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DEPARTMENT OF WATER RESOURCES

James S. Lochhead  
Adam T. DeVoe  
BROWNSTEIN HYATT & FARBER, P.C.  
410 17<sup>th</sup> Street  
Twenty-Second Floor  
Denver, Colorado 80202  
jlochhead@bhf-law.com  
adevoe@bhf-law.com  
Telephone: (303) 223-1100  
Facsimile: (303) 223-1111

James Tucker, #2038  
Senior Attorney,  
Idaho Power Company  
Legal Dept.  
1221 West Idaho Street  
Boise, Idaho 83702  
Telephone: (208) 388-2112  
Facsimile: (208) 388-6935

Attorneys for Idaho Power Company

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION )  
OF WATER TO VARIOUS WATER )  
RIGHTS HELD BY OR FOR THE )  
BENEFIT OF A&B IRRIGATION )  
DISTRICT, AMERICAN FALLS )  
RESERVOIR DISTRICT #2, BURLEY )  
IRRIGATION DISTRICT, MILNER )  
IRRIGATION DISTRICT, MINIDOKA )  
IRRIGATION DISTRICT, NORTH SIDE )  
CANAL COMPANY, and TWIN FALLS )  
CANAL COMPANY )  
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**IDAHO POWER COMPANY'S  
PROTEST TO IGWA'S  
INITIAL PLAN FOR  
PROVIDING REPLACEMENT  
WATER**

Idaho Power Company ("Idaho Power"), by and through its counsel, Brownstein Hyatt & Farber, P.C., and James C. Tucker, Senior Attorney for Idaho Power Company, respectfully submits to the Idaho Department of Water Resources ("IDWR") its Protest to the Idaho Ground

Water Appropriators' ("IGWA") Initial Plan for Providing Replacement Water in this matter. In support of its Protest, Idaho Power states as follows:

**I. NAME, ADDRESS AND TELEPHONE NUMBER OF PROTESTANT:**

The name of the Protestant is the Idaho Power Company. The names of the representatives of the Idaho Power Company in this proceeding and the persons to be utilized for purposes of service and receipt of all official documents are:

Idaho Power Company  
c/o James C. Tucker  
Legal Department  
P.O. Box 70  
1221 W. Idaho St.  
Boise, ID 83702  
Tel: (208) 388-2112  
e-mail: jamesstucker@idahopower.com

James S. Lochhead  
Adam T. DeVoe  
Brownstein Hyatt & Farber, P.C.  
410 17<sup>th</sup> Street  
Twenty-Second Floor  
Denver, CO 80202  
Tel: (303) 223-1100  
e-mail: jlochhead@bhf-law.com  
adevoe@bhf-law.com

**II. INTRODUCTION**

On April 19, 2005, the Director issued an Order (the "April 19<sup>th</sup> Order") in this matter requiring IGWA, and other entities seeking to provide replacement water or other mitigation in lieu of curtailment, to file a plan for providing such replacement water with the Director on or before April 29, 2005. The Director subsequently issued an Amended Order on May 2, 2005 (the "May 2<sup>nd</sup> Order"), which modified certain terms of the April 19<sup>th</sup> Order but did not change the obligation of IGWA or others to file a plan for providing replacement water by April 29, 2005. In response, IGWA filed an "Initial Plan for Providing Replacement Water" (the "Replacement Plan") with the Director on April 29, 2005. The Replacement Plan incorporates and relies heavily on the Ground Water Districts' Mitigation Plan for the American Falls Reach of the Snake River dated February 8, 2005 (the "Mitigation Plan"). Idaho Power filed a Protest

and a Motion to Dismiss the Mitigation Plan on March 21, 2005. The Director has not yet acted on Idaho Power's Motion to Dismiss the Mitigation Plan.

In its Motion to Dismiss the Mitigation Plan, Idaho Power states that the Mitigation Plan, on its face, is so deficient and devoid of information that the Director must dismiss the Petition as inadequate, incomplete, and not in conformance with the Conjunctive Management Rules. Since the Replacement Plan attempts to rely on the same vague precepts set forth in the Mitigation Plan, Idaho Power fully incorporates by reference the Motion to Dismiss the Mitigation Plan into this Protest. Accordingly, all aspects of the Replacement Plan relying on the Mitigation Plan must be dismissed as inadequate, incomplete, and not in conformance with the Conjunctive Management Rules.

In addition, the Replacement Plan identifies sources of water that may be utilized to satisfy the mitigation and replacement requirements of the May 2<sup>nd</sup> Order, but fails completely to identify how or where these sources will be provided. Instead, the Replacement Plan states that full credit for reach gains attributable to past mitigation plans, voluntary curtailment resulting in reach gains, reach gains attributable to ongoing mitigation or curtailment in response to IDWR orders, and reach gains attributable to other mitigation plans which will be sought, but have not yet been filed, will all be taken as a credit in the Replacement Plan and incorporated as replacement water. These sources of replacement water are not specifically identified, nor are these sources of water sufficient to prevent injury to senior water rights users and should therefore be denied as inadequate. Furthermore, like the Mitigation Plan, the Replacement Plan does not propose any accounting methods for the water proposed to be used in the plan and identifies no means of enforcing the plan. Accordingly, the Replacement Plan, like the Mitigation Plan, is inadequate and incomplete on its face, and must therefore be dismissed.

Finally, the Director has provided inadequate opportunity for parties to analyze the proposed Replacement Plan and submit responses. No time has been allocated for discovery and the Director is apparently planning to approve or deny the Replacement Plan without a hearing. The procedure – or, more appropriately, the complete lack thereof – for submitting, reviewing, and approving or denying the Replacement Plan denies due process to all parties involved. Accordingly, the Director should vacate that portion of the May 2<sup>nd</sup> Order expediting submittal and consideration of replacement plans, require the Districts to submit mitigation plans under the Conjunctive Management Rules, if at all, and provide procedural due process to all parties as called for in Idaho Code and the Department's Rules of Procedure. Until such mitigation plans are filed and approved under IDWR's Conjunctive Management Rules and the Rules of Procedure, the Director and IDWR must curtail junior ground water rights as set forth in the May 2<sup>nd</sup> Order to prevent harm to seniors.<sup>1</sup>

## **II. GROUNDS FOR PROTEST**

### **A. Idaho Power Has Standing to File this Protest**

Idaho Power has standing to file this Protest because it holds water rights, contracts rights and entitlements to water at American Falls Reservoir. Based upon the Director's findings in the May 2<sup>nd</sup> Order, these rights and entitlements confer standing on Idaho Power. Since the May 2<sup>nd</sup> Order does not sufficiently remedy harm to these rights, Idaho Power is an aggrieved party and seeks to protest and dismiss IGWA's Replacement Plan.

#### **1. May 2<sup>nd</sup> Order on Standing**

In regards to the USBR storage rights and the standing of members of the Surface Water Coalition, the May 2<sup>nd</sup> Order specifically provides:

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<sup>1</sup> Idaho Power will be submitting a request for a hearing on the May 2<sup>nd</sup> Order, and therefore does not concede that the May 2<sup>nd</sup> Order is adequate to prevent injury to the water rights of seniors, including specifically the water rights of Idaho Power.

According to the Letter, members of the Surface Water Coalition hold entitlements to water in storage projects owned and operated by the United States through the USBR. While legal title to the water in those projects is held by the United States through the USBR, the SRBA District Court has recognized that delivery organizations, such as the members of the Surface Water Coalition, have beneficial or equitable title to storage water described in their contracts with the USBR. *Final Order on Cross-Motions for Summary Judgment*, Consolidated Subcase 91-63 (SRBA Dist. Ct., Idaho, January 7, 2005)(*appeal filed*). Therefore, the Surface Water Coalition has standing to assert rights to storage water in USBR reservoirs on the Snake River upstream of Milner Dam. Moreover, any concern regarding the standing of the members of the Coalition are resolved by the intervention of the USBR in this proceeding.

May 2<sup>nd</sup> Order, Conclusions of Law, Paragraph 15, Page 34.

In the Order of April 6, 2005, the Director granted USBR's Petition to Intervene based on the fact that the USBR is the holder of "water rights directly at issue in this proceeding." The water rights claimed by USBR which are directly at issue in this proceeding are identified in Paragraphs 51 and 52 of the Order of February 14, 2005. Those water rights include the following: (1) Water Right No. 01-02064, for storage of 1.8 Million Acre Feet at American Falls Reservoir; and (2) Water Right No. 01-04052, for storage of 115,000 AF at American Falls Reservoir. The USBR claims filed in the Snake River Basin Adjudication recognize power generation for both Water Rights Nos. 01-02064 and 01-04052.

## **2. Idaho Power Company Water Rights at American Falls Reservoir**

Idaho Power has a contract right and entitlement for delivery of a portion of Water Rights Nos. 01-02064 and 01-04052, pursuant to a June 15, 1923, agreement with the United States. U.S. Contract 11r – 733, attached as EXHIBIT A. The 1923 American Falls contract entitles Idaho Power to the use of 45,000 acre-feet of primary storage capacity and 255,000 acre-feet of secondary storage capacity in American Falls Reservoir, for delivery to Idaho Power facilities in the Snake River both above and below Milner. Additionally, Idaho Power has water rights that

rely upon the contract and water entitlements held by Idaho Power in the American Falls Reservoir. These water rights and claims to water rights include<sup>2</sup>:

| <u>Water Right #/Basis</u> | <u>Source</u> | <u>Priority</u> | <u>Amount</u> | <u>Use</u> |
|----------------------------|---------------|-----------------|---------------|------------|
| 01-02017 – L               | Snake River   | 09/03/1908      | 1400 cfs      | Power      |
| 01-02032 – L               | Snake River   | 03/08/1919      | 4600 cfs      | Power      |
| 01-02046 - L               | Snake River   | 10/15/1926      | 2000 cfs      | Power      |
| 01-07128 - App             | Snake River   | 10/23/1996      | 7850 cfs      | Power      |
| 01-10382 – B/U             | Snake River   | 07/15/1901      | 6000 cfs      | Power      |
| 01-10383 – B/U             | Snake River   | 08/01/1901      | 2000 cfs      | Power      |
| 01-10384 – B/U             | Snake River   | 01/01/1929      | 136 cfs       | Power      |

Furthermore, the USBR, by virtue of the 1923 contract, Exhibit A, holds several of Idaho Power's water rights in trust for use by the Company. Prior to the construction of the American Falls Dam and Reservoir by the USBR, Idaho Power owned and operated three power plants at American Falls – the West Side, Island and East Side plants and was contemplating the enlargement of its generation facilities at American Falls. In preparation for this enlargement, in 1921 Idaho Power filed an application to appropriate an additional 1200 cfs for power purposes (Permit # 15201/01-2041), along with an application for a permit to store 300,000 acre/feet of water at the American Falls site (Permit # R-273/01-2065). These permits, together with other of Idaho Power's water rights and property interests, were the subject of the 1923 contract with the USBR that led to the development of American Falls Dam and Reservoir.

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<sup>2</sup> SRBA claims have been filed for all of these water rights. Copies of the SRBA Filings are attached as EXHIBIT B. At the time several of the claims were filed, Idaho Power referenced the interplay between its water rights, the USBR development of the American Falls Reservoir, and the contracts pertaining to that development. See: Letter to Karl Dreher, 10/23/96, attached as EXHIBIT C. [In the above chart L – license; App – application/ B/U – beneficial use claim.]

Subsequent to the development of American Falls Reservoir by the USBR, IDWR, on October 1, 1970, ordered Idaho Power to show cause why permit numbers 15201/01-2041 and R-273/01-2065 should not be cancelled. Idaho Power filed an answer to the Show Cause Order on December 1, 1970, submitting that based upon the 1923 contract and the circumstances surrounding the development of the American Falls site that all of the rights of Idaho Power under the referenced permits had been merged into water rights granted to the USBR, and the USBR therefore held the referenced permits as trustee for Idaho Power. In a Memorandum Decision, issued April 21, 1971, IDWR Director Keith Higginson found:

*After reviewing the files of the Department and the answer of the Idaho Power Company, the Director finds that the rights established by the Idaho Power Company, by reason of Permit Nos. 01-2041 and 01-2065, have been merged with rights granted the United States of America and that by reason of contracts and agreements entered into between the Company and the United States of America, Bureau of Reclamation, those rights are held in trust for use by the Company under the water rights of the United States at American Falls Reservoir.*

*The Director further finds that since the Company's rights to water at American Falls Dam and Reservoir are already covered by reason of licenses issued to the United States of America, under Permit Nos. R-269 and 4168 and contracts between the Company and the United States of America, that Permit Nos. 01-2041 and 01-2065 are duplicate and should be canceled.*

In the Matter of Permit Nos. 01-2041 and 01-2065 in the name of Idaho Power Company, Memorandum Decision, dated April 21, 1971; attached as EXHIBIT D.<sup>3</sup>

IDWR has not historically considered Idaho Power's rights at American Falls independent of USBR's claims in the Snake River Basin Adjudication. If IDWR is correct in this interpretation, which Idaho Power does not concede, under the 1923 contract and IDWR's 1971 decision Idaho Power still has retained beneficial or equitable title to the 45,000 acre foot primary, and 255,000 acre foot secondary,

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<sup>3</sup> Water Right No. 01-02064 was previously Permit No. R-269.

storage rights at American Falls, which form the basis of this Protest and demand for relief.

The Director's Orders of April 6, 2005; February 14, 2005; and May 2, 2005, recognize that Water Rights Nos. 01-02064 and 01-04052 are directly at issue in this proceeding and confer standing upon parties with an interest in these rights. Idaho Power has an interest in these water rights, and other water rights at American Falls, and is therefore an aggrieved party with standing to file this petition.

**B. The IDWR Rules and Idaho Statutory Authority Do Not Recognize "Replacement Plans" and IGWA's Plan Should be Considered Under the Rules for Mitigation Plans**

IDWR's rules do not recognize or provide for "replacement plans," and nowhere in IDWR's rules is the term replacement plan defined. Instead, the Conjunctive Management Rules recognize Mitigation Plans. Mitigation Plans are defined as:

A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate, holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply.

Conjunctive Management Rule 10.15; IDAPA 37.03.11.010.15.

This definition matches precisely that which the Director has ordered IGWA and others to file, though the Director has improperly labeled the required filing under the May 2<sup>nd</sup> Order a "replacement plan" instead of a "mitigation plan" and failed to provide the substantive and procedural protections required under Conjunctive Management Rule 43 for mitigation plans. It is not clear why the Director would not simply direct the junior-priority rights holders to file a mitigation plan if they so desire, though it is clear from IDWR's rules that a mitigation plan

meeting the standards set forth in Conjunctive Management Rule 43 is the only proper avenue for relief from the May 2<sup>nd</sup> Order requiring curtailment.

The May 2<sup>nd</sup> Order determines that senior-priority rights will be injured in 2005 by junior-priority ground water pumping. May 2<sup>nd</sup> Order, Paragraph 53, Page 44. The Director then recognizes that the junior-priority rights holders may, in order to avoid curtailment, "provide replacement water to members of the surface water coalition as mitigation." Id. The Director provides an avenue for junior-priority rights holders to provide "replacement water or other mitigation in lieu of curtailment" by allowing junior priority rights holders to provide a plan for replacement by April 29, 2005. May 2<sup>nd</sup> Order, Paragraph 9, Page 46. The Director then repeatedly refers to the contemplated replacement water as "mitigation" for out of priority depletions in the "Order" section starting on Page 45 of the May 2<sup>nd</sup> Order. May 2<sup>nd</sup> Order, Paragraphs 1-6, 8, 9, and 11-14.

Thus, what the Director refers to as a "plan for replacement" is in fact nothing more or less than a mitigation plan without the benefit of due process for senior water rights holders. In short, the plan for replacement contemplated in the May 2<sup>nd</sup> Order meets the precise definition of a mitigation plan under Conjunctive Management Rule 10.15; IDAPA 37.03.11.010.15.

Because the "plan for replacement" contemplated by the May 2<sup>nd</sup> Order is in fact a mitigation plan, all such plans submitted in accordance with the May 2<sup>nd</sup> Order should be considered as such and subjected to the substantive and procedural standards set forth in Conjunctive Management Rule 43; IDAPA 37.03.11.043.

The Replacement Plan submitted by IGWA does not meet the standards and criteria set forth in Conjunctive Management Rule 43, and the Replacement Plan should be therefore be dismissed. Because the Director has not provided the process afforded by Conjunctive

Management Rule 43, the Order should be amended to state that junior-priority water rights holders may submit plans in accordance with Conjunctive Management Rule 43, which will then be considered under the substantive and procedural standards set forth for mitigation plans. Until such plans are approved, the Director and IDWR must curtail junior-priority ground water pumpers to avoid injury to senior water rights holders.

Moreover, the fabricated process in the May 2<sup>nd</sup> Order is not authorized by any Idaho law or procedure. To the extent that mitigation plans under the Conjunctive Management Rules constitute an authorized process (which Idaho Power does not concede), that process is grounded in the statutory authorization for changes of water rights contained in I.C. § 42-222, which sets forth standards for approval and a process for protests to the proposed change. The "process" set forth in the May 2<sup>nd</sup> Order for the filing and approval of a "replacement plan" is simply made up out of thin air, and has no legal statutory basis or authority. The Director, in the May 2<sup>nd</sup> Order, created an *ultra vires* process, which on its face denies any other water right holder of due process, and which flies in the face of the substance and procedure set forth in Rule 43 and I.C. § 42-222.

**C. Idaho Power Incorporates by Reference, and Restates its March 21, 2005, Motion to Dismiss the Mitigation Plan**

Idaho Power incorporates by reference its Motion to Dismiss the Mitigation Plan filed March 21, 2005, to all aspects of the Replacement Plan relying on the Mitigation Plan. Because aspects of the Replacement Plan rely heavily on the proposals set forth in the Mitigation Plan, the Director cannot approve the Replacement Plan without first ruling on Idaho Power's Motion to Dismiss the Mitigation Plan. Accordingly, Idaho Power again requests that the Director dismiss the Mitigation Plan and all aspects of the Replacement Plan which rely on the Mitigation Plan.

Furthermore, Idaho Power incorporates and makes the same objections to the Replacement Plan as set forth in the March 21, 2005, Motion to Dismiss the Mitigation Plan and the April 11, 2005, Reply to IGWA's Response to the Motion to Dismiss the Mitigation Plan. As stated above, the Replacement Plan must conform to the standards set forth in Conjunctive Management Rule 43. Since the Replacement Plan wholly fails to meet the standards set forth in Conjunctive Management Rule 43, the Replacement Plan must be dismissed.

**1. The Replacement Plan Does Not Meet the Minimum Requirements Established by Conjunctive Management Rule 43.**

The proponent of a mitigation plan must meet three substantive requirements. First, the proponent must identify the water rights for which benefit the mitigation plan is proposed. Second, the proponent must provide a description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. Third, the proponent must provide such information as will allow the Director to evaluate the factors set forth in Rule 43 of the Conjunctive Management Rules. IDAPA 37.03.11.043.01. As described below, IGWA's Replacement Plan meets none of these requirements, and therefore must be dismissed.

*a. The proposed Replacement Plan fails to set forth the requisite detailed information for water supplies proposed to be used for mitigation, and is therefore speculative.*

Rule 43.03.h requires that the Director assess the reliability of the source of replacement water over the term in which it is proposed to be used. The proposed Mitigation Plan lists some potential water supplies, but provides no basis for the Director to assess the reliability of replacement supplies. Proposed replacement water must be available to senior water rights in quantities, at times, and at locations sufficient to replace all out-of-priority depletions under junior water rights. Rule 43.03.b. and c. If the replacement water is from storage, the state and other water users must know from where such water will be delivered, transit losses associated

with such delivery, and the timing and availability of such water. If the replacement water is from leases, purchases or curtailment of irrigation, the state and other water users must know the historic consumptive use of such water, the priority of the water right, the timing and availability of the historic consumptive use, and the provisions for dry-up and administration of consumptive use credits.

This information is similar to that required for any transfer of water rights under the IDWR's Transfer Processing Policies and Procedures. Rule 43.03.i. requires the Director to assess whether a proposed mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the plan. It is impossible for the state and other water users to assess the viability of the Replacement Plan unless the replacement water is available to the Districts and is specifically identifiable.

None of this necessary information is provided in the Districts' proposed Mitigation Plan. Instead, IGWA attempts to obtain credit for past actions and existing plans, while failing to identify how new water will be provided to prevent injury to senior water rights. As a result, the Replacement Plan is vague and speculative. It fails to meet the requirements of the Rule, and must be dismissed.

*b. The proposed Replacement Plan fails to demonstrate compliance with the criteria set forth in Rule 43, and therefore must be dismissed as deficient on its face.*

Rule 43.01.d requires that a mitigation plan must provide information sufficient to allow the Director to evaluate the factors set forth in subsection 43.03. The proposed Replacement Plan does not set forth such information, and therefore must be dismissed as deficient on its face. Among the deficiencies in the Plan are the following:

1. The delivery, storage and use of water pursuant to the Replacement Plan is not in compliance with Idaho law.

Rule 43.03.a. requires that delivery, storage and use of water pursuant to a proposed plan must be in compliance with Idaho law. The Replacement Plan does not identify how the water to be used in the Replacement plan will be delivered or stored. It is therefore impossible to determine how the Replacement Plan will operate in compliance with Idaho law.

A mitigation plan is in fact a change of water rights. Proposed replacement water will be taken from its original purpose and use, and will instead be delivered to senior water rights to replace out-of-priority depletions under junior water rights. This is a different purpose and place of use than the authorized or present use. Therefore, in order to properly evaluate a proposed mitigation plan, the petitioner must meet the substantive requirements of Idaho law with regard to changes of water rights.

Under Idaho law, a change of water rights can be accomplished only when no water rights are injured, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources in the State of Idaho and is in the local public interest. I.C. § 42-222. In assessing changes of water rights, the IDWR also evaluates the validity of the right being changed and assures that the petitioner owns the right or otherwise has authority to apply for the transfer. See Administrative Memorandum, Transfer Processing No. 24, Re: Transfer Processing Policies and Procedures, October 30, 2002 at 1.

The Districts do not identify how and where the water identified in the Replacement Plan will be delivered and stored. As a result, the Director cannot evaluate whether any changes required for the use of replacement water will result in injury to other water rights. Therefore, the Replacement Plan is deficient on its face.

Additionally, it is impossible to determine the legality of the Replacement Plan. The Director of the IDWR has a "clear legal duty" to distribute water in accordance with priority under the prior appropriation doctrine. I.C. § 42-602; Musser, 871 P.2d at 812. A mitigation plan must provide a reasonably identifiable basis upon which the Director can undertake his duties. This means that the plan must be enforceable and administrable by the Director. The state must also be able to track the amount, timing, location and quality of replacement water to affected seniors. The state must be able to enforce the plan by curtailing any junior water rights if adequate replacement water is not delivered to senior water rights in quantity, quality, time and location sufficient to replace all out-of-priority depletions.

The Districts' proposed Replacement Plan is not administrable or enforceable, because it provides the Director no basis upon which to undertake his duties. As a result, the Plan must be dismissed because it does not demonstrate that it can be operated in accordance with Idaho law.

2. The proposed Replacement Plan does not contain any real means of enforcement.

Rule 43.03.k. provides that the adequacy of a plan must be based on whether it provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. This means two things. First, a plan must have adequate accounting of diversions and depletions under the junior water rights benefited by the plan and of the delivery of replacement water to senior rights. Second, a plan must be enforceable, that is, the junior rights must be subject to curtailment if the required replacement water is not provided to senior rights in the amount, quality, timing and location required to prevent material injury.

IGWA's Replacement Plan offers neither of these attributes. Although the Plan makes a vague reference to accounting after the 2005 irrigation season, it offers no specifics as to how junior well diversions and replacement water deliveries will be accounted. (Replacement Plan at

Page 7.) Moreover, the Replacement Plan does not reference any enforcement. It is based on credits for past action, a vague and confusing Mitigation Plan, and promises of plans to be filed in the future. As such, the Replacement Plan should be dismissed as wholly inadequate to meet the substantive requirements of the Conjunctive Management Rules. In addition, and because of the extremely limited time to file this Protest before the Director expressed his intent to act on the Replacement Plan, Idaho Power reserves the right to make additional substantive and technical comments on the Replacement Plan in the future, whether in writing or at a hearing under IDWR Rules of Procedure.

**C. If the Director Decides Not to Dismiss the Replacement Plan as Deficient, Idaho Power Moves in the Alternative for the Director to Vacate the Proposed Schedule of Approval, and Require Adherence to the Rules of Procedure.**

With less than two weeks notice, the Director required IGWA and others to file a "plan for replacement." The Director then stated that he would rule on these plans within 5 working days, without providing any opportunity for objections or protests, and with no intent to hold a hearing on the matter. This expedited procedure has foreclosed any reasonable possibility for Idaho Power and others protesting the Replacement Plan to review the plan, gather evidence, assess the potential impacts of the Replacement Plan on Idaho Power and others, and prepare written comments and requests for hearings to the Director. There is no apparent basis in the IDWR Rules of Procedure for the contemplated action. Accordingly, this expedited schedule will not afford Idaho Power or other senior water users potentially impacted by the Replacement Plan a meaningful opportunity to defend their interests. Idaho Power, therefore, respectfully requests that if the Director denies this Protest and does not dismiss the Replacement Plan, that the Director instead vacate the expedited schedule and require that IGWA and others seeking to file plans complying with the substantive and procedural rules governing mitigation plans under

Conjunctive Management Rule 43 and IDWR Rules of Procedure. As set forth below, adherence to these minimal procedural rules is critical under the circumstances to ensure that Idaho Power and other senior water users are not deprived of their water rights without due process of law.

An administrative agency, such as IDWR, is bound not only by its own rules and regulations governing administrative actions, but also is bound to ensure that its proceedings meet federal and state due process requirements. See Withrow v. Larkin, 42 U.S. 35, 45 (1975); McClelland v. Andrus, 606 F.2d 1278, 1286 (D.C. Cir. 1979). The Fourteenth Amendment of the United States Constitution and Article 1, Section 13 of the Idaho Constitution prohibit the deprivation of life, liberty or property without due process of law. It is undisputed that individual water rights, such as those at issue here, are protected property rights under the laws of the State of Idaho and, as such, must be afforded the protection of due process before they may be taken or impaired by government action. Nettleton v. Higginson, 558 P.2d 1048 (Idaho 1977).

“Procedural due process is the aspect of due process relating to the minimal requirements of notice and hearing if the deprivation of a life, liberty or property interest may occur.” Bradberry v. Idaho Judicial Council, 28 P.3d 1006, 1015 (Idaho 2001). Procedural due process requires that the government provide a party with “an opportunity to be heard at a *meaningful time and in a meaningful manner*.” Id. (Emphasis added). See also Paul v. Board of Professional Discipline of the Idaho State Board of Medicine, 11 P.3d 34, 39 (Idaho 2000). What constitutes a “meaningful time” and a “meaningful manner” depends on the specific circumstances presented in each case. “Due process, . . ., is not a concept to be applied rigidly in every matter. It is a flexible concept calling for procedural protections as are warranted by the particular situation.” Bradbury, 28 P.3d at 1015.

The Supreme Court has identified three factors for courts to consider in determining the “dictates of due process” in any given case: (1) the interests at stake, (2) the risk of erroneous deprivation of such interests through the procedures used, and the value of additional procedural safeguards, and (3) the fiscal and administrative burden that the additional procedural requirements would entail. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In determining what procedural due process requires, Idaho courts have recognized that one fundamental element of procedural due process is the right to present and rebut evidence in defense of protected property interests. Idaho Historic Preservation Council, Inc. v. City Council of City of Boise, 8 P.3d 646, 649 (Idaho 2000); Chambers v. Kootenai County Board of Comm’rs, 867 P.2d 989, 992 (Idaho 1994); Gay v. County Comm’rs of Bonneville County, 651 P.2d 560, 562-63 (Idaho Ct. App. 1982). Other state and federal courts have further held that the right to conduct discovery, although not constitutionally mandated in all administrative cases, is required if necessary to ensure that the party seeking discovery is afforded procedural due process. See Mister Discount Stockbrokers, Inc. v. Securities and Exchange Commission, 768 F.2d 875, 878 (7<sup>th</sup> Cir. 1985) (because the due process clause ensures that an administrative proceeding will be conducted fairly, discovery must be granted if in the particular situation a refusal to do so would so prejudice a part as to deny him due process); Mohilef v. Janovici, 58 Cal. Rptr.2d 721, 743 (Cal. Ct. App. 1997) (same).

Applying the three factors to the specific circumstances of this case, it is clear that the Director must comply with the procedural protections afforded by the IDWR Conjunctive Management Rules and the Rules of Procedure because a refusal to do so would so prejudice Idaho Power as to deny it due process. First, the interests at stake in this action are substantial.

The Replacement Plan, if accepted, could cause significant and irreversible injury to the surface water rights of not only Idaho Power, but also hundreds of other senior water users.

Second, given the complexity of the issues presented by the Replacement Plan, there is a high risk that a ruling by the Director without the benefit of proper procedural protections for Idaho Power and other senior water rights holders would erroneously deprive Idaho Power and other surface water users of their senior water rights. The sheer scope of the Replacement Plan is enormous, as it covers a wide geographic area and involves hundreds of groundwater users withdrawing vast amounts of groundwater from the ESPA. Furthermore, the Replacement Plan raises highly technical and complex water management issues. The Replacement Plan provides very little substantive detail to support its claims, making it impossible for anyone to analyze the validity of the Replacement Plan on its face. For these same reasons, the Director cannot fully and accurately evaluate the potential impacts of the Replacement Plan on senior water interests without first affording those interests an opportunity to gather evidence, review the plan, submit comments and potentially request a hearing on the matter.

Finally, providing the parties these minimal procedural protections will not impose a fiscal or administrative burden on the Director. Although procedural due process will delay approval of the Replacement Plan, any fiscal burden will be borne by the parties, not the agency. In light of the interests at stake and the highly technical issues presented, due process mandates that the Director vacate the expedited process.

In summary, should the Director determine not to dismiss the Replacement Plan as deficient, the specific circumstances in this action require the Director to vacate the provisions of the May 2<sup>nd</sup> Order expediting filing and consideration of the Replacement Plan and provide the parties with procedural protections of the IDWR Conjunctive Management Rules and the Rules

of Procedure. A contrary decision by the Director would arbitrarily and capriciously violate the procedural due process requirements of the state and federal constitutions.

**D. The Director Must Curtail Junior Ground Water Rights in Accordance with the May 2<sup>nd</sup> Order Pending Approval of any Mitigation Plan.**

The May 2<sup>nd</sup> Order finds that specified junior ground water rights must be curtailed in order to avoid injury to senior water rights. While it is entirely proper for IGWA or any other ground water interest to file a mitigation plan for consideration pursuant to established rules of the IDWR, junior ground water rights must be curtailed pending the approval of such a plan. Failure to properly administer junior ground water rights that have already been found to have caused injury will deprive senior water rights holders, including Idaho Power, of the lawful exercise of their property rights. Therefore, failure of the Director to order the curtailment of junior water rights as set forth in the May 2<sup>nd</sup> Order will result in a violation of law and a taking of the lawful property of others. Idaho Power reserves the right to assert further claims against the State of Idaho in the event the Director fails to carry out his duties under the law.

### **III. REQUEST FOR RELIEF**

Based on the foregoing, Idaho Power Company respectfully requests that the Director take the following action with respect to the District's proposed mitigation plan:

1. Dismiss the Replacement Plan as incomplete under Conjunctive Management Rule 43;
2. In the alternative, vacate the expedited process for consideration of the Replacement Plan.
3. Curtail junior ground water pumpers until mitigation plans meeting all aspects and requirements of Conjunctive Management Rule 43 have been approved.

Dated this 4<sup>th</sup> day of May, 2005.

IDAHO POWER COMPANY

By:   
James C. Tucker, Esq.  
Senior Attorney, Idaho Power Company

and

James S. Lochhead, Esq.  
Adam T. DeVoe, Esq.  
Brownstein Hyatt & Farber, P.C.  
410 17<sup>th</sup> Street  
Twenty-Second Floor  
Denver, CO 80202

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4<sup>th</sup> day of May, 2005 a true and correct copy of the foregoing IDAHO POWER COMPANY'S PROTEST TO IGWA'S INITIAL PLAN FOR PROVIDING REPLACEMENT WATER was deposited in the United States Mail, postage prepaid addressed to:

Tom Arkoosh  
Arkoosh Law Offices  
P.O. Box 32  
Gooding, ID 83330  
alo@cableone.net

Scott Campbell  
Moffatt Thomas  
P.O. Box 829  
Boise, ID 83701  
slc@moffatt.com

W. Kent Fletcher  
Fletcher Law Office  
P.O. Box 248  
Burley, ID 83318-0148  
wkf@pmt.org

Kathleen Carr  
Office of the Field Solicitor  
550 W. Fort Street MSC 020  
Boise, ID 83724

Roger D. Ling  
Ling Robinson  
P.O. Box 396  
Ruper, ID 83350-0396  
lnrlaw@pmt.org

Gail McGarry PN-3100  
US Bureau of Reclamation  
1140 N. Curtis Road  
Boise, ID 83701-1234  
emcgarry@pn.usbr.gov

John Rosholt  
Travis Thompson  
Barker Rosholt  
113 Main Ave West, Suite 303  
Twin Falls, ID 83301-6167  
jar@idahowaters.com  
tlt@idahowaters.com

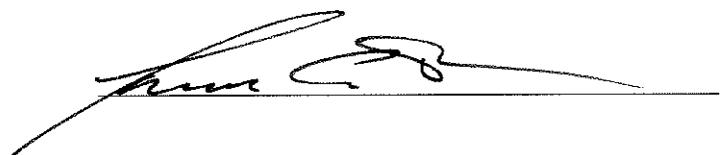
Ron Carlson  
Lewis Rounds  
IDWR  
Eastern Regional Office  
900 N. Skyline Drive  
Idaho Falls, ID 83402-6105  
ron.carlson@idwr.idaho.gov  
lewis.rounds@idwr.idaho.gov

John Simpson  
Barker Rosholt  
P.O. Box 2139  
Boise, ID 83701-2139  
jks@idahowaters.com

Allen Merritt  
Cindy Yenter  
IDWR  
Southern Regional Office  
1341 Fillmore Street, Suite 200  
Twin Falls, ID 83301-3033  
allen.merritt@idwr.idaho.gov  
cindy.yenter@idwr.idaho.gov

Jeffrey C. Fereday  
Michael C. Creamer  
Givens Pursley LLP  
P.O. Box 2720  
Boise, ID 83701-2720  
cf@givenspursley.com  
mcc@givenspursley.com

Director Karl Dreher  
Idaho Department of Water Resources  
P. O. Box 83720  
Boise, Idaho 83720-0098  
karl.dreher@idwr.idaho.gov



# **EXHIBIT A**

Symbol 11r-733

C O N T R A C T

Between the United States and the Idaho Power Company,

Relative to Power Rights at American Falls, Idaho.

Dated June 15, 1923.

DEPARTMENT OF THE INTERIOR  
 UNITED STATES RECLAMATION SERVICE  
 MINIDOKA IRRIGATION PROJECT.

Contract between the United States and Idaho Power Company relative to  
 power rights at American Falls, Idaho.

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Symbol Ilr-733

1. THIS AGREEMENT, Made this 15th day of June, 1923 in  
2. pursuance of the Act of Congress of June 17, 1902, (32 Stat.,  
3. 388) and acts amendatory thereof or supplementary thereto,  
4. between THE UNITED STATES OF AMERICA, hereinafter styled the  
5. United States, acting for this purpose by Hubert Work  
6. Secretary of the Interior, and the IDAHO POWER COMPANY, a  
7. corporation organized under the laws of the State of Maine  
8. and authorized to do business in the State of Idaho, and  
9. having its principal place of business at Boise, Idaho.  
10. hereinafter styled the company, its successors and  
11. assigns.

2. Purpose and Plans of United States.

12. WHEREAS, the United States contemplates the con-  
13. struction of a large reservoir at American Falls, Idaho, to  
14. store the flood water and winter flow of Snake River and  
15. make the same available for the reclamation of large areas  
16. of public lands of the United States including the North  
17. Side Pumping Division of the Minidoka Project and other por-  
18. tions of the Snake River Valley, and to supplement the water  
19. supply of various projects in the Snake River Valley now  
20. having an inadequate or insufficient water supply during  
21. part of the irrigation season. And

3. Company Public Service Corporation.

22. WHEREAS, the company is a public service corpor-  
23. ation furnishing electricity throughout the Southern por-  
24. tion of the State of Idaho for light, heat, and power and  
25. irrigation purposes. And

4. Interference with Rights of Company.

26. WHEREAS, said electricity is, to a large extent, gen-  
27. erated by the company in hydro-electric plants owned by it  
28. and located on the Snake River at American Falls and various  
29. points below and the water which it uses and claims for use  
30. at American Falls is or would be also used, to a large extent,  
31. in its plants located and to be located at points below on  
32. the stream, so that the storing by the United States of win-  
33. ter flow at American Falls will interfere with certain power  
34. and other rights of company at American Falls and points be-  
35. low and

5. Use of Property Owned by Company.

36. WHEREAS, a portion of said proposed American Falls dam  
37. and reservoir will be located on land owned by the company  
38. and the construction and operation of the same will also make  
39. necessary the destruction of or interfere with certain gener-  
40. ating stations and other property of the company; and

6. Company's Prior Filings at American Falls.

41. WHEREAS the company has at American Falls water filings  
42. prior to the American Falls filings of the United States  
43. sufficient to embrace the entire amount of water reserved

44. to the company under this contract.

7. Need of United States for Power.

45. AND WHEREAS, the said proposed North Side Pumping -  
46. Division of the Minidoka Project of the United States is a  
47. pumping project and the United States will require in con-  
48. nection with the said project a large power plant for the  
49. development of a large amount of electric power for pump-  
50. ing water upon the lands of the said project.

8. Mutual Covenants.

51. NOW, THEREFORE, WITNESSETH: That for and in con-  
52. sideration of the covenants and agreements of the par-  
53. ties herein, upon the conditions herein named, the par-  
54. ties covenant and agree:

9. Property to be Conveyed to United States.

55. The Company hereby agrees, upon the terms and condi-  
56. tions hereinafter stipulated, to sell and by good and  
57. sufficient deed convey to the United States of America,  
58. free of tax liens and of liens or incumbrances created,  
59. granted or imposed by itself or its public utility pred-  
60. ecessors, all its right, title and interest in and to the  
61. following described real estate, situated in the counties  
62. of Fower and Bingham, State of Idaho, to-wit: (a) The prop-  
63. erty described in the list of land descriptions hereto  
64. attached as Exhibit "A" and made a part of this contract:  
65. and any other real property owned by the company, if any  
66. such there be, under the proposed dam or reservoir to be

67. constructed by the United States in connection with the  
68. American Falls Reservoir project; the said proposed dam  
69. to be located and constructed upstream from the company's  
70. American Falls Dam as now constructed and north of the  
71. right of way of the Oregon Short Line Railroad Company's  
72. bridge property as now located at American Falls; the ti-  
73. tle to be conveyed to the United States in all cases to be  
74. as full and complete as title as the company has, Provided,  
75. however, that to the extent hereinafter expressly provided  
76. and to no greater extent than hereinafter expressly  
77. provided, and subject to all the terms, conditions and  
78. provisions hereinafter set out, the Company shall have and  
79. there is reserved to the Company, the right to store the  
80. water which it is to receive from the Proposed American Falls  
81. Reservoir, upon that part of the property and rights describ-  
82. ed in Paragraph 9, located within the reservoir, and agreed  
83. to be conveyed by the Company to the United States insofar  
84. as such reservation to the Company does not conflict with any  
85. of the rights hereinafter granted or agreed to be allowed to  
86. the United States or any of the limitations or restrictions  
87. hereinafter agreed to be placed upon the rights of the Company.

88. (b) The two power plants at American Falls known as  
89. the Island Power plant and the West Side plant, except as to  
90. the water rights otherwise provided for in this contract to-  
91. gether with the following described tracts of land on which  
92. said plants are located, to-wit:

93. The following described parcel of land situated in  
94. Lot 5 Sec. 31, T. 7 S., R. 31 E., B. M., beginning at a  
95. point on the low-water line, on the West bank of Snake  
96. River where the continuation (in a straight line) of  
97. the North boundary line of lot five of section thirty-one  
98. Township seven south of Range thirty-one east of Boise  
99. Meridian, would intersect the said low-water line on the  
100. West bank of Snake River; thence west along said north  
101. boundary line of said lot five for a distance of 211.5 feet  
102. to a stake on the south boundary line of the right of way  
103. of the Oregon Short Line Railroad; thence westerly along  
104. the south boundary line of said right of way, for a distance  
105. of 270 feet to a stake; thence South  $43^{\circ} 14'$  East for a  
106. distance of 386 feet; thence due East to the intersection  
107. of the low-water line on the west bank of Snake River;  
108. thence along the low-water line on the said west bank of  
109. said Snake River, following the meandering thereof, to the  
110. point of beginning, containing about two acres, more or less  
111. reserving to the Company from said property in said lot five,  
112. rights of way and easements for occupancy and use by the  
113. Company for the purpose of erecting, operating and maintaining  
114. electric transmission lines, and structures and equipment  
115. appurtenant thereto for substation, sectionalizing and switch-  
116. ing purposes, said rights of way and easements, including  
117. the right of ingress and egress over the property of the  
118. United States, to be located as mutually agreeable to the

119. United States and the Company.

120. Also the following described piece or parcel of  
121. land situated in Lot 12 of Section Thirty (30) Town-  
122. ship Seven (7) South, Range Thirty-one (31) East of the  
123. Boise Meridian, commencing at a point on the west bank  
124. of the Snake River where the easterly boundary line of the  
125. right of way of the Oregon Short Line Railroad Company  
126. intersects the said bank of Snake River; thence running  
127. along the bank of said Snake River in a southerly direction  
128. for a distance of eighty feet; thence in a straight line in  
129. a westerly direction to the intersection of the east bound-  
130. ary line of said railroad company's right of way one hundred  
131. and seventy-five feet; and thence along the easterly bound-  
132. ary line of said railroad right of way to the place of be-  
133. ginning.

134. Also the following described tract of land lying in  
135. the river channel of Snake River between Lots 4 and 12, of  
136. Section 30, T. 7 S., R. 31 E., B.M. Beginning at a point  
137. where the South boundary of Lot 14, Block 20 of the Original  
138. Townsite of American Falls intersects the west boundary of  
139. Lot 4 Sec. 30, T. 7 S. R. 31 E., B.M., thence in a northerly  
140. direction along said west boundary of Lot 4 to the northwest  
141. corner of said Lot 4, thence in a straight line across the  
142. channel of Snake River to the north east corner of Lot 12,  
143. Sec. 30, T. 7 S., R. 31 E., B.M., thence in a southerly

144. direction along the east boundary of said Lot 12 to the  
145. southeast corner of said Lot 12; thence in an easterly di-  
146. rection along the south boundary of said Sec. 30 to a point  
147. where a due north and south line, through a point 25 feet  
148. due east from the southeast corner of what is known as the  
149. Island Plant power house belonging to the Company, intersects  
150. the south boundary of said Sec. 30; thence due north to the  
151. center line of the Oregon Short Line Railroad as now located;  
152. thence in a straight line in a north-westerly direction to  
153. the point of intersection of the east toe of the intake to  
154. the said Island Plant with the downstream toe of the company's  
155. American Falls dam; thence along the toe of the east face of  
156. the east pier or abutment wall of the headworks of said Island  
157. plant to the upstream toe of the company's said American Falls  
158. dam; thence southeasterly along the upstream toe of that por-  
159. tion of the company's said American Falls dam which the com-  
160. pany will retain to the easterly toe of the division dam to be  
161. constructed by the United States between the westerly end of  
162. that portion of the company's dam which the company will retain  
163. and the government's proposed American Falls reservoir dam (re-  
164. ferred to in Paragraph 15 of this agreement): thence in a straight  
165. line in an easterly direction to the point of beginning, and  
166. all rights of the Company in the tailrace from said Island and  
167. West Side plants; and the United States shall have and there  
168. is granted to the United States the right of ingress and egress

169. for pedestrian traffic over the Company's wood-steel  
170. bridge leading from the east bank of Snake River to the  
171. said Island Plant, so long as said bridge may be maintained  
172. by the Company, reserving to the Company, and the Company  
173. shall have the right and easement of junction, tie, abutment  
174. and support of the portion of the Company's American Falls  
175. dam to be retained by it to the portion of said dam to be  
176. conveyed to the United States and to the headworks of  
177. said Island Plant and to said division dam to be constructed  
178. by the United States between the portion of the Company's  
179. dam to be retained by it and the Government's proposed  
180. American Falls reservoir dam; reserving further to the Com-  
181. pany the west portion of the Company's dam as described  
182. and with the limitations contained in Paragraph 9 (c), and  
183. reserving further to the Company and the Company shall have  
184. the right and easement of junction, tie, abutment and sup-  
185. port of the Company's said wood-steel bridge upon the pro-  
186. perty adjacent to said Island Plant; and reserving further  
187. to the Company and the Company shall have the rights and  
188. easements of flowage and pondage on and over the premises  
189. conveyed to the United States under this agreement and lying  
190. south of the down stream toe of the Government's proposed  
191. American Falls dam and east of said proposed division dam  
192. and the headrace or works of said Island Plant for the pur-  
193. pose of utilizing the Company's water rights and rights to  
194. the use of water; and further reserving to the Company, and

195. the Company shall have the easement and right to waste  
196. and discharge such water over said lands lying south of  
197. the downstream toe of the Government's proposed American  
198. Falls dam and east of said division dam and the head race  
199. or works of said Island plant, and through and over the  
200. Company's American Falls dam and works and along and against  
201. the works and property of the United States. The Company  
202. agrees to so maintain and operate the said power plants  
203. and other structures to be conveyed to the United States  
204. until delivery of possession thereof to the United States  
205. that the same will be delivered to the United States in  
206. as good condition as they now are, ordinary wear and  
207. tear and any damage directly or indirectly caused by  
208. the United States excepted. Provided, however, that  
209. should the company on account of any extraordinary  
210. accident or calamity be unable to deliver such plants in  
211. such condition, it shall have the option to deliver them  
212. as they then are and shall furnish to the United States  
213. free of charge as demanded by the officer of the United  
214. States in charge of said American Falls Reservoir the  
215. equivalent output of power of such plants minus the amount  
216. of power which may actually be developed at these plants  
217. by the United States - such power to be delivered on the  
218. generator voltage bus of the Island plant and such deliv-  
219. ery to terminate on April 1st, 1928. The power developed  
220. at said West Side and Island Plants or delivered by the

231. company under this subdivision shall after the delivery  
232. of the deeds provided for in subdivision (d) hereof be  
233. considered a part of and not in addition to the power  
234. right otherwise defined to be in the United States under  
235. the terms of this agreement.

226. (c) The property described in Exhibit "B" attached  
227. hereto and made a part hereof; and the west portion of  
228. the present dam and spillway at American Falls up to and  
229. including the intake to the Island plant; reserving, how-  
230. ever, to the company all and every of the rights it now  
231. has to use, maintain and operate said property in connec-  
232. tion with the use, maintenance and operation of its East  
233. Side plant, until such time as the United States has con-  
234. structed the division dam in accordance with the provisions  
235. of Paragraph 15 hereof and has made the provision for the  
236. discharge of water into the pool between the government's  
237. proposed American Falls reservoir dam and the Company's  
238. East Side plant in compliance with the terms of said Para-  
239. graph 15, Provided that the United States shall, after  
240. making second payment, have the right to demolish such por-  
241. tion of the present dam and spillway at American Falls west  
242. of the Island plant intake as may be necessary for the con-  
243. struction of the proposed government power plant and other  
244. works at American Falls, providing that by so doing no in-  
245. terference is had with the operation of the Company's East  
246. Side Plant.

247. (d) All the company's water rights, appropriations ✓  
248. water filings and permits, at American Falls, or used or  
249. intended to be used in connection with the company's power  
250. plants and proposed plants at American Falls, except the  
251. rights, whether primary or tertiary, expressly reserved  
252. to the company, as hereinafter set out. The water rights ✓  
253. of the company transferred to the United States for use  
254. for power purposes shall be considered as impressed with  
255. a right in the United States to change the use of such  
256. water from power to irrigation or to store the same for  
257. irrigation whenever the Secretary of Interior shall decide ✓  
258. that such water is required for irrigation purposes. But  
259. it is expressly agreed and understood that the water rights  
260. and rights to the use of water which it is herein agreed  
261. that the Company shall have are reserved out of its exist-  
262. ing appropriations and rights as independent rights under  
263. its own filings and appropriations and of the dates of prior-  
264. ity to which the Company is entitled under such appropria-  
265. tions and are not to be considered as mere contract rights  
266. under contract with the United States.

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Prop. AS  
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267. (e) The right to limit all other rights of the company ✓  
268. on Snake River at whatever points and in whatever counties  
269. the same may be located insofar as and no farther than the  
270. rights allowed and granted to the United States to store  
271. and use water as herein provided may interfere with any  
272. rights of the company at any lower points on Snake River.

10. Company's Primary Summer Power Right.

PRIMARY  
POWER  
RIGHT  
JPL

274. It is agreed and understood that the company reserves  
275. and it shall have as against the United States and those  
276. claiming or that may hereafter claim under them, the first  
277. or primary right at American Falls to use for power purposes  
278. at American Falls the following amounts of water during the  
279. following periods of each year:  
280. 100 second-feet beginning April 1st, increasing uniformly  
281. to 2500 second-feet on May 1st, and continuing at that  
282. amount to September 15th inclusive, then decreasing uniformly  
283. to 100 second-feet on October 31st and none except as here-  
284. inafter provided from November 1st to March 31st inclusive.  
285. The above described power right so reserved to the com-  
286. pany shall be considered as prior and superior to all other  
287. rights at American Falls. The company may also have a pri-  
288. mary right to use at any time any water brought to American  
289. Falls by it from beyond the Snake River water shed, or any  
290. stored water acquired by the company from storage capacity  
291. hereafter constructed above American Falls provided that it  
292. is understood and agreed that the company's right to store  
293. water, except water brought by the company from beyond the  
294. Snake River watershed, in such capacity above American Falls  
295. shall be inferior and subordinate to the right of the United  
296. States to provide for building and to fill and use 3,000,000  
297. acre-feet of storage capacity, including the capacity of the  
298. American Falls Reservoir anywhere on Snake River in addition  
299. to the storage capacity now available in Jackson Lake Reser-  
300. voir and Lake Walcott.

11. Government's Summer Power Right at American Falls. ✓

301. ~~The United States shall have and the company hereby~~  
302. grants to the United States as against the company a  
303. secondary power right at American Falls to that amount  
304. of water which will generate continuously for delivery  
305. from the generator bus bars in the Government power  
306. station at American Falls 6,700 kilowatts beginning  
307. on April 1st, increasing uniformly to 25,000 kilowatts  
308. on May 1st and to 30,000 kilowatts on June 1st, contin-  
309. uing at that amount to August 15th, inclusive, then de-  
310. creasing uniformly to 25,000 kilowatts in September 15th,  
311. and to 5,500 kilowatts on October 31st, and none from No-  
312. venber 1st to March 31st inclusive, except in connection  
313. with the 10,000 kilowatts as authorized in Paragraphs  
314. 24 and 19 hereof. In no case, however, except as au-  
315. thorized by Paragraph 13, shall the water utilized under  
316. this power right exceed 1,500 second-feet on April 1st,  
317. increasing uniformly to 5,000 second-feet on May 1st,  
318. and to 6,000 second-feet on June 1st, continuing at that  
319. amount to September 15th inclusive, and decreasing uni-  
320. formly to 1,500 second-feet on October 31st. The secondary ✓  
321. power right granted to the United States under this paragraph  
321a. shall be inferior and subordinate to the primary power right  
321b. reserved to the company in paragraph 10 hereof, and shall be  
321c. prior and superior to all power rights of the company at Amer-  
321d. ican Falls other than the rights reserved under Para. 10 here  
321e. and the right to the storage provided in Para. 19. Provided,

Secondary  
Power  
right  
U.S.

322. however, that if the Company, through the refusal, for  
323. any reason, of the United States or its successors in  
324. control of said reservoir to comply with the terms of  
325. this agreement, fails to receive for its own use at its  
326. plants at American Falls, unless its right to such water  
327. has been taken under the power of eminent domain, the  
328. amount of water and at the times and in the manner con-  
329. templated by this agreement, it shall have the right to  
330. make up such deficiency (during the time of such refusal  
331. and no longer) out of the appropriations, water filings,  
332. and permits which it now holds, and the amount which the  
333. United States shall have the right to store or use out of  
334. said appropriations, shall be reduced accordingly. It is  
335. agreed and understood that errors or inaccuracies in the  
336. release or delivery of water from the reservoir shall not  
337. be construed as a refusal by the United States to comply  
338. with the terms of this agreement. Nothing contained in  
339. this contract shall be construed to make the United States  
340. in any way responsible for the delivery of the water to any  
341. of the plants of the Company after the same has been re-  
342. leased by the United States for the Company from the res-  
343. ervoir at American Falls.

12. Company's Additional Summer Power Right.

344. The company reserves and shall have as against the  
345. United States a tertiary power right at American Falls to  
346. all additional water released or wasted from the reservoir

3rd ed. in  
importance  
a value.  
← Ipc

347. as released or wasted by the United States from April 1st  
348. to October 31st inclusive over and above the amounts re-  
349. quired to furnish the primary rights reserved to the com-  
350. pany in paragraph 10 hereof, and the secondary right grant-  
351. ed to the United States under Paragraph 11 hereof.

352. Should the company fail for five years after a storage ✓  
353. capacity of 1,500,000 acre-feet or more has been provided at  
354. American Falls, to make provision to utilize all the ter-  
355. tiary power provided in Paragraph 12, then the United States  
356. shall become entitled as against the company to develop and  
357. use any unused portion thereof, but should the United States  
358. fail, for a period of three years after becoming vested  
359. with the right to develop and use such undeveloped portion ✓  
360. of said tertiary power, to make provision to utilize the  
361. same then thereafter either party may by making such pro-  
362. vision become entitled to utilize such undeveloped portion  
363. of said tertiary power right.

13. Substitution of Acre-feet for Second-feet.

364. During the period from April 1st to October 31st in-  
365. clusive, either party may take instead of the continuous  
366. flow specified above in Paragraphs 10 and 11 an equivalent  
367. amount of water each day in varying amounts during various  
368. hours of the day, providing the number of acre-feet taken  
369. by either party during any one day of twenty-four hours  
370. shall not exceed a number double the number of second-feet  
371. specified in the above schedules in Paragraphs 10 and 11

372. for such day.

14. Company's Summer Regulation of 5,000 Acre-feet.

373. The company may accumulate from time to time in stor-  
374. age capacity that would otherwise be unused in the American  
375. Falls reservoir out of the amounts of water to which it is  
376. entitled under Paragraph 10, an amount not exceeding 5,000  
377. acre-feet, and use the same as desired, except that after the  
378. reservoir has been filled in any year, the company shall be  
379. entitled under this paragraph only to that part of the 5,000  
380. acre-feet accumulated after the filling of the reservoir and  
381. subject to the limitation of maximum delivery and gate or  
382. outlet capacity herein provided, and provided further that  
383. the company shall release upon demand by the United States  
384. such portion of the said 5,000 acre-feet as the company may  
385. have accumulated whenever the available stored water in the  
386. American Falls Reservoir to which the present Minidoka pro-  
387. ject and extensions thereof diverting from Lake Walcott are  
388. entitled amounts to less than 5,000 acre-feet, and in any  
389. event release all claim to any part of said 5,000 acre-feet  
390. of accumulated water remaining after September 30th.

15. Outlet Works and Division Dam for Company

391. The United States will provide for the company in the  
392. proposed dam to be constructed by the United States discharge  
393. works sufficient for a 6,000 second-feet delivery with a  
394. loss of head net not to exceed two feet. Such discharge works  
395. shall discharge into the pool between the proposed reservoir

396. dam and the company's east side plant and shall be as low  
397. as and similar to the outlets connecting with the power  
398. plant to be constructed by the United States, and shall be  
399. so constructed that the company may and is given the right  
400. to attach its penstocks directly thereto and shall be pro-  
401. vided with protecting devices similar to those to be pro-  
402. vided for the intakes to the proposed Government power  
403. plant at American Falls. The United States shall construct  
404. and maintain as a part of the American Falls storage dam, a  
405. division dam between the westerly and of that portion of the  
406. company's American Falls dam which the company will retain,  
407. and the Government's proposed American Falls Reservoir dam to  
408. an elevation five feet above the present concrete crest of com-  
409. pany's dam, and of sufficient strength to retain the water on  
410. the easterly side up to the crest of said dam, and provision  
411. shall be made whereby the Company shall not be required dur-  
412. ing any flood to discharge over that portion of the com-  
413. pany's American Falls dam and spillway retained by the  
414. company any greater portion of the flood than would have  
415. been discharged over that portion retained had said dam  
416. and spillway not been changed from its present condition.

Primary  
Storage  
Right  
←

16. Company's Primary Storage Capacity.

417. In part consideration for the rights and property to  
418. be conveyed to the United States by the company, and as a  
419. part of the cost of the proposed development at American  
420. Falls the United States grants to the company and the com-

421. pany shall be entitled to the perpetual use of 45,000  
422. acre-feet of storage capacity in the reservoir to be con-  
423. structed by the United States, such capacity to be for  
424. storing the water reserved to the company, and the water  
425. referred to in the last sentence of Paragraph 10, the  
426. company's right to such storage capacity to be on an equal  
427. basis in all respects, except as otherwise provided herein,  
428. with other primary storage capacity rights in the reservoir,  
429. as defined in the contracts between the United States and  
430. the Irrigation Companies and Districts cooperating with the  
431. United States in the construction of said reservoir, a form  
432. of which contract is attached hereto and marked Exhibit "C".

17. Operation and Maintenance Charges

433. For the purpose of determining the operation and main-  
434. tenance charge to be paid by the company, each acre-feet of  
435. secondary storage capacity provided for in Paragraph 18 shall  
436. be considered as the equivalent of 7/20 (seven-twentieths)  
437. of an acre-foot of primary storage capacity and the company  
438. will pay to the United States each year a proportionate part  
439. of the total cost of operation and maintenance of the reser-  
440. voir, and distribution of the waters therefrom to the head  
441. of the ditches and to the power plants of the company di-  
442. verting water from Snake River below said reservoir in the  
443. proportion that 134,250 acre-feet is of the total available  
444. capacity of the reservoir (plus 89,250 acre-feet), the times,  
445. conditions, and manner of billing or stating such charge to  
446.

1/20 x 155,000  
89.2

447. the company and of paying the same to the United States

448. to be the same as provided in the contracts between the

449. United States and the various irrigation companies and dig-

450. tricts cooperating in the construction of said reservoir. *Secondary Storage*

18. Company's Secondary Storage Capacity.

451. Between October 1st of any year and June 10th of the

452. following year, the company shall have and is hereby grant-

453. ed for the purpose of regulating and controlling the water

454. reserved to the company under Paragraph 19 hereof, and the

455. water which may be acquired under the last sentence of Par-

456. agraph 10, a secondary right to use not to exceed 255,000

457. acre-feet of storage capacity in the reservoir when such

458. capacity is not then required and not being used by the

459. owners of irrigation rights to the use of such capacity,

460. but shall have no further right to use any part of said

461. 255,000 acre-feet of capacity or any water stored therein

462. after the reservoir is first filled each season, and the

463. company shall in any event release on April 1st of each

464. year all right and claim to such capacity and water stored

465. therein, except 60,000 acre-feet, and shall release all right

466. and claim to the remainder, if any, on June 10th of each year.

19. Company's Reserved Water Right of 300,000 Acre-Feet. ✓

467. It is agreed that in addition to the primary right re-

468. served in Paragraph 10, the company reserves and shall have

469. the right (for power development at American Falls and to

470. such extent as provided in Paragraph 21 hereof for power

471. development at points below Milner) to 300,000 acre-feet

472. of water flowing into the reservoir after October 1st of  
473. any year which shall be the first 300,000 acre-feet flow-  
474. ing into the reservoir after October 1st and actually  
475. storable therein, except that precedence shall be given  
476. for the release through the American Falls Reservoir dam  
477. to the amount of water, if any, required to supply the  
478. amount of power not exceeding 10,000 kilowatts, half-hour  
479. peak, needed to supply the power demands and uses on the  
480. Minidoka Project and its proposed extensions, and including  
481. the town of Minidoka and the territory now supplied by the  
482. United States, and the camps, buildings, construction work,  
483. dam and adjacent grounds of the United States at American  
484. Falls, but not elsewhere in the old or new town of American  
485. Falls except that if the company should refuse to extend  
486. its lines into the new or government townsite at American  
487. Falls and furnish service in such townsite, then the United  
488. States may do so. The extension of power lines into the  
489. new townsite and furnishing of power to customers therein  
490. shall not be construed as waiving any of the rights of  
491. either party as to the amount of damage which may be al-  
492. lowed the company in condemnation or otherwise for the  
493. removal of the old town or otherwise. Nothing in this  
494. paragraph contained shall be construed to deny the United  
495. States the right to store and use for irrigation purposes  
496. the water herein authorized to be used for the generation  
497. of said winter power of not exceeding 10,000 kilowatts,

498. half-hour peak, whenever the Secretary of the Interior  
499. shall decide that such water is required  
500. for irrigation purposes. The expression "10,000 kilowatts,  
501. half-hour peak", wherever it occurs in this contract shall  
502. be interpreted as meaning that the average for any half-  
503. hour interval must not exceed 10,000 kilowatts.

20. Company Right to Primary Storage Water.

504. The water required to fill the 45,000 acre-feet of  
505. primary storage capacity allowed the company under Para-  
506. graph 16 hereof shall be a part of the 300,000 acre-feet  
507. of water reserved to the company under Paragraph 19 hereof,  
508. and the company shall have no right to require the turning  
509. out for the company of more than 300,000 acre-feet in any one  
510. year beginning October 1st in addition to the primary rights  
511. set forth in Paragraph 10 and the holdover authorized in  
512. this paragraph. The company shall have the privilege of  
513. holding after October 1st and until November 15th any water  
514. which it may have remaining in its own storage capacity of  
515. 45,000 acre-feet, but the company's right shall expire on  
516. November 15th to any amount so held over beyond that date.

21. Company's Rights below Milner Dam

517. The company's right to demand the turning out of water  
518. from the reservoir for release by and use below Milner Dam  
519. shall be limited to the 45,000 acre-feet of primary storage  
520. rights, the water referred to in the last sentence of Para-  
521. graph 10, and to such portion of the 255,000 acre-feet men-

*Isn't this his effective limitation?*

522. tioned in Paragraph 18 as is needed for beneficial use for  
523. power development at Shoshone Falls or Twin Falls but not  
524. exceeding the amount that may be necessary to make the  
525. total flow at the head of Shoshone Falls:  
526. 790 second-feet October 1st to November 30th, incl.  
527. 890 " " December 1st to January 31st, "  
528. 790 " " February 1st to February 12th, "  
529. 690 " " February 13th to April 15th, "  
530. 790 " " April 16th to June 10th, "  
531. exclusive of any part of the company's said 45,000 acre-feet  
532. of primary storage and the water referred to in the last  
533. sentence of Paragraph 10.  
534. Provided, however, that the amount of water released ✓  
535. past Milner for maintaining the flow at Shoshone Falls be-  
536. tween October 1st and June 10th inclusive, as listed above,  
537. shall be a part of the 255,000 acre-feet of primary storage  
538. water which the Company may have stored in its secondary  
539. storage capacity in the reservoir, and provided that it re-  
540. leases such water from the American Falls Reservoir in such  
541. a way that the required flow can be maintained at Shoshone  
542. Falls by the utilization of storage capacity in Lake Walcott not  
543. to exceed 3,000 acre-feet of storage capacity.  
544. Nothing in this paragraph is to be construed as abridg- ✓  
545. ing the Company's right to release from the Reservoir and  
546. have passed by Milner at any time any part of its 45,000  
547. acre-feet of primary stored water stored in its primary  
548. storage capacity, or held over as provided for in Paragraph  
549. 20.

22. Twin Falls Power Site.

550. Should the company construct a power plant at Twin  
551. Falls, then the flow to be maintained below the Milner dam  
552. shall be measured and determined at Twin Falls instead  
553. of Shoshone Falls and the schedule of flow set out in the  
554. foregoing paragraph shall be reduced 100 second-feet for  
555. each period, but nothing herein contained shall be construed  
556. as waiving any rights of the United States at Twin Falls  
557. or any other power site on Snake River, owned or controlled  
558. in whole or in part by the United States, or implying that any  
559. license, permit or right will be granted the company.

23. Government's Winter Power Rights.

560. In securing the winter power not exceeding half-hour  
561. peak of 10,000 kilowatts provided for the United States  
562. under paragraph 19 hereof, the United States shall secure  
563. at the Minidoka Power plant so much of said power as it is  
564. reasonably practicable to secure from the installed machin-  
565. ery at said plant without releasing water which otherwise  
566. might be held for irrigation, generating at American Falls  
567. the balance, if any, of the amount required. Nothing here-  
568. in contained shall be construed to prevent the United States  
569. from obtaining the ten thousand kilowatts at its American  
570. Falls plants when the Minidoka plant, is closed or out of oper-  
571. ation on account of enlargement, improvement or repairs.

24. Storage Rights of United States and Winter Waste.

572. The United States shall have and the company hereby  
573. grants to the United States as against the company the right

574. to store in the American Falls Reservoir for use for  
575. irrigation and domestic purposes and for the power use  
576. set forth in Paragraph 11 and for the development of an  
577. amount of power not exceeding 10,000 kilowatts, half-hour  
578. peak, as defined in Paragraph 19, all of the storable  
579. water at American Falls not specifically reserved to the  
580. company or granted to the company as against the United  
581. States. The company reserves and as against the United  
582. States shall have the right to use for power purposes at  
583. American Falls water released or wasted between November  
584. 1st and March 31st, inclusive, in excess of the amount  
585. herein specified to be allowed to the United States for  
586. power under the foregoing provisions of this contract.  
587. The availability of water for waste shall be determined  
588. by the U. S. Reclamation Service by assuming a year be-  
589. ginning October 1st of 200,000 acre-feet less storable run-  
590. off than the lowest year of record at the time of such  
591. determination, and such water as under this assumption  
592. is not necessary to provide 300,000 acre-feet for the com-  
593. pany and to fill existing storage capacity will be consid-  
594. ered available for wasting. Until some lower year is ob-  
595. served the lowest year of record shall be deemed to have  
596. a storable run-off of 1,500,000 acre-feet, including the  
597. 300,000 acre-feet reserved to the company. The United  
598. States agrees that such water as may be available for  
599. waste during the winter shall be released as nearly uni-  
600. formly as may be practicable, or in such other manner as

601. to secure its reasonable availability for beneficial use for  
602. power development. During the development period, the com-  
603. pany shall have the right to use for power purposes, until  
604. demanded by the United States, the water granted to the  
605. United States for power purposes, but this water shall be  
606. available for use by the United States for power purposes,  
607. on its demand.

25. Release of Liens.

608. The company shall secure from the trustee, or other per-  
609. son or persons having power to release, and shall deliver to  
610. the United States a valid release of all the property and  
611. rights described in Para. 9 (a) to 9 (e) inclusive, and Para.  
612. 34 from the lien of any mortgage, deed of trust or other in-  
613. cumbrance created or granted by the company or its public  
614. utility predecessors and a release of all tax liens.

26. Abstract.

615. In consideration of the premises, the company further  
616. agrees upon receipt of notice that this contract has been  
617. signed by the Secretary of the Interior, to furnish promptly  
618. at its own expense, an abstract of title which shall later be  
619. extended to include any instruments subsequently recorded in  
620. connection herewith, and also the record of conveyance made  
621. pursuant to this agreement provided that if the company fails  
622. or refuses to furnish proper abstract of title within sixty (60)  
623. days after notice that this agreement has been signed, or if  
624. within such period written request be made by the company.  
625. such abstract may be procured by the United States at the  
625a. expense of the company and the cost thereof

526. deducted from the purchase price.

27. Payments by the United States.

627. In consideration whereof the United States agrees that  
628. it will purchase said property on the terms herein expressed,  
629. and upon the signing of the usual Government vouchers there-  
630. for and their further approval by the proper Government of-  
631. ficials, it will, as full payment for the property, and  
632. rights herein agreed to be conveyed to the United States,  
633. and for all damages for entry upon the above described prop-  
634. erty, and the construction, operation and maintenance of  
635. Reclamation works under said act, and for all claims by the  
636. company for surveys, examinations, opinions of experts, and  
637. expenses of whatsoever kind incurred in connection with the  
638. consummation of this contract, in addition to the storage  
639. capacity rights herein granted to the company, cause to be  
640. paid the sum of one million (\$1,000,000) Dollars in in-  
641. stalments as hereinafter provided by United States Treasury  
642. warrant or fiscal officer's check, which sum shall become  
643. due and payable in four equal annual instalments, the first  
644. of which will be due and payable after the furnishing of the  
645. abstract and other evidence of title herein provided and  
646. concurrently with delivery of the deeds to the property des-  
647. scribed in Paragraph 9 (a), and one instalment on the same day  
648. of each year thereafter until the full amount herein spec-  
649. ified has been paid, Provided that concurrently with receiv-  
650. ing said second instalment the company shall deliver to the  
651. United States a deed conveying to the United States all

652. the company's right, title and interest to the West Side  
653. and Island plants, other than water rights except as herein  
654. otherwise provided and land described in Paragraph 9 (b)  
655. and release from tax liens and other liens agreed to be  
656. released in Paragraph 25 and concurrently with the receipt  
657. of the third instalment, the company shall deliver to the  
658. United States the deed and assignment of the properties des-  
659. cribed in Paragraph 9 (c), and concurrently with the receipt  
660. of the fourth instalment shall deliver the deeds and assign-  
661. ments of the remainder of the property and rights herein  
662. agreed to be conveyed. Provided that the company may retain  
663. the possession and use of all the property herein agreed to  
664. to be conveyed or assigned until the first annual instalment  
665. has been paid, but that upon the payment of the first annual  
666. instalment the United States may take possession of the land  
667. needed for the proposed dam and reservoir as described in  
668. Paragraph 9 (a), and upon payment of the second annual in-  
669. stalment may take possession of the West Side power plant and  
670. Island Plant and be entitled to use so much water under the  
671. existing appropriations now owned by the Company and used in  
672. connection with said plants, as may be necessary for the oper-  
673. ation of said plants to their respective capacity, provided,  
674. however, that the right of the United States to the use of  
675. such water shall terminate absolutely upon the transfer of  
676. the water rights to be conveyed by the Company under Para-  
677. graph 9 (d) hereof, or upon the vesting of the water rights

678. mentioned in Paragraph 31 hereof upon the failure of the  
679. United States to make certain payments, and provided fur-  
680. ther, that the water used by the United States at said  
681. plants shall not be deducted from the amount of water which  
682. the Company is entitled to receive after the rights of the  
683. Company become restricted to the amounts specified in Para-  
684. graphs 10 and 19 hereof, and neither the consent of the  
685. Company to the use of such water nor the use of such water  
686. by the United States, shall operate to vest any title or  
687. permanent right to the use of such water in the United States,  
688. and the United States may take possession of all of the chan-  
689. nel west of and including the Island plant and headrace, and  
690. property described in 9 (b), but it is understood and agreed  
691. that the company may retain the possession and use of all of the  
692. other property and rights herein agreed to be conveyed or as-  
693. signed to the United States until the completion of the pay-  
694. ments herein provided for. The United States may pay any  
695. instalments before due and thereupon shall be entitled to  
696. take the property and receive the deeds provided to be taken  
697. or delivered upon the payment of such instalment. It is  
698. expressly understood that the first instalment to be paid  
699. by the United States hereunder includes the claim of the com-  
700. pany for reimbursement for all expenses of whatsoever kind  
701. which it has incurred in connection with the consummation of  
702. this contract, including surveys, investigations, examinations,  
703. and opinions of experts, and for obtaining data and inform-

704. ation upon which to base this agreement.

28. Continued Use of Rights by Company until  
Storage Capacity is Provided.

705. As against the United States the company shall be  
706. entitled to continue the use of the water at American Falls  
707. covered by the company's present appropriations and filings  
708. (except such as the United States may become entitled to  
709. use to operate the Island and West Side Plants under this  
710. agreement) until such time as the 45,000 acre-feet of pri-  
711. mary storage capacity herein granted to the company shall  
712. have been first provided for the Company and until that time  
713. the company shall be entitled to right of way over the lands  
714. and rights conveyed to the United States by the company and  
715. located in the bed of the river for the purpose of and to  
716. the extent necessary for such continued use by the company  
717. of said filings and appropriations in so far as such right of  
718. way can be used by present structures and extensions without  
719. increasing the hazard of flooding the construction work of  
720. the United States. Nothing in this contract shall be con-  
721. strued as giving the company a right to demand right of way  
722. or flowage easement across any land unwatered for construc-  
723. tion purposes by the United States except to the extent nec-  
724. essary to pass the natural flow of the river.

29. Distribution System in American Falls.

725. The company shall not by anything herein contained be  
726. deemed to have transferred any of its poles, lines, or  
727. other property not described in Paragraph 9 located in

728. the present town of American Falls or connecting the dis-  
729. tribution system in said town with its generating plants,  
730. or to have released the United States from any damages to  
731. said poles, lines, distributing system or such other prop-  
732. erty on account of the relocation of said town made nec-  
733. essary by the construction and operation of the proposed  
734. reservoir.

30. Reservation in Deed of Reserved Rights.

735. It is the intent of this agreement that all power  
736. rights at American Falls except those granted to the United  
737. States herein shall be reserved to the company and that the  
738. deeds and conveyances by the company to the United States  
739. may contain a reservation in favor of the company of the  
740. rights reserved to it under the provisions of this agreement.

31. Failure of Appropriation.

741. Where the payments of this contract extend beyond the  
742. current fiscal year it is understood that the contract is  
743. made contingent upon Congress making the necessary appro-  
744. priations for expenditures thereunder after such current  
745. year has expired. In case such appropriation as may be  
746. necessary to carry out this contract is not made the com-  
747. pany hereby releases the United States from all liability  
748. due to the failure of Congress to make such appropriation.

749. Any instalment or portion thereof not paid when due  
750. shall thereafter bear interest at the rate of 6% per annum  
751. payable annually and should any instalment remain due and

752. unpaid for a period of fifteen years the Company shall  
753. have the right to waive and surrender to the United States  
754. such due and unpaid installments. The effect of such waiver  
755. or surrender shall be to modify paragraph 24 hereof to the  
756. following extent:  
757.       If only the first installment shall have been paid the  
758. grant to the United States as therein provided to store  
759. in American Falls reservoir all the storable water not  
760. reserved to the Company or granted to it as against the  
761. United States shall be limited to such storable water over  
762. 2700 second-feet; if only the first two installments shall  
763. have been paid, such grant shall be limited to the stor-  
764. able water not reserved to Company or granted to it as  
765. against the United States over 2200 second-feet; and if  
766. the first three payments shall have been made, then over  
767. and above 1700 second feet, such additional amounts of  
768. water as listed above to be retained by Company in lieu  
769. of cash which it would otherwise be entitled to. The  
770. provisions of this paragraph shall not impair the right,  
771. title or interest of the United States in any property  
772. theretofore conveyed to it by the Company or otherwise  
773. affect this agreement or the rights hereunder. Should  
774. such waiver and surrender of unpaid installments be made  
775. as herein provided and should the United States fail to  
776. construct a reservoir of sufficient capacity to provide  
777. the storage capacity herein agreed, granted or agreed to

778. be furnished to the company the United States shall not  
779. be liable in damages for failure to provide such storage  
780. capacity.

32. Company's Remedy for Failure to Receive Storage.

781. It is the understanding and intent of the parties  
782. that the storage capacity rights herein granted to the  
783. company shall be vested rights in it but that if by change  
784. of Law, a court or commission decision or in any other way  
785. than by errors or inaccuracies in delivery or release  
786. of water from the reservoir the company shall be refused or  
787. denied the right to and use of said capacity or any thereof,  
788. the Company shall be entitled to recover the damages which  
789. it may suffer, and to such other relief as a court of  
790. competent jurisdiction may adjudge the Company entitled to  
791. under the terms of this agreement and the situation of the  
792. parties, but in case of any errors or inaccuracies in the  
793. delivery or release of water the company shall have and  
794. be limited to the same rights and redress as provided for  
795. the Irrigation Companies and Districts in the contracts,  
796. the form of which is attached hereto and marked Exhibit "C",  
797. between the United States and the Irrigation Companies and  
798. Districts cooperating with the United States in the con-  
799. struction of the Reservoir.

33. Liens and Incumbrances.

800. Liens or incumbrances existing against said premises  
801. and of which the company agrees to secure the release, may

802. at the option of the United States be removed at the time  
803. of conveyance by reserving the amount necessary from the  
804. purchase price and discharging the same with the money so  
805. reserved, but this provision shall not be construed to au-  
806. thorize the incurring of any lien or incumbrance as against  
807. this agreement, nor as an assumption of the same by the  
808. United States.

34. Effective when Signed By the Secretary.

809. This agreement shall become effective to bind the  
810. United States to purchase said premises immediately upon its  
811. approval or signature by the Secretary of the Interior,  
812. provided, however, that it shall be of no further force  
813. or effect unless signed by the Secretary of the Interior,  
814. within ninety days after its execution by the Company and  
815. authorization, ratification or approval by the board of di-  
816. rectors of the company which shall be evidenced by a cer-  
817. tified copy of the resolution filed with the Director of  
818. the Reclamation Service.

35. Binding on Successors and Assigns.

819. This agreement shall inure to the benefit of and be  
820. binding upon the successors and assigns of the company, and  
821. also upon the successors and assigns of the United States.

36. No Waiver of Rights of Federal Power Commission or State.

822. The execution of this contract shall not be construed  
823. as waiving any authority, jurisdiction or control which the  
824. Federal Power Commission may have over the company or its

825. assigns at American Falls or elsewhere, and the approval  
826. of this contract by W. G. Swendsen

827. of Idaho shall not be construed as waiving or abridging

828. any lawful jurisdiction, authority, or control which such

829. officer or the State of Idaho may have over the waters of

830. the state or the issuing of permits, certificates or li-

831. censes thereto.

37. Cooperation with reference to Water Rights.

832. In complying with the laws of Idaho relating to per-

833. fecting water filings made by either party at American Falls

834. both parties shall cooperate so that to the extent permitted

835. by statute and the administrative officers having jurisdiction,

836. the construction of works and use by either party shall ap-

837. ply to proof on the permit of the earliest priority of the

838. class on which such proof can be made. In the event the

839. company desires to transfer and change the points of

840. diversion and use, or any of them, of any of its appropria-

841. tions, rights or permits now held by it in connection with

842. the Island and West Side Power Plants, the Company as against

843. the United States shall have the right at any time after the

844. right of the United States to use the Company's water in con-

845. nection with said Island and West Side Plants' terminates as

846. provided in Paragraph 27 hereof, to transfer and change such

847. points of diversion and use from the Island and West Side

848. Plants to the East Side Plant, or any other plant or plants

849. constructed by the Company at American Falls, subject to the

850. provisions and limitations of this contract in respect to  
851. the time of use and amount of water to which the Company may  
852. be entitled; and the United States shall cooperate with the  
853. company in making such transfer and change; and in the event  
854. the United States desires to transfer and change the points  
855. of diversion and use of the water rights or any part thereof  
856. conveyed to the United States by the Company and to which it  
857. may be entitled under the terms of this contract from the  
858. present points of diversion and use to any plant or plants  
859. owned by the United States at American Falls, the United  
860. States shall have as against the Company the right to make  
861. such transfer and change in such points of diversion and  
862. use subject to the provisions and limitations of this con-  
863. tract in respect to the time of use and amount of water to  
864. which it may be entitled, and the Company shall cooperate  
865. with the United States in securing such transfer and change.

38. Agency Clause.

866. The contractor expressly warrants that he has employed  
867. no third person to solicit or obtain this contract in his  
868. behalf, or to cause or procure the same to be obtained upon  
869. compensation in any way contingent, in whole or in part upon  
870. such procurement; and that he has not paid, or promised or  
871. agreed to pay, to any third person, in consideration of such  
872. procurement, or in compensation for services in connection  
873. therewith, any brokerage, commission, or percentage upon the  
874. amount receivable by him hereunder; and that he has not, in

875. estimating the contract price demanded by him, included  
876. any sum by reason of any such brokerage, commission, or  
877. percentage; and that all monies payable to him hereunder  
878. are free from obligation to any other person for services  
879. rendered, or supposed to have been rendered, in the pro-  
880. curement of this contract. He further agrees that any  
881. breach of this warrant shall constitute adequate cause  
882. for the annulment of this contract by the United States,  
883. and that the United States may retain to its own use from  
884. any sums due or to become due thereunder an amount equal  
885. to any brokerage, commission, or percentage so paid, or  
886. agreed to be paid: (Provided, however, it is understood  
887. that this covenant does not apply to the selling of goods  
888. through a bona fide commercial representative employed by  
889. the contractor in the regular course of his business in deal-  
890. ing with customers other than the Government and whose  
891. compensation is paid, in whole or in part, by commissions  
892. on sales made, nor to the selling of goods through estab-  
893. lished commercial or selling agents or agencies regularly  
894. engaged in selling such goods.)

39. Member of Congress Clause.

895. No Member of or Delegate to Congress, or Resident  
896. Commissioner, after his election or appointment or either  
897. before or after he has qualified and during his continuance  
898. in office, and no officer, agent, or employee of the Govern-  
899. ment, shall be admitted to any share or part of this con-  
900. tract or agreement, or to any benefit to arise thereupon.

901. Nothing, however, herein contained shall be construed to  
902. extend to any incorporated company, where such contract  
903. or agreement is made for the general benefit of such in-  
904. corporation or company, as provided in Section 116 of the  
905. Act of Congress approved March 4, 1909 (35 Stat., L. 1109).

IN WITNESS WHEREOF the parties have hereto signed their  
names the day and year first above written. Said Company  
acting in pursuance of a resolution of its Board of Di-  
rectors duly adopted on October 13th, 1921.

UNITED STATES OF AMERICA

By (Sgd) Hubert Work  
Secretary of the Interior

IDAHO POWER COMPANY

By (Sgd) F. F. Johnson  
President

(Seal)

ATTEST:

(Sgd) Clarence T. Ward  
Secy.

(Seal)

Approved except as to Exhibit "C"

(Sgd) W. G. Swendsen  
Commissioner of Reclamation