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MILNER DAM PROJECT

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HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND POWER

OF THE

COMMITTEE ON

INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

H.R. 5417 AND S. 1828

BILLS TO EXEMPT THE MILNER DAM FROM CERTAIN
REQUIREMENTS OF THE FEDERAL POWER ACT (16 U.S.C.
807), AND FOR OTHER PURPOSES

AUGUST 25, 1980

Serial No. 96-209

Printed for the use of the
Committee on Interstate and Foreign Commerce



U.S. GOVERNMENT PRINTING OFFICE

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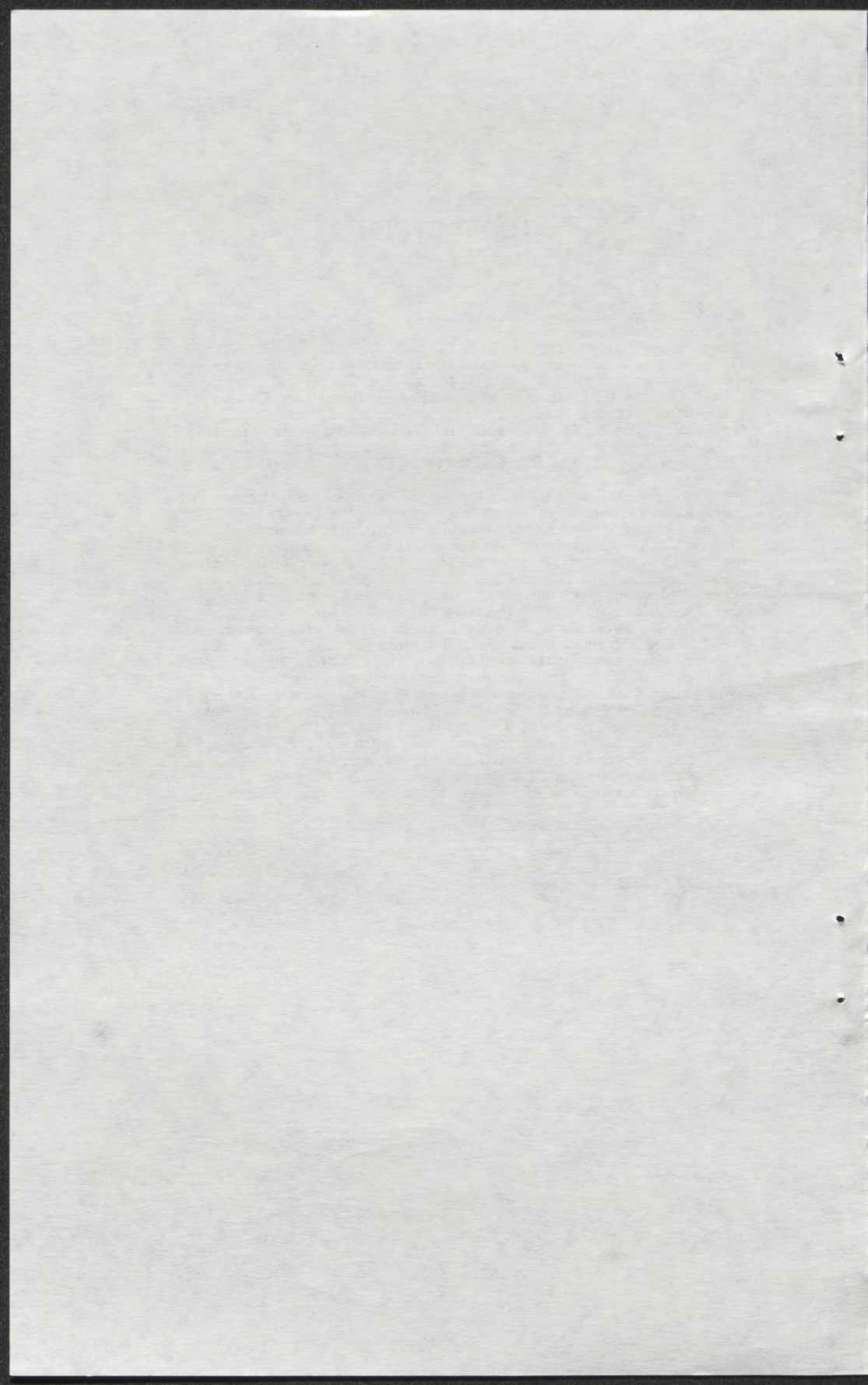
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MILNER DAM PROJECT

MONDAY, AUGUST 25, 1980

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENERGY AND POWER,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m. in room 2123, Rayburn House Office Building, Hon. John D. Dingell (chairman) presiding.

Mr. DINGELL. The subcommittee will come to order. Today's hearing is on S. 1828, H.R. 5417, and related issues. These bills provide the proposed Milner Dam project and its sponsors, the Idaho-Twin Falls Canal Co. and North Side Canal Co., with exemptions from certain provisions of the Federal Power Act; specifically, the "take-over provision" of section 14 and, for certain parts of the project, all of the licensing provisions of part I.

An examination of these bills also reaches a broader range of issues relative not only to this project, but to the Federal Energy Regulatory Commission licensing of hydroelectric projects. These issues include, first, the factors said to be contributing to the substantial backlog of licensing applications before the FERC; second, the adequacy of existing discretionary authority under which FERC may exempt projects of certain size from provisions of part I of the act and whether such authority should be expanded; and third, how fish and wildlife, water pollution, and other environmental concerns, as well as legislation relating to that matter, and questions like dam safety, would be protected within the context of such legislative action.

Witnesses today include the sponsors of the House measure, the Chairman of the FERC, representatives of the U.S. Fish and Wildlife Service, and interested individuals from the State of Idaho. They have been requested to testify in not only this special legislation, but the pertinent generic issues in order for this subcommittee to determine whether or not action is needed to achieve greater development of environmentally safe hydroelectric opportunities in this country.

Without objection, the texts of H.R. 5417 and S. 1828 will be printed at this point in the record.

[The texts of H.R. 5417 and S. 1828 follow:]

96TH CONGRESS
1ST SESSION

H. R. 5417

To exempt the Milner Dam from certain requirements of the Federal Power Act (16 U.S.C. 807), and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 26, 1979

Mr. HANSEN (for himself and Mr. SYMMS) introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

A BILL

To exempt the Milner Dam from certain requirements of the Federal Power Act (16 U.S.C. 807), and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. Notwithstanding any other provision of
4 law, the proposed Milner Dam project, Federal Energy Reg-
5 ulatory Commission numbered 2899, Idaho-Twin Falls Canal
6 Company and North Side Canal Company, shall be deemed
7 to consist only of water regulation and conveyance facilities
8 and powerplants to be hereafter constructed and located out-
9 side of existing irrigation facilities, together with power

1 transmission facilities, and related appurtenant work not now
2 in existence and necessarily hereafter constructed for the
3 generation and distribution of hydroelectric power, and only
4 such hereafter constructed facilities shall be subject to the
5 provisions of section 14 of the Federal Power Act (16 U.S.C.
6 807).

96TH CONGRESS
1ST SESSION

S. 1828

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 31, 1979

Referred to the Committee on Interstate and Foreign Commerce

AN ACT

To exempt the Milner Dam from certain requirements of the Federal Power Act (16 U.S.C. 807), and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. Notwithstanding any other provision of
4 law, the proposed Milner Dam project, Federal Energy Reg-
5 ulatory Commission Numbered 2899—Idaho-Twin Falls
6 Canal Company and North Side Canal Company, shall be
7 deemed to consist only of water regulation and conveyance
8 facilities and powerplants to be hereafter constructed and lo-
9 cated outside of existing irrigation facilities, together with
10 power transmission facilities, and related appurtenant works

1 not now in existence and necessarily hereafter constructed
2 for the generation and distribution of hydroelectric power,
3 and only such hereafter constructed facilities shall be subject
4 to the provisions of section 14 of the Federal Power Act (16
5 U.S.C. 807).

Passed the Senate December 20 (legislative day, December 15), 1979.

Attest:

J. S. KIMMITT,

Secretary.

Mr. DINGELL. The Chair announces that our first witness will be the Honorable Steven Symms, Member of Congress from Idaho. Mr. Symms, we are happy you are with us. If you will come forward, identify yourself fully for purposes of the record, we will be pleased to receive your testimony.

STATEMENTS OF HON. STEVEN D. SYMMS AND HON. GEORGE HANSEN, REPRESENTATIVES IN CONGRESS FROM THE STATE OF IDAHO

Mr. SYMMS. Thank you very much, Mr. Chairman and members of the subcommittee. I am Steven Symms, Representative from the First Congressional District of Idaho.

Mr. Chairman, I am pleased to have the opportunity today to testify in favor of H.R. 5417, which was introduced by Congressman Hansen and myself on September 26, 1979, and S. 1828, which was introduced by Senators Church and McClure on September 27, 1979.

As a cosponsor of the House measure, let me briefly outline the goals of this legislation, which is important to secure not only the construction of an additional hydroelectric facility to generate much needed power to south-central Idaho, but also to protect the ownership rights of the Twin Falls Canal Co. and the North Side Canal Co., who are evaluating that construction project.

The proposed project would enlarge the main canal and allow for the construction of a forebay powerhouse, penstocks, transmission lines, to facilitate the generation of 50.25 megawatts of power. The project is workable and worthwhile, and should be pursued and undertaken.

The Milner Dam was constructed for the purpose of irrigation water diversion. It was constructed and has been maintained with private funding. It is the protection of these private rights that is at stake here.

When the canal companies applied for a preliminary permit to proceed with the construction of the generation facilities, FERC indicated that it felt not only the forebay powerhouse, penstocks, and the transmission lines be included in the project, but the Milner Dam reservoir and canal enlargement as well.

What concerns the proponents of the powerplant proposal is the possible effect of the inclusion of the dam and canal in the project perimeters. The purpose of this legislation, therefore, is to enable the construction of the powerplant in compliance with FERC, and at the same time insure the independent maintenance of the dam for irrigation purposes without the threat of possible water diversions for power purposes, assuming a superior status to water diversion for irrigation purposes.

In addition, this legislation will exempt the reservoir, dam, and irrigation canals from the takeover provisions of section 14 of the Federal Power Act. This will assure continued private involvement and maintenance of the dam, itself, and will, in turn, assure the construction of this very important hydrogenerating project.

Mr. Chairman, I urge the subcommittee to act favorably and quickly on this important legislation for the people of Idaho and for the production of additional hydroelectric power to positively address this country's determination for energy independence.

Thank you, Mr. Chairman and members of the subcommittee. That concludes my statement.

Mr. DINGELL. Mr. Symms, the subcommittee thanks you for your very helpful testimony.

We now recognize our friend and colleague, who is also a cosponsor of this legislation, Mr. George Hansen.

Mr. Hansen, we thank you for being with us.

STATEMENT OF HON. GEORGE HANSEN

Mr. HANSEN. Thank you, Mr. Chairman. It is a pleasure to be here this morning. I do thank you for this opportunity to appear before your subcommittee and for your time and consideration of S. 1828 and my bill, H.R. 5417, which is to exempt the Milner Dam from certain requirements of the Federal Power Act.

This legislation is important not so much because of the size of the project or the amount of electricity it will produce, but because it exemplifies what has built America—private initiative which mutually benefits the public and private sectors but requires no expenditure of tax moneys.

The subcommittee has available the details regarding this project, and expert witnesses scheduled for testimony today will further expand on this. Therefore, I will not rehearse those facts for the subcommittee.

It is sufficient to say that the Milner Dam, with accompanying workings and canals, is privately owned by the Twin Falls and North Side Canal Cos. These private entities are simply asking that they be allowed to construct power-generating facilities without risking federalization of the entire project under such provisions of law as the Federal Energy Regulatory Commission 50-year recapture regulations.

Mr. Chairman, the project is not only feasible, but it should encourage many others across the Nation. The Water and Power Resources Service recently produced a study assessing small hydroelectric developments which indicated that numerous small dams nationwide similarly retrofitted could make a major impact toward filling our increasing electric energy demands at minimum cost to the Federal Government.

I understand that there is some question regarding certain statements in Senate testimony as to whether there should be total exemption of the project from the Federal Power Act. It seems to me to be more practical and less complicated to make this a total exemption. The reason for this is that the powerplant will be physically separated from the existing dam and reservoir by approximately $1\frac{3}{4}$ miles, and will not in any real terms be a part of the old project. Hopefully, this subcommittee, after full and careful review, can make any necessary adjustments to this bill in such a way as to avoid any delay in this much needed project.

The bottom line, Mr. Chairman, is that the private water users in the Milner service area want to develop the power potential without risking inclusion of the dam and canals under Federal control. Hopefully we will not stifle such initiative.

In conclusion, Mr. Chairman, the current project is privately owned, and I believe it is unreasonable that in order to provide a service to our energy-short Nation that it be placed in jeopardy.

The measure before you would prevent that from happening, and require no tax moneys to be appropriated.

The project will give a big boost to encouraging private initiative beneficial to the Nation's energy self-sufficiency, even if only 60,000 kilowatts at a time. The committee's reactions are vital to the future of this concept, and I urge prompt passage of this legislation.

Again, thank you, Mr. Chairman, for your kind hospitality.

Mr. DINGELL. Gentlemen, the Chair thanks you for your very helpful testimony. We have long been aware of your interest in this matter, and I appreciate your kindness in appearing before the subcommittee today.

The Chair will recognize members of the committee for questions. The Chair recognizes first the gentleman from Washington, Mr. Swift.

Mr. SWIFT. No questions, Mr. Chairman.

Mr. DINGELL. The Chair is going to recognize counsel, Mr. Athy.

Mr. ATHY. No questions, Mr. Chairman.

Mr. DINGELL. Gentlemen, the bill before the committee exempts the Idaho Twin Falls Co. and the Milner Dam project from the requirements of the Federal Power Act. Why is it necessary that we give an exemption from these provisions, and what provision is it that this bill would exempt the dam and the owner thereof from?

Mr. HANSEN. Mr. Chairman, one of the problems is the 50-year recapture clause, which the dam and fixtures, structures, being privately owned now, as I understand it, there would be a problem if it were to come under the act of causing this in a 50-year period to revert to the ownership of the Federal Government, and I think that is what they are trying to avoid, is to contribute to producing energy in an area which needs energy without jeopardizing the ownership of the project, and then there are, of course, other considerations that are involved, such as Federal intrusion into the management and other parts of the system, which I think they would like to avoid, also, for the privilege of making a contribution to the power problem of the country.

Mr. DINGELL. What Federal intrusion is it that is troublesome here?

Mr. HANSEN. I think the problem would be as to how much the government could get involved in studies, management demands, or whatever, in parts of the system that really have nothing to do with the generation of power, itself—the reservoir, the ecology, the environment, the use of the reservoir, whatever. I think there are a lot of matters there that certainly they would be leaving themselves open for, some of it probably even unknown at this time, and I think what they would like to do is just maintain the situation as it is now, their ability to manage and to own and control the system, without jeopardizing this for the privilege of producing some power which would be beneficial to the government and to the area.

Mr. DINGELL. What regulations or what statutes would be involved in this? This legislation is sort of unique. Are you aware of any other dam that we have passed legislation exempting a dam which would otherwise be under the Federal Power Act?

Mr. HANSEN. I am not aware, Mr. Chairman, of anything. I do know, according to the study that I cited in my testimony, that there are other projects across the Nation which might be similarly encouraged to do this to help us solve our power problem, if this particular project were to be perhaps the ground plowed to enable this type of thing, so I think that it would be well worth this subcommittee's time, if we are hopeful of solving the energy problems of this Nation under the most economical circumstances, to look at this possibility and what it opens the door to. I think it can be properly controlled and handled in a way that the Nation gets the benefit at the least possible cost, and I think that is what we are hoping for.

Mr. SYMMS. Mr. Chairman, I just would say that the reservoir and the dam are already built, in place, and are operating, and what these people would like to do is to keep their proprietary rights in existence without the additional burden of energy regulations for a power generator facility that is over a mile away.

The primary purpose of the dam is for irrigation. The new generating facility will be built in compliance with FERC, but to include the reservoir and the dam that are already built, and the irrigation company, in the project would cause unnecessary legal entanglements. I think, however, that the attorney for the Milner project could answer that question better than I could, technically, as to what is involved here.

Mr. DINGELL. I have a question. What you are saying here is that this would then constitute a precedent for making the provisions of section 14 of the Federal Power Act, and some other sections, also inapplicable to certain categories of dams?

Mr. SYMMS. The owners do not intend to set any precedent. It would just be in this specific instance that it would be applicable. They could go ahead and construct the generator without a snarl from Federal regulations being applied to facilities other than the power generators.

Mr. DINGELL. What are the problems, though, that occasioned the request for this exemption from the Federal Power Act?

Mr. HANSEN. If I may say so, Mr. Chairman, the point is these people have water rights to protect. They have the status of ownership, and so forth, to protect, and what they are trying to do is allow a use of surplus water for the generation of power at a time when it might be feasible and proper, and I think they are just wanting to be sure that with this exemption that there are no legal entanglements that would jeopardize their current interests that they already hold and have.

Mr. DINGELL. What I am trying to get at is what provisions of existing law or what regulations as set out in section 14 of the Federal Power Act inhibit the company from proceeding with the construction of the facilities in question.

Mr. SYMMS. Mr. Chairman, we are talking about the protection of the private rights that already exist, and that is what they are concerned about.

Mr. DINGELL. How are those impaired by this?

Mr. HANSEN. Mr. Chairman, there is a problem, as I understand it, where they may be jeopardized by the recapture clause.

Mr. DINGELL. Of course, they were aware of that when they constructed the dam originally, the dam was subject to recapture, was it not?

Mr. HANSEN. No. I think we are talking about the fact that this is a privately owned structure, and that now what they are asking for is a different use or an additional use of the situation, and what they would like to do is protect what they already have, in order to give the nation and the people in the area the benefit of this additional use.

Mr. DINGELL. I applaud that, but I am still trying to figure out how the provisions of section 14 impair development of the project.

Mr. SYMMS. Mr. Chairman, I am not an attorney. I think probably we need an attorney to answer that, but I will take a shot at it. We are very concerned about the fact that irrigation rights have a priority use for the water in a short-water year, and so they would not want to get in a position, in putting this project in, that FERC would be able to direct them to spill the water to make electricity, and not keep it for irrigation. So they want to be sure that they establish the priority and purpose of the reservoir, where irrigation is first, and power generation, I think, would be second.

Mr. DINGELL. Does the bill seek to also get out from under, or rather take this facility and the new facilities to be constructed out from under, part I of the Federal Power Act?

Mr. HANSEN. Mr. Chairman, in the words of the Chairman of the Federal Energy Regulatory Commission, I would say this: He says that the problem, the basic problem in a nutshell, "is that the existing Milner Dam and reservoir have long been used to supply water for irrigation purposes that are vital to farmers and ranchers in the surrounding area. Under the proposal the facilities would be used to divert some irrigation water for power generation purposes, but the project sponsors who are the operators of the existing irrigation system are apparently concerned that if the project is subject to the FERC licensing authority, they will no longer be able to make independent decisions on the use of their irrigation facilities. Instead, a Federal agency might be making decisions that might jeopardize agricultural interests in the Milner area. The primary purpose of the bill's exemptions is, of course, to prevent this latter possibility by excluding those irrigation facilities from its reach of the Power Act's licensing requirements."

Basically, in the statement of the FERC Chairman, himself, this is the sum and substance. It is not a big thing. It is just the fact that these people would like to retain their autonomy over that which they have always had autonomy over, without the interference of the Federal Government.

Mr. DINGELL. How does the construction of an electric power-generating facility deal in any fashion adversely with water rights from the standpoint of the people of Idaho, who are the beneficiaries of the irrigation water?

Mr. HANSEN. Problems arise all the time, Mr. Chairman. I think you have to understand that this generation project is going to be a mile and a half from the dam, itself. It is quite a ways away. It is up one of the canals and it is dropping the canal back into the river bed, itself, and with a considerable drop—I think 165 feet or something like that—and the project is totally separated from the

dam, and what we are trying to do is also keep the legislation separate.

The problem we have in Idaho and in many irrigation-type States is that once you set up a project, there gets to be a question as to whether you have to maintain minimum stream flows and whether you have to maintain certain flows of various sorts in order to keep that project going, unless you legally define exactly what you are doing. Otherwise, the water rights of those who take precedence might be jeopardized. We are trying to be sure these water rights for agricultural purposes are not jeopardized by this project.

Mr. DINGELL. What information do you have that would lead you or me to believe—I am sorry, go ahead.

Mr. SYMMS. I think to clarify it, the people who built and own the dam, the irrigators, are willing to cooperate with the power company to build the needed power-generating facilities so we won't have to burn a fossil fuel to provide energy.

The irrigation season is only during the spring and summer months. Consequently, if the power company is to be able to proceed with this project, with the cooperation of the irrigation owners, they need this clarification of the law, so that they will know that irrigation will have the priority during those summer months.

This project, of course, will work year-round, and during the nonirrigation season, there would be no problem. I suggest, Mr. Chairman, that you ask these technical questions to witnesses that are more technically capable of answering these questions. They are not trying to get away with anything. They just want to be sure that those private rights are protected for the irrigators.

Mr. DINGELL. What private rights are we trying to protect?

Mr. SYMMS. We are trying to protect the fact that the priority use for Milner Reservoir is to irrigate farmland, and they have already paid for that; and they are paying for it.

Mr. DINGELL. I have no quarrel with that, but would that right be impaired by construction of the power facilities?

Mr. SYMMS. The South Side Canal, which would drop the water—the people who own the dam, the irrigators, are willing to cooperate on the project as long as they get this legislation so their rights are protected, so that someday the Federal Power Administrator won't come along and say, "You have to make electricity at the expense of farming."

Mr. DINGELL. What I am trying to figure out, though, is what rights are we trying to protect, and how would they be impaired by FERC license?

Mr. SYMMS. I think part of it is that they already have those private rights. The irrigators will not go ahead with this project if this bill is not passed.

Mr. DINGELL. Conceding that point, let me try and rephrase the question. What rights are they trying to protect, and against what actions by FERC?

Mr. SYMMS. Mr. Chairman, I guess we are going to have to get a witness up here that has more expertise. All I can say is that the irrigators are not willing to proceed with the project unless they have a guarantee that the Milner Dam Reservoir is excluded from

the administration or the licensing of FERC, so that their irrigation users' rights have a priority.

Mr. DINGELL. What I am trying to figure out, though, is what is there to believe that if this project is licensed by FERC, as every other project is——

Mr. SYMMS. This project will be licensed.

Mr. DINGELL. Not only in the Eastern, but in the Western United States, what is there to believe that any rights of the irrigators would be jeopardized?

Mr. HANSEN. Mr. Chairman, I might mention that there are a lot of other things that have happened in the past years. There have been upgrading of standards for dams, ecological demands, environmental demands, all sorts of things that have happened, and if they allow themselves to be drawn into the system, the first thing they know, they have to totally change; there is a good chance they would have to totally change everything in order to provide this one service, and I think what you are doing is opening up——

Mr. DINGELL. What would they have to change? That is a good point. These are the concerns of these people.

Mr. HANSEN. The project's sponsors, Twin Falls Canal Co. and North Side Canal Co.—along the northern edge east of the Snake River, when they applied in 1979 for the preliminary permit the application did not propose to include the reservoir, the dam, the Twin Falls Canal supplying water to the proposed powerhouse. In other words, they wanted to generate power, but they didn't want to jeopardize the whole system they developed otherwise.

In response, the Commission staff indicated that the application was therefore deficient, and it did not meet the express requirements of the act, which defines projects as a complete unit of development in order to give this Commission a full opportunity before the license is issued to assess all the likely impacts of a proposed project on water quality, flow, and all of the things that are now required since this project was already in place, and so, in other words, we get into the problems of reservoir erosion and general river ecosystems, the fish and wildlife resources, river navigation, commerce, and all of the things, and here you had a preexisting project, and they wanted to avoid all of this kind of a situation.

Mr. DINGELL. Are the sponsors opposed to protecting the environmental concerns?

Mr. HANSEN. Of course, they are not, Mr. Chairman, but we are talking about an existing project, and it is just about like a house sitting in place and somebody is asking to build a garage on the house, so to speak, and in order to build the garage on the house, the city is asking that the whole house be put under some kind of, I should say, surveillance by the city, and may have to upgrade the whole house in order to put the garage on.

I guess what we are talking about is the fact that they have a system in place now that is serving the area. They were trying to offer to the country a few thousand kilowatts of electricity, which had nothing to do with their system. It is way downstream from their system, and they don't feel that they ought to put their whole project on the line or jeopardize it legally or in any other way

cause themselves a lot of additional expense, in order to do this. All you will do is force them to back off.

Mr. Chairman, we are talking about giving the country some electricity, and doing it under a very feasible project, and we are just talking about an exemption of them not having to put the whole house in the system to get them to give you the garage.

Mr. DINGELL. What I am trying to find out is not whether it is wise to exempt them, but what it is that they seek to be exempted from, and why.

Mr. HANSEN. I think all we are saying is they are trying to not be subject to all the conditions that a new project would be subject to up and down the whole system in order to put one small appurtenance in that has nothing to do with the rest of the system's mission.

Mr. DINGELL. Let me try and ask a few questions here and see whether we can get some answers that might be mutually helpful. First of all, one, are they trying to get out from under any safety requirements here?

Mr. HANSEN. Any what?

Mr. DINGELL. Safety requirements.

Mr. HANSEN. I don't think they are trying to get out from under any safety requirements. What they are doing, Mr. Chairman, is not trying to be subject to new interpretations of ecosystems, safety requirements, or whatever on the main project that is already in place in order to come up with a new use downstream that isn't even related to it. I think I understand what the chairman is getting to, if I might. I think you are trying to say they are trying to avoid some requirements as far as safety, and other things are concerned in order to do this, and they are not.

Mr. DINGELL. Now, let's go through this and try and figure out what it is that they are really after. Can you tell me what requirements of Federal law the folks that want to put this project together are trying to get out from under?

Mr. HANSEN. Let's go back to the house a second, Mr. Chairman, and I will tell you.

Mr. DINGELL. Let's not go to the house thing. If you don't mind—

Mr. HANSEN. For safety requirements, Mr. Chairman, if I may say this, there used to be old wiring requirements for a house, so to speak, and then we changed the wiring requirements. Are you going to make an existing house, in order to perform a different function, are you going to put them under the new safety requirements when it was already constructed under the old safety requirements?

Mr. DINGELL. Are you telling me that they want to be out from under requirements of Federal law that would require them to then function with a safe dam?

Mr. HANSEN. No, I am saying they would like to maintain where they are right now as far as requirements are concerned, which are totally in keeping with the regulations they exist under.

Mr. DINGELL. Are they trying to get out from under Federal dam safety requirements?

Mr. SYMMS. No, Mr. Chairman.

Mr. DINGELL. They are not?

Mr. SYMMS. Mr. Chairman, this project will be under FERC, which will authorize the company to run the generating facilities for them and the power company will buy the electricity.

Mr. DINGELL. You gentlemen are two very highly intelligent, very valuable members of this body. I have a great deal of respect for you. What I am trying to find out is, in my understanding, this legislation, what it is that you seek to do by the bill before the subcommittee: you have said they are not trying to get out from under Federal safety.

Mr. SYMMS. Mr. Chairman, I will be very candid with you. I don't know the answer to that question. I think you are going to have someone who knows more about it than I do to answer that question.

Mr. HANSEN. Mr. Chairman, it is my understanding that they do not wish to have to comply with the new Safety and Dams Act, which you are talking about, because they were already instituted under an old safety concept which I am telling you about. That is why I am referring to the house wiring.

Mr. DINGELL. When these dams go out, they tell me it is quite an event.

Mr. HANSEN. We should know. We had one.

Mr. DINGELL. That is the reason why I am somewhat apprehensive here.

Mr. SYMMS. Mr. Chairman, as you will see, as today's the latest witnesses testify and unfold what is taking place here, you will have a picture of how this project operates—South Side Canal carries water from April to October for irrigators, and can carry water from October to April to make electricity.

Mr. DINGELL. I applaud that, and we have no quarrels with that. Are they trying to get out from under the Fish and Wildlife Coordination Act?

Mr. HANSEN. Mr. Chairman, that word is not right. They are not trying to get out from anything. They are already not under it.

Mr. SYMMS. They don't have to do this project, is the point.

Mr. DINGELL. I am aware of that.

Mr. SYMMS. They don't have to build it. We can go without it. We can burn more coal or we can burn natural gas, or we can go without, and have a lower growth economy. But what they are trying to do is to use the technology and the expertise and the capability of the Idaho Power Co., who has transmission facilities and in that area to let them put in a project where they will sell them the falling water to add to the power generating grid in southwestern Idaho. It is going to add 52,500 kilowatts to that grid. That is what it amounts to.

Mr. DINGELL. I applaud that. What I am trying to figure out is what are the obstacles to this transaction taking place?

Mr. SYMMS. The obstacles are very simple. If the dam, the reservoir, and the canal are under FERC, they are not going to go ahead with it. The generating facilities being newly constructed should be under FERC; there is no argument here. But the Milner Dam and Reservoir and the canals are not under FERC, and they don't want to put them under FERC. So we have a choice here. We can have the electricity, or we can let the power company go burn more coal and waste the water.

Mr. DINGELL. Let's try and see. Is the objection to having the dam be under FERC? Is the objection to having the canal be under FERC? Is the objection to having the penstocks and the generating facilities be under FERC? Is the objection to having the powerlines which would carry the electricity from the site under FERC?

Mr. SYMMS. The objection is to having the Milner Dam Reservoir and canal under the FERC project.

Mr. DINGELL. That is the only objection?

Mr. HANSEN. Mr. Chairman, the project sponsors offer two reasons for the refusal to include this existing dam reservoir and irrigation canals within the gambit of the project. First, they did not wish to be subject to the FERC dam safety requirements, because they have already instituted under the old safety requirements and they didn't want to have to go through a new set of requirements.

Mr. DINGELL. Is there a difference between the requirements of FERC with regard to existing facilities which would be subject to some kind of—

Mr. HANSEN. I am sure there are and, second, one of the applicants did not want to subject the privately owned dam and reservoir to the Federal takeover provisions of section 14 of the Power Act. Now, that is a big one, Mr. Chairman. They just don't want to be taken over by the Government, which authorized the U.S. Government upon the expiration of the license term to take over, operate and maintain the entire project after payment of the net investment of the licensee in the project any severance damages.

Mr. DINGELL. I am aware of that statute. Who is it that objected to that?

Mr. HANSEN. The owners.

Mr. DINGELL. Who are the owners?

Mr. HANSEN. The project sponsors, the Twin Falls and North Side Canal Co.

Mr. DINGELL. What is the arrangement that exists here with regard to the construction of this? Who will do the construction of the new facilities here?

Mr. SYMMS. I think the canal company will do it with the power company as the operating agent for them.

Mr. DINGELL. The power company is the agent.

Mr. SYMMS. I believe that is correct. I think the other witnesses who are going to testify can give you this technically.

Mr. DINGELL. The construction, then, will actually be done by the power company?

Mr. SYMMS. The actual practical application of it would be that the power company would supervise it. I would assume they would hire a construction company.

Mr. DINGELL. Gentlemen, the subcommittee thanks you. The subcommittee recognizes Mr. Loeffler.

Mr. LOEFFLER. Thank you, Mr. Chairman. I have listened to the discussion concerning the position of the gentlemen from Idaho and their efforts to bring about additional electricity—through hydro-electric power—to meet the needs of their constituency in an amenable fashion and where all parties are basically in agreement to move forward.

I would like to ask the two witnesses if they might respond as to why they believe FERC is trying to have such an all-encompassing sort of approval. Is this another case of an agency or a commission within the executive branch extending its regulatory tentacles to the farthest reaches, which is what is basically being said from the testimony here this morning? Do you have any response to that?

Mr. SYMMS. Well, I think it is consistent with what we have seen over the years. It is only natural that as all roads lead to Washington, that the people who run FERC would like to have control of every last generator, because then they think, as they sit here on the banks of the Potomac and plan things for all of us out in the country, that they can have control of everything, and they can plan better. That is part of the reason. I don't happen to agree with that philosophy, but I think it is just a natural decision that would be made by someone at FERC to get more power. It is human nature.

Mr. HANSEN. I might mention to the gentleman from Texas that we have a unique problem in the West, and I think the chairman understands this, but we in Idaho have around 66 or 67 percent of our land is federally owned, and Utah and Nevada it is even more. Alaska is more than that, and anything from Colorado west is almost under Federal receivership, and it is very, very difficult for the people of our State to have any land which really is privately owned and used to do anything with, and so we are very careful.

We understand the relationship probably more than any other people between the Federal Government and private ownership, and that is why we are being very careful here, Mr. Chairman, and that is the fact that we have been burned. We have been burned many times, and here you have a group of people who are trying to do something, but they have to go through the Federal Government to generate the electricity, and so in doing so, they have to put all the rest of their holdings up for grabs, so to speak, in order to do it, unless we get this exemption, and this happens time and again.

We have people out there who have lived 100-and-some years on their land, and they come along through some technicality through the Bureau of Land Management that decides that that land belongs to the Government, and the Government in most cases won't even sell it to them. They make them trade it, because the Government will not divest itself of any power or any authority or any jurisdiction, and I think the gentleman from Washington understands this. It becomes a real problem to us.

We are trying to be very careful here to make this thing very clean, but the people in my State are so concerned about the probabilities and the possibilities of what might happen that unless they can get this thing ironed out here in committee and beforehand, they don't want to proceed, because they could find themselves being hanged, held in the court for years, or whatever, and the Federal Government has a lot more resources than these two little canal companies do out there as far as taking care of their problems; so we need to get it straightened up here, and we want to contribute to the progress of this country, but we can't do it if we are going to be hanged in the process.

Mr. LOEFFLER. Let me ask another question, and that this is not a substantive question, but more along the lines of support. Are there any elected officials, or those who represent at least parts of the constituencies concerned here, that are opposed to this particular proposal that you bring before this subcommittee?

Mr. SYMMS. Not to my knowledge.

Mr. LOEFFLER. How about the Idaho delegation here in Washington?

Mr. SYMMS. We are all in favor of it.

Mr. HANSEN. Yes. In fact, the bill has already passed the other body, and it is that bill, along with the bill sponsored by Mr. Symms and I, which you have before you today. So far as I know, it is complete unanimity. The only problem we have is we just don't want to lose our shirt in order to gain another sleeve.

Mr. LOEFFLER. Thank you, Mr. Chairman.

Mr. DINGELL. Mr. Swift?

Mr. SWIFT. Thank you, Mr. Chairman. I would like to try and clarify two or three things here, because I think there are a number of things involved that shouldn't be confused. First of all, your people are concerned about a possible takeover. They built the dam originally for irrigation purposes. As I understand it, they did not have any idea at that time of it being utilized for power, and now at this later date if it can be used for power, they don't want to lose their property rights to a dam that they built for irrigation purposes. One portion of this bill would see that that recovery clause did not apply to this dam?

Mr. HANSEN. That is correct.

Mr. SWIFT. That is one issue.

Mr. HANSEN. That is correct.

Mr. SWIFT. That does not seem to be an issue of much controversy here. Second, there is, in part I of the Federal Power Act, some provisions that they also do not want to be subject to, because their initial purpose was to be an irrigation facility?

Mr. HANSEN. That is right.

Mr. SWIFT. They meet all Federal requirements currently existing for irrigation facilities. Their position, I gather from your testimony, is kind of this way: If you would like to use our facilities now to generate some power, fine, as long as you don't throw us into a totally different regulatory situation than presently pertains. We currently meet all those requirements. We want to continue to meet those requirements. We don't want to deal with new requirements.

I think the point that the chairman is making is that that might create some precedent that would apply in a different way in different parts of the area. It is possible that the committee may be able to deal with what sounds to me like very legitimate concerns of the owners of these dams in a way that will not establish precedence in other areas that could be troublesome to the committee, to the law, to the Federal Power Commission.

So far as you know, there is no provision that would currently apply to this dam as it is used—dam and the reservoir, and so forth—that currently applies for its present use, that it would be exempted from by the provisions of this bill. Is that correct? This

bill doesn't really eliminate any requirement that it currently has to abide by?

Mr. HANSEN. Oh, no. No.

Mr. SYMMS. That is correct.

Mr. HANSEN. This dam is not deficient under the current statute or provisions that it operates under at all.

Mr. SWIFT. So the owners of the dam are not trying to escape from any current requirements applying to the dam in its present use?

Mr. HANSEN. That is correct. That would be folly if they were here under those circumstances.

Mr. SWIFT. They simply don't want to assume new responsibilities, new regulatory requirements, if they permit Idaho Power Co. to also use it for power purposes. I think those distinctions between what is going on here in the various aspects of the bill may be useful to the committee, and I thank you.

Mr. HANSEN. In a sense, just because they are going into extra innings, so to speak, going into an extra process, they don't want to have the rules of the game changed on them, and I think that is all we are talking about.

Mr. SWIFT. Thank you very much, Mr. Chairman.

Mr. DINGELL. Gentlemen, the subcommittee thanks you for your kind and helpful testimony.

Mr. SYMMS. Thank you, Mr. Chairman.

Mr. HANSEN. I thank the chairman for his thorough inquisition.

Mr. DINGELL. Our next witness is a panel composed of Mr. Charles Curtis, Chairman, Federal Energy Regulatory Commission, and Mr. Lynn Greenwalt, Director, U.S. Fish and Wildlife Service.

Gentlemen, the subcommittee is happy to welcome you.

The Chair is particularly pleased to see Mr. Curtis, a distinguished public servant, a close friend of the present occupant of the chair. I welcome an old friend. You are a fine public servant with whom I worked for many years when I had the pleasure of chairing a more peaceable subcommittee.

Gentlemen, welcome. If you will each identify yourselves and also your associates at the subcommittee table for purposes of the record we will proceed.

Mr. CURTIS. Thank you, Mr. Chairman. My name is Charles B. Curtis, and I am Chairman of the Federal Energy Regulatory Commission. On my immediate left is Mr. Howard Jack, the Assistant General Counsel for Hydroelectric Matters; my far left, Mr. Ronald Corso, the Director of the Commission's Division of Hydropower Licensing.

Mr. DINGELL. Mr. Jack and Mr. Corso, we thank you for being with us.

Mr. Greenwalt?

Mr. GREENWALT. Mr. Chairman, my name is Lynn Greenwalt, Director of the U.S. Fish and Wildlife Service, Department of the Interior.

Mr. DINGELL. Gentlemen, we will recognize first Mr. Curtis and then Mr. Greenwalt.

STATEMENTS OF CHARLES B. CURTIS, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION, DEPARTMENT OF ENERGY, ACCOMPANIED BY HOWARD JACK, ASSISTANT GENERAL COUNSEL FOR HYDROELECTRIC MATTERS, AND RONALD A. CORSO, DIRECTOR, DIVISION OF HYDROPOWER LICENSING; AND LYNN A. GREENWALT, DIRECTOR, FISH AND WILDLIFE SERVICES, DEPARTMENT OF THE INTERIOR

Mr. CURTIS. Thank you, Mr. Chairman. I have attempted, guided by long experience with this subcommittee, to write a brief statement. I believe that what I have to say in the statement is material to the discussion that the subcommittee must engage in to legislate on this matter, and with the indulgence of the subcommittee I would like to proceed to read most of it.

I am pleased to be here today to discuss the two identical bills now pending before you: S. 1828, which was passed by the Senate on December 20, 1979, and H.R. 5417, which was introduced by Congressman Hansen on September 26, 1979.

These measures would exempt the proposed 50.25 megawatt Milner Dam hydroelectric project to be located on the Snake River near Milner, Idaho, from certain requirements of the Federal Power Act.

In a nutshell, the basic problem is that the existing Milner Dam and Reservoir have long been used to supply water for irrigation purposes that are vital to farmers and ranchers in the surrounding area. Under the proposal, the irrigation facilities would be used to divert some irrigation water for power generation purposes. But the project sponsors, who are the operators of the existing irrigation system, are apparently concerned that if the project is subject to the FERC licensing authority, they will no longer be able to decide how much water will be used for irrigation and how much will be used for agriculture. Instead, in their view, a Federal agency in Washington, D.C., might be making decisions on flow rates that could jeopardize agricultural interests in the Milner area. The primary purpose of the bills' exemption is, of course, to prevent the latter possibility.

To help the subcommittee better understand exactly what the bills would do, I have prepared a diagram showing the existing and the proposed facilities at issue here, and this is contained on page 2 of my statement. [See p. 24.]

As you can see, if these bills are not enacted, all of the present requirements of the Federal Power Act would apply to the proposed project. In particular, the act's detailed and comprehensive definition of a hydroelectric project in section 3(11) would subject all of the noted existing structures—including Milner Lake, the reservoir, Milner Dam itself; and the two irrigation canals fed by Milner Lake, which run along the north and south sides of the Snake—and all of the noted proposed structures, including the proposed forebay, powerhouse, penstocks and transmission lines to the Commission's licensing authority under the Power Act.

I would like to note parenthetically, in partial response to a question raised by Congressman Loeffler, that it is not a matter of regulatory projection of authority that this is so, but it is a result of existing law.

However, if the bills are enacted, they would exclude from the project the existing reservoir dam and irrigation canals. Only the proposed forebay, powerhouse, penstocks, and transmission lines would be subject to licensing by the Commission under the act. Moreover, as I read the bills, any future additions to the irrigation canals and any changes or improvements in the dam or reservoir would not be subject to our licensing authority. Conversely, future additions to the powerhouse or the other facilities used to generate or distribute electricity would be part of the project, and hence would fall under our licensing authority.

In the remainder of my statement I try to recount for the subcommittee the history of the particular project, at least as that history relates to the Federal Energy Regulatory Commission's licensing authority, and I outline a number of policy issues which I believe this legislation would present.

I will skip over the history, but I would like to specifically call your attention to the policy issues. The first of these is that there is some confusion as to what is the purpose and effect of the proposed legislation. One explanation of the purpose of the legislation is to solely operate to exempt the proposed Milner Dam project of the workings of the Federal Power Act recapture or takeover clause. If that narrow objective is the goal, an exemption only from section 14 of the Federal Power Act would seem to suffice.

The second and quite different goal is much broader, and that is to exempt the existing reservoir, the dam, and the irrigation canals, from all provisions of the Federal Power Act, not merely its section 14 takeover and recapture clause.

It is my conclusion that it is this latter purpose which is at hand here. It is my view that the broader goal is the effect of the legislation.

I have tried to outline an alternative solution that the subcommittee may wish to consider on pages 7 and 8 of my statement, and that is to give to the project sponsors authority to have overriding control of the utilization of the water for irrigation purposes. That, in my opinion should solve some of their problems, but I must concede that it would not solve all of their problems.

Mr. DINGELL. Would you say that again, please?

Mr. CURTIS. There are several concerns, I think, involved in this legislation. Let me try to summarize them and state them in my own words.

One is that under the Federal Power Act a licensed project is subject to a limited term license not to exceed 50 years. At the end of the 50-year period, the project is subject to Federal takeover. Now, this should be distinguished from the potential that exists that the project could be condemned for public purposes by either Federal or State authority. That is a potential that, of course, exists at any time.

The difference between the two is the payment for the facilities which are diverted to public use. If Federal takeover occurs, under the terms of the Federal Power Act, there is a specific provision which provides for the payment of a so-called net investment. That is something less than would be required if eminent domain authority were exercised by either Federal or State authority pursuant to condemnation proceedings.

I want to emphasize that the condemnation potential exists under present law and would exist even if this legislation were passed.

Mr. DINGELL. The measure of compensation you have indicated is strikingly different——

Mr. CURTIS. Yes, sir.

The second concern that they would have, it appears, is that under the section 3(11) of the Federal Power Act, the entire project would be subject to the licensing authority as well as the controls of Federal authority that attend that license. Thus, the Commission would have the authority to override private decisions on the utilization of flows for irrigation purposes.

I believe the concern is that they wish to be assured that the priority for irrigation would be maintained, No. 1, and No. 2, that the decisions with respect to diversions of flow for irrigation or power generation purposes would remain within the control of the owners of the existing dam and irrigation canals.

The priority for irrigation is something that the Commission commonly recognizes in its licenses and specifically does so in appropriate licensing conditions. But I would emphasize it is something that the Commission does recognize as a matter of its own grace, if you will. If the Commission chooses not to recognize that priority, it has the legal authority to impose conditions that would reverse the priorities.

Second, even if the priority for irrigation were specifically recognized in Commission licenses, nonetheless the decisions with respect to flow rates—this is probably particularly important for this project—minimum flow requirements would be Federal decisions and not decisions which would be within the full and untrammelled control of the project owners.

The third concern that we probably have not identified well enough in our statement is simply that at present the dam, its operation, for irrigation purposes, through the canal, is subject entirely to the control of the owners of the project as maybe limited only by existing State law or such Federal law as may apply to the project. It is a system in which this project has developed and operated for a number of years.

I would expect that the project sponsors would have concern with the unknown; namely, that should this dam and the operation of the reservoir be subject to Federal control, the Federal Government may impose requirements with respect to dam safety, recreational use, or environmental concerns that are beyond those which presently may apply to the project or its operation. I would simply lump that concern into the classification of a fear of the unknown.

The remainder of my statement deals with the precedent and it is a concern that I think that the subcommittee should simply consider from the standpoint of the long history of Federal licensing of hydroelectric projects on navigable waters. As this subcommittee well knows, that used to be authority directly exercised by the Congress through legislative enactment.

The Congress in 1920 decided to reside that authority in a governmental agency, rather than attempt the exercise by enactment of specific legislation. This theory of administration of Federal

power was primarily grounded on a belief that the Congress as a body did not have the means of developing the necessary expertise within its own staff to continually evaluate individual projects as well as a belief that the legislative agenda of the Congress required its focus and attention on matters of greater Federal and national moment.

Should the Congress return to a mood in which individual exemptions in whole or in part from the Federal statute are to be evaluated in the congressional forum, I believe that you will risk the potential of encountering problems similar to those that existed in the early 1900's, that suggested to the Congress that it delegate this authority to a Federal agency in the first place.

With that, Mr. Chairman, I think it might be more useful for the subcommittee's deliberations if I attempt to respond to your questions as they are presented.

Mr. DINGELL. Thank you very much, Mr. Curtis.

[Testimony resumes on p. 49.]

[Mr. Curtis' prepared statement follows:]

Statement of
Charles B. Curtis
Chairman, Federal Energy Regulatory Commission
Before the
Subcommittee on Energy and Power
of the
Committee on Interstate and Foreign Commerce
U.S. House of Representatives

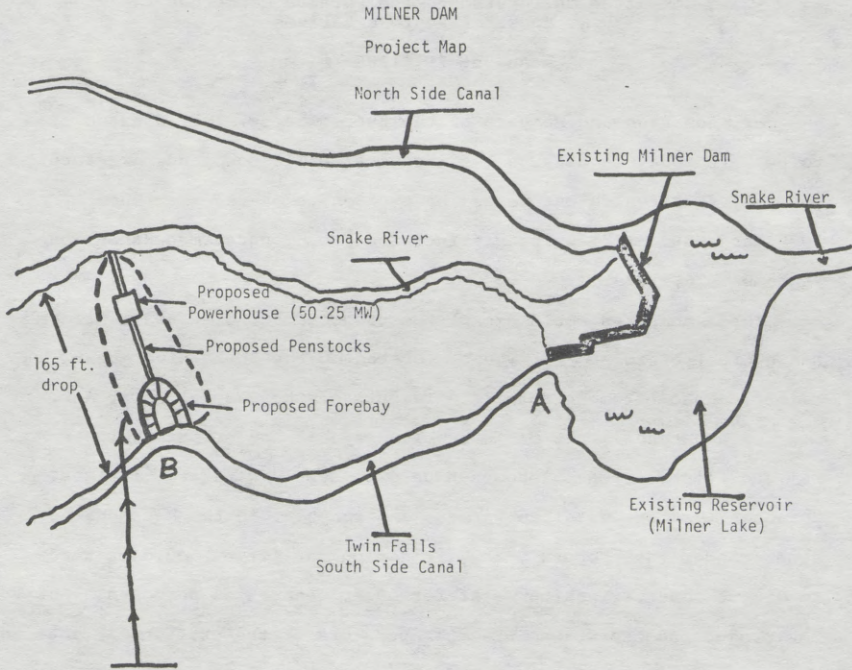
August 25, 1980

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to discuss two identical bills now pending before you: S. 1828, which was passed by the Senate on December 20, 1979; and H.R. 5417, which was introduced by Congressman Hansen on September 26, 1979.

These measures would exempt the proposed 50.25 megawatt Milner Dam hydroelectric project--to be located on the Snake River near Milner, Idaho--from certain requirements of the Federal Power Act.

In a nutshell, the basic problem is that the existing Milner Dam and reservoir have long been used to supply water for irrigation purposes that are vital to farmers and ranchers in the surrounding area. Under the proposal, the irrigation facilities would be used to divert some irrigation water for power generation purposes. But the project sponsors--who are the operators of the existing irrigation system--are apparently concerned that if the project is subject to the FERC licensing authority, they will no longer be able to make independent decisions on the use of their irrigation facilities: Instead, a Federal agency might be making decisions that might jeopardize agricultural interests in the Milner area. The primary purpose of the bills' exemptions is, of course, to prevent this latter possibility, by excluding those irrigation facilities from the reach of the Power Act's licensing requirements.

To help you better understand exactly what these bills would do, I have prepared the following diagram showing the existing and proposed facilities at issue here:



Under H.R. 5417 and S. 1828, the "project" would include only:

- the forebay
- the penstocks
- the powerhouse
- the transmission lines

Under Section 3(11) of the Federal Power Act, the "project" would include:

- Milner Lake, the reservoir
- Milner Dam
- the South Side Canal (Point A to Point B)
- the forebay
- the powerhouse
- the penstocks
- the transmission lines

What The Bills Do

As you can see, if the bills are enacted, they would exclude from the "project" the existing reservoir, dam, and irrigation canal. Only the proposed forebay, powerhouse, penstocks, and transmission lines would be subject to licensing by the Commission under the Act.

However, if these bills are not enacted, all the present requirements of the Federal Power Act would apply to the proposed project: In particular, the Act's definition of a hydroelectric "project" in section 3(11), would subject all the noted existing structures--including Milner Lake, the reservoir; the Milner dam itself; and the South Side Canal between the dam and the powerhouse forebay--and all the noted proposed structures--including the proposed forebay, powerhouse, penstocks, and transmission lines--to the Commission's licensing authority under the Power Act.

Moreover, as I read the bills, any future changes or improvements in the dam, reservoir, and canal (other than the portion of the canal between the dam and powerhouse) would not be subject to our licensing authority. Conversely, future additions to the powerhouse or the other facilities used to generate or distribute electricity would be part of the "project", and hence would fall under our licensing authority.

The FERC's Milner Dam Licensing Proceeding

The project sponsors, the Twin Falls Canal Company and the North Side Canal Company, are the two irrigation firms that operate the irrigation canals along the southern and northern

edges of the Snake River. When they applied in early 1979 for a preliminary permit from the Commission, their application did not propose to include the reservoir, the dam, or the Twin Falls canal that would supply water directly to the proposed powerhouse.

In response, the Commission's staff indicated the application was therefore deficient, and did not meet the express requirements of the Act, which defines projects as a complete unit of development in order to give this Commission a full opportunity before the license is issued to assess all the likely impacts of a proposed project on water quality and flow; river or reservoir erosion; the general river ecosystem, including fish and wildlife resources; river navigation and commerce, including irrigation uses; archeological, recreational and historic resources associated with the project; the safety of the dam structure; and power generation. For instance, the Milner Dam now has a "significant hazard" classification, i.e., if failure should occur, there would be some loss of life and appreciable property damage, with accompanying economic loss.

The project sponsors offered two reasons for their refusal to include their existing dam, reservoir, and irrigation canals within the ambit of the project: First, they did not wish to be subject to the FERC dam safety requirements. Second, one of the applicants did not want to subject the privately-owned dam and reservoir to the Federal "takeover" provisions of Section 14 of the Power Act--which authorize the United States, upon the

expiration of the license term, to take over, operate and maintain the entire "project", after payment of the "net investment" of the licensee in the project and any severance damages. Since virtually all hydroelectric licenses issued by the FERC are valid for 40 to 50 years, the Section 14 "takeover" provisions raise the possibility that, sometime after the year 2020 or 2030, the U.S. might take control of these now privately-owned facilities at a very low price.

Parenthetically, while I recognize the understandable concerns of the project sponsors on this issue, such a future Federal "takeover" of the dam and reservoir is hardly a certainty: To date, no FERC-licensed hydroelectric project has ever been taken over by the U.S. upon the expiration of the license term, under the Section 14 authority. Indeed, a more likely possibility is that some municipality in the project area, for example, the Town of Milner, might itself seek to take over the project at the "takeover" price, by means of the Act's municipal preference provisions in a relicensing proceeding commenced upon the expiration of the license.

In any event, this is the basic outline of the controversy that has brought this legislation before you.

Policy Issues Raised By the Legislation

Let me briefly review with you the policy questions raised by this legislation.

1. The Bills Are Ambiguous

The text of the bills and the statements of Senators Church and McClure, upon introducing S. 1828 on September 27, 1979, indicate to me that the stated goals of the measures are somewhat contradictory.

One goal, embodied in the last two lines of each bill, was explained by Senator Church in these words: "This legislation will solely operate to exempt the proposed Milner Dam project from the working of the Federal Power Act recapture [takeover] clause." (Cong. Rec., S 13587, September 27, 1979) (Emphasis added). If this narrow objective is the goal, an exemption only from Section 14 of the Power Act would seem to suffice.

The second, and quite different goal, is much broader: To exempt the existing reservoir, the dam, and the irrigation canals from all provisions of the Power Act, and not merely its Section 14 takeover or recapture clause. This is accomplished by the first ten lines of each bill, which define the "project" to include only the proposed generating facilities, and exclude the reservoir, dam, and canals from the "project". Since FERC jurisdiction extends only to the "project", no provisions of the Power Act could (by virtue of the first ten lines of the bills) be applied to the reservoir, dam, or canals. This broader goal was summed up by Senator McClure, again on September 27, 1979, in these words: "The thrust of this proposal is merely to exempt Milner Dam from inclusion in the project description." (Cong. Rec., S 13587).

2. The Project Sponsors' Probable Goal

However, since the major stated concern of the sponsors apparently is local and private control over irrigation flows, I have concluded that the major goal of the sponsors is the second, broader one: A complete exemption from the Act for the reservoir, dam, and irrigation canals. Of course, a mere exemption from the Act's Section 14 "takeover" price provisions--an exemption that would have no utility whatsoever until about half a century from now--would not give the project sponsors any control over irrigation flows now and during the immediate future. And that is, I believe, what they want to be assured of. 1/

3. Possible Alternative Solutions

The Subcommittee may be able to draft a new bill that directly addresses the irrigation concerns of the sponsors. If this could be done in a more narrow fashion than the broad "total exemption" approach now set forth in the bills, it might also permit the Commission to exercise at least some of its public interest responsibilities regarding water quality, environmental, dam safety, and other matters.

1/ I say this even though Senator McClure explained that "the dam owners do not want to risk the possibility of irrigation diversions being subordinated to diversions for power in the future if recapture occurs." In my view, other statements--"Milner Dam has always been...used primarily for irrigation diversions [and] the proponents of the proposal do not want to change that"--believe the sponsors' apparent concern over events in the distant future. (See Cong. Rec. S 13587, September 27, 1979)

For example, the bill might be revised to provide that the entire project, including the dam, reservoir, and irrigation canals, shall be subject to the normal licensing requirements of the Power Act--but that nevertheless, "Notwithstanding any term or condition in any such license, the sponsors shall be entitled to subordinate diversions for power to diversions for irrigation purposes, in order to maintain and deliver reasonably adequate supplies of irrigation water." And some other similar proviso might balance in a better fashion the irrigation needs of local agriculture interests on the one hand, and the more general public interest needs served by the licensing process, on the other hand.

Concededly, a "priority for irrigation" requirement might well limit the effectiveness of other conditions touching on environmental or dam safety matters, or on the reliability of the power output. But these limitations, if any, may be minimal in scope, or otherwise acceptable. All I am saying is that some licensing review, even one necessarily curtailed by a statutory "priority for irrigation" requirement, is probably preferable to no licensing review at all for this project. In this connection, it should be of interest to the Subcommittee that many FERC licensed projects have as a primary purpose irrigation, which is not compromised by the terms of the licenses in any way. In other words, power production is a secondary purpose of such projects, but the power revenues provide the total revenue to finance the multi-purpose irrigation and power project.

Finally, I doubt that a simple exemption from the Section 14 "takeover" clause, for this particular project, would in any measurable way disserve the public interest. The real impact of such an exemption, I believe, would lie more in its status as a precedent.

4. Is Such a Precedent Appropriate?

The precedential effect of this legislation is difficult to assess. It may touch off a spate of requests for similar full or partial exemptions, or it may not. It may also generate new pleas for legislative changes in the Power Act's relicensing and municipal preference provisions, which under the Commission's recent Bountiful decision, may be used--I stress the word "may"--to allow municipalities and other advocates of public power to "take over" formerly private power projects at the end of their license term by obtaining the new license. The theory would be, if Congress is willing to protect a private project from Federal "takeover", shouldn't it also be willing to protect private projects from, in effect, a municipal takeover?

But I cannot predict the future.

I would point out, though, that determinations on the wisdom of exempting particular projects from the Power Act licensing process will generally be difficult for Congress to make. A great deal of information and expertise in environmental, engineering, dam safety, and other fairly specialized matters is typically required--and this indeed is precisely why Congress transferred its hydroelectric licensing authority to the Commission in 1920.

To give you one example, we cannot now assess the likely environmental, water pollution, or fish and wildlife impacts of the Milner Project--because the sponsors have not filed an environmental report with us. If you are to act wisely in this matter, you will doubtless want to know what these effects may be. Yet, you may be unwilling, or unable, to convert the Subcommittee's staff into a hydroelectric environmental analysis organization. If you do, I suspect you will quickly find that the detailed spadework inherently required to fairly assess each project and to determine the wisdom of each exemption--is detracting from your ability to handle the broader policy matters that are already flooding this Subcommittee.

This concludes my statement on S. 1828 and H.R. 5417. Let me add that the Chairman has requested, in his letter of August 18, that we provide a variety of information relating to the Commission's hydroelectric programs, in particular, data on our small hydro programs and other data bearing on a possible discretionary licensing exemption authority for the Commission, in the case of projects ranging in size from five to thirty megawatts. This information is attached, as an appendix to my testimony.

Thank you. I would be pleased to answer any questions you may have.

APPENDIX TO MILNER DAM TESTIMONY

Question 1: Please identify the Bureau or Office within FERC administering Title IV of the Public Utility Regulatory Policies Act of 1978 and the number of full time positions authorized for this Bureau or Office in FY 1980 and 1981 and for the Title IV program, together with a statement of the number of vacancies and a description of the other functions and duties of that Bureau or Office.

Answer: The Office of Electric Power Regulation (principally the Division of Hydropower Licensing and the Division of Environmental Analysis) and the Office of the General Counsel (principally the Hydroelectric Licensing Section) are the two principal offices engaged in the administration of the Commission's responsibilities under Title IV of PURPA. The full-time positions devoted to the hydropower permitting and licensing program are about 106 for OEPR and about 26 for OGC, including both clerical and professional. These positions are allocated to the permitting and licensing program generally, and positions are not separately assigned only to those portions of the hydropower program that fall within the scope of Title IV of PURPA. Currently there are no vacancies in OEPR and two vacancies in OGC. Other OEPR and OGC functions within the hydropower permitting and licensing program are:

(a) Permitting and licensing of all other new hydropower projects using existing dams, i.e., those with over 30 MW installed capacity; all relicensings of hydropower projects; and all new hydropower projects involving construction of a new dam and impoundment;

(b) Administration and supervision of about 1,100 hydropower developments under preliminary permits or licenses, including the administration and supervision of the dam safety program for about 1,200 dams; and

(c) all other matters related to licensing of non-Federal hydropower development.

Question 2: Please provide a copy of your current procedures for the Title IV program.

Answer: Attachment 1 is a "Blue Book" containing copies of current Commission regulations that apply to those projects that come within the scope of Title IV of PURPA.

Part I of the Blue Book contains the general provisions that apply to filing and processing of all preliminary permit and license applications, including those for projects covered by Title IV (i.e., projects of 30 MW or less at existing dams).

Part II contains the license application requirements for all major projects at existing dams, which includes all those with a generating capacity between 1.5 MW and 30 MW.

Part III contains the preliminary permit application requirements for all projects, including those within Title IV of PURPA.

Part IV contains the license application requirements for all minor projects (1.5 MW or less), including those at existing dams.

Also included, as Attachment 2, is a copy of a staff discussion draft of a case-by-case exemption rule for implementing section 405(d) of PURPA, as amended by the Energy Security Act of 1980 (ESA) with respect to projects of 5 MW or less at existing dams.

Question 3: Please provide number of permit or licensing applications pending before FERC as of July 31, 1980, indicating the size of each project applied for and the identity and location of the project and the estimated time it will take to consider and act upon each application under current procedures.

Answer: Attachment 3 is a set of four tables listing pending applications for preliminary permits and licenses and outstanding permits and licenses, as of June 30, 1980. Filings submitted during July 1980 would slightly alter these data. Revised data can be supplied for the record if desired.

The time required for considering and acting on any particular application cannot be predicted with any accuracy, but will vary depending on myriad factors, for example: the scope of the proposed project; whether interventions opposing the application are filed; whether competing applications are filed; whether preparation of an environmental impact statement is necessary; and whether disputed material issues of fact arise in the course of the licensing proceeding, thus necessitating formal evidentiary hearing.

The time required for action on preliminary permit applications typically ranges from four months to nine months, although it may

be longer in more complex circumstances. Applications for minor licenses (1.5 MW or less) typically are completed in six months to a year. Applications for larger projects generally require more time. In more complex circumstances -- for example, if a project involves the creation of a large impoundment, if many intervenors appear in opposition, and if preparation of an environmental impact statement, or evidentiary hearings are required -- the application may require several years to process.

Question 4: Please identify the provisions of the Federal Power Act for which exemptions are most likely to be granted under your present discretionary authority or any expanded version of that authority.

Answer: (4) Under the Commission's current discretionary authority under section 10(i) of the Power Act to waiver Power Act licensing requirements for "minor" projects (1.5 MW or less), the Commission typically waives the following requirements of Part I of the FPA:

- Section 4(b) except for the second sentence;
- Section 4(e), insofar as it relates to approval of plans by the Chief of Engineers and the Secretary of the Army;
- Section 6, insofar as it related to public notice and to the acceptance and expression in the license of terms and conditions of the Act that are waived;

- Section 10(c) insofar as it relates to depreciation reserves;
- Section 10(d);
- Section 10(f);
- Section 14, except insofar as the power of condemnation is reserved; and
- Sections 15; 19; 20; and 22.

These waivers relieve the licensee from: developing and supplying original cost information; obtaining Corps of Engineers approval of project plans; providing 30-day public notice of license amendments; maintaining depreciation reserves and amortization reserves (and the attendant bookkeeping); incurring liability for headwater benefits charges; being subject to the possibility that, at the end of the license term, the United States or a new licensee might obtain the project at a price of "net investment plus severance damages," rather than fair market value; being subject to provisions permitting the temporary use of the project by the United States for manufacturing munitions or purposes involving the safety of the United States; being subject to the possibility of rate and service regulation by the Commission in the absence of state regulation; and the need to gain prior approval by the Commission and state public service commission for contracts for sale of project power extending beyond the term of the license.

In appropriate instances, the Commission has also waived other provisions of Part I for minor projects, most notably the annual charge provisions of section 10(e) (except that the statute does not permit waiver of annual charges for the use of U. S. government dams or for use of tribal lands within Indian reservations).

Under the recently enacted authority in section 30 of the FPA to exempt small conduit hydroelectric facilities (15 MW or less), the Commission's experience is understandably still limited. But so far, in all but one instance, the applicant has requested, and the Commission has granted, exemptions from all of the requirements of Part I, including licensing. (In the remaining instance, the applicant sought a license, but asked for and was granted an exemption from one of the types of statutory annual charges.)

To implement the newly-granted authority in section 408 of the Energy Security Act, our staff has prepared a discussion draft of a rule governing case-by-case exemptions for projects of 5 MW or less at existing dams. (Attachment 2.) We anticipate granting exemptions from all of Part I of the FPA, including licensing, whenever requested, unless the particular circumstances of the project warrant a lesser exemption.

We are also beginning to examine the possible scope of generic exemptions, but have not yet determined what parameters are appropriate for establishing a class of exempt projects, or

the suitable requirements of Part I for which exemptions should be granted. We would anticipate that any exempt class of projects would be exempted from all of Part I, including licensing -- assuming we concluded upon completion of the rulemaking proceeding that a complete exemption was in the public interest. But any such exemption that we concluded desirable we would condition in light of public interest considerations such as dam safety and environmental protection.

We cannot identify at this time the provisions of Part I for which exemptions are likely to be granted for projects ranging in generator size between 5 and 30 MW, should Congress grant such additional exemption authority. We would implement that authority either by examining on a case-by-case basis the requirements of Part I from which an exemption for a particular project would be appropriate, and under what conditions of exemption; or by investigating through a rulemaking proceeding the requirements of Part I for which exemptions for a particular class of projects would be appropriate, and under what conditions. Either process demands the gathering of information about the particular project or class of projects, and analyzing that information to determine the extent to which and conditions under which exemptions should be granted. Since that information is not available now, we cannot meaningfully predict the likely scope of or conditions on any such exemptions.

Question 5: A statement indicating why FERC believes that such discretionary authority is needed for small hydroelectric projects of up to 30 MW and for projects such as the Milner Dam. We understand a study was conducted for FERC which has been cited as supporting the need for such authority. Please identify the portions of any such study that provide this support.

Answer: Earlier this year the Commission's Advisory Subcommittee on the Review of the Decisional Process submitted a report regarding the hydroelectric licensing process. The Subcommittee's report was submitted prior to passage of the Energy Security Act, which granted to the Commission the discretionary authority to exempt small hydroelectric power projects of 5 MW or less, located at existing dams, from all or part of the requirements of Part I of the Federal Power Act.

The Subcommittee focused on the Commission's then-existing authority under section 10(i) to provide limited relief from the licensing requirements of the Federal Power Act for "minor" hydroelectric projects (1.5 MW or less). The Subcommittee concluded:

"Federal law which grants FERC jurisdiction over the licensing of hydroelectric projects has a virtually meaningless size cut off point: limited waivers of licensing requirements are possible for only very small projects, 1.5 MW or less -- and even here the granting of licenses is required where other Federal jurisdictional tests are met. With the passage of time it would seem that much of the very careful work which is required under the law may take on the nature of going after a mouse with an elephant gun. This particular area is not subject to remedy by the Commission; Congressional action is required." 1/

1/ Federal Energy Regulatory Commission Advisory Committee on Revision of Rules of Practice and Procedure, Report of the Subcommittee on the Review of the Decisional Process: Hydroelectric Licensing, March 20, 1980, at page 10.

The Subcommittee, with the aid of the staff of the Commission, explored the question of how to separate significant projects from insignificant projects, utilizing the amount of generating capacity as the only criterion. While agreeing that the installed capacity is one criterion that could be utilized, the Commission staff was unable to agree that it would be appropriate or meaningful if it were the sole criterion. For example, even with projects of up to 30 MW, the height of the dam or the size of the reservoir may vary greatly from project to project, regardless of whether the installed capacity is the same. These variations may have important implications with regard to dam safety or environmental concerns, considerations which may bear on the extent to which a project should, consistent with the public interest, be exempted from all or part of the requirements of Part I of the FPA. These considerations led the Subcommittee to recommend that the Commission study further the possibility of developing a matrix of criteria -- utilizing variables like dam height, size of the reservoir, and amount of generating capacity, for example.

In our view, the Subcommittee's point was the importance of establishing a more meaningful threshold of Federal regulation over small hydroelectric projects, so that the scope of Federal regulation can be tailored to fit the size and public importance of the project. Establishing such a threshold would both remove the perceived institutional burdens of Federal licensing that can

discourage development of these small renewable energy resource projects, as well as free the Commission to concentrate its efforts on regulating larger projects that affect significant Federal interests. While it would be possible to develop a set or matrix of criteria establishing that threshold legislatively, we do not have sufficient information upon which to make such a recommendation now; and we are concerned that a rigid "statutory matrix" approach would be too inflexible. In our view, the discretionary waiver and exemption authority in sections 10(i) and 30 of the FPA and section 408 of the ESA reflect the consistent judgment of Congress that it is preferable to delegate to the Commission the detailed determinations of the extent to which small hydroelectric projects should be relieved from Federal licensing and related regulatory requirements.

Question 6: (a) Please indicate why this authority should be exercised on a generic basis, rather than a case-by-case basis and state what criteria should be established for exercising the authority in either case.

(b) Please explain to us why generator size should be the criterion for distinguishing between granting or not granting exemptions.

Answer: (a) The Commission has not concluded that such authority should be exercised on a generic basis. In fact, in the first instance it has implemented section 30 of the Federal Power Act, relating to exemptions for small conduit hydroelectric facilities, and is proposing to implement section 405(d) of PURPA, relating

to exemptions for projects of 5 MW or less on a case-by-case basis. However, as a second step the Commission is beginning to examine the feasibility of establishing through a generic rule-making certain classes or categories of projects that would be exempt. The essential criterion for exercising that authority would be the standard common to exercising all of the Commission's various authorities -- the public interest.

Generally speaking, the ability to exempt projects generically, *i.e.*, by class or category, provides the Commission with the flexibility to administer its programs more efficiently. The advantage of giving the Commission authority to exempt on a generic basis is one inherent in any classification, whether performed by a legislative body or an administrative agency -- efficiency. Not only would the use of generic exemptions free the Commission from having to expend limited resources on case-by-case examination of specific projects, but it would remove the perceived Federal regulatory barrier to development of small hydroelectric projects caused by the time and expense of project-by-project applications.

(b) Installed capacity should not necessarily be the sole criterion for granting or not granting an exemption: it is instead merely one of many possible starting points. Particularly as the installed capacity increases, it becomes more likely that other factors, such as dam height, size of reservoir, or mode of operation, would also become important considerations in determining the extent to which a project should be exempted, and under

what conditions. Installed capacity is, however, a convenient and historic criterion that Congress has repeatedly used -- in 1920 when FPA section 10(i) was enacted, in 1978 when FPA section 30 was enacted, and in 1980, when section 408 of ESA was enacted -- to define the limits of the Commission's discretion to determine the extent to which a project should be relieved of Federal regulation. Within the limit set by the installed capacity criterion, the Commission could evaluate other potential criteria, such as dam height and reservoir size, in deciding the extent to which individual projects or classes or categories of projects should be exempted.

Question 7: Your letter states that you "anticipate significant problems in the exercise of such authority" for projects greater than 30 MW. Please identify those problems and indicate why these would not be significant at or below the 30 MW level.

Answer: As the amount of installed capacity at a project increases, the physical consequences and effects of the project tend to increase also. (This is not to say that there is a one-to-one correspondence between capacity and other characteristics, or that a "matrix" approach like that described above would not be necessary). Through the Commission's experience with almost 1,200 hydropower developments, it has found, for example, that virtually all projects with a very small installed capacity (up to 1.5 Mw) are operated on a run-of the-river basis, thus

having little or no effect on stream flow characteristics. Generally, this is also true for projects of up to 5 MW, although there are some exceptions. As installed capacity increases beyond 5 MW, the probability of operational characteristics that involve reservoir level and streamflow variations will increase. By about the 30 MW level, the mode of generation will generally involve storage operations that necessitate fluctuations in streamflow and reservoir levels. These changes, in turn, have more and more important implications for such factors as recreational uses, fish and wildlife resources, irrigation, flood controls, and water quality.

Similarly, as the installed capacity increases, the height of the dam, the size of the reservoir, the steamflow, or all three, tend to increase and become more and more important factors - - for instance, in terms of dam safety. Moreover, as the capacity itself increases, the project tends to become more significant, in terms of both its actual capacity and its probable mode of operation, to the interconnected generating system.

Because of these considerations, there is more likelihood that important protective conditions will have to be imposed upon exemptions as the capacities of projects approach and exceed 30 MW. Thus, those exemptions will become more like licenses, and the value of the exemptions to project developers and the likelihood that exemptions will encourage

development, will become more and more problematic.

Obviously, there is nothing magical to the 30 MW figure itself. But the line must be drawn somewhere. Congress decided in section 408 of the ESA that small hydropower projects of up to 30 MW, at existing dams, should be encouraged, and accordingly, raised the ceiling for eligibility for the important financial incentives in Title IV of PURPA. We expect that these financial incentives will increase the interest in developing hydropower projects of up to 30 MW at existing dams and that the Commission will in turn experience an increase in the number of applications for preliminary permits and licenses for such projects.

Accordingly, the 30 MW figure seems to provide a reasonable ceiling on the discretionary authority of the Commission to tailor, or fine tune, the applicability of the federal regulatory scheme to individual small hydropower projects or classes of categories of them, both to further encourage development and to respond to the increased licensing program workload that will occur.

Question 8: On March 20, 1980, a NERA Subcommittee on the Review of the Decisional Process in connection with hydroelectric licensing submitted its report to the Commission. The report identifies four primary factors contributing to the current delay in connection with hydroelectric licensing. Please comment on the validity of these findings, the Subcommittee's recommendation for addressing these problems and the need for legislation to minimize problems identified in the report.

Answer: The Commission's Advisory Subcommittee on the Review of the Decisional Process identified four primary factors previously contributing to delays in connection with the hydropower licensing program generally. The first of these factors relates directly only to operating but unlicensed projects, not to applications involving new capacity. The Subcommittee noted that the Commission had developed a backlog (largely inherited from the FPC) of over 90 pending applications for unlicensed constructed projects. This backlog developed primarily because these applications for operating projects were subordinated to applications involving new capacity, to avoid delaying development of that new capacity.

To attack the backlog the Commission has recently approved a short-term incentive program. Under the program, 45 of the pending patently deficient applications have been dismissed. Those project owners who, within six months, refile applications conforming to the Commission's new simplified and clarified licensing regulations will gain two benefits. First, the prospective license terms will be extended from 20 years to 30 years. Second, the projects will be assessed only one-half of the back annual charges that otherwise would have been imposed.

The Commission hopes that these incentives and the availability of the simplified application requirements will lead to adequate filings for those projects in the near future. Upon receipt of conforming applications, the Commission can then proceed to issue licenses expeditiously. To complement these incentives, the owners have been warned of the enforcement measures that are available

against those who do not refile conforming applications within the prescribed time.

With respect to the approximately 45 remaining applications for unlicensed constructed projects, the Commission has instituted a major effort to complete the licensing process. For many of those projects where comments and staff analyses were already completed, license orders have now been issued. For those applications where agency and intervenor comments had already been received, but were somewhat stale, the Commission has begun to issue licenses subject to conditions reserving the authority to impose any necessary corrective or mitigative measures in the future. For the remaining applications, agency comments have now been solicited and a staff task force has been organized to help expedite the final stages of the licensing process. As a result of these efforts, the Commission is now well on its way to eliminating the backlog of "overage" applications for unlicensed constructed projects. This matter does not require any legislation.

Secondly, the Subcommittee noted the problem of delay resulting from statutory requirements for consultation with other agencies that have overlapping jurisdiction over projects. The Subcommittee recommended that the Commission seek to establish firmer deadlines for other agencies to respond to consultation requests, either through legislation or through action by the Office of Management and Budget. The Commission's staff has had initial discussions with officials within the Executive Office of the President concerning ways to deal with this problem. In

the interim, the Commission is setting and enforcing deadlines more strictly, to the extent possible under existing law. While the problem of interagency coordination remains an impediment to expeditious action there has been some progress and the Commission is not prepared to seek legislative action at this time.

As its third major point, the Subcommittee stated that legislation to increase the minimum size threshold for exempting projects from Federal licensing was necessary. A detailed discussion of this aspect of the Subcommittee's report has been provided above, in the answer to question 5.

As a final point, the Subcommittee recommended that the Commission, as a general matter, exert greater effort to ensure correction of deficiencies in applications for preliminary permits and licenses. In addition to the measures described above for deficient applications for unlicensed constructed projects, the Commission's regulations now prescribe only limited time periods for curing deficiencies, and the staff of the Commission is under instruction to routinely reject any applications not cured within the time allowed.

Mr. DINGELL. The Chair recognizes Mr. Greenwalt.

STATEMENT OF LYNN A. GREENWALT

Mr. GREENWALT. Thank you; it is a pleasure to be here to add my testimony to the testimony given by Mr. Curtis.

Mr. Chairman, on the assumption that my written statement will be included in the record in its entirety, I will attempt to paraphrase it and highlight my concerns about the two bills in question.

Mr. DINGELL. Without objection, your full statement will appear in the record and we will recognize you for such summary as you choose to give. [See p. 51.]

Mr. GREENWALT. Thank you, Mr. Chairman.

One of the concerns that arises immediately with these bills, is the question of how the consideration of fish and wildlife and related environmental concerns will be undertaken. I think, Mr. Chairman, one of the salient points that has been overlooked, at least thus far this morning, is that when the dam was constructed at the turn of the century, most of the environmental and other considerations that are now in place were nonexistent. This may explain at least in part some of the concerns expressed by the present owners.

My particular concern is that however this problem may be resolved, concerns about fish and wildlife and related resources should not be overlooked. Furthermore, the precedent that may permit the exemption of projects of this kind poses some difficulty for me.

The project at hand, the Milner Dam, is interestingly enough, one that appears not to pose particular fish and wildlife concerns at the present. However, the precedent established by an exemption process of this kind could cause problems.

Again, almost with irony I must point out that many of the projects that can have a profound impact on fish and wildlife resources can be undertaken with minimum cost, as I understand it, but perhaps with profound impact on fish and wildlife values—for instance, small hydro projects in the East where retrofitting of existing dams occurs.

I hasten to make clear, Mr. Chairman, as I think you will recall from your earlier tenure on another committee, that these problems are not without solution. Actions such as the construction of fish ways, and giving attention to minimum stream flows, can overcome with relative ease the problems of fish and wildlife impacts in many cases.

They cannot be overcome, in my judgment, however, Mr. Chairman, unless there is a provision in law and regulation or both that requires that equal consideration be given to these values during the licensing process or when changes or modifications are made to existing structures. It is that particular concern that underlies my skepticism, my real concern about the long-term precedent of the exemption we are addressing today.

However, I would say that if this subcommittee decides to move along with the legislation, we see the solution to our problems being the clarification of the fact that no exemption would be provided from the Fish and Wildlife Coordination Act, NEPA, the Endangered Species Act or any other environmental law that may be relevant to the considerations of these projects.

Furthermore, Mr. Chairman, it has been suggested, by some that very small projects could be exempted. Unfortunately, very often it is the small projects that may have a considerable impact on fish and wildlife. I think the process presently in use, the review process involving the Fish and Wildlife Coordination Act and NEPA, should be applied in such a way that determinations can be made as to what, if anything needs be done in fact to modify or adjust projects to benefit fish and wildlife. This can be accomplished, I think, Mr. Chairman, without the horrific delay that is often alleged to accompany these processes and without the fear that no project can ever succeed because it cannot satisfy the requirements of fish and wildlife.

You are privy to the history of the Fish and Wildlife Coordination Act and know that is not true in the majority of cases.

Mr. Chairman, I think that conveys to you my feelings and the feelings of my Service about this particular issue and I would be delighted to answer any questions you or members of the committee may have.

[Mr. Greenwalt's prepared statement follows:]

STATEMENT OF LYNN A. GREENWALT, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, SUBCOMMITTEE ON ENERGY AND POWER, AUGUST 25, 1980.

Mr. Chairman, I appreciate the opportunity to appear before you today to testify on S. 1828, which pertains to the Milner Dam project in Idaho. Milner Dam is a privately owned dam, built on the Snake River in 1904, and containing a reservoir storage capacity of 48,500 acre-feet. The primary purpose is diversion of Snake River flows for irrigational purposes. The proposed project would develop the hydroelectric potential of the site and provide approximately 50 mw of generating capacity.

S. 1828, as passed by the Senate, is intended to exempt the dam and reservoir features of the Milner Dam Project in Idaho from the licensing provisions contained in Part I of the Federal Power Act, as well as from the takeover provisions of Section 14 of the Act. A portion of the project canals, plus the proposed penstock and powerhouse would remain subject to licensing authority of the Commission. Inasmuch as the Federal Energy Regulatory Commission has the licensing responsibility under the FPA, we defer to them concerning the merits of the proposed exemption. However, should the Committee decide to approve this proposal, we recommend that it be amended to ensure that environmental review laws, such as the Fish and Wildlife Coordination Act and the National Environmental Policy Act are not circumvented.

Mr. Chairman, as the Federal government's primary biological agency, the FWS has the responsibility for working with other Federal agencies to determine the impacts of their actions on the country's fish and wildlife resources. The Fish and Wildlife Coordination Act requires the Service to review proposals concerning the modification of rivers, streams and other bodies of water; to provide the appropriate Federal agency with our views and recommendations

concerning the proposals' effects upon fish and wildlife and their habitat; and, when appropriate, to recommend measures for mitigating any fish and wildlife losses which may occur as a result of the project or for potential enhancement of fish and wildlife. Other environmental review statutes, such as the National Environmental Policy Act and the Endangered Species Act, contain similar review requirements. Through these mechanisms we are able to encourage water development agencies to construct fishways and other facilities to avoid or to mitigate project-caused fish and wildlife losses. Just as these laws require the FWS to respond to the requests of development agencies, the statutes require these agencies to seek our assistance in determining a project's impact before licensing or otherwise approving it. The Coordinator Act specifically requires the action agencies to consider fish and wildlife conservation equally with other factors in project reviews. This consultative procedure is now operating relatively smoothly and has gained wide acceptance within the Federal bureaucracy.

My concern with S. 1828 is that it may remove the operation of the Milner Dam and Reservoir from the oversight of this well established process. Although an application for a preliminary permit was submitted by project sponsors in 1979, it was rejected by the Commission. Without the Federal licensing requirement, or where that requirement applies only to certain aspects of the project facilities, project sponsors may not necessarily be required to conduct the environmental studies that are attendant to permit review, and without this information we cannot accurately evaluate the project's effects upon fish and wildlife. The authority of the Commission to condition its license with necessary mitigation stipulation is clouded when certain project features are exempt from the review requirements of the Federal Power Act.

Therefore, should the Committee decide to move forward with this legislation, we recommend that it be amended to clarify that none of the existing project features are exempted from the Coordination Act or other environmental review statutes.

Such an amendment would be completely consistent with recent positions taken by the Congress to facilitate the construction of small hydroelectric projects. As you know, sections 405 and 408 of the Public Utilities Regulatory Policy Act of 1978, 16 U.S.C. 2705, 2798 (PURPA) authorizes the FERC to exempt from the licensing requirements of Part I of the FPA small hydroelectric power projects at existing dams which would have a proposed installed capacity of 5 mw or less. Section 213 of the PURPA created section 30 of the FPA, 16 U.S.C. 823a, similarly authorized the Commission to exempt from Part I small hydroelectric projects proposed to be installed in man-made conduits, having capacity of 15 mw, or less. Congress enacted PURPA in order to remove some of the regulatory burdens imposed by the FPA which delay the construction of small hydroelectric projects.

However, both these sections of the PURPA expressly reaffirmed the applicability of Federal environmental review requirements to the FERC's decision to exempt small hydroelectric projects from Part I. Section 405 directs the FERC to consult with CEQ and EPA concerning project impacts before making site specific or categorical exemption decisions on small hydroelectric projects at existing dams, and it confirms the applicability of NEPA, the Fish and Wildlife Coordination Act, and the Endangered Species Act to such decisions. Section 213 expressly affirms the applicability of the Fish and Wildlife Coordination Act to exemption decisions made with respect to small hydroelectric projects to be installed at man-made conduits.

The Commission has adopted procedures for environmental reviews which it conducts in making exemption decisions under section 30 of the FPA (45 Federal Register 28085), and similar draft regulations have been issued to implement section 405 and 408 of the PURPA. We consulted with them in this effort and are generally satisfied with the procedures. Application of the requirements of subsections 30(c) and (d) of the FPA, and section 405 of the PURPA, to the Milner Dam Project would be a precedented and effective manner of safeguarding environmental concerns.

In addition to speaking about S. 1828, you have also asked for the Service's views on the need for generic legislation which would authorize FERC to exempt from Part I of the FPA on a case-by-case basis hydro projects of up to 30 mw. We once again defer to FERC on the advisability of such a proposal, but again with the caveat that should the Committee decide to proceed, statutory requirements for environmental review which are currently contained in sections 30(c) and (d) of the FPA, and section 405 of the PURPA, should be applicable to these projects exemption decisions. Without such review, impacts on anadromous fish could be disastrous, particularly in the Northeast.

Our major interest in projects of the 5 - 30 mw range is to ensure that installation of fish passageways and regulation of flows occurs. Although mainstem fishways have been completed on the Penobscot River and some are in progress on the Connecticut River, there are still numerous dams in the region where fishway construction has not occurred. Furthermore, a rough projection by our biologists in the area is that over the next 5 years there could be as many as 300 - 400 dams retrofitted with hydroelectric facilities. Therefore,

it is essential that the Service continue to have the ability to work with FERC and project sponsors to develop conservation measures in connection with the construction of these facilities, in order to avoid lost opportunities for fish and wildlife protection, and potentially greater project costs if it is decided after a project is well underway that these type of conservation features should be incorporated.

It is also very important to recognize a project's size is not necessarily a determinant of its impact on fish and wildlife. For example, a small project in an important habitat area may have a greater impact than a larger project in less valuable habitat. Likewise, a run-of-the river operating schedule for a large generating facility may have less impact on downstream resources and reservoir fisheries than a smaller peaking operation with irregular discharges and fluctuating reservoir levels.

Mr. Chairman, this concludes my prepared testimony. I would be pleased to answer any questions you may have.

Mr. DINGELL. The subcommittee thanks you for your very helpful testimony.

The Chair will recognize my colleague, the gentleman from Washington, Mr. Swift.

Mr. SWIFT. Thank you very much.

Mr. Greenwalt, in your statement on page 2, the second paragraph, you said, "My concern is that the bill might remove the operation of the Milner Dam and reservoir from the oversight of this well established process," and you refer to the process by which fish and wildlife gets input into certain agencies. Did you mean that exactly, you are afraid this bill would remove this project from procedures it is currently required to participate in?

Mr. GREENWALT. No, I did not intend, Mr. Swift, to imply that the dam, as currently constructed, would be removed from anything, because the project, as it presently stands, predates the Fish and Wildlife Coordination Act by almost half a century, and I think the concern I would have is that if it is in some way embraced by a current Federal regulatory process, I would like to be assured that the fish and wildlife components of that process be retained.

Mr. SWIFT. I think that is a useful clarification in your testimony. I would direct this generally to all of you. It seems to me what we are dealing with here is a kind of catch 22 situation that frustrates people a lot these days. Essentially, people have a dam as long as they continue to operate the dam the way they are doing. They have a current and certain set of regulations and regulators they work with. If they do nothing, then this continues to pertain so that however valuable new regulations might be, they

are not going to pertain as long as these people sit on their dam and don't let it be used for anything else.

So whatever might be lost by not having the new regulations is lost. But we also lose 50 megawatts of electricity. That seems an anomaly to me. That I see no public gain by denying the 50 megawatts of power to the public when the regulatory situation absent that it remains exactly the way it is now.

Do you have any comments on that apparent anomaly at all, that kind of catch 22?

Mr. GREENWALT. Let me offer an observation at the beginning, if I might. I think there is no anomaly so long as nothing changes, as you have carefully pointed out. If some modification to the dam or its works were contemplated, however, it is entirely possible that these modifications might come under the current Federal laws and regulations.

None of us in the Fish and Wildlife Service, which I represent, particularly wants to forego the 50 megawatts of electricity. I think our concern is more directed to how this is done so that we don't find ourselves in a situation where this exemption leads to the exemption of projects having perhaps far more profound impacts on fish and wildlife. In short, we are concerned that the electricity not be provided at the expense of other values which are, I hope, equally important in the scheme of things in this country.

Mr. SWIFT. I am certainly not suggesting they are the good guys and you are the bad guys. I don't think this is a situation we run into all the time in which from their perspective, concerned with their one project, this bill just makes sense, it just lets them go ahead and do what they have been doing and also permits 50 megawatts of the power being generated from your standpoint, and from the subcommittee's standpoint have to be considered with precedents. The implications begin to send ripples out in all directions and we get very nervous and you get very nervous.

But somewhere, it seems to me, we have got to devise a mechanism in this country so that we can deal with, and maybe the suggestions that have been made here in testimony will help us. We have got to find some ways that we don't let good individual things, we don't prevent good individual projects from occurring simply because we can't figure out how to keep them from raising questions in the future.

Any comments on that, Mr. Curtis?

Mr. CURTIS. Yes, Congressman.

First, an initial comment. It does seem an anomaly that a project which in this case was constructed in 1905, as I understand it, and operated with apparent consistency with environmental and safety values, should suddenly be brought within a whole new set of regulations and set of regulators by the mere installation of hydroelectric facilities to take advantage of water flows which offer that potential. But I would offer one qualification to it, and that is that the operation of the existing facilities will be modified by the construction and presence of hydroelectric facilities.

The operation of the reservoir and canal will necessarily, in order to take advantage of the generating facilities, be modified in terms of flow rates and the manner in which the reservoir is operated. Those modifications and operations can pose potential

environmental and dam safety problems and for that reason, it has been the Commission's position to try to wrestle with this anomaly by seeking from the Congress exemptive authority which would allow the Commission to tailor the requirements of the Federal Power Act to the circumstances of an individual project, or where it can be done, to classify projects and provide blanket exemptions, exemptions which may be conditioned upon certain protections of various safety and environmental concerns.

The Congress, in the Energy Security Act recently gave the Commission authority to do just that with respect to proposed installed capacities, generating capacities of up to 5 megawatts at existing dam sites. Of course, that does not apply to the Milner Dam situation because we are talking about 50.25 megawatts.

The Commission has recommended to the Congress and requested exemptive authority up to 30 megawatts. Again, requested exemptive authority would not apply to this present circumstance but at least our theory is that we can vest the Federal power and control in a manner more consistent with the circumstances if we are given some latitude in the organic acts which we administer to conform the regulatory pattern to that which is important, distinguishing that which is unimportant.

At the present time we do not have the authority to exempt projects from the licensing requirement except for those in the 5-megawatt range. Essentially what we have to do is make the type of decision that the subcommittee is considering today. Based upon an analysis of a particular project or a class of projects, we determine whether we can, consistent with our requirements to protect environmental and safety concerns, vest only part and not all of the Federal authority.

We could conceivably exercise that authority to do exactly the thing that this bill is proposing.

Mr. SWIFT. If the chairman would permit, because I know that I am over my time, just a very quick question.

You said that this would make some change in the operation of the reservoir and the dam. Do you know or have you had a chance to investigate whether that in probability is to be a radical change or whether it is a fairly minor change?

Mr. CURTIS. No, sir, we don't. The Commission does not have before it an environmental assessment that would give us the answers to some of those questions that would be required under our regulations. It has not been presented here because the project sponsors do not wish to include the reservoir and the dam as well as the canals in the project.

Mr. SWIFT. Thank you very much.

Thank you very much, Mr. Chairman.

Mr. DINGELL. The Chair thanks the gentleman.

The Chair recognizes the gentleman from Texas.

Mr. LOEFFLER. As I listened to the testimony of the two gentlemen at the table, I can appreciate the irony with which you brought forth, Mr. Curtis, of the need to move ahead with a project such as this—it is in our best interest—but that from your standpoint you must be careful of the precedent being set.

I have no specific questions as to the project. I think I understand it, but I would like to get your reaction as someone who has

had the privilege of working in the past in various capacities. I would like to reiterate statements made by the gentleman from Washington with regard to our ability to look at a case-by-case analysis. We have to make a decision in Congress to establish policy, but it would appear, in this instance, that we are not really giving you difficulties in the future if we take a real thorough look at a problem such as this, and then move ahead with an exemption.

This will alleviate some of our problem in the regulatory area of responsibility without jeopardizing the future concerns that we all have, which includes the environment as well as wildlife, and clearly the production of energy.

I wonder if you might react to my statement. I am not asking a specific question because I know where I am coming from and I think I know where the committee is coming from, too. We are not jeopardizing precedents in the future by taking a real thorough look, on a case-by-case basis, for surely this is also our role in Congress.

Do you find that that could be something you could agree with, or would rather have the general carte blanche approach of total regulation?

Mr. CURTIS. It is a question of practicality, I think. Certainly the Congress has the primary authority under the Constitution, and if the Congress were to choose to exercise it directly, rather than through subordinate agencies, I would have no objection to that. The difficulty is, it is my understanding that there is something on the order of 50,000 existing dams in the United States that do not have hydroelectric facilities attached to them. The problem is the sheer number of questions that may be presented to the Congress in this respect.

Mr. LOEFFLER. In light of the current mood throughout the country, and the thrust of allowing us to make our own decisions at a plane more adequate, in my opinion, other than Washington, it doesn't strike me as being something so totally aberrational to go ahead and set a precedent here by exempting one, to exempt even perhaps 50,000. That is probably an overstatement, no question in mind it probably is; still, I am not saying it is an overstatement in the area of numbers but in the area of need and necessity and a reasonable approach to the levying of good decisions.

The thrust of what I hear from you this morning is that you really aren't opposed to the project going on as is proposed to us by the State of Idaho and all levels of elected officials, but your basic concern is the precedent that would intrude on the regulatory scheme that you currently have to administer?

Mr. CURTIS. Well, if I might qualify it somewhat.

First, I think the problem is by what means would the Congress, if it were to act directly, exercise its recovered authority?

It would be likely that the Congress would need to replicate the environmental and engineering and legal expertise that now exists within the various agencies of Government which administer the acts on behalf of the Congress. If they do not replicate that expertise, the Commission and other agencies of Government will be called upon to utilize their existing resources in testimony before

the committees, so I don't see any savings obtained either in time or in outcome if that is the way we go.

The point that I would like to emphasize to the subcommittee is that there should be greater latitude within the Federal establishment to confine Federal authority to circumstances of need. But I would suggest it is a sounder and more practical administrative practice for the Congress to give that authority to the agencies of the Federal establishment and through oversight insure its sensible and judicious exercise, rather than for Congress itself to undertake the task of considering individual applications for exemption as they may be presented to the Congress.

Mr. LOEFFLER. I appreciate your response and yield back the balance of my time.

Mr. DINGELL. Time has expired.

The Chair recognizes counsel, Mr. Athy.

Mr. ATHY. What steps has the Commission taken to carry out section 405 of PURPA and what have been the projected effects of those reforms?

Mr. CURTIS. Section 405 of PURPA as amended by the Energy Security Act?

Mr. ATHY. Section 405 as originally enacted and then as recently expanded.

Mr. CURTIS. There are two things. One, the Commission has simplified its licensing procedures for the applications for licenses for hydroelectric facilities at existing dams. While we were directed to do so under the Public Utility Regulatory Policies Act for facilities of 15 megawatts or less—later expanded to 30 megawatts or less—we have been able to do so across the board irrespective of size. We have simplified the licensing procedures for any new installed capacity at existing dams.

We have done that in coordination with the Fish and Wildlife Service and other agencies of government and we believe and hope that we have done it in a fully satisfactory and sensible way.

The second thing, most recently, the Energy Security Act amendment, to that section of the Public Utility Regulatory Policies Act, granted the Commission authority to exempt in whole or in part from part 1 of the Federal Power Act, facilities of 5 megawatts or less. We are at present trying to implement that amendment. We have a staff draft proposed rule for implementation that has been furnished to the committee. There have been technical conferences held on that and within this next week or 2 weeks a notice of proposed rulemaking will be presented to the Commission for its adoption.

Now, that proposal will exercise the exemptive authority on a case-by-case basis until we acquire some experience.

Mr. ATHY. That proposed ruling, would that cover all of the public policy questions that would be reached if there was expansion of authority from 5 to 30?

Mr. CURTIS. If the Congress were to give us expanded authority from 5 to 30 megawatts of proposed installed capacity, we would contemplate doing it first on a case-by-case basis until some experience is gained to identify the means of carrying out the congressional mandate on a generic basis.

I want to emphasize, however, that even such expanded authority would not address the question immediately before the committee.

Mr. ATHY. Right.

Mr. CURTIS. Because this facility would exceed 50 megawatts.

Mr. ATHY. The next question goes to the Stelzer study in which a number of recommendations are made in this area. What if any, of these recommendations is the Commission contemplating taking action on?

Mr. CURTIS. You referred to a report to the Commission by a subcommittee of the Commission's Advisory Committee on the Decisional Process which looked into our hydroelectric facilities licensing. A number of recommendations, as you know, were made to the Commission. I have recently sent a letter to the chairman of that subcommittee, Dr. Erwin Stelzer, which recounts the steps that the Commission has taken both with regard to the recommendations of the subcommittee and a number of other initiatives that the Commission has attempted in order to get its licensing house in order, and I will be happy to furnish that letter to the subcommittee.

Mr. ATHY. Have other agencies had an opportunity to comment on this particular study, do you know?

Mr. CURTIS. No; not that I know of.

Mr. ATHY. My last question refers to a statement made in the conclusion of the study that says "Some of the delay in processing hydroelectric applications is intensified in the legislation. Only Congress can grant ultimate relief from these burdens."

Do you have any recommendations with respect to that statement?

Mr. CURTIS. Well, the subcommittee report did identify a number of problems that they saw in the present statutory scheme. One of those was that the exemptive authority under section 10(i) of part I of the Federal Power Act was perceived by the subcommittee to be too limited. As you know, that is the authority to exempt in whole or in part with some qualifications, proposed—installed capacity of 2,000 horsepower, which is equivalent to 1.5 megawatts.

The implicit recommendation in the subcommittee report was that the Commission has greater latitude than exists in present law. They did not make a specific recommendation because generating size alone does not identify or give assurances that there are not associated problems with any proposed facilities that have environmental or safety or fish and wildlife implications.

I generally tend to include fish and wildlife concerns when I speak of environmental concerns, but I thought I should specifically identify that.

The subcommittee talked about trying to develop a matrix including size of pondage, reservoir height, and generating size that might define a category of facility that would not raise questions of sufficient Federal importance to justify the full licensing procedures and mechanism. They were not able to do that and indeed, we are not able to do that at the present time.

It is for that reason that we would recommend using generating size as a starting point, but as a starting point for the Commission's exercise of discretionary authority in which the Commission

could craft an appropriate matrix of relationships which would justify exemption across the board, or in certain cases, a qualified exemption—qualified by requirements that the project remain subject to the Commission's dam safety authority, for example, and to future terms and conditions relating to dam safety.

In short, the Commission has asked this subcommittee specifically to consider in the context of this legislation, as Chairman Dingell's opening remarks indicated, granting to the Commission broader exemptive authority of the character recently enacted by the Congress in the Energy Security Act.

Mr. ATHY. No more questions, Mr. Chairman.

Mr. DINGELL. The Chair recognizes Mr. Finnegan.

Mr. FINNEGAN. Mr. Curtis, is the dam that is in question, the Milner Dam; was my understanding correct that was built in 1902?

Mr. CURTIS. I understand it was actually constructed in 1905.

Mr. DINGELL. You mean completed or commenced?

Mr. CURTIS. Completed is my understanding, but I cannot speak with certainty to that.

Mr. DINGELL. It is then, I assume, subject to the Rivers and Harbors Act of 1899, which requires that dams and impediments to navigation on navigable waters must be constructed with prior consent of Congress. Is that correct? Or must not be constructed without a prior consent of Congress?

Mr. CURTIS. Mr. Chairman, I do not believe that I or the Commission staff is able to speak with certainty as to what if any Federal law may apply to the existing facility in its present operating mode. We can say that part I of the Federal Power Act, within our jurisdictional responsibility to administer, does not apply in its present mode.

If electric generating facilities are attached or constructed as proposed by the project owners, then part I of the Federal Power Act would apply.

Mr. DINGELL. You made a comment in your statement which I thought was of concern. On page 4 you said:

In response, the Commission's staff indicated the application was therefore deficient, and did not meet the express requirements of the act, which defines projects as complete unit of development in order to give this Commission a full opportunity before the license is issued to assess all the likely impacts of a proposed project or water quality and flow; river or reservoir erosion; the general river ecology system, including fish and wildlife resources; river navigation and commerce, including irrigation uses; archeological, recreational and historic resources associated with the project; the safety of the dam structure; and power generation. For instance, the Milner Dam now has a "significant hazard" classification, that is, if failure should occur, there would be some loss of life and appreciable property damage, with accompanying economic loss.

You put "significant hazard" in quotes. Does that have a particular meaning?

Mr. CURTIS. Yes; it is a classification that is made by the Corps of Engineers. They have three classification categories. They are low hazard, significant hazard, and high hazard, and the classification is a view of the potential for loss of life and property in the event of a dam failure.

Mr. DINGELL. It is not related to the engineering safety of the structure?

Mr. CURTIS. No sir, and it should not be taken as any implied judgment as to the safety characteristics of the existing structure.

It is merely a view of potential harm in the event of a dam failure and does not imply any value judgment as to the safety worthiness of the existing structure.

Mr. DINGELL. So, does this mean that the dam is inspected annually or as required by Federal legislation on the subject?

Mr. CURTIS. It is my understanding that the dam is subject to dam safety inspection by State authority.

Mr. DINGELL. By State authority, as opposed to Federal authority.

Before I yield back to counsel, I wanted to ask this question, Mr. Greenwalt.

Mr. Greenwalt, if this legislation goes through, will the dam and the project for the construction of generation facilities be exempt from the Fish and Wildlife Coordination Act?

Mr. GREENWALT. As I understand it, Mr. Chairman, the existing structure would be exempt from consideration under the Fish and Wildlife Coordination Act because it would be exempted from section 1 of the Federal Power Act.

Mr. DINGELL. The existing structure?

Mr. GREENWALT. The existing structure.

Mr. DINGELL. How about the new structure?

Mr. GREENWALT. The new structure would be under the general provisions of the Fish and Wildlife Coordination Act because of our relationship with the Federal Energy Regulatory Commission.

Mr. DINGELL. Is that your interpretation, Mr. Curtis?

Mr. CURTIS. Well, there is a concern, I guess, whether Federal authority, as it may be exercised respecting the forebay, the penstock and the generating facility, can be extended to regulate the minimum flow or the discharge from the reservoir in the face of the statutory limitations contained in this bill. If so, then the Commission may have only limited ability to attach conditions to the operation of electric generating facilities with respect to fish and wildlife concerns associated with the operation of the reservoir and the flow rates into these facilities.

The short answer is, I don't know.

Mr. DINGELL. You don't know. Could you by research give us a better guidance?

Mr. CURTIS. I don't think so. It is a matter of statutory interpretation, and I would hope that the committee's report would speak to that issue specifically.

Mr. DINGELL. Is the committee report language sufficient or is change in the statutory language required to deal with this question?

Mr. CURTIS. One never knows. If it is said in the statute one is more secure than if it is only said in legislative history.

Mr. DINGELL. I would be happier, I think, with legislative language. As a drafting service to the committee, Mr. Curtis, would you submit to us, after consultation with Mr. Greenwalt and his attorneys, the necessary amendatory language to make sure that the Fish and Wildlife Coordination Act and so forth with regard to stream flows and so forth is implemented.

Mr. CURTIS. We would be happy to do that, Mr. Chairman. I think I would be duty bound to point out that if we assure that the

Fish and Wildlife Coordination Act is application and can be—excuse me, let me rephrase that.

We must assure that there exists a means of carrying out the Fish and Wildlife Coordination Act. I believe we have to effectively do that to provide for the operation of the reservoir and dam facilities. If we therefore assure that the statute gives us that authority, then we take away the very type of divesting of Federal authority that the applicants are seeking here.

Mr. DINGELL. I am not aware of that. We will address that with the applicants at the appropriate time.

Mr. CURTIS. May I suggest one other thing that just occurs to me. If the committee were to grant to the Commission exemptive authority of the character that is provided for five megawatt facilities or less under section 405 of PURPA, the Commission cannot meet the requirements of the Fish and Wildlife Coordination Act, while at the same time giving applicants some protection against the exercise of future Federal authority in other areas of the operation of facilities that they may be worried about.

Mr. DINGELL. That, however, would not apply to this because this is a 50 megawatt facility.

Mr. CURTIS. No, you would have to do it—it would still have to be for this project specifically, but a specific grant of exemptive authority for this project.

Mr. DINGELL. Now, are there any of the other powers of the Commission that should remain intact as regards to this facility?

For example, safety inspection. You gave a list of sundry powers that would be dealt with under this.

Mr. CURTIS. What we tried to outline in the prepared statement and appendix thereto, Mr. Chairman, was the types of exemptions that the Commission traditionally has given under its section 10(i) authority with respect to facilities of 2,000 horsepower or less. Those exemptions generally relate to parts of Part I of the Federal Power Act which are concerned with the Federal takeover.

Mr. DINGELL. Now, you set forth possible alternative solutions which you would, in consultation with Mr. Greenwalt, please submit to us as a drafting service, such suggestions as you might deem appropriate with regard to the points raised in that section?

Mr. CURTIS. Yes sir.

[The information requested was not available to the subcommittee at the time of printing.]

Mr. DINGELL. The Chair is going to recognize Mr. Finnegan.

Mr. FINNEGAN. Mr. Curtis, in connection with the alternatives that you suggest on page 8, you state that the bill might be revised to provide that the entire project be subject to the normal licensing requirements of the act. I would presume that that statement would bring into play the Fish and Wildlife Coordination Act and the other environmental laws at the same time, is that correct?

Mr. CURTIS. Yes sir.

Mr. FINNEGAN. Then you would add the phrase “notwithstanding any term or condition of such licenses shall be entitled if subordinate diversion of power for diversion to irrigation purposes in order to maintain and deliver reasonably adequate supply of irrigation water.”

How would that really help the sponsors, based on what you have heard so far this morning and from what you understand from presentations before the Commission?

Mr. CURTIS. Well, it may help them in part. First of all, let me clarify the statement in this respect.

One, it seems that at the very least, the project sponsors want exemption from section 14 of the Federal Power Act relating to Federal takeover, and I could say without qualification the Commission has no objection or no basis for registering objection.

In this regard, I would call to the subcommittee's attention that the Congress in 1953 did that across the board for all municipal and State owned projects and it may be entirely appropriate to do it here.

The proposal to write in a qualification that says in essence "notwithstanding any term or condition in any such license, the sponsors shall be entitled to subordinate diversions of power to diversions for irrigation purposes in order to maintain and deliver adequate supplies of irrigation water," would give the project sponsors some comfort that the Commission would not override their judgments as to irrigation requirements so in favor of power generation requirements.

I would point out that this is traditionally done in Commission licenses and it has proved administratable without qualification.

Mr. Corso is prepared to speak to that if you like.

Mr. DINGELL. Am I incorrect in saying that the rights of the owners of the water under water law are vested and are constitutionally protected and could not be terminated by the Federal Government even if the provisions with regard to termination of ownership of the dam were to be applicable?

Mr. CURTIS. Perhaps Mr. Jack can speak to that. I know that we do maintain that if you accept the license subject to our conditions, then you are legally bound to observe those conditions, and I am sure that even if there is a constitutionally protected right of exercising dominion or control over water resources, it can be surrendered.

Mr. DINGELL. It can be surrendered but it can't be extorted.

Mr. CURTIS. The question is by accepting the license, which subjects some control to the administration of those water resources, the licensees at least surrender in part their claim of unlimited dominion over the water resource. Let me ask Mr. Jack to speak to that.

Mr. JACK. Mr. Chairman, if I might point to section 14 of the Federal Power Act. It clearly contemplates, for instance, that on Federal takeover or relicensing the United States, under Federal takeover or a new licensee through relicensing, can take not only the project works and other property, but also the water rights necessary to operate the project. But the former licensee would then be compensated for those under section 14.

Mr. DINGELL. The former licensee would have to be compensated but the termination of the ownership of the dam under the termination provisions of the Federal Power Act would not terminate the water rights of the persons who held them as irrigators, isn't that right, just by that one fact? It would not necessarily terminate

them just by the one fact. These are rights that are recognized under Western water law and are constitutionally protected?

Mr. JACK. These are matters which are not clear at this time. For one thing, let me point out that there has never been a takeover under section 14. There has never been one, so some of these questions are inchoate. They have never been addressed, so we are not sure what the answers are in some of these questions.

That is a very difficult question, which I don't think has been adequately answered. There are recent Supreme Court opinions which put this whole area into question.

Mr. DINGELL. Have the applicants, rather, have the owners of the dam or Idaho Power submitted any applications to the Federal Power Commission at any time earlier with regard to the operation of the 50-megawatt facility?

Mr. CORSO. The only application, Mr. Chairman, that we have received is that which Chairman Curtis spoke to earlier, an application for a permit, which is a study authorization. That is the application that was rejected because it did not include the dam and reservoir.

Mr. DINGELL. Could you submit to us copies of that, please?

Mr. CORSO. Yes sir.

Mr. DINGELL. For the review of the staff and possible insertion in the record.

[The information referred to was not available to the subcommittee at the time of printing.]

Mr. FINNEGAN. Mr. Curtis, in the language that you provide on page 8, the proposal, what effect would that kind of a provision have on meeting any requirements for fish and wildlife that might be imposed as part of the license, such as flows and so forth?

Mr. CURTIS. To the extent that a license might provide as a condition a minimum flow requirement, this language would override that minimum flow requirement where a determination was made that the water was necessary in order to maintain and deliver reasonably adequate supplies of irrigation water. It would create a preference for irrigation.

Mr. FINNEGAN. So that if you included this sentence plus language similar that was included in S. 932 for small hydro projects, you would have somewhat of a contradiction, is that true?

Mr. CURTIS. Yes. I would suggest that the Congress either impose the conditions for exemption that it wishes to impose, or give the Commission discretionary authority to draft appropriate conditions. If you used the model under 405 of the Public Utility Regulatory Policies Act, then that imposes on us the obligation to include as a condition to exemption such terms and conditions as Fish and Wildlife may recommend. If they then recommend a minimum flow condition, it could block this type of priority for irrigation.

Mr. FINNEGAN. Is that your understanding, too, Mr. Greenwalt?

Mr. GREENWALT. I believe that is correct.

Mr. DINGELL. Have you made any review of this application or of this legislation or the subject matter of it with regard to flow levels to be taken for protection?

Mr. GREENWALT. We have not looked at this in terms of what kind of flows we might request, as a condition of licensing, assum-

ing that went that far. We have not done much at all in connection with considering improvements.

Mr. DINGELL. Would you submit to us such judgments as you can make on that?

Mr. GREENWALT. Certainly, sir. I will be pleased to.

[The following information was received for the record:]



United States Department of the Interior

FISH AND WILDLIFE SERVICE
WASHINGTON, D.C. 20240

ADDRESS ONLY THE DIRECTOR,
FISH AND WILDLIFE SERVICE

Honorable John D. Dingell
Chairman, Subcommittee on Energy and Power
Committee on Interstate and Foreign Commerce
House of Representatives
Washington, D.C. 20515

OCT 14 1980

Dear Mr. Chairman:

At the August 25, 1980, Subcommittee Hearing on Senate Bill 1828, a bill to exempt the Milner Dam Project from certain provisions of the Federal Power Act, you requested that I provide you some additional information. Those specific items about which you requested information are discussed below. Please bear in mind that the Fish and Wildlife Service has not conducted field studies of the proposed Milner Dam Project.

Based on data from studies in 1975 and 1979 by the Idaho Department of Fish and Game (IDFG), we believe that the downstream flow of 58 cubic feet per second (cfs) recently recommended by IDFG would allow only a minimum level of winter fish survival. That flow would produce a velocity of about one foot per second, which is barely enough to prevent freezing of the river. The 1975 IDFG study indicated that flows needed to maintain the resources at approximately existing levels of quality between Milner Dam and Buhl, Idaho (33 river miles), are (in cfs):

January - 1,000	April - 3,600	July - 2,000	October - 1,000
February - 1,000	May - 3,600	August - 2,000	November - 1,000
March - 3,600	June - 2,000	September - 2,000	December - 1,000

While these figures are the best available, we recommend that any legislation on this project include provisions for additional studies using the latest instream flow methodology to determine downstream flow needs. Such studies would cost approximately \$20,000.

Except for the downstream flow needs, we know of no wildlife or other environmental resources that would be significantly impacted by the project. We do not expect that any particular problems would result from reservoir fluctuation. The reservoir supports only minor fish and wildlife use.

If I can be of further assistance in your consideration of this legislation, please let me know.

Sincerely yours,

Director

Mr. DINGELL. As I understand the proposal, the application is for seasonable use of facility; is that correct, Mr. Curtis? In other words, during the irrigation season the facility will be used for storing water for irrigation, and will permit the balance of the flow to go on down the river, and during the nonirrigating season, according to the testimony of my colleagues, it will be to permit, then, the surplus water to go downstream, in large part, I suspect, through the penstocks and on into the generating facilities. Is that correct?

Mr. CURTIS. If I may ask Mr. Corso to respond.

Mr. CORSO. Mr. Chairman, I believe that is correct. There will be some flow on a year-round basis available for power generation but principally, as I understand it, in the off-irrigation season with irrigation being the primary purpose; that is the first consideration.

Mr. DINGELL. Am I correct in my appreciation that this would be a stable load and a stable flow, or will it be used for peak?

Mr. CORSO. Based on the very preliminary data that we have, it would not be so-called run-of-river operation. It would involve some peaking operations.

Mr. DINGELL. It would be used for peaking which would change, I suspect, flows in the streams beyond and above the penstock quite significantly when it was used for these purposes. Is that correct?

Mr. CORSO. That is correct. It would involve changes in the present flow regime.

Mr. DINGELL. Do you have any information as to what that would be?

Mr. CORSO. The only information we have is in the application that you asked that we finish.

Mr. DINGELL. Does your recollection enable you to guide the subcommittee on those matters, as to what shift in the river level would be from the operation of the generators and the penstocks?

Mr. CORSO. I don't believe we have enough information to give you a good answer, but some background information is available.

Mr. DINGELL. Would you submit such information?

Mr. CORSO. Yes.

Mr. FINNEGAN. Mr. Curtis, on page 9 of your testimony, you discussed the takeover, and you suggested that this might generate pleas for legislative changes in the Power Act regarding relicensing and municipal preference provisions. Could you expand a little bit on that? State what the problems are.

Mr. CURTIS. There are two problems. One is that under part I of the Federal Power Act there exists a statutory preference for municipal and State applicants, both for preliminary permits and for licenses in the first instance. I would suggest that that preference exists with respect to the hydroelectric facilities even as the project is defined in the legislation before you, namely, that if the town of Milner and another municipal or State entity were to apply for either the preliminary permit or the license for construction of the forebay, penstock, and generating facilities, they would have a preference under part I of the Federal Power Act.

There is considerable concern now that the economics of hydroelectric generation have changed so dramatically in relationship to other forms of alternative generation that a number of entities,

primarily industrial entities who own existing dams and who might contemplate the construction of hydroelectric facilities at those dams, will, once they identify the facilities in a public proceeding before the Commission as possessing significant hydroelectric potential, find that the projects will be, in essence, taken away from them by municipal or State entities, given the existence of the preference in part I of the Federal Power Act.

That is a concern of significant dimension, and perhaps sufficient dimension to suggest that there may be a number of applications to the Congress to grant exemptions from those parts of the Federal Power Act that give the preference. This is also a relicensing preference under the Commission's holding in a recently issued case involving the city of Bountiful. A number of those present license holders have expressed the concern that the jeopardy of a municipal takeover is so great that they may need to seek legislation that would, on a project or license specific basis, exempt the project from the municipal preference on relicensing. I am merely trying to call to the committee's attention that there exists significant potential for project-specific legislation in this arena.

Mr. FINNEGAN. What about the 30-megawatt exemptive authority that was provided in S. 939? Wouldn't that give the Commission authority to deal with that particular problem?

Mr. CURTIS. Yes, it would, Mr. Finnegan, and we are going to propose to the Commission for its consideration a rulemaking in the administration of the 5 megawatts or less authority which would, in essence, cut out the municipal and State preference in circumstances where the project is owned by—project lands and facilities are owned by—the applicant.

Mr. FINNEGAN. What is the reaction, or have you discussed this with such organizations as the American Public Power Association or others of those who are very concerned about the municipal preference.

Mr. CURTIS. It is fairly controversial in general principle. It may be much less controversial in specific application, but we are asking for specific comments on that aspect of the proposed rule-making, to make sure people are duly alert to it.

Mr. FINNEGAN. Have you asked them whether they would be supportive of this exempt idea, further exemption from 5 megawatts to 30 megawatts in light of that particular concern?

Mr. CURTIS. We have called their attention to it so that they may address any concerns they have to the Congress.

Mr. FINNEGAN. Have they given any reaction to it?

Mr. JACK. In their comments on the draft rule that was circulated for limited discussion purposes, the APPA favored maintaining the municipal preference even in instances where there were applications by a project owner for exemption from licensing.

Mr. FINNEGAN. They want to retain it?

Mr. JACK. They want to retain the State and municipal preference over the project owners.

Mr. FINNEGAN. So that they really have a significant interest in any proposals to increase the exemption from 5 to 30 megawatts, or in this particular bill, itself, on a precedent-setting basis.

Mr. JACK. I think that they would be very interested in it.

Mr. FINNEGAN. In connection with the proposal——

Mr. CURTIS. If I may, this particular bill, if enacted as it passed the Senate, would not speak to that.

Mr. FINNEGAN. It would not?

Mr. CURTIS. No, because the confined project which would include the forebay and the penstocks and the facilities, themselves, would still be subject to our license and, as such, subject to whatever preference exists in part I of the Federal Power Act. They couldn't take over the dam, but they could take over the 4(c) license facilities.

Mr. FINNEGAN. But if you included in this bill exemption from the takeover provisions, that would apply, would it not?

Mr. CURTIS. That is correct.

Mr. FINNEGAN. In connection with raising exemption from 5 to 30 megawatts, do you have any figures on the number of applications which you have received in this regard.

Mr. CURTIS. Yes, there are two things working here, and this is, I think, very important. One is that the circumstances have changed dramatically, so that hydroelectric potential has expanded greatly at existing sites in which it was not previously economic to install hydroelectric facilities. That has combined with the second important development, and that is a series of congressional initiatives to encourage the development of small hydroelectric facilities. These take both the form of tax incentives as well as a grant program. The Congress, therefore, is encouraging the development of up to 30 megawatts more hydroelectric facilities, and that encouragement is dramatically shown in the growth of preliminary permit applications at the Commission.

If I might give you some figures on that, to give you an appreciation of the dimension of this, as of December 31, 1979, the end of last year, there were pending 113 applications for preliminary permits. Already this was reflective of a very significant growth in interest. As of June 30 of this year, that had grown to 197. As of August 25 of this year, in other words, today, there are around 287 pending applications for preliminary permits.

Now, at the same time, the Commission has increased its ability to dispose of these, and we are now seeing real results from a number of initiatives that we have undertaken. For example, in the last quarter, which ended on—now, I am using fiscal quarters—which ended on June 1, the Commission disposed of 64 applications for preliminary permits. That compares to 57 in a 15-month period, which ended on December 31, 1979. We expect to obtain an even more significant gain in the last half of this fiscal year, which concludes on the 30th of September, but to say that we are overwhelmed at this point, I think, is a realistic assessment.

Mr. DINGELL. You have no difficulties in terms of achieving the necessary coordination with Mr. Greenwalt on these matters, and so forth?

Mr. CURTIS. We have difficulties, Mr. Chairman. The Commission has approximately 17 acts, Federal statutes, which influence and impact on our exercise of our licensing functions. Most of these require consultation with Federal and State agencies, and in some cases the requisite certificates must be obtained from Federal and State agencies. The various agencies of both the Federal and State establishment, number one, view their consultative role with various degrees of seriousness, both to the doing of it as well as to the

Commission reflecting any counsel that they give us in license terms. Second, what is a high priority for us is not necessarily a high priority for them. Sometimes, quite understandably, our requests for consultation are referred to the region. The region sometimes believes it has other things to do than to respond to us, and they do those other things; so this is a problem of the Federal establishment's getting its act together, and we haven't done as good a job on getting our act together as we should have.

Mr. DINGELL. Mr. Greenwalt, do you want to make a comment on that last question?

Mr. GREENWALT. I think that is a fair assessment. I hasten to point out that I think Mr. Curtis was being generic as it relates to other Federal agencies and not specific to the Fish and Wildlife Service. I will say we speak frequently to the Commission. We don't always agree, and in the future, I suspect, our answers and their answers will not always be coincidental. But I will say that we regard our relationship with the Commission, and particularly on the matter of hydropower projects, as being extraordinarily important to the future of the resources with which we are concerned, and we will continue to speak and counsel hopefully with coincidence of answers growing as time goes on.

Mr. CURTIS. Mr. Chairman, if I can just try to draw some implications of what we are seeing, if the preliminary permits result in license applications, and not all of them will, but if only 10 percent of them do, our ability to cope with that tide of license applications is not obvious to me. Our present ability to cope with the tide of applications for preliminary permits is not obvious to me, either.

Eighty-seven percent of these preliminary permit applications that we now have pending are for proposed installed capacity of 30 megawatts or less. Fifty-seven percent of them, a subset within the 87 percent, are for 5-megawatt-or-less facilities; thus, to me, the importance of the Commission's attempting to confine and define its regulatory requirements as needed is demonstrated for these projects.

I wish I could give you a statutory formula in which we could all, with assurance, say, well, if it is not bigger than a breadbox, it should be exempted from all Federal requirements. We cannot come up with that. Maybe we will be able to in the future, but at the present, we should have authority to do it on a case-by-case basis. Again, I would emphasize that we are talking about installed electric generating capacity at existing dam sites or run-of-the-river facilities. There exists, even with them, a potential for environmental and safety problems, but that potential is not as great as if we were talking about facilities to be constructed in the future nor as great if we were talking about 100-megawatt facilities, or greater. Somewhere in there is a gradient in which I believe your administrative agency should have the authority to apply the statutory and regulatory scheme to public need and purpose rather than apply those requirements as if all projects presented similar perils to the public interest. They simply do not.

Mr. DINGELL. I concur fully in what you say. My problem is to see to it that those questions, when important, are considered. We have had some bad experiences with some Federal regulatory bodies on that matter, including with the Federal Power Commis-

sion. I would observe, not during your administration, but I used to have continuous battles with your predecessors on matters that I felt were highly important, that is, environment; Fish and Wildlife Coordination Act, fish and wildlife values, and we had the devil's own time getting the folks down there at FPC in the old days to heed those concerns.

Now that I have gotten their attention, I am able to hope, and I think I will be more comforted if I know that my successors will be able to proceed without the difficulties that I used to have in the old days. I regret the pain and aggravation it has caused you, Mr. Curtis. I know it is difficult, but I am not sure that your successors will be as well attuned to the public interest as you are. Certainly many of your predecessors were not.

Mr. CURTIS. Well, Mr. Chairman, the question, I think, is simply one of balance. What we do know is that there exists today considerable untapped hydroelectric potential in the United States. The mechanisms that have grown up over the last several years, designed for good and proper purposes to guard the public interest, are mechanisms which in their present complexity and detail will impede the development of the hydroelectric resources of this country, and therefore we are making a conscious tradeoff of those hydroelectric resources for the assurance that the other public interests are protected and served.

I would only suggest that we can strike that balance somewhat differently than is stricken in the existing law, and, of course, as the administrative head of an executive agency, albeit an independent regulatory commission, I tend to trust the reasoned judgment of administrative agencies acting within the confines of the laws that the Congress writes. When I used to work on the Hill, I was less trustful.

Mr. DINGELL. I tend to trust everybody, but I also tend to cut the cards. You understand the wisdom of that.

Mr. Finnegan.

Mr. FINNEGAN. Mr. Curtis, at what stage do you intend to apply the exemptive authority concerning these small hydro licenses that you now have pending before you? I mean, when will the exemptive authority be exercised?

Mr. CURTIS. The exemptive authority would probably be exercised across the board, including preliminary—you are saying between preliminary permits and license?

Mr. FINNEGAN. Or before preliminary permits.

Mr. CURTIS. We would attempt to do it before either a preliminary permit or a license application is filed, and to do it across the board.

Mr. FINNEGAN. I see.

Mr. CURTIS. I don't want to mislead the subcommittee to say that we might not also exempt on a case-by-case basis those proposed projects which are already before us. We may, in fact, do that either before us in a preliminary permit stage or a license stage.

Mr. FINNEGAN. What things would be exempted from the Federal Power Act as the general norm?

Mr. CURTIS. If on a case-by-case basis we are reasonably satisfied as to the relative benignness of the project, we would exempt across the board. Now we did that in the administration of the conduit exemptive authority, which is something that we have

coordinated with Fish and Wildlife rather closely. There has only been one case where we granted exemption for less than the entirety of part I of the Federal Power Act, and, quite frankly, that was with respect to one of the fees, and that was because that is all the applicant requested; so it has worked to do it across the board.

I would expect that if the subcommittee were to give us the authority from between 5 and 30, that there would be a number of instances between 5 and 30, and there may also be between 1.5 and 5, where the Commission does not grant an across the board exemption, or grants an exemption, conditional upon a reserved authority to impose in the future terms and conditions as relate to environmental protection or dam safety, as the need is presented.

Mr. FINNEGAN. Would you look at each of these applications on a case-by-case basis?

Mr. CURTIS. That is what we are doing now, and that is what we will propose to do on the 5 megawatt or less. Now, it may evolve that we can come up with generic classifications that sensibly may be granted exemptions either across the board or in part. My personal view is that the most likely candidates for generic classifications would be for certain provisions of part I of the Federal Power Act. For example, we could say that anyone who obtains 5 megawatts or less is on a generic basis exempted from the Federal takeover provision. If you want to be exempted from more, come in and we will see what you propose to do.

Mr. FINNEGAN. Let me ask a question as to the applications now pending. Is it your understanding that all of them are subject to some sort of classification by the Corps as to their safety hazard?

Mr. CURTIS. Let me ask Mr. Corso to speak to that.

Mr. CORSO. Mr. Finnegan, the Corps of Engineers has published a document that includes some 57,000 dams which the FERC and other agencies participated in developing. All the dams are classified.

Mr. FINNEGAN. If that is the case, supposing now that of all of these dams or the 64 that you handled in one-quarter, they contained a significant hazard classification. Would you exempt them at that point?

Mr. CURTIS. That may depend on what dam safety inspection or responsibilities these facilities may otherwise be subject to. As you know, some State agencies have a very well-developed dam safety program, both in terms of inspection and in terms of supervisory requirements. Others do not.

Mr. FINNEGAN. How long will it take on a case-by-case basis to determine whether an exemption across-the-board or even partial exemption should be granted, and what procedure would you go through?

Mr. CURTIS. I don't think we can give you a specific estimate of processing time, because it depends upon so many variables. We tried to speak to that in the appendix to my testimony in identifying what the constraints are on our ability to give you an estimate of processing time.

Mr. FINNEGAN. Do you anticipate that whatever that processing time is, it would be shorter than if you had gone through the whole licensing application?

Mr. CURTIS. Yes. If, for example, it is uncontested, if the application is complete, we feel reasonably confident in our ability to hold

to an automatic provision in regulations which says if you don't hear from us within 120 days, your exemption is deemed granted. That is the type of mechanism that we have used for the conduit exemption and for the small hydro up to 5-megawatt exemptive authority, and it is one that has proved practicable with Fish and Wildlife as well. There we are using a 90-day provision, so we are giving ourselves an extra 30 days here because we are not sure what the flow is going to be, so to speak.

Mr. FINNEGAN. This is sort of a silence-is-golden theory. Is that correct?

Mr. CURTIS. That is correct.

Mr. FINNEGAN. To what extent, though, does the Commission have any responsibility to examine the matter to determine whether, in fact, people have failed to comment just for other reasons, not just having exercised their ability to do so—it is out of our hands, so to speak?

Mr. CURTIS. Yes. The Commission certainly has the responsibility to satisfy itself that the project should be exempted, whether it is exempted by specific order of the Commission or through a mechanism which, in essence, deems that order granted by a specific time frame. The Commission must assure itself of the appropriateness of that result.

Mr. FINNEGAN. What about in the particular safety situation? How would you determine whether or not a State is adequately handling the safety matters regarding that dam, whether that is a sound State or not a sound State program in that respect?

Mr. CURTIS. It is difficult to speak in the hypothetical. The particular facility presented to us may obviously not require a specific vesting of Federal authority and responsibility for the dam safety. My guess is that the Commission will in many instances reserve the authority to impose dam safety requirements, and will trigger its own inspection program, but there may be exceptions to that.

Mr. FINNEGAN. If you do that, then what are the other exemptive provisions that are going to be of greatest concern—I mean provisions of the Federal Power Act that should be exempted, and which are of greatest concern to the project sponsors. You have mentioned safety, and you have mentioned takeover. What are the things that give us—can you give us a list of the things?

Mr. CURTIS. Let's try to go through them in order as to what may be of concern to those who would be subject to our licensing requirements. The first is the type of problem encountered by the owners of Milner Dam. It is simply being subject to unknown requirements that may be imposed by the Commission or through the Commission by other Federal agencies relating to environmental and safety requirements that they are not at present subject to. I would put that kind of in the fear-of-the-unknown category.

Mr. FINNEGAN. However, in connection with 932, assuming that you adopted, that Congress adopted, this, these projects would still be subject to the Fish and Wildlife Coordination Act and the environmental requirements in that statute, that amendment to the existing law. As you indicated, the Commission may very well reserve the safety aspects. You wouldn't be relieving them, the Milner Dam-type projects, from those types of situations?

Mr. CURTIS. If you did it the way 932 does it for 5-megawatt-or-less facilities, then the Commission is directed to condition the exemption on terms and conditions which relate to fish and wildlife recommendations as well as other environmental concerns and dam safety.

Mr. FINNEGAN. But you are not advocating that this exemptive authority apply to those types of situations, fish and wildlife?

Mr. CURTIS. No, no; I am not advocating that you remove such conditions as are contained in 405 of PURPA, but I would suggest that the Congress recognize that it is as a condition to the granting of exemption, giving priority to requirements that are not given priority with respect to other facets of the Commission's licensing responsibility. It is, for example, rather anomalous that for a 10(i) constructed facility of 2,000 horsepower or less, the Commission would not have to observe and condition the license in the same manner that it would if it were to exempt a 5-megawatt-or-less facility from part I of the Federal Power Act.

Mr. FINNEGAN. But, as I understand it, Mr. Greenwalt mentioned that some of these smaller projects could have fairly significant fish and wildlife concerns. Is that correct?

Mr. GREENWALT. That is correct, and I think that is where the close coordination between ourselves and the Commission would be absolutely necessary, especially if we are talking about some kind of broad-scale exemption. The cumulative effect should be looked at. I think I heard Mr. Curtis say that he did not intend that this kind of exemption or across-the-board look at these projects exclude those considerations.

Mr. CURTIS. No. That is correct.

Mr. FINNEGAN. I would appreciate it if you could provide for the record, first the proposed regulations that you have drafted after you have had consultation with some people concerning the exemption, up to this present moment.

Mr. CURTIS. They were attached to my testimony.

Mr. FINNEGAN. Second, if you can provide to us the rest of the list of the exemptions that would be of concern to project owners beyond safety and environment, that would help.

Mr. CURTIS. That we have attempted to identify as those exemptions which the Commission has given historically under its administration of section 10(i). We tried to set those out in the testimony.

Mr. FINNEGAN. No further questions.

Mr. DINGELL. Gentlemen, the subcommittee thanks you very much for your assistance. We appreciate your courtesy.

Our next witnesses will be John Rosholt, counsel, Twin Falls Canal Co.; Mr. Logan Lanham, vice president for public affairs, Idaho Power Co.; and Mr. Conley Ward, president, Idaho Public Utilities Commission.

Gentlemen, we welcome you to the subcommittee table. If you would take your places, the Chair will recognize you in appropriate order. Gentlemen, if you would start on your left, my right, please identify yourselves for the purposes of the record.

Mr. ROSHOLT. Mr. Chairman, John Rosholt, counsel for the Canal Co.

Mr. WARD. Mr. Chairman, Conley Ward, Jr., President of the Idaho Public Utilities Commission.

Mr. LANHAM. Mr. Chairman, I am Logan Lanham. I am vice president of public affairs with the Idaho Power Co.

Mr. DINGELL. Mr. Rosholt, I note you have with you another gentleman. Would you see that he is identified for purposes of the record?

Mr. ROSHOLT. Mr. Chairman, Jim T. Casey, consultant to the canal companies.

Mr. DINGELL. Gentlemen, we will recognize first Mr. Rosholt, then Mr. Ward and Mr. Lanham.

STATEMENTS OF JOHN ROSHOLT, COUNSEL, TWIN FALLS CANAL CO., ACCOMPANIED BY JAMES T. CASEY, CONSULTANT; CONLEY WARD, JR., PRESIDENT, IDAHO PUBLIC UTILITIES COMMISSION; AND LOGAN LANHAM, VICE PRESIDENT FOR PUBLIC AFFAIRS, IDAHO POWER CO.

Mr. ROSHOLT. Thank you, Mr. Chairman. I have submitted a fairly lengthy statement which I would ask be included in the formal record.

Mr. DINGELL. Without objection, that will be done, and we will recognize you for such summary as you choose to give. [See p. 78.]

Mr. ROSHOLT. Thank you.

I wish to first thank you for holding this hearing, and recognizing the hour, and that the prime motive from here on may be adjournment, I will try to be as brief as I can. I do represent two nonprofit mutual irrigation companies with headquarters in central Idaho. We have talked much about the facility that they own. It is called the Milner Dam. It is a critical facility to the irrigation economy of south central Idaho. During the summertime it diverts adequate irrigation water to serve some 500,000 acres with probably an underestimated net profit on those acres of \$50 million per year. In addition to this facility's criticality for the diversion of irrigation water, some few years ago, it was identified by a State agency as a potential hydrosite. This was at the time that hydro was then coming to the fore, back from the valley, as it were. My people set upon an evaluation of the facility for its possible hydro potential. We employed an expert. We filed a water right application under State law, which was granted.

After the evaluation, the best determination that our engineers could make indicated that rather than locate a hydro facility at the existing dam site, by diverting the waters some 1.3 miles down the Twin Falls Canal on the south side of the river, we could obtain nearly 200 feet of head, there being less than 75 at the dam site. Based on the water flows, and this being primarily a winter water chance, the canal capacity was such that with a small expenditure, we would enlarge the canal for 1.3 miles and utilize all of the water that might be available at Milner Dam.

Please understand that Milner was completed in 1905, and that during a normal year the flows of the Snake River are such that no water passes over Milner Dam from approximately April 15 to October 15; except for those years when there is a substantial spring flood, water that cannot then be controlled in any reservoir in the upper Snake River Basin will pass over this dam into the Pacific, as it were, there being really no essential irrigation facility between there and Portland, Oreg., but for some hydro facilities of the Idaho Power Co. and of the U.S. Corps of Engineers.

During the winter months the flows are sporadic, and depending on the condition of the reservoirs, at the end of the irrigation season in October, there may well be no water available for power generation at the Milner site, there being an upstream priority to store that water in existing reservoirs, so as best we can read the hydrologic records, Milner, we always felt, was a very marginal winter power chance. It is only in recent years when, as I say, hydro has come back to the fore really through the rising cost of energy that this became an attractive site.

Some very pointed questions have been asked. I think I would like to first address, if I may, rather than going directly to the bill, just a couple of points that have been made in earlier testimony. If this dam constitutes a danger to health and safety, the owners thereof have never been notified by anyone, including the Corps of Engineers. Our State agency under State laws has inspected this dam since, I believe, 1969, or at least 1972, on an annual basis, and we have been consistently awarded a certificate of safety for its operation.

For the 10-mile reach immediately below this dam, if the dam were to fail and wash out, the water goes into a very severe canyon. I think it is 10 miles down to the next dam, which is a facility of the Idaho Power Co., and I know of no living resident in this reach. There could possibly be a fisherman in the area at some obscure time, but, to my knowledge, there is no facility which would be in danger. The reservoir, itself, holds only 31,000 acre-feet of water, and in terms of our canal companies, that is an amount less than we divert at that facility in a 24-hour period. It is, in fact, a regulating reservoir. It sits on a shelf, and it forces water in the canal systems.

If the power facility were to be built, as again another question was pointed out, the head on the dam would be the same during the power season if the water were available as it is presently operated during the irrigation season.

We are here today because we had a preliminary permit rejected, and we suggested that probably a recourse to Congress might not only be better for us, but better for FERC. I must upfront admit that if I were the Administrator of FERC, or the president of the Commission, that I would not want an amendment which would give me discretion to make the kind of decisions that were talked about earlier.

In my view, Milner is one that needs a special legislative exemption, for the reason that in a reading of the Federal Power Act, in my opinion the Administrator could make no other decision than the one he made. A strict reading of the law, I think, clearly says that the dam, the reservoir, and the canal must be included as a part of the project facility. My people, and you asked the question of my Congressman this morning—I wish they had done better homework. Their major reason is paranoia. They have a facility that has been in existence for some 80 years. It has operated perfectly. It will continue to operate perfectly; we are going to use water in the wintertime for another purpose. We are going to divert that water into the canal system downstream some 1.3 miles and put it back in the river channel.

We have contacted the Fish and Wildlife Commission of our State. They have done a study. A copy of it is attached to my

statement, as is a copy of a position paper adopted by that same State commission, suggesting that they approve and exempt the Milner powersite as proposed.

I have attempted to address many of the academic questions concerning the operation of FERC and the many academic ramifications thereof, and I really don't feel qualified to speak to those subjects. I would say that if the congressional bill be passed in its present form, that my people then make the decision to spend some \$250,000 to prepare an application for a Federal Power Commission license.

We think that we are going to satisfy the concerns of the fish and wildlife agencies, of the environmental agencies, and build a powerplant only if it is feasible—and we really haven't even gotten far enough down the road to determine that. We would like to have this permission. This is not the last permission we indeed need. We can't tell you whether we would sign a license if it were awarded to us, because we have no way to foresee what additional conditions would be on it.

As we contemplate the legislation, and when we approached it initially in conversations with our Senators and Representatives, we thought it better not to seek an amendment of the definition of facilities within section 3, but merely to provide a specific exemption. It seems to us that the amendment of that would cause more turmoil than perhaps has been caused to date.

I really think that that summarizes the project as such. My people are not willing to mortgage their water rights nor their lands nor go under an assessment to raise the money to build this facility. They are primarily irrigation oriented, but if they can be good citizens and for that, pick up some compensation which would enable them to keep their own costs down in operating and maintaining an irrigation system, they say let's look at it.

The Idaho Power Co. has been talked to by my clients. We are in negotiations attempting to negotiate what we call a hell or high water contract. My people would sign the note for the bill, if the powerplant is built. Mr. Lanham's company would guarantee those obligations. If the water is not there on an annual basis to generate power, so that my people would have to come up with a \$1 million payment or whatever it may be, his people would step up and make the payment.

It is their evaluation, I guess that keeps them in negotiations with us, if we get to a point where his company says we can't do it, or it is not worth it for us to put forth our guarantee under a hell or high water contract, then we look at another potential purchaser or we let the site sit.

I think that covers what I need to go over at this point, unless the chairman has questions.

[Testimony resumes on p. 107.]

[Mr. Rosholt's prepared statement and attachments follow:]

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SUBCOMMITTEE ON ENERGY AND POWER
 COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
 UNITED STATES HOUSE OF REPRESENTATIVES

August 25, 1980

HEARING ON S.1828 AND H.R.5417 - MILNER DAM PROJECT, IDAHO

Chairman Dingell, Members of the Subcommittee:

I am an attorney residing in Twin Falls, Idaho. I am counsel for the Twin Falls and North Side Canal Companies, joint applicants to the Federal Energy Regulatory Commission for a Preliminary Permit to build the Milner Dam Project, which is the subject of S.1828 and H.R.5417. I appreciate the opportunity to appear here today.

I will attempt to address in my statement those items identified by the Chairman's August 4, 1980 letter in the order as therein presented.

1. PROVIDE YOUR VIEWS, COMMENTS AND RECOMMENDATIONS
 ON S.1828.

The Twin Falls and North Side Canal Companies, hereinafter referred to as the "Canal Companies", have operated as non-profit irrigation corporations since the turn of the century. Their mission is to deliver irrigation water to their member stockholders who irrigate in total some 370,000 acres. The Canal Companies are joint owners of 10/11ths of the Milner Dam on Snake River some 25 miles east of Twin Falls. This dam facilitates diversions into the main canal of both companies as well as for three other irrigation districts. While the Canal Companies have never deviated from their sole mission of the delivery of irrigation water, the energy crisis found a State agency identifying the Milner Dam site as a potential remaining major hydro site in our area. Engineering evaluations suggested that the best all around power generation could be obtained by diverting the water some 1.3 miles down the Twin Falls main canal and from there into turbines some 150 feet below in the river canyon.

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Because the flows designated for power would utilize the present capacity of the canal, some increase in the capacity of the canal for 1.3 miles would facilitate fulfilling the irrigation and power mission to the extent flows were available over and above the irrigation needs during the spring floods. If there is no flood, there would likely be no water for other than irrigation.

An application for preliminary permit was rejected on two occasions because Milner Dam, Milner Reservoir and the main canal of the Twin Falls Canal Company system were not included in the licensed project area identified in the application. Thus, the introduction of S.1828 and its counterpart was requested by my clients. The reasons for seeking legislation rather than appealing the staff's decision to the Commission was two-fold. First we suggested that under the precedents and the orders that we researched, that our chance of success with an appeal to the Commission was slight. We also thought that perhaps the legislation could more quickly remedy our immediate problem.

My clients' reluctance to include the dam, reservoir and the canal within the licensed project area essentially arises out of a fear of a federally dictated change in operational criteria to favor power generation as opposed to irrigation delivery if recapture were to occur. Milner Dam has existed for nearly 80 years and has annually been inspected since 1969 by the Idaho Department of Water Resources and found adequate and safe pursuant to the Idaho Safety of Dams Act (Idaho Code Section 42-1710, et seq.). My clients further feel that even though the hydropower-irrigation conflict could be overcome, that the Federal Energy Regulatory Commission Dam Inspection Policies might well result in an order which would necessitate expensive repairs to the dam and reservoir, which would then have to be accomplished as a part of the initial project. My clients further feel that they are not willing to agree to federal jurisdiction over the 1.3 miles of the canal conduit in order to obtain a license for the hydro project.

If S.1828 were to become law, my clients then have no fear of the recapture provision of the Federal Power Act since none of the critical structures required for the irrigation mission would then be included in the project area. Consequently, at the end of the license period recapture

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could be exercised by the United States and there would be no jeopardy to the Canal Company stockholders in obtaining water deliveries in the same manner as have occurred for many years. Consequently, the language of S.1828 is necessary to the Canal Companies.

The passage of S.1828 will not eliminate all of the conditions preceding the construction of the Milner hydroelectric project. In the 1930s, the United States constructed the Milner-Gooding Canal, the diversion into which is also facilitated from Milner Dam. Litigation ensued whereby the then owners sought compensation for a portion of the original cost of construction of Milner Dam as well as reimbursement annual operation and maintenance costs of the dam. While the court eventually held that the United States and American Falls Reservoir District No. 2 (beneficiaries of the Milner-Gooding Canal) had no financial responsibility and were essentially incidental beneficiaries of the existence of the dam, in order to insure their diversion, American Falls Reservoir District No. 2 acquired a 1/11ths ownership interest in Milner Dam by purchase from the North Side Canal Company prior to the final court decision. If the dam is to now be located within the hydro project area, the 1/11th interest of American Falls Reservoir District No. 2 will have to be dealt with. That would require a hold harmless of that district as to additional costs incurred in a rehab of Milner Dam by reason of its inclusion in the licensed project area. So long as the dam facility cleanly passes dam safety inspections made by the State, it does not seem to them necessary to require a major rehab of the facility to fulfill the irrigation mission. Because of the critical location of the dam, if safety restrictions were imposed by those with jurisdiction, or disaster occurred, the dam would be restored as soon as possible since without this facility, some nearly 1/2 million acres would not receive irrigation water.

The joint applicants who are in support of this legislation also face other hurdles before the project can be constructed. The State of Idaho is presently studying the feasibility of the construction of another large irrigation project which would require the diversion of remaining Snake River waters during the wintertime to offstream storage facilities for use during the irrigation season. If that plan is eventually endorsed by the State, and as a part of their State Water Plan they prefer that irrigation develop-

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August 25, 1980

ment as opposed to the Milner hydro project, it is likely that the hydro project could not proceed. Certainly the position of the State would not be overlooked by FERC in their considerations concerning a license for the project. Most of the hydro facilities downstream that presently exist on Snake River are owned by the Idaho Power Company. Those facilities are subordinated to upstream future depletion for irrigation. A recent District Court case in the State of Idaho affirmed those subordination provisions of the FERC licenses which were requested by the State. If the State determines their support is initially for the irrigation project and secondarily for the power project, it is likely that they would insist upon a subordination provision in any FERC license that would be issued for the Milner Project. This would seriously detract from the feasibility and the probable result would be the abandonment of the potential power development.

Yet another interface exists for the use of the limited supplies of the Snake River in the wintertime. Recently the Idaho Legislature enacted "groundwater recharge" enabling legislation which would permit the formation of districts to divert waters for the beneficial use of recharging underground spring supplies. As this panel probably knows, some 8,000+ c/f/s of water emerge downstream from the proposed Milner Dam site within a reach of Snake River of approximately 30 miles in length. These waters flow from the underground from the Snake Plain Aquifer. The flows are heavily used by trout propagators. The United States and the State of Idaho raise trout here, and 90% of the United States supply of commercial trout is produced in this area. Our preliminary negotiations would indicate that there may well be sufficient flows that would enable the full utilization of the Milner powerplant as contemplated and still permit the diversion of excess flood flows to the desert for this recharge.

Presently the Canal Companies are negotiating with the Idaho Power Company under the "hell or high water" contract concept for the sale of all the Milner project power. The Canal Companies are not willing to mortgage their facilities and impose assessment liens on the lands that they serve for the purpose of constructing this hydro project. It is probable that even if the Canal Companies were willing, that no financing could be obtained without an adequate

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financial guarantee. Hydro power is needed in our area and while the Milner project is essentially wintertime power, Idaho Power Company's shortages during the cold winter months of early 1980 dictate their interest. My Directors have suggested that once the feasibility analysis of the project has been accomplished, and if all other hurdles can be overcome, that they will submit the proposal to their stockholders for a vote. If the vote is successful, we will presume that some remuneration will be forthcoming for the use of the facility under a "hell or high water" contract. It is the intention of the Canal Companies to utilize any monetary return for continued rehabilitation of the major irrigation structures within their systems, including continued rehabilitation and maintenance programs for Milner Dam and Reservoir.

2. SHOULD SUCH AUTHORITY BE PROVIDED GENERALLY TO ALLOW FERC TO GRANT EXEMPTIONS UNDER THE ACT, RATHER THAN DEAL WITH THE PROBLEM BY SPECIAL LEGISLATION?

Since the Milner project is the initial venture into the hydro power field by the Canal Companies, they have little experience to draw from to comment on whether or not FERC should be granted discretionary authority in defining the licensed project area. It appears likely that such discretion would have resulted in the same staff position as to Milner. It appeared to the Canal Companies that the expeditious way to realize the result they sought was to seek legislation in the form of S.1828. In much of the irrigation west, the diversion facilities which exist on navigable streams are in fact already owned by the United States and to that extent the recapture threat or the threat of other difficult license dictates is non-existent. However, if granting FERC discretion through a statute to deal with the problem would in any way expedite the development of the remaining hydro sites in the west, then perhaps such an alternative should be considered.

2A. IF YOU BELIEVE SUCH LEGISLATION IS DESIRABLE, PLEASE IDENTIFY THOSE PROVISIONS OF THE ACT FOR WHICH EXEMPTIONS ARE NECESSARY AND INDICATE THE REASONS THEREFORE.

If one were to pursue legislation which would allow FERC discretion, it would appear that rather than require facilities such as Milner Dam and the Canal be within the licensed project facility, that FERC could license only the

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power facility if they were to assured that water rights existed for the facilities and that a nonterminable conveying arrangement had been consummated so as to insure that the water could always been delivered to the licensed power facility.

3. IF THE EXEMPTION SET FORTH IN THE BILL ARE PROVIDED, WHAT WOULD BE THE POSSIBLE EFFECTS ON THE OPERATION OF THE RESERVOIR, ESPECIALLY WITH REGARD TO THE ENVIRONMENT, FISH AND WILDLIFE AND SAFETY IMPLICATIONS?

After the spring flood flows have subsided in the Snake River in an average year in the late spring, the only flows which reach Milner Dam are totally appropriated and diverted for irrigation. Through the irrigation season in years when there is no flood, no flows pass through Milner Dam between April 15th and October 15th. All of the waters diverted are put on the land. Consequently, a substantial fishery does not exist nor will the environmental effects be severe through the 1.6 miles of river reach that would be by-passed if the Milner Project were constructed insofar as the irrigation season is concerned. In early 1979, Canal Companies requested the Idaho Fish and Game to make a study in hopes of negotiating an agreement which would satisfy the environmental and fish and wildlife aspects of the project if the Milner Project were to be completed and winter flows used to generate at the Milner project site. I attach to this statement a copy of the results of a flow study for the reach below Milner Dam conducted on February 12th and 13th of 1979 (Exhibit "A" hereto). The Idaho Fish and Game suggests in this report on investigations conducted by them, that a flow of 58 c/f/s would be necessary to maintain trout habitat in the 1.6 mile study section during the winter months. The finalization of an agreement was not pursued with Idaho Fish and Game because the completion of the report corresponded with the rejection of the amended preliminary application, and which later resulted in the introduction of S.1828. On January 29th of 1980, the Idaho Department of Fish and Game adopted a position paper concerning all potential hydroelectric development and Fish and Wildlife resources in Idaho. A copy of that report, together with a cover letter from the Department of Idaho Fish and Game is attached hereto as Exhibit "B". While the Milner Project is identified in the position paper on the basis of annual average generation, the cover letter of August 8, 1980 addressed to me from Idaho

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Idaho Fish and Game explains the criteria used by the Idaho Fish and Game Department. The position paper does identify the Milner Project as acceptable at page 4 thereof.

While we have previously spoken to the dam safety issue, it is not the intention of the Canal Companies to skimp in any respect concerning dam safety. We have to date complied with all applicable dam safety laws and the recommendations by the State as the inspecting agency. It would be our intention to continue to so comply.

The environmental, fish and wildlife and dam safety requirements of the Milner Project will not be exempted by the enactment of S.1828. The applicants must resolve these issues in compliance with the Federal Power Act and other applicable federal and state laws.

4A. ENCLOSED IS A COPY OF A JUNE 17, 1980 LETTER FROM FERC. WE WOULD APPRECIATE YOUR VIEWS AND COMMENTS ON EACH OF THE FERC RESPONSES TO THE SUBCOMMITTEE'S QUESTIONS.

Question 1 of FERC's June 17, 1980 response requested FERC's recommendations on S.1828. Essentially, the Commission's answer provided their interpretation of Idaho Senator Frank Church's remarks in introducing the bill suggesting that it involved terms about recapture only. As stated in our answer to Question 1 contained in the Chairman's August 4, 1980 letter to me, there are more concerns of the applicants than merely recapture. In their answer FERC suggests both safety and environmental implications may be present. We have attempted to deal with those items concerning the Milner Project in response to Question 3 above.

As to Question 2, we agree with FERC's analysis of the sections of the Federal Power Act which would be modified only insofar as the Milner Project is concerned. For the reasons we have above outlined, we still prefer that the dam, the reservoir, and the intake canal be exempt from the Federal Power Act.

In Question 3 of the June 17, 1980 letter, FERC was asked to identify other provisions of federal law that may be effected if S.1828 is passed. They mention specifically NEPA and the Fish and Wildlife Coordination Act. The project applicants feel that they can effect agreements concerning possible environmental impacts.

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August 25, 1980

Question 4 addressed in the June 17th letter asks whether or not S.1828 is generally consistent with Title 4 of PURPA in encouraging the development of small hydroelectric power projects. The response points out that over 30 megawatts is not a small project within the law and suggests that FERC feels it would be preferable to delegate to FERC detailed determinations as to specific legislative exemptions. Again we have no criticism of FERC's procedures but would only comment that there are situations where projects must be dealt with by Congress if they are to be completed.

Question 5 addressed in the June 17th letter asks whether or not there should be a general legislative proposal developed rather than specific bills such as the Milner bill considered by the Congress. FERC suggests that a 30 megawatt exemption from Part One of the Power Act may well be large enough for the exemption. They suggest that to increase the size to 50 megawatts might put the Commission at a disadvantage in assessing the extent of the exemption from federal regulation, particularly as to Dam Safety and Fish and Wildlife and other environmental impacts. Again we suggest that in the case of Milner, those matters can be assessed because the effects will be the same as to Fish and Wildlife and other environmental impacts whether or not the dam, the reservoir, and the conduit are included within the licensed project description.

Question 6 of the June 1980 letter, asks what is meant by "outside of existing irrigation facilities" and "not now in existence and necessarily hereafter constructed". While we essentially agree with FERC's answer, the thought of those of us who had input into the initial draft of the bill was that anything that was built to facilitate the diversion from the canal conduit into the penstocks, including the powerhouse and transmission lines, should be included within the licensed project. But as we have above indicated, it was definitely our intention to exclude all of the now existing facilities which are necessary to deliver the irrigation water. The facilities that would be constructed to facilitate power generation would essentially not be exempt under S.1828, since they would be facilities "not now in existence".

Question 7 related to fish and wildlife, water pollution and other environmental concerns.

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As above stated, an environmental statement was not prepared by the applicants for the reason that we had just begun the studies when the application for preliminary permit was denied. While the applicants recognize that there are impacts of this proposed project, we feel that the Milner Project will have minimal impacts on the resources for the reason that the facilities to be constructed would have minimal impact. It would be our purpose to identify the impacts of the project. If conditions are imposed on the licensee if the license be granted, we can only assess acceptance when we know what they are.

Question 8 of the June 17, 1980 letter talks about the open ended authority to Interior, Army, and Energy Departments to construct generating facilities of existing projects within their jurisdiction. The applicants have really no comment in this regard except to suggest that it may impact the development of hydroelectric generation by the nonfederal sector. As the Chairman knows, there are two or three proposals in Idaho for the construction of generating facilities at federal dams by nonfederal entities. To my knowledge, in all of these cases, Congressional legislation will be required and is being sought. However, it would seem that if the agency that owns the dam were to first pursue hydroelectric generation, that certainly they should have some type of preference unless the agency were to waive it in that regard.

Question 9 addressed in the June 17, 1980 letter requests views and comments on S.1641. This witness is not familiar with the provisions of S.1641, and probably any comment would be nonexpert.

4B. IN RESPONSE TO QUESTION 5, FERC SUGGESTS THAT CONGRESS "MAY WISH TO RESIDE ADDITIONAL DISCRETIONARY EXEMPTIVE AUTHORITY IN THE COMMISSION FOR PROJECTS BETWEEN 5 AND 30 MEGAWATTS IN ORDER TO RELIEVE THE PERCEIVED BURDENS THAT THE LICENSING AND RELATED STATUTORY REQUIREMENTS PLACE ON THE DEVELOPMENT OF SMALL HYDROELECTRIC POWER PROJECTS." DO YOU AGREE? PLEASE GIVE REASON.

Some eight years ago I represented an applicant for a major project license. While the license required the enactment of a Congressional Bill, we were then told that it took some seventeen months from the filing of the application

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to final consideration of the application if there were no significant interventions, appeals, or opposition. Of course, preparation of the initial application took between four and six months. Consequently, prior to the recent exemptions as to some qualifying projects, the licensing procedure took a minimum of twenty-four months. With complications, the licensing procedures have been known to draw out as long as four to five years.

Perhaps exempting up to 30 megawatts could help relieve FERC's burden as well as lessen the burden on applicants to some extent. However, with all of the overriding federal laws, it is unlikely that the process can be expedited substantially. If there are major problems, the applicant may be better off with a full blown NEPA process.

I commend the Congress for their recent enactments attempting to streamline licensing procedures for qualifying hydro power projects. Any lessening of the paperwork requirements will obviously encourage filings and hopefully result in substantial additional hydro construction at this time of crisis in our country.

4C. FERC CONTRACTED FOR A STUDY BY MR. IRVING STELZER ON HYDROELECTRIC LICENSING. A COPY IS ENCLOSED AND PLEASE COMMENT THEREON.

As indicated my personal involvement with FERC is extremely limited. I have only been of record before the Commission on three separate occasions in ten years. For this reason I do not feel qualified to specifically discuss the broad concepts identified in N/E/R/A Report of March 20, 1980. However, even with my limited involvement, I can foresee that Mr. Stelzer's recommendation that jurisdictional overlaps be dealt with by providing time limits for response, could be extremely helpful in attempting to expedite the consideration of applications. I have noted in recent years a bill at the Congressional level to provide a "one stop" permitting process for applicants. Because of the many overlapping jurisdictions, and the fact that some of the federal laws which apply supercede even the Federal Power Act, some mechanism must be developed to obtain this input at the earliest possible time.

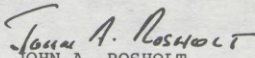
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August 25, 1980

I can personally verify that one of Mr. Stelzer's recommendations has been recently followed. I have submitted an application for exemption of a conduit facility within the same Twin Falls Canal Company system and find that the application was rejected rather than the Staff identifying the deficiencies and asking for the correction thereof. As I read the regulations both courses of action were available to the Staff.

In the Milner situation, economic justification may not be a major consideration since "early-on" when the formal application would be filed it can be demonstrated that this power can be produced at approximately the same cost of alternative sources of energy in our area. There are no competing applications and it is our feeling that the major issues to be decided, if S.1828 be enacted, are the State issues concerning the priorities for the development of the resources within the State.

I much appreciate the opportunity to appear here today and thank the Commission for their attention and courtesy.

Respectfully submitted,



JOHN A. ROSHOLT
Attorney for Twin Falls
Canal Company and North
Side Canal Company

JAR:bg

Enclosures

IDAHO DEPARTMENT OF FISH & GAME

Joseph C. Greenley, Director

SHAKE RIVER STREAM FLOW STUDY
(below Milner Dam)

February 12 - 13, 1979

by

Tim Cochnauer
Senior Fishery Research Biologist

ABSTRACT

The Twin Falls Canal and Northside Canal Companies have proposed a hydroelectric project which would dewater approximately 1.6 miles of Snake River below Milner Dam. A two day investigation by the Idaho Department of Fish and Game found that a significant trout population does exist and that a minimum winter survival flow of 58 cfs would be necessary to maintain trout habitat in the study section.

ACKNOWLEDGEMENTS

This study was made possible through the cooperation of the Twin Falls Canal and Northside Canal Companies. Messrs. Robert Bell and Neil Hoyt provided assistance during the study.

RECOMMENDATIONS

Maintain a minimum winter survival flow of 58 cfs discharge from Milner Dam with 40 cfs being released from west side of dam and 18 cfs being released from east side of dam.

OBJECTIVES

1. To determine if game fish inhabit the Snake River immediately below Milner Dam during the winter months.
2. To determine a minimum winter survival flow for the game fish populations in this section of river.
3. To determine at what flow freezing of the stream could occur.

INTRODUCTION

In late 1978, the Twin Falls Canal Company and the Northside Canal Company proposed a hydroelectric project which would divert winter flows (non-irrigation season) at Milner Dam into the existing Twin Falls southside canal, and eventually through a hydroelectric structure at a point approximately 1.6 miles downstream of Milner Dam (Figure 1). At this point the water would reenter the Snake River. Depending on the water year, this 1.6 miles of Snake River could be dewatered during the winter months. At the present time, this river stretch is dewatered during the irrigation season by diversions at Milner Dam.

Game fish populations in this section of river are displaced during low water, but are provided the opportunity to repopulate during the non-irrigation

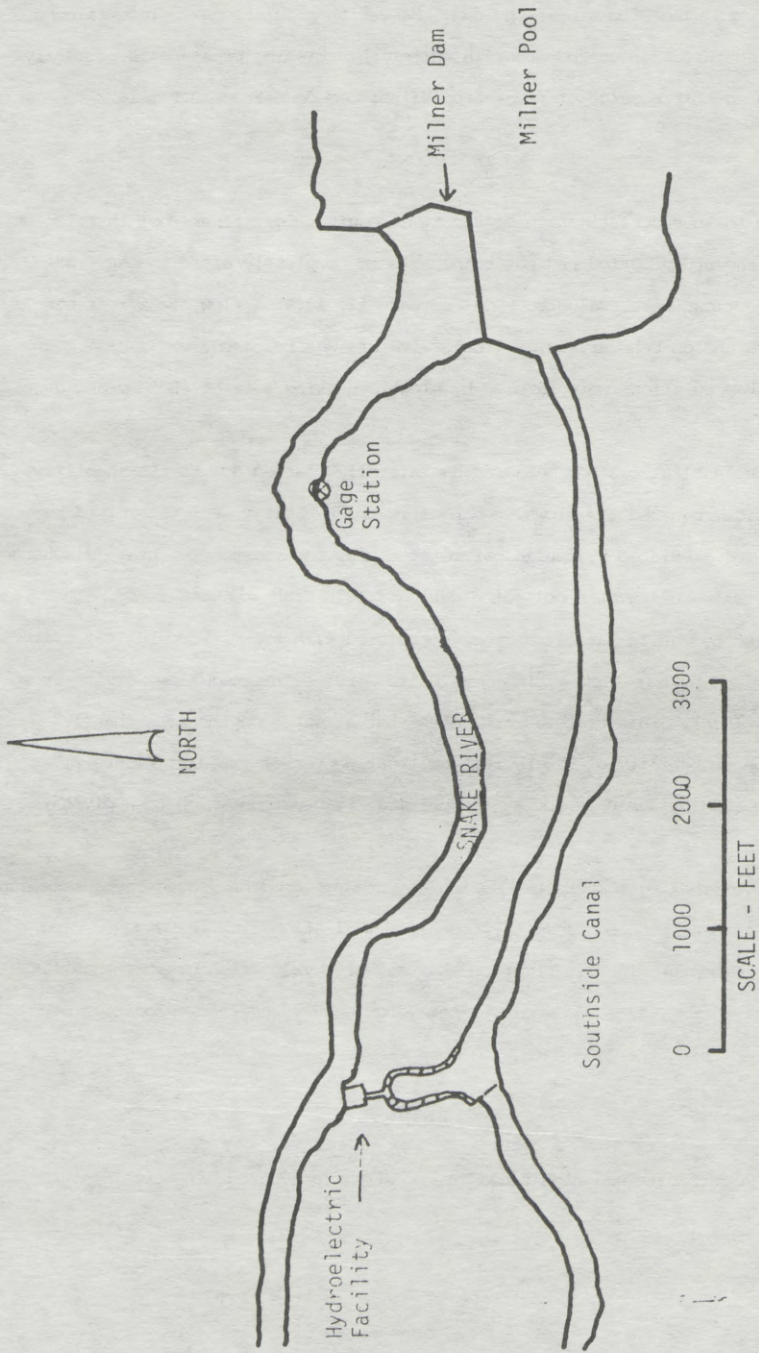


Figure 1. Location of Milner Dam Proposed Hydroelectric Project and Idaho Fish and Game Flow Study.

season when water flows past the dam. Game fish populations include rainbow trout, cutthroat trout and mountain whitefish. Fishing pressure is primarily limited to that section of river from Milner Dam downstream 0.5 mile.

TECHNIQUES

Due to an underestimation of the time required for Milner Pool to fill during the study period and not being able to completely close the dam gates, only two flows were evaluated. On February 12, 1979, a flow of 397 cfs was released and on February 13, a flow of 173 cfs was released.

Fish populations were sampled by electroshocking between the dam and gage station.

Trout habitat was not measured as initially planned due to the inability to provide required low flows. Changes in trout habitat were determined by the use of predicted hydraulic parameter tables for incremental stage/discharge relationships using data collected during a 1975 Fish and Game study. The predicted hydraulic parameters were correlated with known trout habitat criteria as provided by the U. S. Fish and Wildlife Service Instream Flow Service Group (Bovee 1978). This criteria indicates that at water depths less than 1.7 feet the probability of use by rainbow trout decreases rapidly (Figure 2). Station SRBM100 was selected as the critical transect on which to apply this criteria.

Above freezing temperature during the study period prevented the assessment of freezing at reduced flows. Personal communication with the InstreamFlow Service Group provided information that at water velocities greater than 1.0 feet per second, freezing would probably not occur. Average velocities were predicted using the 1975 data.

FINDINGS

High turbidity and high flows in the stream prevented effective electro-

RAINBOW TROUT

11102

ADULT

78/01/24.

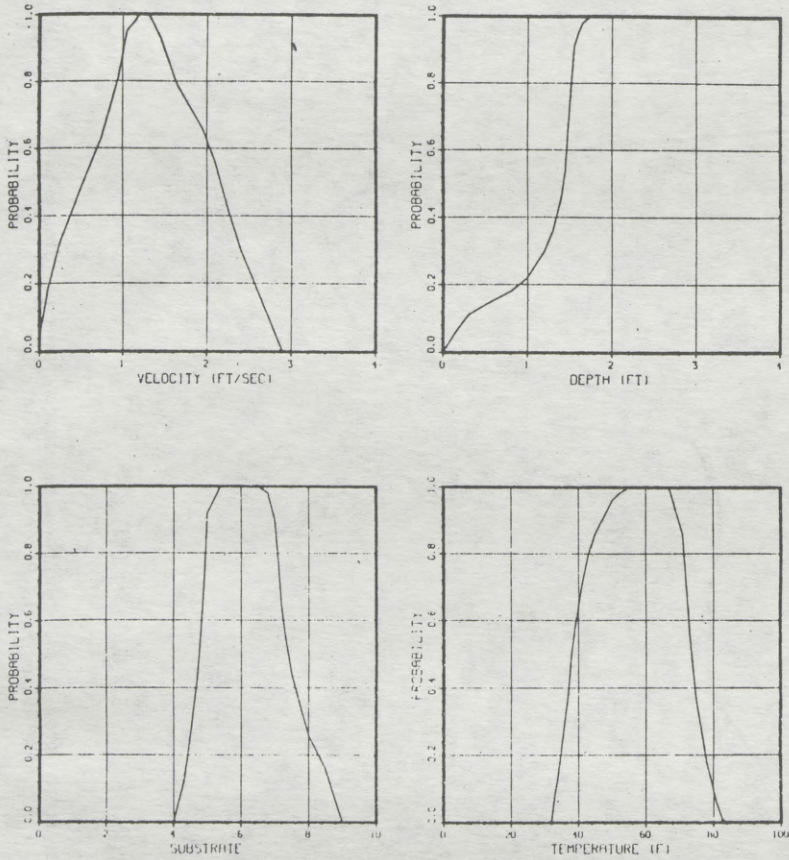


Figure 2. Rainbow trout adult rearing probability curves (from Bovee 1978).

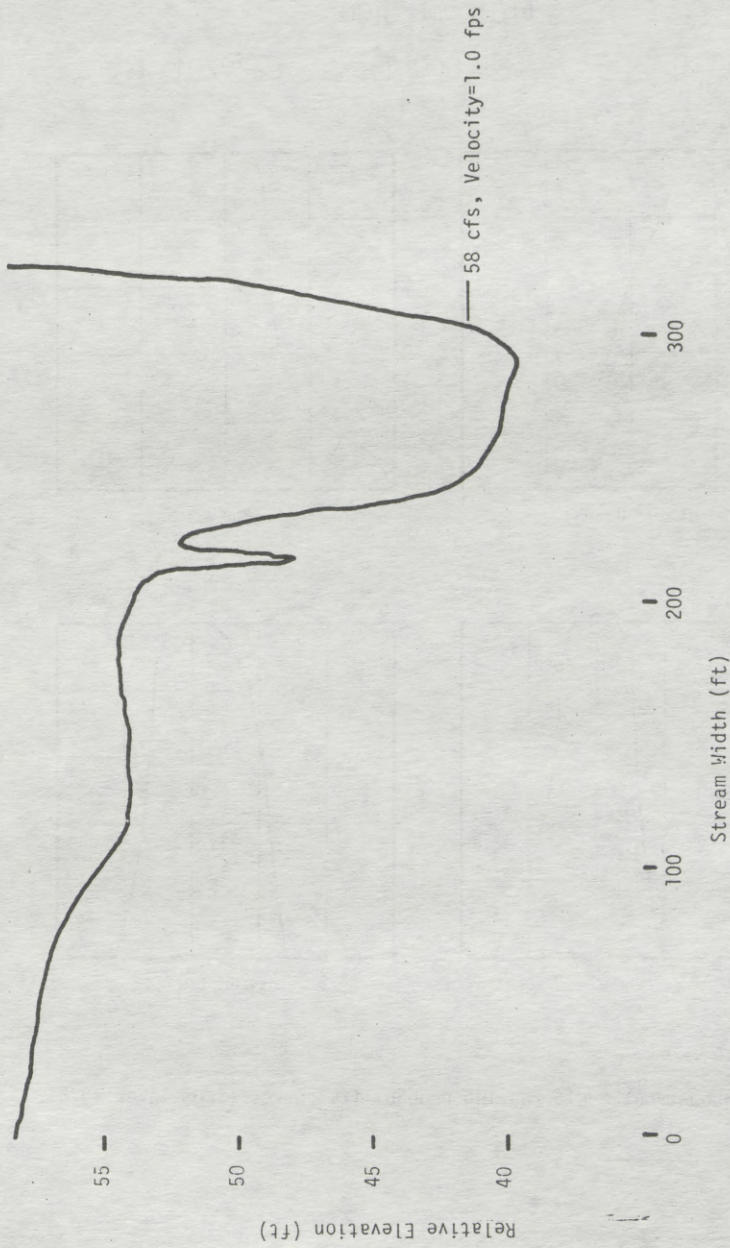


Figure 3. Stream bottom profile and relative water stage/discharge relationship for Station SRBM 100 on Snake River below Milner Dam.

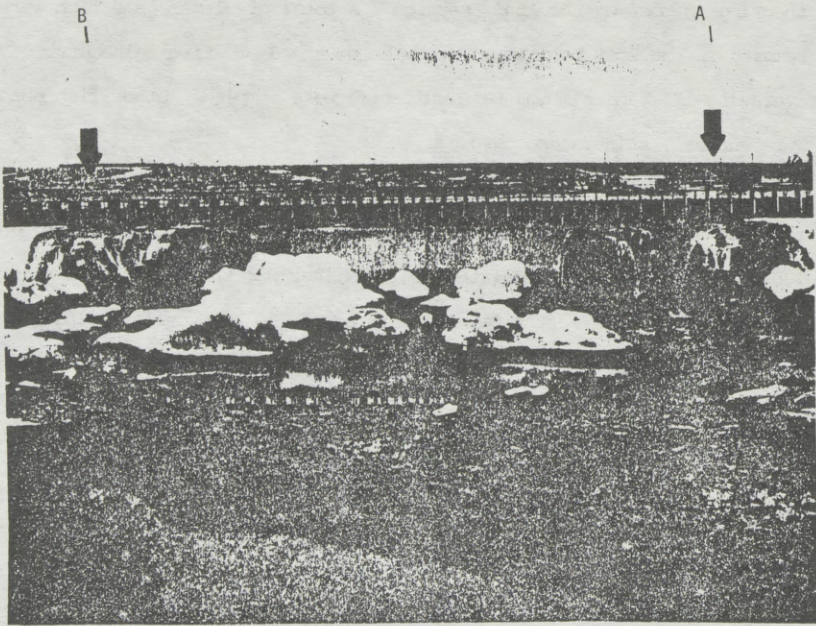


Figure 4. Location of recommended winter flow releases at Milner Dam.

shocking in most of the study section. A total of eleven game fish were sampled in the west pool immediately below the dam. Five rainbow trout, averaging 17", and six mountain whitefish were sampled. Other fish observed were suckers, shiners and carp.

As shown in Figure 3, a flow of 58 cfs would maintain 1.7 feet depth on transect SRBML100. The average column velocity at this flow would be equal to 1.0 feet per second. Immediately below Milner Dam there is a pool on the east side and one on the west side, and both appear to be excellent habitat for trout. To maintain adequate flow in each of these pools, flows should be released at each end of the dam. Visual observations indicate that 40 cfs should be released at the gates 10, 11, 12 the west side (Figure 4-A) 18 cfs be released at the 5th and 6th gates from the east end (Figure 4, B).

LITERATURE CITED

- Bovee, Ken D. 1978. Probability-of-use Criteria for the Family Salmonidae. Instream Flow Information Paper No. 4. Cooperative Instream Flow Service Group, Fort Collins, Colorado. January 1978. 88 pp.
- Bovee, Ken D. Personal Communications. Cooperative Instream Flow Service Group.



STATE OF IDAHO

AUG 6 1980
DEPARTMENT OF FISH AND GAME600 SO. WALNUT ST. — P.O. BOX 25
BOISE, IDAHO 83707

August 8, 1980

Mr. John Rosholt
Attorney at Law
P. O. Box 1906
Twin Falls, ID 83301

Dear John:

This is in response to your questions concerning the potential Twin Falls Canal Company project referred to in the Idaho Fish and Game Commission position paper, "Hydroelectric Development and Fish and Wildlife Resources in Idaho."

The referred-to project is the project involving diversion of winter/spring flow from Milner Dam pool into 1.2 miles of the Twin Falls main canal from where the flows are run through a hydroelectric generating facility and returned to the Snake River approximately 1.6 miles below Milner Dam. Annual average generation is shown as 18 MW. Average generation would be considerably greater than this if calculated only for the actual winter/spring generating period rather than over the entire year.

Classification of this project as "Acceptable" by the Fish and Game Commission is based upon the project providing the recommended minimum flows below Milner Dam as determined through the cooperative study conducted by your clients and the Idaho Department of Fish and Game. You have a copy of the study report prepared by our agency.

Sincerely,

DEPARTMENT OF FISH AND GAME
Jerry M. Conley, Director

Monte R. Richards
Monte R. Richards, Chief
Bureau of Program Coordination

MRR:jt

HYDROELECTRIC DEVELOPMENT
AND
FISH AND WILDLIFE RESOURCES IN IDAHOA Position Paper
Idaho Fish and Game Commission

Adopted January 29, 1980

The current "energy crisis" and widespread state concern over thermal production of electric energy have sparked increased interest and activity in developing relatively small hydroelectric projects. There is a popular misconception that "low head" dams are universally less environmentally-damaging than high head storage dams. This is not necessarily true. "Low head" dams can be just as damaging or even more so than high head dams depending upon location. Net fishery losses are usually greater with "low head" dams as they normally create an artificial and inferior habitat resembling neither the original stream nor, as in the case of most high-head storage dams, a lake.

Construction of small hydro projects for what could be termed "stop-gap" measures in planning for Idaho's future energy demands is of great concern to the Idaho Fish and Game Commission when such projects result in major fish, wildlife and related recreational losses. Power produced by these projects can only delay for a relatively short period the point in time when alternative measures to supply long-term power generating needs must be applied. The short-term and relatively minor benefits gained can be at the expense of major irreplaceable fish and wildlife losses. We do not believe such an approach is in the best interests of the people of Idaho.

The Commission strongly believes that rather than considering projects individually and piecemeal, there should be an orderly planned approach to developing hydropower in Idaho. Potential projects should be looked at as a group, rigorously evaluated as to long-term versus short-term costs and benefits, including environmental and social factors, and a "best mix" arrived at that would provide reasonable power benefits with minimal environmental losses.

As one step in a comprehensive, cooperative planning effort the Commission is willing to state its position on potential hydroelectric projects in the state of Idaho. Such a position statement will address the development of hydroelectric projects in the context of the goals and objectives of the Commission for protection of Idaho's fish and wildlife resources and, hopefully, will assist utilities and other power interests in their planning efforts.

The following definitions and criteria represent the standards against which projects will be evaluated in order to arrive at a Commission position regarding any proposed hydroelectric project.

Definitions

Acceptable - projects that the Commission would support.

Questionable - projects that the Commission would recommend be delayed until studies needed to determine their acceptability or unacceptability are completed.

Unacceptable - projects that the Commission would oppose.

Broad criteria used in classifying projects are as shown below.

Acceptable - those proposed projects where existing studies, data or information are adequate to determine that there will be no major adverse impacts on fish and wildlife resources if the project were constructed.

Questionable - those proposed projects where existing studies, data or information are inadequate to make a determination as to impacts on fish and wildlife resources if the project were constructed.

Unacceptable - those proposed projects where existing studies, data and information are sufficient to determine that major adverse impacts would occur on fish and wildlife resources if the project were constructed.

Through the cooperation of Idaho Power Company and coordination with other state and federal agencies, a comprehensive compilation of potential, future hydroelectric projects within the state of Idaho has been made available. The projects considered in this compilation are limited to: those which could materially affect fish and wildlife resources; those for which the bulk of the power produced would be available to the state of Idaho; and those for which state or federal permits have been applied for, or for which a firm indication has been given that such permits will be applied for in the near future. These projects, along with an estimate of average annual generation from each in megawatts, are shown in Table 1-1. Project locations are depicted in Figure 1.

^{1/} All estimates of average annual energy production made from information supplied by Idaho Power Company, the Idaho Public Utilities Commission, consultants for Raft River R.E.A. and the U.S. Bureau of Reclamation.

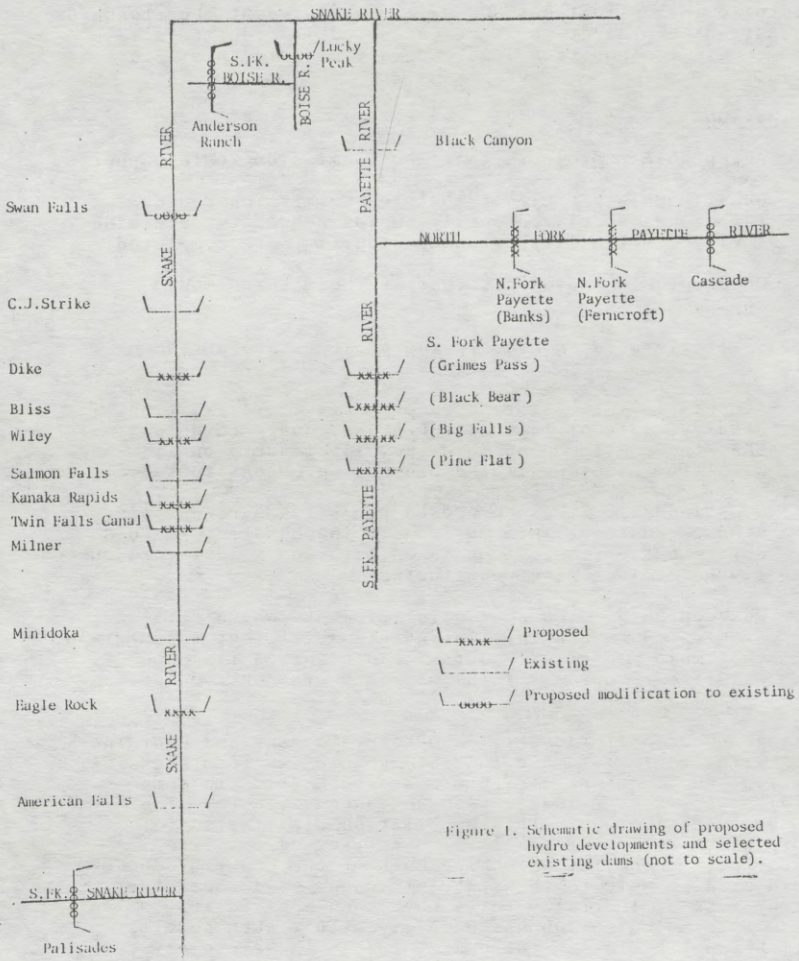


Table 1. Potential projects by system and average annual energy generation in megawatts.

<u>Project</u>	<u>System</u>	<u>Megawatts</u>
Cascade	Idaho Power Company	6
Lucky Peak	Idaho Power Company	34
North Fork Payette	Idaho Power Company	137
Wiley	Idaho Power Company	45
Dike	Idaho Power Company	35
Kanaka Rapids	Idaho Power Company	12
Twin Falls Canal	Idaho Power Company	18
Swan Falls	Idaho Power Company	4
South Fork Payette	Idaho Power Company	35
Eagle Rock	Rural Electric Authority	19
Palisades	Bonneville Power Administration	18
Anderson Ranch	Bonneville Power Administration	2
Total		365

Based on information available at this point in time, the assumption that environmentally sound construction and operating practices would be adhered to and that reasonable mitigation would be provided if needed, an evaluation of the potential projects as to their impacts on fish and wildlife against the standards listed earlier is presented in Table 2.

Table 2. Acceptability of potential hydroelectric projects as regards impacts on fish and wildlife resources.

<u>Project</u>	<u>System</u>	<u>Average Annual MW</u>
<u>Acceptable</u>		
Cascade	Idaho Power Company	6
Lucky Peak	Idaho Power Company	34
North Fork Payette	Idaho Power Company	137
Twin Falls Canal	Idaho Power Company	18
Swan Falls	Idaho Power Company	4
Palisades	Bonneville Power Administration	18
Anderson Ranch	Bonneville Power Administration	2
Total		219
<u>Questionable</u>		
Wiley	Idaho Power Company	45
Dike	Idaho Power Company	35
Kanaka Rapids	Idaho Power Company	12
Total		92

Unacceptable

South Fork Payette	Idaho Power Company	35
Eagle Rock	Rural Electric Authority	19
Total		54

The Dike, Wiley and Kanaka Rapids projects are listed under the "Questionable" category because they require additional study before a final judgement can be made. Of prime concern is the sturgeon population in the reach of the Snake River involved. Results of sturgeon research conducted to date indicate that the Hells Canyon Snake River sturgeon population may be in a decline, possibly irreversible, due to lack of growth and recruitment to the spawning population. This potential situation places added long term importance on the sturgeon population in the Dike-Wiley-Kanaka Rapids area where, currently, viable populations exist. Additional research is necessary to determine how these populations would be impacted by the projects in question.

The South Fork Payette River project is unacceptable because among other impacts, extremely valuable known, and potential, wild rainbow trout and whitefish fisheries would be eliminated by impoundment and because of severe adverse impacts on a major mule deer wintering concentration, such as loss of critical micro-habitats and thermal cover and potentially excessive mortalities due to ice cover on impoundments.

Among other impacts, the major trophy trout fishery in southeastern Idaho would be severely impacted or lost through impoundment and water quality problems, and a wintering area for a large concentration of bald eagles would be greatly reduced or eliminated by ice cover, if the potential Eagle Rock Project were constructed.

Further data and information to support classifications in Table 2 are available in the files of the Department of Fish and Game.

Using the evaluation presented in Table 2, a percentage range of hydro megawatts, it would be possible to develop without major adverse impacts on fish and wildlife resources can be estimated as shown in Table 3.

Table 3. Maximum and minimum percent of total potential hydro megawatts (average annual generation) that can be developed without major adverse impacts on fish and wildlife resources, by system.

Idaho Power Company System (Total potential 326 MW)

Maximum	89%
Minimum	61%

Bonneville Power Authority & Rural Electric Authority Systems (Total potential 39 MW)

Maximum	51%
Minimum	51%

All Systems (Total potential 365 MW)

Maximum	85%
Minimum	60%

The Idaho Power system obviously has the greatest potential for additional hydropower development. Projection of need through the year 1990 and a proposed schedule for development of generation of power to meet this need has been developed by the company as shown in the following table and Figures 2 and 3. Valmy Number 1 and 2 are out-of-state coal-fired plants. Coal Number 1 is an in-state coal plant, site as yet undetermined.

Table 4. Idaho Power Company proposed development schedule by project and annual average energy generation.

<u>Year</u>	<u>Project</u>	<u>Average Annual MW</u>
1981	Valmy #1	88
1984	Valmy #2	88
1985	Wiley	45
1985	Cascade	6
1986	Lucky Peak	34
1988	North Fork Payette	137
1990	South Fork Payette	35
1990	Coal #1	88
	Total	521
	Need	500
	Surplus	21

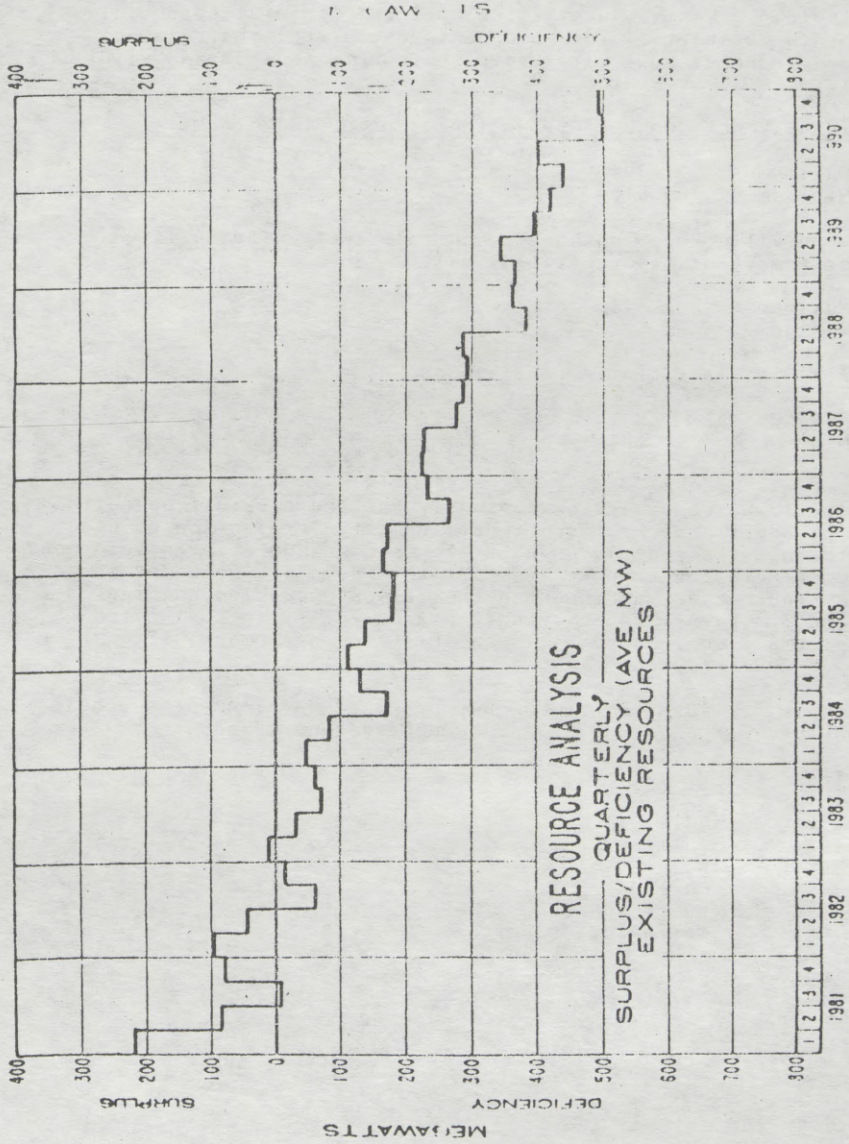
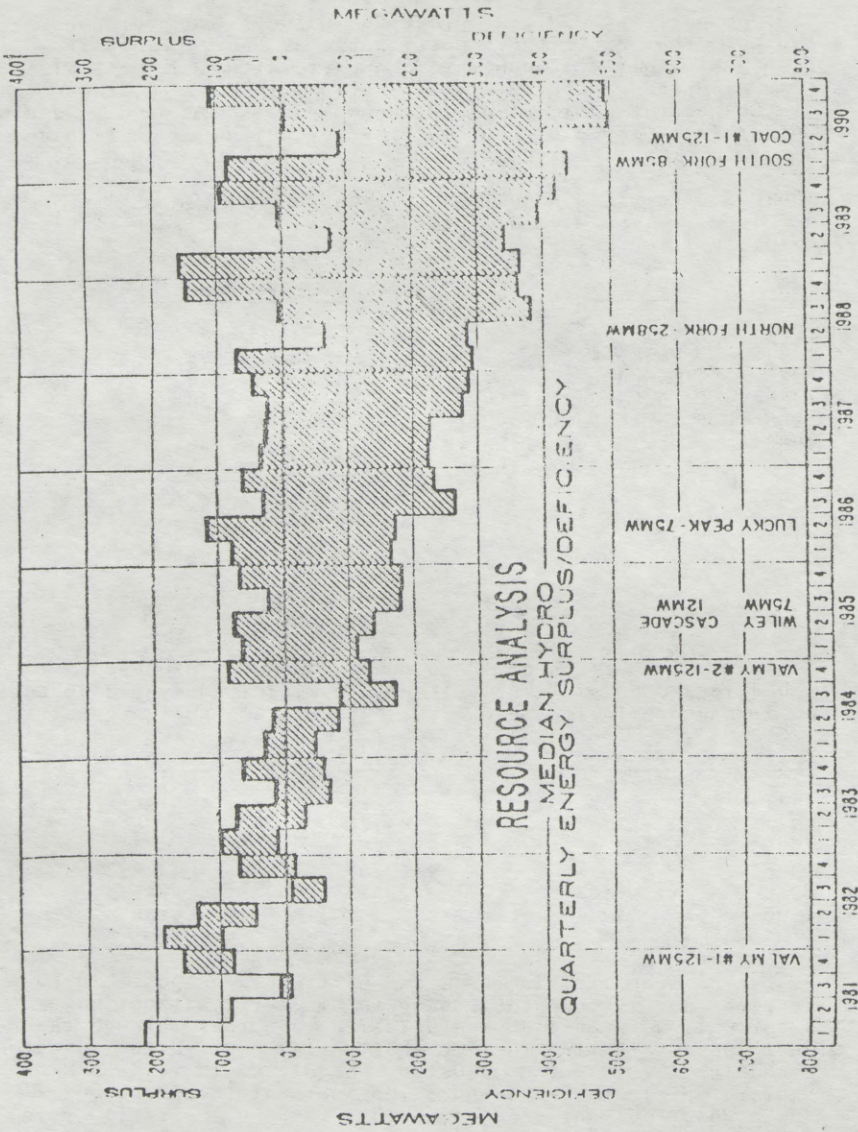


Figure 3.



The Company's schedule as proposed includes two hydropower projects that are either questionable or unacceptable from a fish and wildlife standpoint. However, with some possible adjustment based on the classifications in Table 2, the bulk of the generation involved in the Company's proposed schedule could be developed without major adverse impacts on fish and wildlife or related resources as shown in Tables 5 and 6.

Table 5. Possible adjustment of Idaho Power Company's development schedule to minimize adverse impacts on fish and wildlife resources.

<u>Year</u>	<u>Project</u>	<u>Average Annual MW</u>
1981	Valmy #1	88
1984	Valmy #2	88
1985	Cascade	6
1985	Lucky Peak	34
1986	North Fork Payette (Banks)	52
1988	North Fork Payette (Ferncroft)	85
1990	Coal #1 or other	88
	Total	441
	Need	500
	Deficiency	59

Table 6. Comparison of Idaho Power Company's proposed schedule and possible adjustments to minimize adverse impacts on fish and wildlife resources, by average annual megawatts.

<u>Year</u>	<u>Proposed</u>	<u>Adjusted</u>	<u>Difference</u>
1981	88	88	0
1984	176	176	0
1985	227	216	-11
1986	261	268	+ 7
1988	398	353	-45
1990	521	441	-80

As can be seen from Tables 5 and 6 it would be possible to develop roughly comparable amounts of energy without major adverse impacts on fish and wildlife resources through the year 1987. Starting in 1988 shortfalls occur in the adjusted schedule. By 1990 the adjusted schedule would fall 59 MW short of projected need and 80 MW short of the proposed Idaho Power Company schedule. This 1988-90 shortfall could be made up by development of some of the presently questionable projects if additional study should determine they are acceptable; out-of-state thermal; or an additional increment to the proposed in-state thermal.

The Commission accepts environmentally acceptable hydropower as the preferred alternative for future power generation in the state. Sooner or later, however, turning to sources other than hydropower will be necessary. In the Commission's opinion it would not be a wise use of state resources to permanently eliminate important and irreplaceable fish and wildlife resources in order to temporarily delay turning to thermal power by a matter of months or even a year or two.

In order to promote a balanced approach between hydropower development and fish and wildlife and related resources and to avoid foreclosing future options the Idaho Fish and Game Commission, subject to the conditions set forth on Page 4, supports a hydropower development schedule similar to that shown in Table 5. If future firm proposals for additional projects should evolve they will be evaluated in the same manner as currently existing proposals considered in this statement.

The Commission and the Department of Fish and Game will work closely with Idaho Power Company, other power interests, and appropriate state and federal agencies towards the objective of developing the maximum amount of potential hydropower possible without causing major adverse impacts on fish and wildlife and related resources.

Mr. DINGELL. Mr. Ward.

STATEMENT OF CONLEY WARD, JR.

Mr. WARD. Thank you, Mr. Chairman. I also filed a brief statement and if it would be agreeable to the chairman, I would just as soon that the subcommittee members read that statement and I would summarize just a couple of points.

Mr. DINGELL. Without objection, your full statement will be inserted in the record and you may proceed with such comments as you wish. [See p. 109.]

Mr. WARD. Thank you, Mr. Chairman.

I just want to add one or two points that I think have not perhaps been adequately addressed. What we have here really, in my view, the reason why I am here today, is a political problem of some magnitude. As the chairman may know, our Commission, the Idaho Public Utilities Commission, has been very active in following the congressional directives contained in PURPA and other Federal legislation, and among those are activities including extensive hearings on cogeneration and small producer production, promulgation of rules and regulations for that entire spectrum of activities, and within just a few days we expect the final culmination of the proceeding with filing of what amount of tariffs for the purchase by utilities, mandatory by utilities of power generated by cogeneration facilities and small power producers.

This is relevant here because our potential for small power production is primarily at this point low head hydroelectric sites and it is primarily on irrigation and canal systems.

The reason why I bring this up is we have been spending a great deal of time throughout the State trying to educate canal companies, irrigation districts, our farmers, in short on the benefits avail-

able to them of supplying power under PURPA or under separate arrangements negotiated with utilities.

I think we have made some considerable progress in that regard but the difficulty the Milner project poses to us is that we have here a well-known site that is perceived throughout the State as being hung up on a problem of Federal regulation.

Now, Mr. Chairman, the members of the subcommittee and those of us who deal with these sort of problems every day are well aware that what problems there are for the irrigation districts may be more illusory than real, but that does not solve the farmers problem. They are convinced that the possibility of recapture of the reservoir and dam is a problem. They are convinced that the possibility of more extensive regulation than they now face over that dam and reservoir is a problem and they simply will not go forward. It will make no difference to them if the rest of us agree to the contrary.

Now, with this particular facility, it is very difficult for me to imagine one that could be located in Idaho with less impact, environmentally, or in terms of safety. You have here a small irrigation reservoir in the middle of the Snake River plain and a lava desert, no significant fisheries, no significant wildlife impact.

Mr. Chairman, the most important point that I think I would like to emphasize is that while we have heard a great deal today about the possibility of generic legislation, and I don't quarrel with the context that generic legislation may well be necessary, we can't afford to wait for that generic legislation for this project. Our credibility as commissioners and our credibility as Government officials is on the line to move this project as fast as possible, and I think that is the substance of my remarks, Mr. Chairman. I would be happy to entertain questions.

[Mr. Ward's prepared statement follows:]

STATEMENT OF CONLEY WARD, JR.
PRESIDENT, IDAHO PUBLIC UTILITIES COMMISSION
BEFORE THE
SUBCOMMITTEE ON ENERGY AND POWER
OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
U.S. HOUSE OF REPRESENTATIVES

Mr. Chairman, Members of the Subcommittee, my name is Conley Ward, Jr. and I am President of the Idaho Public Utilities Commission. I have accepted Chairman Dingell's invitation to testify before you in order to express my Commission's support of Senate Bill 1828 regarding the proposed Milner Dam Project.

This project contemplates diverting water from the existing Milner Reservoir into an irrigation canal owned by the Twin Falls and North Side Canal Companies. The water would then be allowed to flow down the canal approximately 1 1/3 miles where the drop to the Snake River is considerably greater than at the dam site. At that point penstocks would be constructed to direct the water through turbines and into the Snake River Canyon. The project is expected to have a nameplate capacity of 50 megawatts, but most of the energy deliveries will occur outside of the irrigation season. The parties presently contemplate that this energy will be sold to Idaho Power Company.

What impresses us most about the debate over S. 1828 is that the Milner Dam Project is essentially a canal project. The applicants are not proposing modifications to the existing dam, reservoir, or canal intake structures. We see no real need to include the pre-existing dam, reservoir and other facilities in the application and licensing process for this project. Any affect on the existing facilities, on fish and wildlife, on streamflows or on the environment can be studied in connection with an application restricted to the facilities being constructed. Keep in mind we

are talking about an old irrigation reservoir in a lava desert, with no fish runs, no forest, no fields, no highways and no towns.

Nevertheless, the FERC relies on case law to argue that the "project works" must include all pre-existing facilities. But why must it? Any blind reliance on case law predating 1978 is sadly misplaced. Since passage of the National Energy Act in November 1978, Congress has consistently expressed its intention that all energy resources be developed in the most expeditious and cost effective manner. The Water Resources Act of 1976, the Public Utility Regulatory Policies Act of 1978 and the Power Plant and Industrial Fuel Use Act of 1978 clearly establish a national priority for the speedy development of low impact type electric facilities. In addition, state commissions such as ours are developing procedures and tariffs under PURPA for utility purchases of electricity generated by small power producers and co-generators.

In our state, there are a number of irrigation dams and canal drops that can be utilized for hydroelectric production. Most of these sites are owned collectively by the farm community through irrigation or canal companies. As a general rule, these companies are willing and able to install generating facilities at these sites and sell power to the electric grid if they can do so without subjecting themselves to additional federal and state regulatory requirements. But the farmers and ranchers who own these projects will not participate in solving our energy problems if they risk federal recapture of their irrigation dams and canals, or safety requirements that differ dramatically though not significantly from already applicable state law. There is little point in bemoaning this recalcitrance on the part of the affected farmers -- it is simply a fact of life that their primary employment comes first and they will engage in the generation of power only if it is both profitable and convenient.

In the Northwest, all of this has real meaning in the face of imminent electric energy shortages. Bonneville Power Administration predicts that by 1985 the Northwest will have

resource shortages of approximately 6,000 megawatts, the equivalent of the capacity needed to serve three Seattles! Secretary of Energy Charles Duncan has recently created a Pacific Northwest Energy Task Force in response to what he views as "a serious electric energy situation," emphasizing that "early and concerted action" is required.

For these reasons, Mr. Chairman, we urge the swift passage of S. 1828. It may well be that a generic amendment to the Federal Power Act is necessary to allow FERC to grant appropriate exemptions for small hydroelectric facilities. But we cannot afford to await the passage of general legislation in this case. The Milner project is widely viewed in Southern Idaho as a test of both the state and federal governments' commitment to the speedy development of low impact hydroelectric facilities. If this project is tied up while more far reaching legislation is drafted and passed our credibility will be severely damaged.

This is seminal time for the diversified production of energy wherever that energy is available. If our response is to smother these pioneer efforts with a blanket of regulation created for other purposes and other times, we will be crib stangling some very exciting developments.

Swift action on this bill does not jeopardize any environmental or safety concerns. The affected stretch of the Snake River is not a significant fishery and there will be no impact on the upland game bird population. For these reasons, our Department of Fish and Game has assured other state agencies that it has no opposition to the project. With respect to safety, the existing dam is already subject to safety inspections by the State of Idaho, and the irrigation company applicants have independent economic and self serving reasons to see that the dam remains safe and operational.

I have not prepared a detailed response to the balance of the questions in the Chairman's August 4th letter. We simply have not had sufficient time to carefully analyze either FERC's response to the Chairman's questions or the study conducted by Mr.

Irving Stelzer. We do agree, however, with the Commission's suggestion that Congress may wish to provide discretionary exemptive authority for projects between 5 and 30 megawatts. We cannot speak to the merits of such a proposal on the national level, but we are firmly convinced that full application of the Federal Power Act requirements to small hydroelectric projects will unnecessarily discourage developments in Idaho. This is particularly true in cases such as this where the Federal Power Act provision for recapture of a project threatens the irrigation districts with loss of their entire facility if they engage in small power production.

I am convinced that an appropriate exemption either by legislation or a FERC order would not threaten legitimate environmental, wildlife or safety concerns in our part of the country. The State of Idaho has a long history of dealing with hydroelectric projects and we believe our record of protecting the public health and welfare is excellent in this area. I see no reason why the Federal Energy Regulatory Commission should not be given discretionary authority to effectively allow decisions on irrigation projects to be made at the local level.

Mr. DINGELL. Thank you very much, sir.
Mr. Lanham.

STATEMENT OF LOGAN LANHAM

Mr. LANHAM. My name is Logan Lanham of Boise, Idaho. I am vice president of Public Affairs for the Idaho Power Co. We appreciate the opportunity to present our position and views on S. 1828 and its companion bill H.R. 5417—Milner Dam project.

The Idaho Power Co. is an independent, investor-owned utility, founded in 1916, supplying electric service to nearly 250,000 customers in a 20,000-square-mile area of southern Idaho, northern Nevada, and eastern Oregon. A map depicting the Idaho Power Co.'s service area is attached as exhibit 1. [See exhibits, p. 115.] Idaho Power Co.'s customers have been fortunate in the past that the company has been able to rely heavily on low-cost hydroelectric generation to supply their energy needs. While the company is still one of the Nation's few utilities with primarily a hydro base, the electric demand on Idaho Power's system has increased so rapidly that the company turned early in the 1970's to generation using low-sulphur coal located in the neighboring State of Wyoming.

Growing electric demand requires that the company build substantial additions to its generating capacity, and the company is planning several generating projects to allow it to meet its customers' electric needs. We have just recently completed construction of a new powerplant at the American Falls Reservoir, increasing our

generating capacity at this site from 27,000 to 100,000 kilowatts. We have added a fifth generating unit at Brownlee Dam of 225,000 kilowatts, which is utilized primarily for peaking. We have just completed a fourth generating unit at the Jim Bridger coal-fired plant in Wyoming, adding an additional 167,000 kilowatts to our system. In addition, the 530,000-kilowatt Boardman coal-fired plant in Oregon, in which the company has a 10-percent interest, went into commercial operation just last month. The company, in partnership with the Sierra Pacific Power Co., also has a 50-percent share of two 250,000-kilowatt, coal-fired generating plants which are now under construction near the town of Valmy, Nev.

We have not, however neglected our hydro potential because we are predominantly a hydro-based utility.

We are currently engaged in intensive investigations of low head hydro potential within our service area. At the year's end the company had filed for water rights on nine sites with an aggregate installed capacity of nearly 500,000 kilowatts.

You may remember that we have participated in legislation that went through the House here recently, to allow us to participate with the Boise Project Board of Control, which is a group of irrigation districts to construct an 87,000 kilowatt hydroelectric plant at an existing Army Corps of Engineers dam near Boise, Idaho.

We are working with these irrigation districts and other canal companies to develop hydroelectric facilities on canal drops throughout our area, but even with this substantial construction program, demand is outstripping our supply and the future remains uncertain.

Our population and load growth projections show that even if we were able to construct all of the generating facilities that we have filed for, or applied for, we still will experience winter deficits in 1983 and continuing up through 1990.

The Milner Dam project is one of the projects that we hope will provide the means for reducing those deficiencies in the winter-time, by using generation within our service area and utilizing existing and renewable hydroelectric resource. It is for that reason that we are supporting Senate bill 1828.

The Milner Dam project lies approximately in the center of the Idaho Power Co. service area. It is located, as mentioned, on the Snake River near Twin Falls. This project will divert water from the existing Milner Dam via Twin Falls Canal, South Side Main Canal, and drop into the Snake River downstream of the Milner Dam developing the available head for power generation.

We have also attached exhibits 2 and 3 which are an engineer's drawing and general map of the project and an actual photograph of the forebay and penstocks that would carry the water from the canal through the powerhouse and into the Snake River.

It is somewhat similar to a conduit facility as described in the Public Utility Regulatory Policies Act.

Mr. DINGELL. Without objection, those will also be included.

Mr. LANHAM. Thank you, Mr. Chairman.

The waters available for this power generation are those in excess of the irrigation demand up to the capacity of the canal. The irrigation season is from mid-April to mid-October and the total

capacity of the canal is available for the remainder of the year for power generation.

A preliminary engineering report recommended that the development at this location consist of two units rated at 30,000 kilowatts each. Under median water conditions, the units would generate approximately 162 million kilowatt hours annually, which is equivalent to approximately 270,000 barrels of oil.

The company has made a commitment to assist the irrigators in developing this and other hydroelectric sites within their canal system. This assistance would include financial, engineering, and a firm commitment to purchase all of the energy developed from the facilities.

Now, we have been told, and you have been told today by the irrigators, that if the Milner Dam is included as a project facility and is subject to licensing procedures, including recapture, they would not be willing to proceed with this project. We understand their concern in this regard.

Idaho Power Co. believes that the Milner Dam generating project is a good one. It utilizes a renewable resource, in an innovative way, to produce energy that otherwise would be lost. The people of Idaho and Nevada and Oregon, who are customers of Idaho Power Co., are going to need that energy. For these reasons, Mr. Chairman, we would urge this subcommittee to act favorably on Senate bill 1828 and allow the licensing and development of the Milner project to proceed.

We thank you, Mr. Chairman, for this opportunity to testify. [Attachments to Mr. Lanham's prepared statement follow:]

EXHIBIT 1

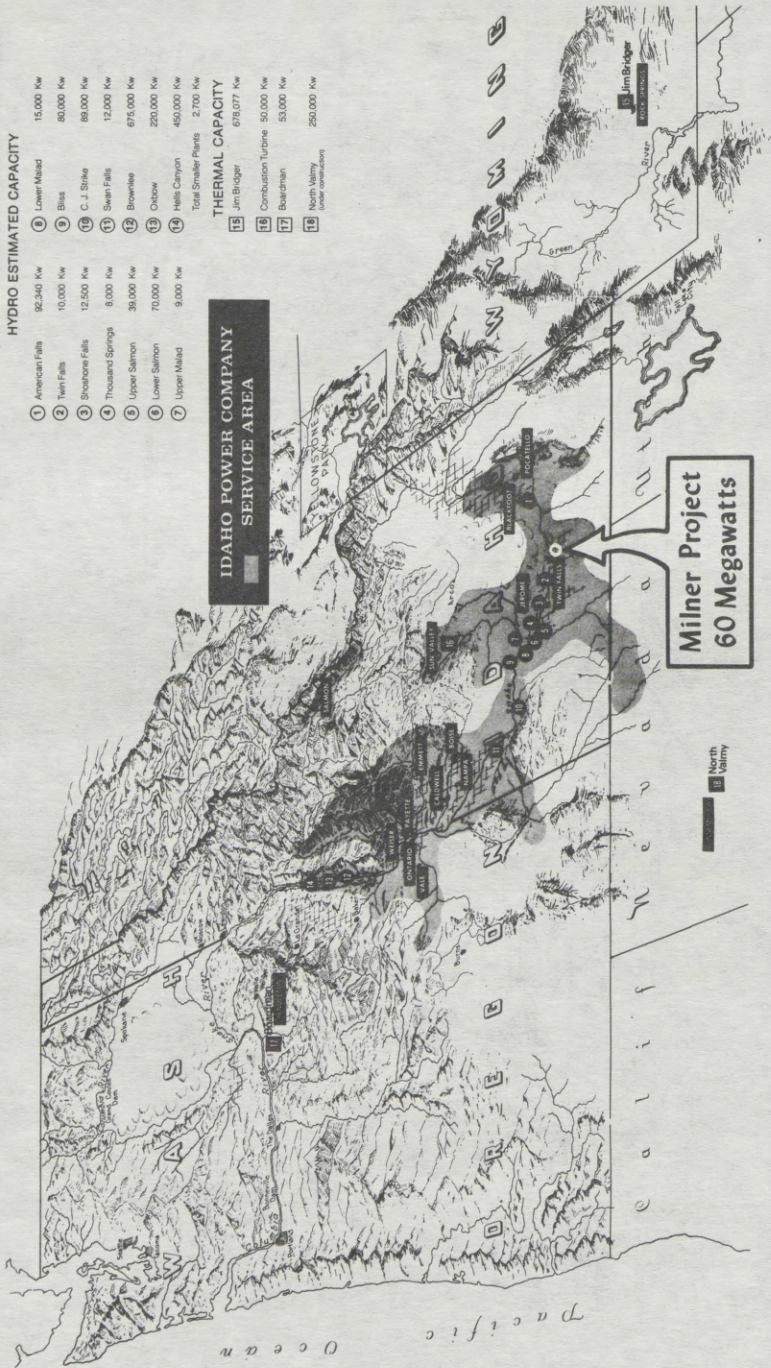
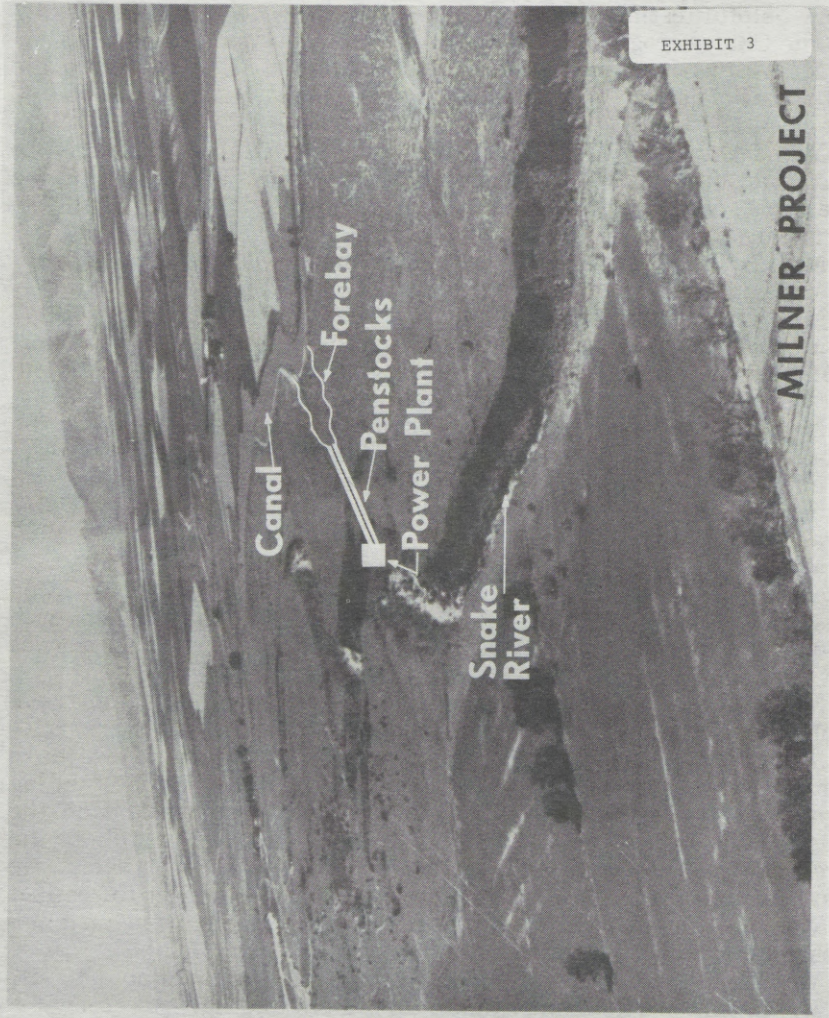




EXHIBIT 2

TWIN FALLS AND NORTHSIDE CANAL COMPANIES
MILNER HYDROELECTRIC PROJECT
GENERAL MAP
B.E.H. INC., ENGINEERS



Mr. DINGELL. Gentlemen, the subcommittee thanks you for your very helpful testimony.

The Chair recognizes first, Mr. Athy, for questions.

Mr. ATHY. Just one question, Mr. Lanham, with respect to the size of the project. Your testimony indicates that it would be 60 megawatts?

Mr. LANHAM. Yes, Mr. Athy, we have looked at the project—we have had our engineers look at it and the flows are such that we feel that two 30,000 kilowatt generators would be the most economical.

Mr. ATHY. There has been no agreement with respect to that? Mr. LANHAM. No sir, there has not.

Mr. ATHY. The original application had a 50-megawatt facility?

Mr. LANHAM. I understand the irrigator's preliminary application was for that. Our engineering findings since then demonstrates to us they can even improve upon it.

Mr. DINGELL. Your financing mechanisms would be, I believe the words used were "hell or high water contract." In other words, I think Idaho Power would be obligated to pay for the interest and principal on the facility during the years that there was no water available, is that right?

Mr. LANHAM. Mr. Chairman, that is one of the requirements that the bonding attorneys have asked for and after having reviewed the project, economically we feel that we can supply them with contract provisions for operation and maintenance and debt service on their bonds and achieve that commitment.

Mr. DINGELL. Have you negotiated any contracts with the irrigation companies?

Mr. LANHAM. At the present time, Mr. Chairman, no, we have not. We have proposed to them a memorandum of understanding similar to the memorandum of understanding that we did on the Lucky Peak project with the Boise Project Board of Control. At the present time they have not responded to that but, nevertheless, we have expended funds to go down and look at the project to see if it is economically feasible and whether it is feasible from an engineering basis.

Mr. DINGELL. Could you make a copy of that available to us?

Mr. LANHAM. The memorandum of understanding?

Mr. DINGELL. Yes.

Mr. LANHAM. The one proposed to them?

Mr. DINGELL. Yes.

Mr. LANHAM. Yes sir, we can.

[The information requested was not available to the subcommittee at the time of printing.]

Mr. DINGELL. Is it contemplated that the power generated by this project would be used for firm power or would it be used for peak?

Mr. LANHAM. Mr. Chairman, our commitment to the irrigation community is that irrigation is No. 1.

Mr. DINGELL. I recognize that. So during the irrigation season you would draw virtually no power from the facility except during flood years, but during the balance of the year would it be used for peaking or would it be used for firm?

Mr. LANHAM. Mr. Chairman, it is contemplated that it is strictly a run of the river project, or when the water is available. We do not contemplate any peaking whatsoever.

Mr. DINGELL. No peaking?

Mr. LANHAM. All this project does is divert the water so that instead of running over the spillway into the Snake River it would flow through a canal and through a penstock back into the river a mile downstream. That is all this does.

Mr. DINGELL. Would any of this power go for irrigation purposes?

Mr. LANHAM. At certain times of the year, if the irrigation load were on at that time, yes, it could conceivably be used for pumping.

Mr. DINGELL. Would this be a part of the contract with the irrigation companies?

Mr. LANHAM. No, at the present time I don't think so, Mr. Chairman.

Mr. DINGELL. You are saying irrigation companies would purchase then the power that would be generated from the dam?

Mr. LANHAM. Mr. Chairman, when you put the power in the grid it is pretty hard to say where it comes from. There would be no contract per se in that fashion.

Mr. ROSHOLT. To a major extent the irrigation companies are gravity application. They are not a pumping—most of them do not have pumping requirements. There are no sprinklers, they are in fact—

Mr. DINGELL. Some of the individual irrigators may have need—

Mr. ROSHOLT. Yes sir, within the Twin Falls and North Side projects of 370,000 some acres in total, I think it is less than 50,000 acres are sprinkled.

Mr. DINGELL. There is no lift?

Mr. ROSHOLT. That is right.

Mr. DINGELL. Other than just sprinkling.

What would be the transaction between the Idaho Power Co. and the irrigation companies? Would you purchase water from them, purchase power from them, make payments to them, or how would that be done?

Mr. ROSHOLT. I can start that, I guess. That is complex, as I view it. We can borrow money cheaper than they can. Although we are not a political subdivision or instrument of the State, we are a quasi-nonprofit corporation and we qualify for certain loans that the U.S. Government makes available.

Mr. DINGELL. Farmers Home?

Mr. ROSHOLT. Through farmers co-ops and whatever. That interest rate is generally a percent less than what Mr. Lanham can borrow money for his company. That is the differential on which we negotiate. As I visualize it, the companies would borrow the money, own the plant, operate, sell all of the generation capability in consideration for which he would in some years pay us a differential if it is a good water year. In other years he would merely guarantee and pay the debt.

Mr. DINGELL. What would the Idaho Power Co. pay the irrigation companies and what would they pay for?

Mr. ROSHOLT. What would they pay for, sir?

Mr. DINGELL. Yes.

Mr. ROSHOLT. For the electricity that they receive.

Mr. DINGELL. They would actually buy electricity.

Mr. ROSHOLT. From this plant. Their facilities are nearby. As kilowatt hour develops they pick it up and put it on their grid.

Mr. DINGELL. You say your companies, the irrigation companies, are nonprofit companies?

Mr. ROSHOLT. Yes sir.

Mr. DINGELL. What would happen then to the moneys they would receive for this water?

Mr. ROSHOLT. As I said earlier, this is just the first of my hurdles, Mr. Chairman. If they have a year in which more than 15 percent of their income comes from other than assessment of their stock they have a taxable year and they would become profitmaking companies in that vernacular for the purpose of the tax laws.

Mr. DINGELL. Would that create problems with regard—

Mr. ROSHOLT. We are analyzing that at this point and it is obviously a point in the negotiations. If all we do is provide a site and bring in the money which subjects us to taxes and we essentially have no net benefit, then why go to the meetings, as it were. It is being analyzed by our accountants and it is hoped that in most cases the places where the money would be spent would be on operation and maintenance items which would be totally deductible. So it does not in fact expose them to taxes even though in fact they would lose their tax-exempt status for the year, they would be exposed to the tax but they would pay none.

Then the question exists, what happens if they rebuild capital improvements on the system or do a major rehab on a siphon or concrete canal, what tax treatment occurs there, and that is the question that has not been definitively answered for me.

Mr. DINGELL. Do you contemplate that you would seek some benefits through this mechanism?

Mr. ROSHOLT. While the Idaho Public Utility Commission and the applicant may disagree to some extent, presently we hold an exemption on canals from the property tax and we would hope that we would be able to hold that. There is a kilowatt hour tax in our State which at this time we would be subject to. There are corporate income taxes, of course, and we would probably be subject to those without some change. We have not at this point approached the Congress with an exemption.

Mr. DINGELL. Would you be seeking any tax exemptions from the Congress?

Mr. ROSHOLT. We would have to restructure our company. If we qualified as an irrigation district, then we could obtain the benefits of the tax-exempt financing, but as of this time we do not. I think that my people would be reluctant to do that for the reason that they have existed under this structure for some 75 years.

Mr. DINGELL. Have you made any studies—either Mr. Rosholt or Mr. Lanham, made any substitutes with regard to the cost of generating the power and the price at which it would be sold?

Mr. ROSHOLT. Mr. Lanham has probably made the study. Our guidance to date has been really to look at what the Idaho Public Utility Commission was doing with the avoided cost rate under PURPA so that would give us some guidance because presumably that number, if the Commission has done their job in setting it,

would be what the competitive rate would now be. I suspect if our costs under a feasibility analysis would cause it to be more expensive than that number, that Mr. Lanham would have to look at it pretty hard.

Mr. LANHAM. Mr. Chairman.

Mr. DINGELL. Any comment?

Mr. LANHAM. Mr. Chairman, we have the chairman of the Commission here.

Mr. DINGELL. We are going to ask him next.

Mr. LANHAM. We have looked at the project in 1978 dollars and 1982 dollars and right at the present time in 1978 it was 38 mills. In 1982—we brought it up to 1982 because that would be about the date when this project would move—it looks like in the neighborhood of 54 mills per kilowatt hour.

Our avoided cost, if we are discussing that, that is applicable to the PURPA legislation looks like it can be in the neighborhood of 45 to 48 mills per kilowatt hour, depending upon what year you are looking at and what facilities that you are utilizing for the determination of your avoided costs.

Mr. DINGELL. I am going to yield to Mr. Athy for a question here.

Mr. ATHY. You are estimating in the year 1982 your avoided cost would be somewhere around 54 mills?

Mr. LANHAM. Not avoided cost, the cost of this project would be in the neighborhood of 54 mills per kilowatt hour.

Mr. ATHY. What are your avoided costs approximately?

Mr. LANHAM. Avoided cost, the Chairman of the IPUC is here and can present their position. At the present time they are computing those. We have had our hearings and the Idaho Commission has not finalized them but it looks like to us like it is somewhere in the neighborhood of \$45, \$48 mills. It could go that high.

Mr. ATHY. Maybe less than the cost of the project?

Mr. LANHAM. It could be. But not in 1982 dollars because you wouldn't get it on the line before 1982 at the earliest. If we started today we are looking at a year to engineer, two to construct, so that is three.

Mr. ATHY. Let me ask Mr. Ward, what is the likely total revenue benefit to the irrigation companies from this project?

Mr. WARD. Mr. Athy, I didn't calculate that. You can make some assumptions on the basis of the estimated kilowatt hour sales per year and just multiply it out by say 45 mills. that would be a pretty good guess. If they choose to go under PURPA, if they choose to sell under our avoided cost rules, there are some complications there, because when the utility, when an irrigation district seeks the utilities essentially to loan its credit on a hell and high water clause, then we have a somewhat different situation than we have with most PURPA sales which contemplate strictly a private investment, private construction, and a sale of the energy.

So I guess what I would have to say to you, I can't give you a really solid answer. We can give you one that is in the neighborhood but that is the best we can do.

Mr. ATHY. Do you have an estimate as to what the revenue benefits of the program would be?

Mr. ROSHOLT. The money that would be, you have to assume a lot of things, you have to assume several average years and contract

negotiations has taken several different tacts, one being that if we had a series of dry years and there was no generation over and above this magical debt service limit, that we would receive no payment.

On the other hand, my people have said we want a given number—that is what we are really negotiating now—but the number would be less than the half million dollars a year from our standpoint.

Mr. ATHY. You would be free to use the power revenues to offset irrigation costs?

Mr. ROSHOLT. That is our thought, that we would take this money and spend it on things that now cost \$2 that 5 years ago cost \$1, and try to keep our assessments down. The farmers own the project and they are the beneficiaries of any involvement here.

Mr. ATHY. How many members are there in the cooperative?

Mr. ROSHOLT. Stockholders?

Mr. ATHY. Yes.

Mr. ROSHOLT. We have a couple cities—200,000 acres of Twin Falls tract, 170,000 of the North Side tract, and a couple of towns—the city of Twin Falls is 25,000. Some of the waters are appurtenant to some of the city lots. Approximately 5,500 shareholders on the Twin Falls Co. and approximately 3,500 on the North Side company.

Mr. ATHY. I have no further questions.

Mr. DINGELL. Mr. Finnegan.

Mr. FINNEGAN. Gentlemen, you have indicated that you wanted to clearly have exemptions from the takeover provisions of the Federal Power Act. Can you speak to what other provisions of the Federal Power Act that you feel you must have exemptions from and indicate why?

Mr. ROSHOLT. Mr. Chairman, Mr. Finnegan, as I stated earlier, we felt that our life became a lot simpler by excluding the facilities that now exist from the recapture provisions. We are also concerned about conditions that would be imposed on those facilities if they were included as a part of the project licensed facility. They have been bandied about.

I think my dam will pass the dam safety inspection. On the other hand, do I really want it in the problem area. My boards of directors who I work for says they do not.

I think we can resolve to the satisfaction of the U.S. Fish and Wildlife Service the fish and wildlife issues. On the other hand, if they don't feel that they get what they want, of course, as to those facilities, they can condition the license.

I look at things like a bypass. While we will agree to a winter-time bypass there is no summertime bypass now. The last license issued in Idaho by FERC required a year around bypass and it was contrary to existing contracts between irrigators and the U.S. Government through the Bureau of Reclamation. These are the kinds of things to further explain my clients' paranoia.

Mr. FINNEGAN. First, let me ask you a question. Are you familiar with the exemptive authority that has been granted for small hydro projects up to 5 megawatts?

Mr. ROSHOLT. Just in a cursory way, Mr. Finnegan. I have filed an application for a hydro exemption from licensing for a conduit

facility within the same Twin Falls systems within the last couple of months.

Mr. FINNEGAN. What if the Congress was to provide you with that authority, similar type of authority for this particular project, that leaving up to FERC to decide outside of fish and wildlife and environmental concerns, decide as to what extent and exemption were to be granted, would that—

Mr. ROSHOLT. Depending on what that said, I may be exactly where I am now.

Mr. FINNEGAN. Not necessarily. FERC would then have authority to exempt from various parts of—from part of the act, which could include the takeover and other matters.

Mr. ROSHOLT. I have got to hedge takeover. I mean, exemption from it. And I would have to look at what else is there.

Mr. FINNEGAN. Takeover is your primary concern?

Mr. ROSHOLT. Certainly I would have to say that in terms of priority.

Mr. DINGELL. For the assistance of the Chair, you want to protect existing facilities against takeover?

Mr. ROSHOLT. Yes sir, if those hereafter would be constructed pursuant to a license, fine.

Mr. DINGELL. You have no feelings on that?

Mr. ROSHOLT. No.

Mr. DINGELL. And no objection to that falling—

Mr. ROSHOLT. I really have no problem in negotiating a water agreement whereby so long as it remains in the irrigators' discretion to turn the head gate, as it were, that the rest of the water would be provided to the project if it were so taken over.

Mr. DINGELL. Now, Mr. Lanham, you have no objection to the 50-year takeover requirement being applied to newly constructed facilities on behalf of Idaho Power, is that right?

Mr. LANHAM. Mr. Chairman, that is a philosophical question, but—

Mr. DINGELL. I know it causes you distress but if applied to all the rest of your facility?

Mr. LANHAM. It would track along with our other licenses.

Mr. DINGELL. So if we treated you on this as we do your other licenses?

Mr. LANHAM. It would be equity.

Mr. DINGELL. I have a list here that we have asked the FERC to deal with on waivers, and some of these are kind of technical and I think what we probably had better do is make these available to you gentlemen and we will try and deal with those, but maybe you had better give me your counsel in a more satisfactory fashion, after you have had a chance to look at Mr. Curtis' assistance to the subcommittee.

These refer to part I of the Federal Power Commission Act. He then refers to parts which—he says section 4(b), except for the second sentence—don't ask me what that is, I don't know. Section 4(e), insofar as results to approval of plans by the Chief of Engineers and the Secretary of the Army. I am not sure you are prepared to comment on that either at this particular time.

Section 6, insofar as relates to public notice and acceptance and expression and license of terms and conditions of the act that are waived.

Section 10 insofar as relates to depreciations reserves. That is sections 10 (c), (d), and (f).

Section 14, except insofar as power of condemnation is reserved, and sections 15, 19, 20, and 22.

Then Chairman Curtis goes on to say as follows:

"These waivers relieve the licensee from developing and supplying original cost information." I would assume you would have no objection to this, since this is sort of almost standard boiler plate, Mr. Lanham. Obtaining Corps of Engineers approval of project plans, I would assume that would fall about in the same category. Providing 30-day notice of license amendments, maintaining depreciation reserves and amortization of reserves, and I would assume you would have no objection to that. That is almost boiler plate. I would suspect that Mr. Ward and the Commission would look to you to do that sort of thing.

Incurring liability for headwater benefits charges—I would assume that is sort of a routine thing again. Being subject to the possibility that at the end of the license term the United States or new licensee might obtain the project at a price net investment plus severance of damages. We already discussed that. Rather than fair value being subjected to a provision permitting temporary use of the project by United States for manufacturing munitions or purposes involving the safety of the United States. Being subject to the possibility of rate and service regulations by the Commission in the absence of State regulation, and the need to obtain prior approval by the Commission and the State Public Service Commission for contracts for the sale of power extending beyond the term of the license.

There is more here, but it relates to waivers that have been given by the Commission. But if you could give me your comments on which of those you find difficult, it would be appreciated.

Mr. WARD. Be happy to, Mr. Chairman.

Mr. DINGELL. Mr. Lanham, I guess I have been directing this to you; do you have any comments you want to make now or would you rather deal with those through the—

Mr. LANHAM. I would rather check those out.

Mr. DINGELL. I think that would be fair.

Mr. Ward, do you have any comments?

Mr. WARD. I think I will take the same out. I have more talented people than I at that sort of business.

Mr. DINGELL. We will respect your wishes on that.

Mr. Rosholt?

Mr. ROSHOLT. I would like a chance to do a little looking. I am a country lawyer, Mr. Chairman.

Mr. DINGELL. As long as you get yourselves out of dealing with the question of the facilities reverting to the Federal Government and we don't apply the law to the existing facilities, it doesn't cause you basically though, as I detect, any particular trouble, is that right?

Mr. ROSHOLT. Mr. Chairman, I like the bill as it is written, but if that is where I end up, it is better than no place, and I appreciate that.

Mr. DINGELL. Gentlemen, I would observe this. The subcommittee is running out of time, as you know. They are talking about an October 4 adjournment. That means that a very quick response to these matters is urgent in your own interests. The committee is anxious to process the legislation as fast as we decently can, but time is somewhat limited on these matters.

Just one question. What would be the total amount of power that you can figure in a good year and how many bad years would you anticipate you would run into on the basis of irrigation usage, if you please?

Mr. LANHAM. Mr. Chairman, our people have looked at the water flows in that stretch of the river since they were first recorded. In the case of our power generation projections, we are computing all of our power generation on median flows. The generation that I mentioned this morning is the average annual energy flow or generation in median years and that is 162 million kilowatt hours.

As you know, in median, half the time you are right and half the time you are wrong. That is the basis that the economics were computed on and also the size of the units.

Mr. DINGELL. Now, if you were to leave 58 cubic feet per second, I think that is the amount that was indicated by fish and wildlife as being needed to preserve the winter fishery in the stream, what would that do in terms of compelling a decline in the production of power there?

Mr. LANHAM. Mr. Chairman——

Mr. DINGELL. Would there be a significant loss?

Mr. LANHAM. That takes into consideration that 58 cubic feet per second.

Mr. DINGELL. That takes into consideration the figures you have stated?

Mr. LANHAM. Yes sir. You see, Mr. Chairman, when we look into a project—I have my environmental engineer here also—we go out and cover it as thoroughly as possible without writing up a report. We look at all aspects of it and all that is all taken into consideration.

Mr. DINGELL. So you have no objection, I guess?

Mr. LANHAM. No, we would not.

Mr. DINGELL. Gentlemen, we have kept you a long time. We thank you for your assistance. I suggest that some speed in the response to the questions would be in order, and we may have need of some further advice or counsel from you, if either Mr. Finnegan or Mr. Athy has to get hold of you, it is appreciated.

The subcommittee stands adjourned.

[Whereupon, at 1:30 p.m., the hearing was adjourned.]

1. The first part of the report is a general introduction to the subject of the study.

2. The second part of the report is a detailed description of the methods used in the study.

3. The third part of the report is a discussion of the results of the study.

4. The fourth part of the report is a conclusion and a list of references.

5. The fifth part of the report is a list of appendices.

6. The sixth part of the report is a list of figures and tables.

7. The seventh part of the report is a list of footnotes.

8. The eighth part of the report is a list of references.

