the power company's proposal and proceeding with the construction of the power plant at American Falls. Mr. Darlington explained that at the present time some of the companies and districts in the Snake River Valley, including the North Side Canal Company and the Twin Falls Canal Company, seemed disposed to favor the acceptance of the power company's proposal because such parties had been led to believe that more water could be saved for storage in the American Falls reservoir by accepting the power company's proposal than by constructing our own power plant. Mr. Darlington and I are both convinced that in so far as there now appears to be any disposition to favor acceptance of the proposal of the Idaho Power Company on the theory that more water would be saved in that way, the parties so favoring such acceptance are mistaken.

6. At the present time the Burley district is inclined to favor the acceptance of the proposal of the Idaho Power Company for the reason that the Burley district is now securing 96% of the profits from the government power plant at the Minidoka dam, although half of the power sold from the Minidoka power plant for commercial purposes is sold in the Minidoka Irrigation District. In other words, the Minidoka district furnishes 50% of the market which yields the power profit, and also two-thirds of the dam which creates the power possibility, but receives only 4% of the power profits. The controversy

which has existed for a number of years between the Minidoka district and the Burley district on this question still continues and to a considerable extent accounts for the present attitude of both the Minidoka district and the Burley district in regard to the advisability of accepting the proposal of the Idaho Power Company.

7. The Burley district would like very much to have another power unit constructed at the Minidoka dam but realizes that if a power plant is constructed by the government at American Falls, the secretary's decision awarding 96% of the profits from the power plant at the Minidoka dam to the Burley district would have no application to the power plant at American Falls and power might be sold from that plant for use in the Minidoka district upon a basis which would permit the Minidoka district to share in the profits of commercial power sold from that source on a more liberal basis than the 4% to which it is now limited. This is the reason why the Burley district is now inclined to favor accepting the proposal of the Idaho Power Company. It also explains to some extent the very strong support which the Minidoka district is giving to the proposed construction of the power plant at American Falls and the strong opposition of the Minidoka district to the acceptance of the power company's proposal.

8. The Burley district is afraid that if we build the power plant at American Falls, the power situation will get out of their hands and they will not be able to secure the 96% of the power profits from sales on the Minidoka project as they are now doing. But it seems to me that this district has overlooked the fact that if we buy power from the Idaho Power Company at 3½ mills for summer power, with no charge for winter power (within certain limits), the control of the power profits under that condition would be just as much out of the hands of the Burley district as it would be if we built our own plant at American Falls. The secretary's decision as to division of the profits from the Minidoka power plant would not control the division of receipts from the sale of commercial power out of the power furnished by the Idaho Power Company under the proposed contract.

9. It is anticipated that there will be a severe water shortage during the coming irrigation season, particularly on Mr. Shepherd's project (North Side Twin Falls) owing to the fact that there will probably be no stored water at all in the top half of the Jackson Lake reservoir. You will recall that the Jackson Lake rights of the Twin Falls companies are altogether in the top half of the reservoir and that the North Side Company has about three-fourths (300,000 acre-feet) of the so-called "top rights" at Jackson Lake. Mr. Darlington thinks that there will be just about enough water to fill the bottom rights at Jackson Lake. The watermaster, Mr. Crandall, is even more pessimistic as to the probable water supply and predicts that the bottom rights at Jackson Lake will fill only to about 70%. While the North Side Twin Falls project has a large share in the water of the American Falls reservoir which will probably fill about 75%, that project will not have a full water supply unless it also secures some water out of its Jackson Lake right, particularly in a year like this when the normal flow of the river will probably drop at a very early date to a point which will shut the North Side company out of its right to divert natural flow.

10. The situation discussed in the preceding paragraph, together with the knowledge of the prospective construction of a reservoir on the North Fork of Snake River and the knowledge that if the North Fork reservoir is built the people on the North Fork will have to have some source of water supply to fill that reservoir, has spurred the representatives of the American Falls Reservoir District (particularly those on the North and South Side Twin Falls projects) and also the Burley district to telegraph to you and to the Secretary requesting the abandonment of the proposed North Side Pumping Division of the Minidoka project and the sale of all the American Falls rights reserved for that project to the companies and districts now having rights in the American Falls reservoir, and also specifically requesting that the Secretary shall not make any commitments to sell any of this water to the North Fork people. In other words, the Twin Falls companies and the Burley district and other parties who have been sending in these telegrams are not only trying to force the abandonment of the North Side Pumping division of the Minidoka project and the transfer to them of the water rights reserved for this project, but also to shut out the North Fork people from any opportunity to secure a water supply to store

in the North Fork reservoir. Perhaps I should not say that they want to shut the North Fork people out of a water supply but that is the effect of what they want as they want all the water for themselves. The people interested in the proposed reservoir on the North Fork have suggested that they be permitted to buy a sufficient amount of the government's reserved share of the American Falls reservoir capacity to entitle them to a sufficient water supply to replace in American Falls the water which will be taken to fill the North Fork reservoir. After discussing this situation with Mr. Darlington, I sent you a telegram as follows:

"Apparently the most feasible way to meet the insistent demands for largely increased storage rights both in Upper and Lower Snake Valley including water required to replace at American Falls water needed to fill North Fork Reservoir would be through enlargement American Falls Reservoir to three million acre feet capacity stop. Believe this sufficiently cheap to provide about three acre feet carry over capacity for each acre foot annual yield desired without prohibitive cost. Suggest that serious consideration be given to this solution and rough estimate cost of enlargement be made."

11. It occurs to me that if it is necessary to construct holdover reservoir capacity on Snake River to carry over the flood water of high water years for use during the low water years, the place for such construction is at the American Falls reservoir. If we have low water years as frequently as we have had them during the last seven years since the American Falls reservoir was completed, it will probably be necessary to provide about 3 acre-feet of storage capacity to insure an annual yield of 1 acre-foot of stored water in any additional reservoir capacity which may be added either by enlarging American Falls reservoir or constructing any other reservoir which has a later priority than that awarded to the American Falls reservoir. If additional storage capacity can be provided in the American Falls reservoir at a cost of from \$3.50 to \$4.50 an acre-foot, as I understand is the case, the cost of providing additional stored water, even on the basis of providing three acre-feet of capacity for each acre-foot of stored water desired, would not be prohibitive. But if we attempt to provide carry-over capacity in the proposed reservoir on the North Fork of Snake River, or

anywhere else where the cost would be upward of \$10 per acre-foot of capacity, I think the cost of providing three acre-feet of storage capacity for each acre-foot of water desired would probably be considered prohibitive. Furthermore, there is a better chance of filling carry-over capacity at American Falls than there would be at the proposed North Fork reservoir.

12. The canal companies in the Idaho Falls and Blackfoot section, which now get stored water from Jackson Lake direct and also by means of exchange of American Falls rights for Jackson Lake storage, also want more water but they are limited in the amount they can get not only by the limit of their rights in Jackson Lake and American Falls but also by the fact that if they could purchase additional storage rights in American Falls they might not be able to get the water in the low water years since in such extreme low water years the amount of bottom storage available for exchange in Jackson Lake may not be any more than the amount necessary to provide the rights already acquired in the Upper Snake River Valley.

13. When I met Mr. Darlington at Shoshone I found that the proposed meeting at Twin Falls had been postponed to the 15th on account of the fact that Judge Cavanah had set the argument on the motion to dismiss the case of American Falls Reservoir District No. 2 v. Crandall et al for the 14th. This gave me an opportunity to attend the hearing and the Assistant United States Attorney asked me to make the argument in support of the motion to dismiss. I believe we have already advised you that the United States District Attorney in this case filed on behalf of the Secretary of the Interior a motion to dismiss the bill of complaint and also a motion to have the other parties holding contracts in the American Falls Reservoir joined as defendants. This was substantially the same motion as that filed by Judge Bothwell and his Associates as attorneys for the defendants Crandall, Faris and American Falls Reservoir District.

14. Judge Bothwell and Mr. Parry (Mr. Shepherd's son-in-law) made the argument for the defendants Crandall, Faris and the American Falls Reservoir District, and Mr. Bissell made the argument for the plaintiff. I explained to the court the position which has been adopted by the Secretary of the Interior on this question, including the fact that the Secretary has made a decision on the issues involved, namely that inasmuch as both of the rights in dispute were decreed by the court and awarded by the

state engineer to the same party and under exactly the same date of priority, the Secretary as the holder of both these decreed rights under the same date of priority would have the right to determine which of the two rights held by him under the same priority should be filled first out of the water available to fill a priority of that date and that the Secretary had concluded that it would be most equitable that neither of the contending parties should be given all of the advantage every year to the preference right to divert the water available for a priority of this date and therefore that the preference should be given alternately, during one year to one party and during the next to the other, thus equalizing the benefits. I also advised the court that the officers of the Interior Department in charge of the American Falls reservoir would necessarily be governed by the decision of the Secretary of the Interior until the court decides the question involved and that we would therefore expect to distribute the water, so far as the same is under the control of the Reclamation Bureau, according to the Secretary's decision until there is either a final decree or a temporary order from the court determining how it should be distributed. I also advised the attorneys for the opposing parties that inasmuch as the American Falls reservoir had been given the preference last year, it would be the turn this year for District No. 2 to have the preference and that if the interested parties were not satisfied with this arrangement, it would be up to them to apply to the court for a temporary order directing the proper method of distributing the water in dispute during the coming irrigation season.

15. I think it would be a great help to the government officers in charge of the reservoirs if some kind of a court order should be made as to the determination of this question for the coming irrigation season. The preference right to divert the natural flow of Snake River available for the filling of priority under date of March 30, 1921 during the time that American Falls reservoir is filling is a right of considerable value, both to the Gooding division and to the other parties interested in the American Falls reservoir. As both of these projects are government projects, it is somewhat embarrassing to the government officers to be compelled to make a decision on this question, which decision must necessarily be unsatisfactory to one party or the other. But if the court makes the decision, or even a temporary order, for this irrigation

season, it relieves the officers of the Interior Department of this responsibility.

16. Mr. Crandall advised me, when I saw him on our return from the North Fork reservoir site, that he had received a letter from Mr. Parry, one of the attorneys representing the American Falls Reservoir District, and that our program of giving the preference this year to District No. 2 was not satisfactory to the American Falls Reservoir District and other parties who have similar rights. Mr. Crandall was very doubtful, however, whether an application would be made this year for a temporary court order for the reason that it seems probable that there will be very little water available after the first of April to fill any priority as late as March 30, 1921. As the flood water of the Snake River this year may be no more than can be diverted by the various canals having headings on Snake River and holding priorities of earlier date than the rights in controversy between District No. 2 and the owners of American Falls storage, the question involved in this suit may be of very little importance this year.

17. The proposed meeting at Twin Falls (postponed from the 14th to the 15th) was for the purpose of giving some further consideration to the alternative proposal of the Idaho Power Company to the proposal to build a power plant at American Falls, and also for the purpose of discussing the application of the Twin Falls canal, North Side canal, American Falls Reservoir District, Burley Irrigation District, and others to be allowed to purchase the government's reserved share of the American Falls reservoir which is being held for use on the North Side Pumping Division of the Minidoka project. As it was found that the representatives of the Idaho Power Company could not get to Twin Falls until some time in the afternoon, we had a preliminary meeting on the morning of the 15th for some informal discussion among ourselves. This meeting was attended by Judge Bothwell, representing the Twin Falls Canal Company and the American Falls Reservoir District; Mr. Parry, representing the North Side Canal Company and also, in association with Judge Bothwell, the American Falls Reservoir District; Mr. Brookman, one of the directors of the Minidoka Irrigation District; Mr. Trathen, the secretary of the Minidoka District; Mr. Darlington and I, representing the Reclamation Bureau. In the afternoon there were also present Judge Baker, attorney for the Minidoka Irrigation District; Mr. Lowe, attorney for the Burley Irrigation

District; and Mr. Boone, attorney for the Idaho Power Company, and Mr. Robinson, the manager of the company. I do not think that any of the companies in the upper valley and certainly none from the North Fork were invited to attend this meeting; at any rate none of them were present.

18. With reference to the proposal that the government abandon the Minidoka North Side Pumping Division and sell all the reserved water to the parties that now have rights in the American Falls reservoir, thus excluding the North Fork people from participation, I first explained to those present that there was undoubtedly a very urgent need for some storage water on the North Fork of the Snake River and that if the government is to construct a reservoir on the North Fork, some means must be found to provide a water supply for the reservoir after it is built. I also explained that the constitutionality of the reclamation act has been sustained by the courts on the ground that the project is primarily for the reclamation of public lands; that we secured the right to build the American Falls reservoir by representing to the court, both in our complaints in condemnation and in the evidence which we submitted in support of our complaints, that that reservoir was being built primarily for the reclamation of public lands on the North Side Pumping Division of the Minidoka project and that a large part of the stored water from the American Falls reservoir would be used for that purpose; that it seems to me that it would be a breach of faith with the court if we first secured the right to build the American Falls reservoir and to condemn the necessary right of way by representing that the water would be largely used to reclaim the public lands of the proposed North Side Pumping Division and then, after the reservoir is built, to sell all the water to private parties and abandon the project which was the foundation of our right to build the reservoir and which was represented as the primary object of the reservoir construction.

19. In taking up the proposal of the Idaho Power Company, I found that there were some mistaken ideas quite prevalent among the representatives of the various companies, particularly those of the Twin Falls Company, and that, as Mr. Darlington had suggested, the inclination of these people to favor the power company proposal was based upon a mistaken idea that more water could be saved under the power company's proposal than through the construction of the proposed American Falls power plant. For instance, the engineer for the Twin

Falls Canal Company thought that the Idaho Power Company had a contract right to run its entire 255,000 acre-feet of secondary reserved water right over the Milner dam and through its Shoshone Falls power plant and that the company was giving up this right under its proposed contract. When the representatives of the power company arrived in the afternoon, however, they were quite emphatic in saying that the officers of the company were in no way responsible for this misunderstanding and that all they had ever claimed for their proposal was that it would save as much water as could be saved by the construction of the government power plant but that they did not claim that it would save any more water.

20. We were easily able to demonstrate that the power company under the proposal submitted were not giving up any water rights which they have under the permanent contract and would not sacrifice any part of their reserved 255,000 acre-feet. To the contrary, if their proposal should be accepted they would still have at American Falls an amount of water largely in excess of the 300,000 acre-feet of primary and secondary water rights reserved to them under the contract. This can be readily calculated as the Twin Falls Canal Company and the North Side Canal Company insist that they can not reduce their water diversions for domestic purposes to an amount less than 1200 second-feet, which alone amounts to about 360,000 acre-feet during the non-irrigation season, counting 1200 second-feet as equivalent to 2400 acre-feet per day for a period of 150 days; to this 360,000 acre-feet which would have to be released during the winter season to supply the domestic requirements of the Twin Falls canals, as would have to add the 108,000 acre-feet which the power company insists upon having released over the Milner dam to supply at Shoshone Falls the amount specified in the contract to be available at that point during the winter season, making a total of some 468,000 acre-feet which would have to be released at American Falls if the power company's proposal should be accepted, whereas the power company's right under contract of June 15, 1923 is limited to a total of 300,000 acre-feet, of which 45,000 acre-feet is a primary right and 255,000 acre-feet is a secondary right to be used during the non-irrigation season and available to the power company only at American Falls.

21. It is true that there is about 300 second-feet of return flow coming in below the Minidoka dam and between the Minidoka dam and the Milner dam and this might be

calculated to amount to about 90,000 acre-feet during the non-irrigation season, which in a measure would supply the requirements of the Twin Falls canals or the requirement of the power company for 108,000 acre-feet over the Milner dam. But this 90,000 acre-feet of return flow is offset by the fact that we have nearly 100,000 acre-feet of storage capacity in the Lake Walcott reservoir which can be filled during the non-irrigation season with the water released at American Falls after such water has passed through the power plants at American Falls. So that the return flow between the Minidoka dam and Milner dam and the amount of water required for storage in Lake Walcott reservoir practically offset each other and the amount which must be released at American Falls during the non-irrigation season in the event of the acceptance of the power company's proposal can be readily calculated by simply adding the 360,000 acre-feet required by the Twin Falls Canal Company to the 108,000 acre-feet required by the power company to go over the Milner dam to keep up the flow at the Shoshone plant. In other words, if the power company's proposal is accepted, the company would not give up any water whatever to which it is entitled under its contract of June 15, 1923, but, to the contrary, would have an amount of water at American Falls largely in excess of its reserved right. This was virtually admitted by the representatives of the power company, who stated that they had never represented that their proposal would save any more water than the proposed power plant at American Falls but only that it would save as much water.

22. I then stated that it appeared to me that inasmuch as it was conceded that there would be no greater saving of water under the power company's proposal than there would be through the construction of the first unit at the government power plant at American Falls, we might consider the water-saving possibilities of the two propositions as being virtually on a par but there would be several very serious disadvantages from our standpoint in accepting the power company's proposal. The disadvantages would include the fact that the company's charge of $3\frac{1}{2}$ mills per kilowatt hour is more than double what it is costing the government to produce power at its own power plant. Our records show that the cost of producing power at the Minidoka power plant is less than 1 mill per kilowatt hour, and even if it should be considerably more than that

at American Falls, it would still be only about half the amount proposed to be charged by the Idaho Power Company.

23. From a legal standpoint there is serious doubt as to whether the proposed contract of the Idaho Power Company would not be set aside by the courts if it ever should be attacked in court, for the reason that the power company is a public utility company and might not be permitted to sell power to the government at a rate less than half what the company is charging its other customers for power to be used for similar purposes. Mr. Boone, representing the power company, claimed that the contract would be all right because it was in a class by itself, being a contract for the purpose of saving water for irrigation purposes as well as a contract for the sale of power. But there was serious doubt on this question among the other attorneys present.

24. There is also the question as to what the situation would be if the bondholders should ever foreclose and take over the property and whether the bondholders would be bound by the agreement made by the company without their consent.

25. There is the further objection that the power company in its proposal as submitted has attempted to inject into the contract a number of undesirable conditions and restrictions, tending to interfere with the government's control of its own power business on its own project. For instance, the provision attempting to restrict us from increasing the amount of power used for air heating. Also the provision to restrict the territory in which power may be sold from the plant on the government project. Also the provision that the amount of power to be furnished by the power company during the non-irrigation season should not be more than 140% of the amount developed at the Minidoka Power plant.

26. With reference to the restriction limiting the amount of power to be furnished by the company during the non-irrigation season, it seems to me that if the purpose of this contract is to save water for irrigation purposes, this provision is just the opposite of what it ought to be. Under this restriction the amount of power to be furnished by the power company in the non-irrigation season would be in direct proportion to the amount which we develop in the non-irrigation season at our own plant at the Minidoka dam. If we

want to save water and close down our Minidoka plant in whole or in part in order to store the water either in Lake Walcott or American Falls, and therefore need more power from the power company, the more we shut down our plant, the less power the company would furnish. For instance, if we shut down the Minidoka power plant in the non-irrigation season entirely, we would not be able to get any power at all from the power company under this restriction. This would tend to prevent the saving of water for irrigation purposes.

27. These restrictions would add additional complications to a water situation which is already so complicated that it is difficult to understand and as we can never foresee all the conditions which may arise in the future, might prove even more embarrassing than we contemplate. For instance, suppose that by 1939 the Twin Falls companies should have found it necessary or desirable to cut down their water diversions to a total of 400 second-feet instead of 1200 second-feet; suppose that during the month of November, 1939, we should be storing water in the Lake Walcott reservoir at the rate of 1000 second-feet (or 2000 acre-feet) per day and releasing water from American Falls at the rate of 1000 second-feet per day for storage in Lake Walcott and also should be releasing sufficient water to supply the winter demands of the Twin Falls Canal companies, allowing for 300 second-feet return flow; and suppose that in 1939 the winter power requirements on the Minidoka project should be 50% more than they are now, how much water would we have to waste over the Milner dam in November 1939 in order to secure enough power for the needs of the Minidoka project under the restriction imposed by the power company that the amount of power furnished by the company should not exceed 140% of the amount developed at the Minidoka power plant.

28. It seems to me that conceding that the saving of water would be the same under either proposal, -that is, the construction of the first unit of our power plant at American Falls or the acceptance of the power company's proposal, - the decision should be in favor of the construction of the government power plant on account of the higher cost of power under the power company's proposal and on account of the objections to the various restrictive provisions inserted in the power company's proposal and the uncertainty as to the legality of the contract proposed by the company.

29. I think we made some progress at this meeting in securing a better understanding of the situation, at least to the extent that it is now understood that the power company's proposal will not save any more water than the construction of the government's plant at American Falls and that the power company's proposal is open to a number of objections on other grounds.

30. I suggested that if the company would agree to give up their present right to have about 100,000 acre-feet of water go over Milner dam during the non-irrigation season, that would be a concession which would result in some real saving of water and would justify a reconsideration of the company's proposal. But on the basis of the proposal heretofore submitted by the company, it is my opinion that we should reject the company's proposal and proceed with the construction of our own power plant at American Falls. Mr. Boone said that each acre-foot of the 108,000 acre-feet which the company has a right to demand over Milner dam for use at its Shoshone Falls plant is worth as much as four acre-feet of water at American Falls, on account of the higher head at the Shoshone plant, and that he doubted whether his company would authorize a contract under which they would surrender the right to have any water go over Milner dam. I told them that it appeared to me that unless they were willing to give up the 108,000 acre-feet over Milner dam, they would not be giving up any water to which they have a right under their contract of June 15, 1923.

31. The final conclusion was that the representatives of the power company would give further consideration to the matter and let us know later whether they would or would not be willing to make a contract surrendering the right to have the 108,000 acre-feet go over the Milner dam. I do not know what the outcome of this suggestion will be but rather think that if we "stand pat" on the proposition that we will not consider the company's proposal unless they surrender the right to have water wasted over the Milner dam during the non-irrigation season, they will eventually come to the point that they will be willing to make this concession rather than to have us proceed with the construction of the government power plant at American Falls but I may be mistaken on this point. I think that Mr. Boone and Mr. Robinson would make this concession rather than to have the government power plant constructed but I have some doubt whether the eastern officials of the company will authorize them to do so.

32. One thing which I had in mind in these discussions is that if we can make a contract saving the 108,000 acre-feet which goes over the Milner dam, we might allocate this water for the purpose of filling the North Fork reservoir. Also, that in order that the Minidoka project might not be called upon to bear all the burden of the higher-cost power involved in securing this saving of water, the parties who participate in the use of the North Fork reservoir (or whatever reservoir receives the benefit of this additional water supply), might be glad to pay the difference in the cost of buying power from the Idaho Power Company under its 3½ mill proposal and the estimated cost of developing power at the government's proposed plant at American Falls. Of course we would have to figure out about what this would amount to so that we could submit a proposition to the interested parties in definite terms but to me it seems that the people on the Minidoka project should not stand all the increased power cost involved in accomplishing the desired saving of water for irrigation purposes.

33. I also took up the matter of the possibility of securing an increased water supply by increasing the capacity of the American Falls reservoir to 3,000,000 acre-feet, providing about 3 acre-feet of reservoir capacity for each acre-foot of water desired each year. I believe that if this were done and the parties participating in the payment for the enlargement of the reservoir should be allowed reclamation terms of payment, the cost of storage water secured in this way - even though 3 acre-feet of capacity should be provided for each acre-foot of water desired - would be no greater than the cost incurred by the parties who participated in the construction of American Falls and borrowed money on bond issues on which they have been paying interest ever since in order to pay in advance for their share of the American Falls reservoir. That is to say, the greater cost of providing the 3 acre-feet of capacity would be offset by the saving of interest. Mr. Parry, speaking for the North Side Twin Falls project, suggested that if the rights secured in the enlargement of the American Falls reservoir should be considered top rights in the same status as top rights in Jackson Lake reservoir, it would be difficult to convince the settlers on the North Side Twin Falls project that they were buying anything but "blue sky" in buying top rights in another reservoir. Some of the other parties, however, seemed to be rather favorably impressed with this suggestion.

34. In case it should be decided to proceed with the enlargement of American Falls reservoir to 3,000,000 acre-feet, I would be willing to meet the representatives of the old canal companies half-way on their desire to purchase a part of the water supply reserved for the North Side Pumping Division - that is, I would be willing to sell 200,000 acre-feet of the 400,000 acre-feet of reserved capacity in the present reservoir to the old canal companies and districts, provided each company or district securing one acre-foot of this reserved water right in the American Falls reservoir would take and pay for 3 acre-feet of capacity in the proposed enlargement, thus providing 1 acre-foot of water from the present reservoir for each acre-foot of water from the enlargement, assuming that 3 acre-feet of carry-over capacity would yield 1 acre-foot of water annually, and then allot to the North Side Pumping Division the remaining 200,000 acre-feet of capacity in the present reservoir with 600,000 acre-feet of capacity in the enlargement.

35. As I see it, there are three possibilities of securing water for filling the proposed reservoir on the North Fork of Snake River;

- (1) if the power company surrenders the right to have 108,000 acre-feet go over Milner Dam during the non-irrigation season, we might allocate this water to the purpose of filling the North Fork reservoir;
- (2) we might sell to the people on the North Fork a sufficient part of the water reserved for the North Side Pumping Division to insure the filling of the reservoir on the North Fork;
- (3) If it should be decided to proceed with the enlargement of the American Falls reservoir, we might allow the North Fork people to participate in the additional capacity to be provided in the enlargement of American Falls as a means of replacing at American Falls the water to be used in filling the North Fork reservoir, or if the fifty-fifty suggestion should be followed we might let them purchase half of the reserved right in the present reservoir and provide the other half out of the carry-over capacity in the proposed enlargement.

36. It seems to me, however, that we must in one way or another provide some definite means of securing water to fill the proposed North Fork reservoir before proceeding with the construction of that reservoir.

37. One of the incidents of my trip to the Snake River Valley last week was that we had three earthquakes during the first night I spent at Burley, each quake being sufficient to wake me. I learned afterwards that the school house at Rupert was damaged to such extent that it is thought the use of this building will be discontinued. I did not hear of any other serious damage from the earthquakes.

38. On Friday Mr. Darlington and I drove from Burley to the North Fork Reservoir site. Mr. Trathen, secretary of the Minidoka Irrigation District, accompanied us on this trip. We spent Friday night at the site of the reservoir and spent part of Friday afternoon and part of Saturday morning going over the various ranches in the site and looking at some of the improvements as well as the test pit work and diamond drill work. We were somewhat handicapped in seeing the ranch property on account of the fact that there is still about two feet of snow at this reservoir site, an amount of snow, however, very much less than is usual at this time of year.

Saturday morning we had the pleasure of seeing the mail starting out from the postoffice at the North Fork reservoir site for a trip of about thirty miles I believe to the postoffice of Kilgore by sleigh and dog team. It was quite a change from the Snake River Valley where we had been having almost summer weather.

39. On the return trip from the reservoir site we stopped at Idaho Falls and had quite a talk with Mr. Crandall, in charge of Water District No. 36, in regard to the water supply situation and various matters affecting the proposed construction of the reservoir on the North Fork.

40. I visited the Owyhee and Vale projects on my return to Portland and will write you separate letters concerning matters connected with those projects.

cc - Denver
Burley

B. E. Stoutemyer

Affidavit of Michael C. Orr
In re SRBA Case No. 39576
Subcase No. 01-02064 (American Falls Storage Subcase)

EXHIBIT 58:

Expert Report of David B. Shaw, P.E.,
Idaho Power Co. v. United States,
No. 07-730C (Fed. Cl.), November 2009.

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS
(No. 07-730C)

IDAHO POWER COMPANY

v.

UNITED STATES

**EXPERT REPORT
OF**

David B. Shaw, P.E.

NOVEMBER 2009

I. Introduction

This report is being prepared at the request of Brownstein Hyatt Farber Schreck, P.C. The purpose of the report is to describe the analysis of stream flow conditions for the contract years 2001 through 2007 to determine whether the target flows set forth in the June 15, 1923 contract between the United States and Idaho Power Company Relative to Power Rights at American Falls, Idaho (hereinafter Contract) were satisfied.

Exhibit A attached hereto is an annotated map of South Central Idaho that illustrates the relative locations of the physical features of the Snake River that are relevant to this analysis. Beginning from the right side of the map is American Falls Reservoir, the primary storage facility that is the subject of the Contract. Moving downstream, to the left, is the Neeley Gage, the stream gage that measures the rate of discharge of water leaving American Falls Reservoir through the Snake River. Moving further downstream to near the center of the map is Lake Walcott, an additional storage facility addressed in the Contract. Still further downstream is the location of the Milner Gage, the stream gage that measures the entire discharge passing the Milner Dam location. Twin Falls, downstream of the Milner Gage, is the location at which the flow targets in paragraph 22 of the Contract are established. The furthest downstream gage on the map is the Kimberly Gage, the best available stream gage to determine the discharge of the Snake River at Twin Falls. Shoshone Falls, downstream from the Kimberly Gage, is the location at which the flow targets in paragraph 21 of the Contract are established.

The following analysis compares the Contract criteria to the observed discharge at Twin Falls for the 2001 through 2007 contract period. The results of the analysis describe those discharge conditions that did not meet the Twin Falls target flow Contract criteria.

This report is preliminary and my work is continuing. I reserve the right to modify and supplement these opinions as further information comes to light, including through the depositions of experts, and to express new opinions in response to new information or opinions expressed by experts or other witnesses or evidence.

II. Qualifications and Publications

David B. Shaw is a registered professional engineer in the states of Idaho, Arizona, Oregon and Colorado. His work includes 23 years with the Idaho Department of Water Resources (IDWR) and its predecessor agencies and 13 years with ERO Resources Corporation. At the IDWR he served in a variety of technical and management positions including 11 years as manager of IDWR's responsibility for the Snake River Basin water right adjudication. At ERO David provides expertise and expert witness testimony to a variety of clients from water users to government agencies.

A resume is attached hereto as Exhibit B.

III. Data and Other Sources of Information Considered

This opinion is based on my experience as an engineer and many years of studying and analyzing the hydrology of the Snake River and its tributaries, and water use in Idaho. Over the past 36 years I have come to understand much of the historical development of water use in Idaho, the changes that have occurred over time and the issues facing water users today. This understanding has been enhanced through the regular use of published and unpublished gage records of stream discharge and reservoir contents, crop water requirements, population and land use changes and water needs, instream water needs and regulatory requirements and methods to assure proper administration of water use and water rights in Idaho and in other western states.

I have for purposes of this opinion also made a review of the Contract and the specific gage records for American Falls Reservoir, and the Neeley, Milner and Kimberly Gage data as those data appear on the Water District 01 web site at:

<http://maps.idwr.idaho.gov/wraccounting/viewer.htm>

A list of documents and data considered is attached hereto as Exhibit C.

IV. Summary of Opinions, Basis and Reasons for Opinions

It is my opinion the flow targets within paragraph 22 of the Contract were not satisfied at all times during any of the contract years 2001 through 2007.

My analysis began by reducing each of the flow targets specified in paragraph 21 of the Contract by 100 cfs as specified in paragraph 22 of the Contract. The Kimberly Gage is located upstream of the Shoshone Falls and downstream of the Twin Falls. Using the Kimberly Gage is a conservative estimate of the Twin Falls discharge since any reach gains between Twin Falls and the Kimberly Gage would increase the measured discharge at the gage above the actual discharge at Twin Falls.

Paragraph 21 of the Contract sets out the flow targets and the periods of the year during which each of the flow targets is applicable at Shoshone Falls. For convenience, the Shoshone Falls flow targets and the Twin Falls flow targets are set out in Table 1 below.

Table 1

Period	Shoshone Falls Targets (cfs)	Twin Falls Targets (cfs)
10/1 – 11/30	790	690
12/1 – 1/31	890	790
2/1 – 2/12	790	690
2/13 – 4/15	690	590
4/16 – 6/10	790	690

The next step of the analysis compared the mean daily observed discharge at the Kimberly Gage to the Twin Falls target for all dates during the period October 1 through June 10. If the observed discharge is less than the target the other criteria of the Contract must be tested to determine if the shortage is a missed target. The gage records of American Falls

Reservoir contents are checked to determine if the reservoir has already filled during the current contract year. If the reservoir has filled, the shortage is not a missed target as provided in paragraph 18 of the Contract. If the date is later than April 1 and 60,000 ac-ft has been released since April 1, the shortage is not a missed target as provided in paragraph 18 of the Contract.

If American Falls Reservoir has not filled and the 60,000 ac-ft criteria is not a limitation, the shortage is a missed target. After a missed target is identified the discharge at Milner is examined for the prior day. If the discharge at Milner for the prior day is solely made up of Idaho Power Company primary storage as described in paragraph 16 of the Contract, the discharge at Milner for the prior day is added to the total shortage for the missed target. This is consistent with paragraph 21 of the Contract since the flow targets are intended to be satisfied solely from secondary storage as provided in the Contract.

This analysis is completed for each of the 253 (254 in 2004) days from October 1 through June 10. On those days in which the flow target is missed the shortage in cubic feet per second (cfs) is determined. The missed target shortages are then totaled and multiplied by 1.9835 to convert cfs to acre-feet (ac-ft) per year. The number of days each year the flow targets are missed is then counted. Twin Falls flow targets were missed in each of the contract years 2001 through 2007 where a contract year is the same as a water year and is defined as the period from October 1 of the prior year through September 30 of the year in question.

Summary of Conclusions

This analysis determined the shortages resulting from the missed Twin Falls targets. The results of the analyses for each contract year 2001 through 2007 are reported in Table 2 below.

Table 2

Water Year	Shortage Due to Missed Targets ac-ft	Days Target Missed
2001	17,415	47
2002	71,776	94
2003	71,044	108
2004	77,597	130
2005	77,762	102
2006	52,424	74
2007	21,547	41

V. Exhibits Supporting Opinions

Exhibits supporting my opinions are included in the materials cited above. I may use additional exhibits at trial.

VII. Compensation

My firm is being compensated at the rate of \$130 per hour of time spent preparing this opinion and for my time spent preparing for any testifying at deposition and trial.

VIII. Other Testimony

Cases in which I have testified as an expert at trial or by deposition within the preceding four years are as follows:

Surface Water Coalition water delivery call.

A & B Irrigation District water delivery call.

Snake River Farms water delivery call.

Sage Springs Home Owners Association v Rotarun contested drilling permit.

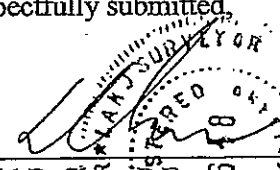
Lexington Hills Home Owners Association v Lexington Hills Inc., SRBA Subcases.

Ada County Highway District v Settlers Irrigation District.

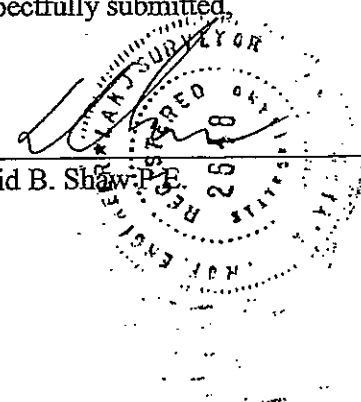
Pioneer Irrigation District v City of Caldwell.

Dated this 3 day of November 2009.

Respectfully submitted,



David B. Shaw, P.E.



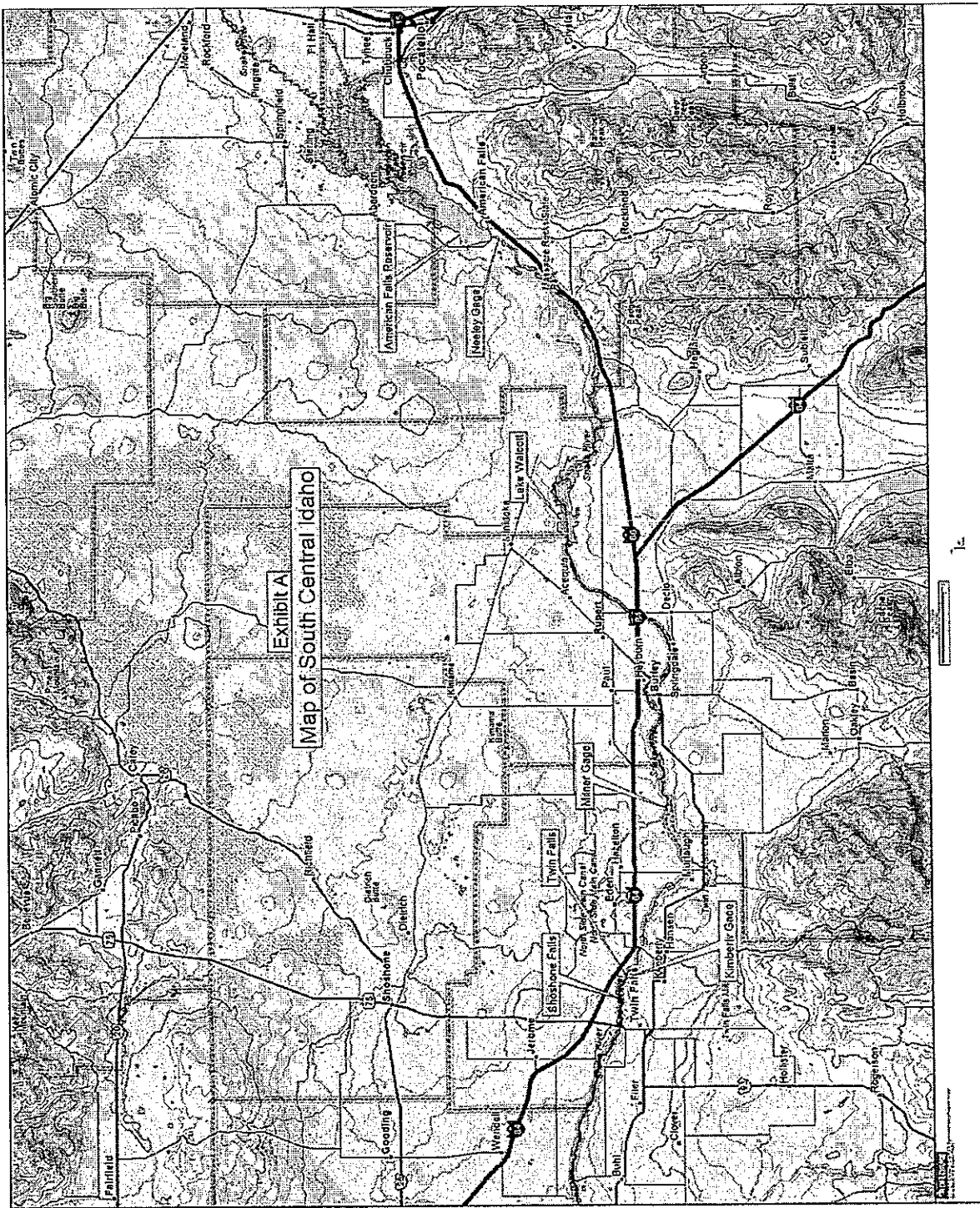


Exhibit B

David B. Shaw

SUMMARY:

David Shaw is an engineer and principal in the firm of ERO Resources Corp, a Denver based natural resources consulting firm. David manages and provides leadership to the Boise ERO Resources Corp. office. He specializes in the identification, analysis, and resolution of water issues including coordination with other professionals in multi-disciplinary projects. David has 36 years experience and expertise in water resources and management covering a broad spectrum of disciplines including surface and ground water supply and use studies, water rights evaluations, water quality evaluation and monitoring, project management, alternative dispute resolution, litigation support and expert witness testimony, and technical input on legislative and administrative matters.

EDUCATION: B.S., Agricultural Engineering
University of Idaho, 1966

M.S., Agricultural Engineering
University of Idaho, 1972

EXPERIENCE:

1996 to present

Engineer, Project Manager and Principal since 2003
ERO Resources Corporation, Boise, ID

- Provide technical expertise and coordination to the State and water users for the resolution, through mediation or litigation, of federal law based water right claims filed by the United States and certain Indian tribes in the Snake River Basin Adjudication of water rights.
- Develop and implement water quality monitoring programs for various water user organizations.
- Assist a variety of water users with technical expertise to resolve issues and conflicts relative to their continued use of water. Activities have included collection of field data, including stream flow measurements and gaging, evaluation of existing data, and data analysis to facilitate agreements or to offer expert opinion.
- Provide expert testimony in the Klamath Adjudication in Oregon.

1985 to 1996

Water Rights Adjudication Bureau Chief
Department of Water Resources, Boise, ID

- Responsibilities included the design, implementation and management of the Snake River Basin Adjudication (SRBA) program involving the processing of 170,000 claims to water rights; staff selection and training, budget preparations, implementation and monitoring for main office and four regional offices; established rules and regulations pertaining to the SRBA; educational presentations for professionals, public and the media.

- Served as co-chair of the state, Indian, federal and private technical advisory committee for the Shoshone-Bannock reserved water right determination that resulted in the 1990 Fort Hall Indian Water Right Agreement.
- Lead responsibility for preparation of the first water distribution rules developed and adopted in Idaho. Participated and testified before Legislature in two rewrites of Idaho's adjudication statutes.
- Designated as an expert witness in water right adjudications by the SRBA court.

1978 to 1985

Western Region Manager

Department of Water Resources, Boise, ID

Responsibilities included management of a separate office including budget and staff needs, work assignments and responsibility and supervision for the department's regulatory programs for Southwest Idaho.

1974 to 1978

Technical Support Section Manager

Department of Water Resources, Boise, ID

Responsibilities included management of staff that provided technical support in the areas of engineering, economics, soils, geohydrology, geology, geothermal, remote sensing and computer operations. Provided technical support for completion of the original State Water Plan. After completion of the state water plan, managed the Water Allocation Section responsible for water right processing, water distribution and adjudications.

RELATED EXPERIENCE:

Assistant Professor – College of Engineering, Department of General Engineering, University of Idaho 1968-1973. Courses taught: Engineering Graphics, Slide Rule, Engineering Science (Statics & Dynamics), Introduction to Fortran Programming and Advanced Fortran Programming, Freshman Engineering Design.

David was raised on an irrigated farm and has operated and managed an irrigated orchard in the Emmett Valley since 1982. As a result, he has gained insight into water use and water users that may not be available in any other way.

Licensed Professional Engineer and Land Surveyor in Idaho
Licensed Professional Engineer in Arizona, Colorado and Oregon
Emmett Irrigation District Board Member, 1992
Chairman, Board of Trustees, Walter Knox Memorial Hospital
Past Chairman, Board of Directors, Gem Supply Cooperative
Licensed Private Pilot

PUBLICATIONS:

Shaw and Molnau. 1974. "Problem Oriented Languages – Statistics and Hydrology." COED Transactions.
Shaw and Molnau. 1975. "Why Use Problem Oriented Languages." ASAE Transactions.

PROFESSIONAL AFFILIATIONS:

American Society of Agricultural and Biological Engineers
U.S. Committee on Irrigation and Drainage
Idaho Society of Professional Land Surveyors
National Council of Examiners for Engineering and Surveying

Exhibit C

Documents and Data Considered

Contract between the United States and the Idaho Power Company Relative to Power Rights at American Falls, Idaho, dated June 15, 1923.

Stream flow and reservoir content data available from the Water District 01 web site at:
<http://maps.idwr.idaho.gov/wraccounting/viewer.htm>

Data include:

- American Falls Reservoir contents
- Neeley Gage records of Snake River discharge
- Milner Gage records of Snake River discharge
- Kimberly Gage records of Snake River discharge

Descriptions of these gages are available at:
<http://waterdata.usgs.gov/id/nwis/sw/>