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DEPARTMENT OF
WATER RESOURCES

Excerpted pages of the “Falling Water Contract
Dated as of March 31, 1976 by and between
American Falls Reservoir District
and Idaho Power Company.”

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OFFICE OF THE SECRETARY

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FEDERAL
POWER COMMISSION

FALLING WATER CONTRACT

Dated as of March 31, 1976

by and between

AMERICAN FALLS RESERVOIR DISTRICT

and

IDAHO POWER COMPANY

CONTRACT

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FALLING WATER CONTRACT
BY AND BETWEEN
AMERICAN FALLS RESERVOIR DISTRICT
AND
IDAHO POWER COMPANY

THIS CONTRACT, entered into this 31st day of March, 1976, between the AMERICAN FALLS RESERVOIR DISTRICT, an instrumentality of the State of Idaho, with its offices located in Twin Falls, Idaho, hereinafter referred to as the "Constructing Agency", and the IDAHO POWER COMPANY, a corporation organized under the laws of the State of Maine, authorized to do business in the State of Idaho, with its principal office therein located in Boise, Idaho, hereinafter referred to as "Idaho Power Company";

WITNESSETH:

WHEREAS, the existing American Falls Dam and Reservoir ("Existing Dam") was constructed on the Snake River in southern Idaho adjacent to the City of American Falls, Idaho, by the United States ("United States"), and was placed in operation in 1927 as a part of the Minidoka Project, Idaho-Wyoming, and the United States contracted with certain organizations and individuals ("Waterusers") for various amounts of the storage space of the Existing Dam and which Waterusers agreed to pay the United States their proportionate share of the cost of the Existing Dam and the United States has retained ownership of the Existing Dam and has operated and maintained the Existing Dam primarily for the furnishing of water for irrigation purposes; and

WHEREAS, the Existing Dam provides irrigation storage water for beneficial use on approximately 900,000 acres of land in southern Idaho to which said water is appurtenant; and

WHEREAS, the United States has determined the Existing Dam to be no longer structurally competent, and in 1972 restricted storage in the top 11.3 feet of the Existing Dam on a year-round basis for safety reasons, and additional restrictions may possibly be required to continue to meet applicable safety standards as the deterioration of the Existing Dam advances, which present and future storage restrictions have and will cause severe economic losses to the Waterusers, reductions in recreational benefits and adverse effects on fish and wildlife facilities associated with the Existing Dam; and

WHEREAS, Chapter 22 of Title 43, Idaho Code, as amended, ("State Act"), authorizes the Constructing Agency, for the purpose of preserving, restoring, protecting and maintaining rights of storage, diversion and delivery of water necessary and appurtenant to the purposes for which the Constructing Agency and other like similarly situated irrigation districts were organized: (1) to reconstruct, rehabilitate, replace and improve dams and other related structures and works together with all necessary appurtenances related thereto whether located within or without its boundaries and whether or not legal title thereto is owned by it, including without limitation as a part thereof the reconstruction and relocation of all roads, bridges and highways made necessary by reason of such reconstruction, rehabilitation, replacement and improvement, the construction of penstocks and other facilities related to hydroelectric production plant which are made necessary in order to carry out the provisions of this Falling Water Contract and facilities for flood control, public recreation and fish and wildlife mitigation purposes made necessary in order to comply with applicable state and Federal requirements; (2) to enter into all necessary agreements, contracts and other legal arrangements with the United States and its agencies and departments, the State of Idaho and its agencies, departments and political subdivisions, and public and private persons, firms, corporations and associations in order to carry out such reconstruction, rehabilitation, replacement and improvement; and (3) to issue its Bonds ("Bonds") in the manner provided therein for the purpose of paying all or part of the cost of such reconstruction, rehabilitation, replacement and improvement, together with all expenses preliminary and incidental thereto; and

WHEREAS, the State Act provides that any Bonds issued and sold pursuant to the provisions thereof shall be payable solely out of a special fund into which the Constructing Agency shall be obligated to deposit, as from time to time received: (1) the proceeds of the collection of certain assessments to be levied and collected by the Constructing Agency on lands contained within its boundaries; (2) payments pursuant to contracts to be entered into by the Constructing Agency with other irrigation districts; (3) payments pursuant to contracts to be entered into by the Construction Agency with other public or private persons, firms, corporations and associations; and (4) when so authorized by Act of Congress, the proceeds from the sale or use of falling water released from the dam to be so reconstructed, rehabilitated, replaced and improved, pursuant to a contract for the use of such falling water for power generation to be entered into by the Construction Agency with a public or private person, firm, corporation or association; and

WHEREAS, pursuant to the provisions of the Act of Congress of December 28, 1973 ("Act of December 28, 1973"), the United States, acting through the Regional Director, Pacific Northwest Region, Bureau of Reclamation ("Contracting Officer") upon authorization of the United States Secretary of the Interior ("Secretary") has entered into an agreement with the Constructing Agency ("Government Contract") of even date herewith, authorizing the Constructing Agency to finance and provide for the construction of a new dam ("Replacement Dam") and related structures and works to replace the Existing Dam (which Replacement Dam and related structures and works, together with the storage reservoir to be created behind the Replacement Dam, are hereinafter collectively referred to as the "American Falls Replacement Dam Program"); and

WHEREAS, the Government Contract provides that delivery of water is to be contingent upon the execution by each Wateruser of a contract with the Constructing Agency and the United States (which contracts are collectively referred to as "Spaceholder Contracts") providing for the repayment by such Wateruser of its proportionate share of the total costs to be incurred by the Constructing Agency for engineering, financing, designing and constructing the American Falls Replacement Dam Program not returned by this Falling Water Contract, and providing that the delivery of water to each Wateruser shall be contingent upon the fulfillment of the obligations thereunder, said Spaceholder Contracts being otherwise consistent with the terms of the various existing contracts between the Secretary and the Waterusers for the delivery of water from and the payment of costs associated with the Existing Dam; and

WHEREAS, an appropriate number of the Waterusers satisfactory to the Secretary and the Constructing Agency have entered into Spaceholder Contracts of even date herewith to pay their proportionate share of the cost of the American Falls Replacement Dam Program (which Waterusers which have entered into Spaceholder Contracts being herein referred to as "Spaceholders"); and

WHEREAS, the Act of December 28, 1973, also authorizes the Constructing Agency to contract with a non-Federal entity, as herein provided, for the use by such non-Federal entity for power generation of the falling water released from the Replacement Dam for irrigation and other purposes incidental thereto, which contract shall provide for a monetary return to the Constructing Agency to defray in part the costs of financing and constructing the American Falls Replacement Dam Program and for the coordination of the construction of hydroelectric power facilities with the construction of the Replacement Dam, provided said contract shall be approved by the Secretary and shall not impair the efficiency of the Replacement Dam to serve the other purposes of the Minidoka Project; and

WHEREAS, the State Act provides that the contract for the use of falling water may contain such provisions as are contemplated in the Act of December 28, 1973, providing for the reconstruction, rehabilitation, replacement and improvement of such dam and other related structures and works and appurtenances, the coordination of the construction of the hydroelectric power facilities, the conditions under which the non-Federal entity shall make payments to the Construction Agency, the rights and remedies of the parties to such contract in the event of a failure of the non-Federal entity to make the required payments, and the securing of all necessary permits and licenses required in connection therewith; and

WHEREAS, the Idaho Power Company is a Wateruser and is also the owner and operator of a hydroelectric generating powerplant located on the Snake River below the Existing Dam adjacent to the City of American Falls, Idaho pursuant to a license issued by the Federal Power Commission on March 31, 1975, for Project No. 2258; and

WHEREAS, the construction and operation by Idaho Power Company of a new hydroelectric generating facility ("Powerplant") attached to the Replacement Dam will increase power generation over that produced by the existing powerplant by utilizing the additional head and more of the water released from the Replacement Dam for irrigation and other purposes incidental thereto; and

WHEREAS, as contemplated in Section 4 of the Act of December 28, 1973 and in the State Act (Section 43-2201(D)(4), Idaho Code), the Idaho Power Company heretofore proposed to pay an amount necessary to amortize, at a tax exempt interest rate in 40 approximately equal annual installments, for utilization by it for power generation at the Powerplant of falling water released from the Replacement Dam for irrigation and other purposes incidental thereto, within the limitations specified in the Government Contract, \$19,550,000 of the principal amount of the cost of financing and constructing the American Falls Replacement Dam Program, and subsequently further agreed to increase such amount by the cost of the facilities included in the American Falls Replacement Dam Program for the purpose of meeting the amended State of Idaho water quality dissolved oxygen standard as approved on April 17, 1975, by the United States Environmental Protection Agency for water released from the Replacement Dam ("Water Quality Facilities") and if necessary by approximately 50% of the costs of financing and constructing the American Falls Replacement Dam Program in excess of \$38,000,000; and

WHEREAS, under the provisions of Section 4 of the Act of December 28, 1973, and the provisions of the State Act (Section 43-2201(D)(4), Idaho Code), the Constructing Agency and the Idaho Power Company have agreed to enter into this falling water contract (hereinafter referred to as the "Falling Water Contract"), but only upon satisfaction of the conditions set forth herein; and

WHEREAS, the Constructing Agency has made provision for the estimation of the cost of financing and constructing the American Falls Replacement Dam Program, and, as required in the State Act, the allocation of the costs of financing and constructing the American Falls Replacement Dam Program as between the sums to be paid pursuant to this Falling Water Contract and the Spaceholder Contracts, and has made provision for a determination as to the actual amount of Bonds of the Constructing Agency to be issued, depending upon the amounts to be prepaid pursuant to the provisions of the several Spaceholder Contracts, it being contemplated that the United States will, pursuant to Section 7 of the Act of December 28, 1973, pay, as provided in the Michaud Division, Fort Hall Indian Reservation Spaceholder Contract entered into between the Constructing Agency and the United States, the proportionate share of the Michaud Division, Fort Hall Indian Reservation of the total cost of financing and constructing the American Falls Replacement Dam Program not returned pursuant to this Falling Water Contract; and

WHEREAS, pursuant to authority contained in the State Act the Constructing Agency has heretofore authorized the issuance of not to exceed \$44,750,000 Bonds of the Constructing Agency for the purpose of paying all or part of the costs of financing and constructing the American Falls Replacement Dam Program, and further the Constructing Agency has called and held an election at which the Constructing Agency was authorized to impose assessments on lands within the Constructing Agency, approving said assessments, and was authorized to execute a Spaceholder Contract with the United States and to execute the Government Contract; and

WHEREAS, the Constructing Agency will institute proceedings pursuant to the provisions of the State Act for the purpose of obtaining confirmation decrees approving this Falling Water Contract, the Spaceholder Contracts, the Government Contract, and the levy and collection of the assessments, which confirmation proceedings will, prior to the issuance of the Bonds, be completed in accordance with the provisions of the State Act; and

WHEREAS, the Constructing Agency has entered into an agreement dated November 27, 1974, with the State of Idaho, acting by and through the Department of Transportation, Division of Highways, providing for construction of a two-lane highway on the crest of the Replacement Dam and construction of a two-lane highway bridge located immediately downstream from the Replacement Dam, and providing for the payment by the Constructing Agency of 50% of the total cost of the construction of said highway and bridge as part of the American Falls Replacement Dam Program; and

WHEREAS, the Constructing Agency has entered into an agreement dated July 2, 1974, with the Idaho Fish and Game Department providing for the payment by the Constructing Agency of costs relating to the mitigation of anticipated loss of existing recreational and fish and wildlife resources and constituting the Recreation and Fish and Wildlife Mitigation Facilities (as hereinafter defined); and

WHEREAS, it is provided in the Act of December 28, 1973, that this Falling Water Contract shall be approved by the Secretary and all requirements and conditions of the Act of December 28, 1973 have or will have been satisfied prior to the delivery of any of the Bonds of the Constructing Agency herein contemplated to be issued; and

WHEREAS, the Idaho Power Company has received a fifty (50) year license for Project No. 2736 issued March 31, 1975 by the Federal Power Commission authorizing it to construct, operate, and maintain the Powerplant; and

WHEREAS, the Constructing Agency has executed the Government Contract with the United States, as contemplated in the Act of December 28, 1973, to which Government Contract a copy of this Falling Water Contract is attached as an exhibit, and by the execution of the Government Contract the Secretary, in accordance with the provisions of the Act of December 28, 1973, approves this Falling Water Contract as though incorporated in and made a part of the Government Contract; and

WHEREAS, the Constructing Agency and the Idaho Power Company desire to provide that the issuance, sale and delivery by the Constructing Agency of its Bonds pursuant to the authority contained in the State Act, in an amount which shall be sufficient to pay the estimated cost of financing and constructing the American Falls Replacement Dam Program not paid in advance by Spaceholders pursuant to the Spaceholder Contracts, shall be a condition precedent to the obligation of the Idaho Power Company to make the payments to the Constructing Agency provided for in this Falling Water Contract in consideration of the utilization by the Idaho Power Company at the Powerplant for power generation, within the limitations specified in the Government Contract, of the falling water released from the Replacement Dam for irrigation and other purposes incidental thereto; and

WHEREAS, the Idaho Power Company and the Constructing Agency desire to enter into an arrangement hereunder whereby the Constructing Agency, having entered into the Spaceholder Contracts and the Government Contract, and as a Spaceholder having imposed assessments on lands within its boundaries, will issue and sell its Bonds for the purpose of paying the costs of financing and constructing the American Falls Replacement Dam Program not paid in advance by the Spaceholders, and whereby the Idaho Power Company in accordance with the provisions of the Federal Power Commission license, will finance, construct and own the Powerplant, and will make the payments to the Constructing Agency contemplated hereunder; and

WHEREAS, the Constructing Agency and the Idaho Power Company wish to delineate their mutual responsibilities and to set forth the terms and conditions for the use of the Falling Water by the Idaho Power Company, for the engineering, financing, construction, ownership and operation of the American Falls Replacement Dam Program and the Powerplant and the coordination of the construction of the Powerplant with the construction of the Replacement Dam;

NOW, THEREFORE, in consideration of the mutual and dependent stipulations and covenants herein contained, it is agreed by and between the parties hereto as follows:

The Constructing Agency will execute such conveyances of title of the Replacement Dam, the Related Facilities, and the Water Quality Facilities as shall be necessary to vest title thereto in the United States, pursuant to the requirements of the Act of December 28, 1973, and the Government Contract. The Constructing Agency agrees that it will recognize, in any such instruments or conveyances of title to the Replacement Dam, the Related Facilities and the Water Quality Facilities, the continued right of the Idaho Power Company during the term of its License or any continuation or renewal thereof, to utilize the Falling Water at the Powerplant for power generation in accordance with the provisions of the License or any continuation or renewal thereof, within the limitations specified in the Government Contract, pursuant to Section 4 of the Act of December 28, 1973, and Articles 18(a) and (b) of the Government Contract, so long as the Idaho Power Company is not in default under the provisions of this Falling Water Contract. The Idaho Power Company recognizes that title to the Replacement Dam during the term of its License or any continuation or renewal thereof, shall be vested in the United States.

As provided in Article 14(d) of the Government Contract, upon the acceptance of the final transfer review memoranda, the correction of any construction deficiencies therein specified, the submission of the documents and equipment specified in Article 14(c) of the Government Contract and the giving of notice by the Secretary to the Constructing Agency, the Trustee and the Idaho Power Company, construction of the Replacement Dam, the Related Facilities and the Water Quality Facilities shall be deemed to have been completed. The determination of completion of construction by the Secretary in accordance with the applicable provisions of the Government Contract shall be binding upon the Idaho Power Company. The Idaho Power Company agrees to cooperate with the Constructing Agency, the Secretary and the Authorized Representatives in the furnishing of any or all of the documents or copies thereof and equipment set forth in Article 14(c) of the Government Contract as shall be necessary to aid in the determination of the Secretary that construction of the Replacement Dam, the Related Facilities and the Water Quality Facilities is complete.

SECTION 4.6. *Operation and Maintenance of Replacement Dam by United States.* The Idaho Power Company agrees to the provisions of the Government Contract governing operation and maintenance of the Replacement Dam. The following Articles of the Government Contract are incorporated herein and made a part hereof as follows:

(A) Article 16 which reads:

The Replacement Dam will be operated by the United States in a manner so that (1) the present proportionate storage rights of the Spaceholders shall not be altered or changed except as provided herein and in the Spaceholder Contracts, (2) the water surface elevation of the Replacement Dam shall not exceed a maximum of 4354.5 feet above mean sea level U.S.C. & G.S. datum, and (3) the primary irrigation purpose and the incidental purposes of the Minidoka Project shall not be impaired by the subordinate utilization for power generation at the Powerplant of the water released from the Replacement Dam. 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.

(B) Article 18(d) which reads:

In the event that the Contracting Officer determines that the water being released from the Replacement Dam through the Powerplant does not meet the amended State of Idaho water quality dissolved oxygen standard, as approved on April 17, 1975, by the United States Environmental Protection Agency, the Contracting Officer, after oral notice to the Idaho Power Company's American Falls Powerplant Chief Operator, may bypass part or all of such water around the Powerplant until satisfactory arrangements are made to meet such standard. The Contracting Officer in such circumstances will attempt to bypass only the amounts of water necessary to meet such standard. As contemplated in the Water Quality Facilities Agreement the Constructing Agency, the Contracting Officer, and the Idaho Power Company shall develop