

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Idaho Power Company

Project No. 2726-012

ORDER ISSUING NEW LICENSE

(Issued March 25, 2005)

1. This order issues, pursuant to sections 4(e) and 15 of the Federal Power Act (FPA),¹ a new license to Idaho Power Company (Idaho Power or licensee) to continue operation and maintenance of the 21.77-megawatt (MW) Upper and Lower Malad Project (Malad Project) No. 2726. The Project is located on the Malad River, a tributary of the Snake River,² in Gooding County, Idaho. The project does not occupy any federal lands.
2. This order is in the public interest because it preserves the benefits of hydroelectric generation, will not result in any major, long-term adverse environmental impacts, and includes enhancements to the existing aquatic and terrestrial environments, recreation, and cultural resources. We find therefore that issuance of a new license for the Malad Project, with the conditions attached hereto, will serve the public interest because it is best adapted to the comprehensive development of the Snake River Basin.

¹ 16 U.S.C. §§ 808 and 797, respectively.

² The project is required to be licensed pursuant to section 23(b)(1) of the FPA, 16 U.S.C. § 817(1), because it is located on a Commerce Clause stream (*i.e.* a tributary to the Snake River, a navigable waterway of the United States, *see* 14 FPC 71 (1955)); it underwent construction or major modification after 1935; and it affects the interests of interstate commerce because of its interconnection with the interstate electrical grid.

Background

3. The Commission issued the original license for the Malad Project in 1979.³ It expired on July 31, 2004. The project continues to operate under an annual license.⁴ On July 29, 2002, Idaho Power filed its application for a new license for the project. The Commission issued public notice of the application,⁵ setting May 20, 2003, as the deadline to file comments, protests, and motions to intervene. The State of Idaho, the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation (Shoshone-Paiute Tribes), and Idaho Rivers United timely intervened.

4. In May 2004, the Commission issued for comment a draft Environmental Assessment (EA) that evaluated the potential environmental impacts of continued operation of the Malad Project. The U.S. Fish and Wildlife Service (FWS), the Idaho Department of Parks and Recreation (Idaho DPR), the Shoshone-Paiute Tribes, and Idaho Rivers United filed comments on the draft EA. In September 2004, the Commission issued a final EA for the project. The EA concludes that issuance of a new license for the Malad Project, with environmental measures recommended by the Commission staff, would not constitute a major federal action significantly affecting the quality of the human environment.

5. On December 16, 2004, a delegation from the Commission conducted separate government-to-government consultation meetings with representatives of the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation (Shoshone-Bannock Tribes) and the Shoshone-Paiute Tribes on matters related to the proposed relicensing of the Malad Project. The transcripts of these meetings have been placed in the record of this proceeding.⁶

³ 8 FERC ¶ 62,051 (1979). The 1979 license for the Malad Project was backdated to 1965 and given a 25-year prospective term, pursuant to our policy at the time for projects that were required to have been licensed years earlier. In 1992, we adopted a new policy for these projects, no longer backdating the licenses. *See City of Danville, VA.*, 58 FERC ¶ 61,318 at 62,020 -21.

⁴ *See* FPA section 15(a)(1), 16 U.S.C. § 808(a)(1).

⁵ 68 *Fed. Reg.* 15164 (March 28, 2003).

⁶ *See* consultation meeting transcripts, issued on December 16, 2004.

6. The Commission has considered all the comments and interventions filed in this proceeding in determining whether, and under what conditions, to issue a new license for the Malad Project.

Project Description

7. The Malad Hydroelectric Project is comprised of an upper and lower development with a total installed capacity of 21.77 MW. The upper development includes a 100-foot-long, 25-foot high gated dam located on the Malad River at river mile (RM) 2.1.⁷ Streamflow at the upper dam is diverted by a 44-foot-wide, screened, flume intake section that directs the flow into a 15-foot-wide flume that runs parallel to the river for a distance of about 4,600 feet downstream. At a point about 450 feet downstream of the upper diversion dam, additional flow from Cove Creek, a small, spring-fed tributary of the Malad River, is directed into the flume by a 5-foot-high diversion dam and associated 90-foot-long aqueduct. The combined diverted flow from Cove Creek and the Malad River travels the 4,600-foot length of the flume to an intake structure that then directs the flow to a 10-foot-diameter, 240-foot-long steel penstock. The penstock delivers up to 990 cubic feet per second (cfs) of water to a single, vertical Francis turbine housed in a powerhouse located at about RM 1.1. The turbine generator has an installed capacity of 8.27 MW. The powerhouse discharges the flow back to the Malad River. A 0.76-mile-long, 46-kilovolt (kV) project transmission line carries the generator output to Idaho Power's Hagerman sub-station, which is not part of the project.

8. The lower development, located immediately downstream from the upper development's powerhouse, consists of a 163-foot-long, 16-foot-high gated diversion dam and a 56-foot-wide, screened, flume intake section that diverts flow from the Malad River into a 5,318-foot-long flume. The flume carries the flow to an intake structure that then directs the flow to a 12-foot-diameter, 301-foot-long penstock. The penstock delivers up to 1,400 cfs of water to a single, vertical Francis turbine housed in a concrete powerhouse located on the Snake River about 1,000 feet downstream of the confluence with the Malad River. The lower development turbine generator has an installed capacity of 13.5 MW. The powerhouse discharges the Malad River flow into the Snake River. A switchyard located next to the lower development's powerhouse contains a transformer that connects the generator output to Idaho Power's non-project, 138-kV transmission line.

⁷ River mile 2.1 denotes a location on the river 2.1 miles upstream of the river mouth.

9. There is no appreciable amount of storage (less than one acre) at either of the project's two developments. The project currently operates as a run-of-river facility whereby outflows from the project approximate inflows. The project's current annual generation is 177,574 megawatt-hours (MWh).

10. The hydraulic capacity of the upper development is 950 cfs and of the lower development is 1,400 cfs. Idaho Power currently releases a minimum flow of 70 cfs into the Malad River 656 feet downstream of the lower diversion dam. There are currently no minimum flow releases to the Malad River between the lower and upper diversion dams; however, flow always occurs in this reach due to numerous springs that arise from the canyon walls adjacent to the river.

11. The project boundary of the Malad Project encompasses 274.1 acres and includes the above described project reservoirs and facilities. The boundary, as shown in the Exhibit G drawing approved in Ordering Paragraph (C) of this order, is delineated by a combination of survey courses and distances and topographic features. Topographic features defining the boundary include the top of Malad River Canyon for a portion of the boundary along the north side of the canyon, and the eastern side of the Snake River for a portion of the boundary that follows the Snake River.

Relicensing Proposal

12. Idaho Power proposes to continue operating the Malad Project as a run-of-river facility while increasing current minimum flows in the project's lower reach from 70 cfs to 100 cfs. Idaho Power also proposes to relocate the project's minimum flow release point from its current location 656 feet downstream from the project's lower dam upstream to an existing notch in the lower dam. Idaho Power does not propose any change in the project's current maximum hydraulic capacity of 950 cfs at the upper development and 1,400 cfs at the lower development.

13. Idaho Power also proposes implementing measures for the protection and enhancement of project area resources. These proposed measures include:

- (1) implementing an operation and maintenance plan to avoid planned power plant shutdowns during spawning, incubation, and early rearing periods for rainbow trout;
- (2) implementing a snail protection plan for the Cove Creek project area;
- (3) implementing a habitat enhancement program to control noxious weeds, reseed disturbed areas, and minimize habitat disturbances associated with project operation and maintenance;
- (4) implementing an historic properties management plan;
- (5) implementing a recreation plan to develop specified recreation facilities; and
- (6) improving and maintaining project area aesthetic values by implementing a plan to blend project facilities with the surrounding landscape.

Water Quality Certification

14. Under section 401(a)(1) of the Clean Water Act (CWA),⁸ the Commission may not issue a license for a hydroelectric project unless the state water quality certifying agency has issued water quality certification for the project or has waived certification by failing to act within a reasonable period of time, not to exceed one year.⁹ Section 401(d) of the CWA provides that state certification shall become a condition of any federal license or permit that is issued.¹⁰ Only a reviewing court can revise or delete those conditions.¹¹

15. The Idaho Department of Environmental Quality (Idaho DEQ) issued timely water quality certification for the Malad Project on March 13, 2003. The certification requires Idaho Power to comply with the total maximum daily load (TMDL) for the Malad River as set forth in Idaho DEQ's Big Wood River Watershed Management Plan. TMDL is generally defined as the sum of the allowable loads of a single pollutant from all contributing point and nonpoint sources that a waterbody can receive and still meet state water quality standards.¹² Ordering Paragraph (E) incorporates the certification into this license. A copy of the certification is included in the Appendix to this order.

Threatened And Endangered Species

16. Section 7(a) of the Endangered Species Act of 1973 (ESA)¹³ requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species, or result in the destruction or adverse modification of designated critical habitat. When a federal agency determines that a

⁸ 33 U.S.C. § 1341(a)(1).

⁹ The Commission's regulations provide the full one-year waiver period. *See* 18 C.F.R. § 4.34(b)(5)(iii) (2004).

¹⁰ 33 U.S.C. §1341(d).

¹¹ *See American Rivers v. FERC*, 129 F.3d 99 (D.C. Cir. 1997).

¹² Section 303(d)(1) of the CWA requires states to develop a list of waterbodies not meeting state water quality standards and to establish TMDL's that meet state water quality standards. Section 303(d)(2) of the CWA requires states to submit such lists and TMDL's to the U.S. Environmental Protection Agency for approval.

¹³ 16 U.S.C. § 1536(a).

proposed action may affect a threatened or endangered species, it must consult with FWS or the National Marine Fisheries Service (NOAA Fisheries) and obtain a biological opinion on whether the action is likely to result in a violation of the ESA. After the initiation of formal consultation, section 7(d) of the ESA¹⁴ prohibits an agency from making any irreversible or irretrievable commitment of resources that would foreclose the formulation or implementation of any reasonable and prudent alternative measures that would not violate section 7(a)(2).

17. Federally listed species that occur in or near the Malad Project are: the threatened bald eagle, gray wolf, and Bliss Rapids snail; and the endangered Utah valvata snail, Idaho springsnail, Snake River physa snail, and Banbury Springs lanx snail. The Commission staff's draft EA issued on May 3, 2004, concluded that the project proposed for relicensing is not likely to adversely affect the threatened Bliss Rapids snail and would have no effect on the threatened bald eagle and gray wolf, or the endangered Idaho springsnail, Utah valvata snail, Snake River physa snail, and Banbury Springs lanx snail. On May 4, 2004, Commission staff requested FWS's concurrence with staff's determinations.

18. By letter dated May 27, 2004, FWS informed the Commission that it disagreed with the Commission staff's determination that the project is not likely to adversely affect the Bliss Rapids Snail and that it would proceed with formal consultation pursuant to section 7 of the ESA and prepare a biological opinion (BO) on the Bliss Rapids snail. On June 28, 2004, Commission staff initiated formal consultation on the Bliss Rapids snail. In September of 2004 the Commission staff issued a final EA reaffirming the draft EA's findings on the other six listed species cited above.¹⁵

19. FWS issued its BO on January 7, 2005, finding that relicensing the project as proposed by Commission staff would not jeopardize the continued existence of the Bliss Rapids snail, and that, since no critical habitat for the snail has been designated, none will be affected by the proposed relicensed project. FWS also concurred with the Commission staff finding that the proposed relicensed project would have no effect on the bald eagle, gray wolf, Idaho springsnail, Utah valvata snail, Snake River physa snail, and Banbury Springs lanx snail.

¹⁴ 16 U.S.C. § 1536(d).

¹⁵ Final EA section V.C.2 at 53.

20. Section 7(b) of the ESA provides that if, after consultation, the ESA agency concludes that the proposed action will not jeopardize the continued existence of a species, the ESA agency shall provide the action agency with a written statement that specifies the impact of incidental taking on the species, specifies those reasonable and prudent measures that the ESA agency considers necessary or appropriate to minimize such impact, and sets forth the terms and conditions that must be complied with to implement those measures.

21. The BO includes an incidental take statement that specifies a single reasonable and prudent measure: reduction of harm, harassment, and mortality to Bliss Rapids snail populations during project shutdowns for planned maintenance and repairs. Restricting planned shutdowns would avoid adverse impacts associated with poor water quality and high flows that could disrupt breeding patterns and dislodge adult snails and eggs.

22. To implement this measure, the BO specifies compliance with four conditions, which have been included in this new license: (1) restricting project shutdowns for maintenance, repair, and inspections to three periods, April 1 through April 30 at the lower development, and April 1 through April 30 and October 15 through November 30 at the upper development (Article 403); (2) providing a 300-cfs-per-hour ramping rate during shutdowns for planned maintenance, repair, and inspections (Article 404); (3) requiring project power plants to be brought back online as soon as possible after emergency or forced shutdowns (Article 403); and (4) notifying FWS within 48 hours of emergency shutdowns that occur between April 30 and October 15 and between November 30 and April 1 (Article 403).

23. The BO also stipulates, and this license includes, three reporting and monitoring requirements to track the level of take and compliance with the terms of the incidental take statement: (1) monitoring and reporting the frequency and occurrence of shutdown events on an annual basis and the ramping rates and river stages associated with planned shutdown events (Article 405); (2) monitoring snail population distribution and densities on a biennial basis in reaches of the Malad River affected by flow changes from project shutdowns (Article 407); and (3) including the snail monitoring results in the annual report to the FWS required by the ESA section 10 Recovery Permit (Article 407).¹⁶ In addition, Article 406 requires implementation of Idaho Power's plan for the protection of the federally listed snails in the Cove Creek area of the project.

¹⁶ This is an annual permit that is issued to allow the holder to undertake surveys and other studies that could harm or harass a listed species without violating section 9 of the ESA.

Section 18 of the FPA

24. Section 18 of the FPA¹⁷ states that the Commission shall require construction, maintenance, and operation by a licensee of such fishways as may be prescribed by the Secretaries of Commerce or the Interior. Neither agency has prescribed fishways at the Malad Project or requested that the Commission reserve authority to prescribe fishways in the future.

Recommendations Under Section 10 of the FPA**A. Recommendations Pursuant to Section 10(j) of the FPA**

25. Section 10(j)(1) of the FPA¹⁸ requires the Commission, when issuing a license, to include conditions based on recommendations of federal and state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act¹⁹ to "adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat)" affected by a project. If the Commission believes that any such recommendation may be inconsistent with the purpose and requirements of Part I of the FPA, or other applicable law, section 10(j)(2) requires the Commission and the agencies to attempt to resolve such inconsistencies, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If the Commission still does not adopt a recommendation, it must explain how the recommendation is inconsistent with Part I of the FPA or other applicable law and how the conditions imposed by the Commission adequately and equitably protect, mitigate damages to, and enhance fish and wildlife resources.

¹⁷ 16 U.S.C. § 810.

¹⁸ 16 U.S.C. § 803(j)(1).

¹⁹ 16 U.S.C. § 661 *et seq.*

26. Idaho DFG submitted five²⁰ recommendations for the Malad Project that fall within the scope of section 10(j). The license contains conditions consistent with four of the recommendations. The adopted measures require: (1) development and implementation of a plan to provide upstream and downstream fish passage with appropriate access flows at the project's upper and lower diversion structures (Article 408); (2) development of a project maintenance schedule to limit power plant shutdowns to times other than the spawning and early rearing period for rainbow trout²¹ (Article 405); (3) release of the licensee's proposed average daily minimum flow of 100 cfs, or inflow if less, from the lower development dam, with an allowance for a 5 percent deviation on nonconsecutive days and an instantaneous minimum flow of 90 cfs, or inflow if less (Article 402);²² and (4) relocation of the minimum flow release point from its current location about 650 feet downstream of the lower development dam to a point at the lower development dam (Article 402).

²⁰ The EA at 81 and 82 indicates incorrectly that Idaho DFG made the additional recommendation that Idaho Power monitor bypassed reach trout populations specifically to determine effectiveness of minimum flows. Rather, Idaho DFG suggested that Idaho Power consider conducting an analysis of the relationship between trout habitat and flow in the middle reach in any future project monitoring efforts. *See* letter to the Commission from Idaho State Agencies, filed on December 31, 2003, at 28. Although higher flows in the middle reach could increase habitat for adult trout, the benefit would be offset by poorer water quality (EA at 32). Therefore, although this license does not require monitoring for purposes of providing additional flows for trout habitat in the middle reach, it does require monitoring of trout populations to evaluate the effectiveness of the upstream and downstream fishways.

²¹ The spawning and early rearing period for rainbow trout is October 1 through March 31 downstream of the project's lower development and May 1 through September 30 downstream of the upper development.

²² The purpose of the allowance is to allow Idaho Power time to access the project to make adjustments to the flow releases in response to changes in project inflow. The allowance would be for one 24-hour period (one day) per occurrence so as to prevent the allowance from occurring on consecutive days. *See* EA at 31. The 90-cfs lower limit for releases would prevent large swings from releases lower than 90 cfs to releases greater than 100 cfs that could damage aquatic resources.

27. This license does not include Idaho DFG's recommendation²³ to establish and implement a ramping rate of one to two inches per hour downstream of the project diversion dams during planned powerhouse shutdowns five days a year²⁴ for the protection of trout. Studies by Idaho Power show that there is no substantial upstream or downstream displacement of juvenile and adult trout during powerhouse shutdowns and that, due to the channelized nature of the Malad River in the project area, there is very little potential for stranding of juvenile and adult trout caused by powerhouse shutdowns.²⁵ Therefore, the minimal benefits of providing ramping rates during planned shutdowns for only a few days a year do not justify the \$50,000 to \$100,000 annual cost of doing so.²⁶ The recommendation thus conflicts with the comprehensive planning and public interest standards of sections 4(e) and 10(a) of the FPA.²⁷

28. As noted above, this license does include Article 403, which restricts planned powerhouse shutdowns to protect spawning, incubation, and early rearing life stages of trout. Other measures included in the license will provide considerable additional benefits to all life stages of trout in the Malad River and Snake River, including run-of-river operations (Article 401), minimum flow releases (Article 402), and construction and operation of fishways (Article 408). These measures will adequately and equitably protect, mitigate damages to, and enhance fish and wildlife resources.

²³ FWS made a similar request pursuant to section 10(a) of the FPA.

²⁴ The Commission staff made a preliminary determination that the recommendation was inconsistent with the FPA or applicable law. Idaho DFG did not request a meeting with staff to resolve the inconsistency. *See* EA at 84.

²⁵ EA at 27 and 28.

²⁶ EA at 81.

²⁷ An expensive minimally-beneficial mitigation measure that conflicts unduly with other project purposes or values (including a project's economic benefits) may be deemed inconsistent with the balancing of development and environmental values in the Commission's determinations under the equal consideration/comprehensive development standards of FPA sections 4(e) and 10(a)(1). *See Wisconsin Valley Improvement Company, et al.*, 76 FERC ¶ 61,054 at 61,307 (1996).

B. Recommendations under Section 10(a) of the FPA

29. Section 10(a)(1) of the FPA²⁸ requires that any project for which the Commission issues a license shall be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce; for the improvement and utilization of waterpower development; for the adequate protection, mitigation, and enhancement of fish and wildlife; and for other beneficial public uses, including irrigation, flood control, water supply, recreation, and other purposes.

30. Idaho DFG made two recommendations that are outside the scope of section 10(j); consequently, we consider these recommendations under the broad public interest standard of FPA section 10(a)(1). Additionally, FWS, which failed to file timely section 10(j) recommendations, filed four recommendations that we also consider pursuant to section 10(a) of the FPA.²⁹

31. This license does not adopt Idaho DFG's recommendation that Idaho Power assess the flow needed to assist fish passage through the area of the Malad River immediately downstream of the upper dam.³⁰ Article 408 requires Idaho Power, in consultation with fish and wildlife agencies, and Indian tribes, to design, construct, operate, and evaluate fishways at the project dams consistent with Idaho Power's previously filed conceptual fishway designs. Those designs show that the flow exiting the upper diversion dam fishway would be 12 cfs, which would facilitate fish passage through the reach in the area of the fishway.³¹

²⁸16 U.S.C. § 803(a)(1).

²⁹ On January 16, 2004, FWS filed a request for an extension (to February 6, 2004) of the proceeding's January 2, 2004 deadline for filing comments, recommendations, prescriptions, or terms and conditions. The Commission denied the request on January 23, 2004. FWS later filed its recommendations on February 10, 2004.

³⁰ Such an assessment could have been conducted prior to licensing, and therefore does not fall within the scope of section 10(j). *See* 18 C.F.R. § 4.30(b)(9)(ii) (2004).

³¹ *See* EA at 32.

32. This license also does not adopt Idaho DFG's recommendation that Idaho Power file an annual statement that details Idaho Power's compliance with the environmental requirements of this license.³² The Commission already has an established license condition compliance tracking program requiring regular reports from licensees. However, Article 408 does include a provision requiring Idaho Power to establish reporting requirements associated with disseminating fish population and fishway monitoring results to Idaho DFG and FWS.

33. This license adopts three out of four recommendations made by FWS under section 10(a) of the FPA. The adopted measures require: (1) development and implementation of a fish passage plan (Article 408); (2) protection of the genetic integrity of native redband trout in Cove Creek (Article 408);³³ and (3) development and implementation of an operational compliance monitoring plan to avoid power plant shutdowns during the spawning and early rearing period of rainbow trout (Article 403).³⁴

34. This license does not adopt FWS' recommendation that the licensee develop and implement an agreement with FWS for minimum flows in the bypassed reaches downstream of the three project diversion dams. This license already includes a minimum flow requirement for the bypassed reach downstream of the lower development dam (Article 402). The benefits of providing flow releases to the bypassed reach below the upper development dam would be offset by reduced water quality in the reach. Implementation of minimum flow releases would dilute the high quality water that comes

³²Idaho DFG's recommendation is not for a specific measure to protect, mitigate damages to, or enhance fish and wildlife, and therefore does not fall within the scope of section 10(j).

³³ This recommendation by FWS is vague and does not specifically address how to accomplish the objective of protecting the genetic integrity of the trout other than contemplating the need for specific measures at some point in the future if such a need should arise. The intent of this recommendation, however, is achieved through Article 408, which requires that fishways be constructed on the project's dams on the Malad River and not on the project's dam on Cove Creek. The result is that for the time being the redband trout population residing in Cove Creek will remain isolated and protected from introgression from outside trout populations. EA at 35.

³⁴ The operational compliance monitoring plan required by Article 403 does not provide for a 2-inches-per-hour ramping rate as sought by FWS in its recommendation. As noted in our discussion above of section 10(j) recommendations, the benefits of such a ramping rate do not justify its \$50,000 to \$100,000 estimated annual cost.

from spring inflows with the warmer and more turbid surface runoff that is delivered from the Big Wood and Little Wood Rivers and from irrigation returns.³⁵ The short length (45 feet) of the bypassed reach below the 5-foot-high dam on Cove Creek and the lack of trout habitat located there would limit any benefits to releasing minimum flows into the reach.³⁶

35. Without offering specifics about the timing and duration of flows, the Shoshone-Paiute Tribes and Idaho Rivers United urge consideration of restoration of Malad River flows to a more natural hydrograph. Such a restoration, however, is unwarranted.³⁷ The license does increase minimum instream flows from 70 to 100 cfs; however, the EA finds that higher flows might introduce irrigation return flows that would degrade water quality in the Malad River's lower reach.³⁸ Continued run-of-river operation of the project provides for optimal utilization of the waterway with fewer adverse impacts.

36. Asserting that hydroelectric development has limited its ability to exercise its rights under treaties with the United States to hunt and fish within the river basin, the Shoshone-Paiute Tribes contend that the Malad Project has contributed to adverse impacts to the health of its members. They also contend that additional ethnographic studies of project area sites and resources of cultural significance to the tribes are needed to protect such resources. To help mitigate and prevent harm to fish and wildlife and cultural resources, the Shoshone-Paiute Tribes, along with the Shoshone-Bannock Tribes, request³⁹ that the Commission afford the tribes greater opportunity to review, prior to implementation, proposed measures for the protection and enhancement of fish and wildlife and cultural resources of importance to the tribes.⁴⁰

³⁵ EA at 31-32.

³⁶ EA at 32.

³⁷ See transcript of consultation meeting with the tribes issued on December 16, 2004, at 70, and Idaho Rivers United's comments filed on January 2, 2004, at 3.

³⁸ See EA at 29.

³⁹ See ShoshonePaiute Tribes motion to intervene filed on May 20, 2003, at 6-9 and transcript of consultation meeting with the tribes issued on December 16, 2004, at 56-57.

⁴⁰ The Shoshone-Paiute Tribes asserted in their June 17, 2004, comments on the draft EA that the Commission must engage in government-to government consultation with it. As discussed above, see P 4, *supra*, a delegation from the Commission conducted
(continued)

37. We agree that greater input from the two tribes on project activities is warranted in this proceeding. The new license therefore requires that the Shoshone-Paiute Tribes and the Shoshone-Bannock Tribes be consulted on the development of the required fish passage plan (Article 408), habitat enhancement program (Article 409), Cove Creek Snail Protection Plan (Article 406), Bliss Rapids snail monitoring plan (Article 407), and the Historic Properties Management Plan (Article 413).

Adequacy of Environmental Analysis

38. Intervenors Shoshone-Paiute Tribes and Idaho Rivers United each oppose Commission action on Idaho Power's relicensing application, contending that an environmental impact statement (EIS) for the project should have been prepared instead of an EA.⁴¹ Both argue that the EA for the project is inappropriate because relicensing the project as proposed is a major federal action significantly affecting the quality of the human environment, an action that under the National Environmental Policy Act (NEPA)⁴² requires an EIS. Questioning the EA's conclusions, they assert that the range of project alternatives examined in the EA is inadequate. They also assert that the Commission staff's environmental analysis fails to address the cumulative impact of activities other than Commission authorized projects in the Malad River Basin on

government-to-government consultation with the Tribes on December 16, 2004. The Tribes further stated that the Commission must identify and address environmental justice issues as referenced in Executive Order 12898. While we have previously concluded that Executive Order 12898 is, by its terms, not applicable to independent regulatory agencies including the Commission, *see, e.g., Sound Energy Solutions*, 107 FERC ¶ 61,263 at P 109 (2004), Commission staff nonetheless explained in the final EA that it had sought to address the effects of the proposed relicensing on tribal rights and resources and concluded that cultural and environmental resources, including fishery resources associated with the project, would be protected and enhanced by the project as proposed by Idaho Power and modified by staff's recommendations. In addition, during the environmental review process, staff received no studies or data to indicate that continued operation of the project would contribute to any environmental or human-health risks to Native Americans or other low-income and minority communities. *See* EA at B-2 (response to Comment 3).

⁴¹ *See* the Shoshone-Paiute Tribes' motion to intervene and Idaho Rivers United's comments, filed on May 20, 2003, and June 17, 2004, respectively.

⁴² 42 U.S.C. §§ 4321 -61.

resources such as redband trout, Shoshone sculpin, white sturgeon, and listed snail species. Idaho Rivers United also argues that an EIS is needed because the proposed relicensed project would have a negative impact on the threatened Bliss Rapids snail.

39. An EIS is not required in this proceeding. Nor is the EA deficient. We have reviewed Idaho Power's relicensing proposal and the entire record of this proceeding, including alternative development scenarios and recommendations from various entities. The EA adequately assesses the probable impacts of relicensing on water and aquatic, terrestrial, cultural, recreational and aesthetic resources, and threatened and endangered species. Staff in the EA finds no convincing evidence that Idaho Power's relicensing proposal would have significant environmental impacts on the environment with respect to the resources examined. In addition, the BO supports the findings of the EA by concluding that relicensing is not likely to jeopardize the continued existence of the Bliss Rapids snail.

40. With regard to adequacy of the EA and the range of alternatives it analyzes, under NEPA, the range of alternatives that must be discussed in an environmental analysis is a matter within an agency's discretion.⁴³ A discussion of environmental alternatives need not be exhaustive and need only provide sufficient information to permit a reasoned choice of alternatives.⁴⁴ The EA for the Malad Project examined an appropriate range of alternatives for the size and scope of the proposed relicensing measures: the licensee's relicensing proposal as submitted, the licensee's proposal as modified by staff's recommendations, and a no-action alternative (continued project operation under original license terms).

41. The EA also adequately analyzed the cumulative impact of activities, other than operation of Commission-licensed projects, on environmental resources in the project area. The EA noted that human activities such as aquaculture, agriculture and irrigation, ranching, road construction, and residential development could in combination with the project operation influence the Malad and Mid-Snake Rivers' water quality and aquatic resources, such as fish passage and spawning; terrestrial resources, such as riparian and wetland habitats; and recreational activities, such as white-water boating. The EA accordingly analyzed cumulative impacts on some resources from the Malad River upstream of the project to its confluence with the Snake River at RM 571 of the Snake River and from as far upstream on the Snake River as Shoshone Falls at RM 613 to the

⁴³See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551-52 (1976).

⁴⁴See *North Carolina v. Federal Power Commission*, 533 F.2d 702 (1976).

downstream C.J. Strike Project at RM 518.⁴⁵ The EA's cumulative impact analysis accordingly incorporates relevant parts of the Commission staff's Mid-Snake River EIS on the recent relicensing of four Idaho Power projects in the Mid-Snake River Basin, the Bliss, Lower Salmon Falls, Upper Salmon Falls, and Shoshone Falls Projects (Project Nos. 1975, 2061, 2777, and 2778, respectively).⁴⁶ The Mid-Snake River EIS assessed the cumulative impact of hydropower and non-hydropower activities from Milner Dam at RM 639 above Shoshone Falls to the downstream Lower Granite Dam at RM 151 below Hells Canyon, a distance of nearly 500 miles.⁴⁷

42. Supported by the Mid-Snake River EIS and the rest of the record, the EA for the Malad Project reasonably concluded that continued operation of the project is not expected to contribute to the adverse cumulative effects on the white sturgeon and Shoshone sculpin populations in the Snake River. The EA finds further that operation of the project as proposed for relicensing with its increased 100-cfs minimum flows would increase available habitat for spawning and juvenile and adult rainbow trout. It concluded that the proposed project would generally contribute to basin-wide efforts to restore redband trout populations and would likely benefit the Bliss Rapids snail.

Historic Properties

43. On November 9, 2004, the Idaho State Historic Preservation Officer and the Commission executed a Programmatic Agreement (PA) for managing historic properties that may be affected by the relicensing and continued operation of the Malad Project. Article 413 of the new license requires the licensee to implement the agreement, including but not limited to an Historic Properties Management Plan for the project that

⁴⁵ See EA Section V.B.

⁴⁶ See EIS for Mid-Snake River Project Nos. 2778, 2777, 2061, and 1975, issued on August 22, 2002. The Commission in separate orders granted new licenses for the four Mid-Snake projects on August 4, 2004.

⁴⁷ The Mid-Snake EIS evaluated the cumulative effects of the five above-named Idaho Power projects on resources of concern, including water quality and quantity, sediment transport, resident fish, federally listed aquatic mollusks, riparian/wetland habitat, bald eagles, native grasslands and shrublands, and recreation use patterns. See Mid-Snake River EIS, at 335-355.

will be finalized within one year after license issuance. The agreement serves to satisfy the Commission's responsibilities under section 106 of the National Historic Preservation Act.⁴⁸

State and Federal Comprehensive Plans

44. Section 10(a)(2) of the FPA requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans for improving, developing, or conserving a waterway or waterways affected by the project. We have identified 11 comprehensive plans⁴⁹ that are applicable to the Malad Project. We have reviewed these plans and have found no conflicts.⁵⁰

⁴⁸ 16 U.S.C. § 470s.

⁴⁹ (1) Monument Resource Area Proposed Management Plan and Final Environmental Impact Statement, 1984, Bureau of Land Management, Department of the Interior, Shoshone, Idaho; (2) Land and Resource Management Plan for the Sawtooth National Forest, 1987, USDA Forest Service, Twin Falls, Idaho; (3) Draft white sturgeon management plan: Status and objectives of Idaho's white sturgeon resources in the Snake River. Idaho Department of Fish and Game, Boise, Idaho. August 2003; (4) Idaho Fisheries Management Plan - 2001 to 2006, 2001, Idaho Department of Fish and Game, Boise, Idaho; (5) Idaho Water Quality Standards and Wastewater Treatment Requirements, 1997, Idaho Department of Health and Welfare, Division of Environment, Boise, Idaho; (6) Idaho Statewide Comprehensive Outdoor Recreation Plan (SCORP) 2003-2007, Idaho Department Parks and Recreation Boise, Idaho; (7) State Water Plan, 1992 (Revised), Idaho Water Resource Board, Boise, Idaho; (8) Comprehensive State Water Plan, Snake River: Milner Dam to King Hill, 1993, Idaho Water Resource Board; (9) Northwest Conservation and Electric Power Plan, 1998 (Revised), Northwest Power Planning Council, Portland, Oregon; (10) Protected Areas Amendments and Response to Comments, Document 88-22, 1988, Northwest Power Planning Council, Portland, Oregon; and (11) 2000 Columbia River Basin Fish and Wildlife Program, 2000 (Revised), Northwest Power Planning Council, Portland, Oregon.

⁵⁰ We are including in the license Article 410, which reserves to the Commission the authority to require future alterations in project structures and operations to take into account, to the fullest extent practicable, the applicable provisions of one of the reviewed comprehensive plans, the Columbia River Basin Fish and Wildlife Program.

Applicant's Plans and Capabilities

45. In accordance with sections 10(a)(2)(C) and 15(a) of the FPA, we have evaluated Idaho Power's record as a licensee with respect to the following: (A) conservation efforts; (B) compliance history and ability to comply with the new license; (C) safe management, operation, and maintenance of the project; (D) ability to provide efficient and reliable electric service; (E) need for power; (F) transmission service; (G) cost effectiveness of plans; and (H) actions affecting the public.

A. Conservation Efforts

46. FPA section 10(a)(2)(C) requires the Commission to consider the extent of electric consumption efficiency programs in the case of license applicants primarily engaged in the generation or sale of electric power. Idaho Power is such an applicant. Idaho Power has programs to promote cost-effective conservation and load management for residential, commercial, industrial, and agricultural customers and funds regional energy conservation initiatives through the Northwest Energy Efficiency Alliance. Through these programs, Idaho Power is making satisfactory efforts to conserve electricity and reduce peak hour demands.

B. Compliance History and Ability to Comply with the New License

47. Based on a review of Idaho Power's compliance with the terms and conditions of the existing license, we find that Idaho Power's overall record of making timely filings and of compliance with its license is satisfactory. We conclude that Idaho Power has or can acquire the resources and expertise necessary to carry out its plans and comply with all articles and terms and conditions of a new license.

C. Safe Management, Operation, and Maintenance of the Project

48. We reviewed Idaho Power's management, operation, and maintenance of the Malad Project. We conclude that the dams and other project works are safe, and that there is no reason to believe that Idaho Power cannot continue to safely manage, operate, and maintain these facilities under a new license.

D. Ability to Provide Efficient and Reliable Electric Service

49. We reviewed Idaho Power's plans and its ability to operate and maintain the project in a manner most likely to provide efficient and reliable electric service. We find that Idaho Power has been operating the project in an efficient manner within the constraints of the existing license and is likely to continue to do so under a new license.

E. Need for Power

50. Idaho Power, a public utility supplying electricity to residential, wholesale, commercial, and industrial users, owns and operates the Malad Project. The 21.77-MW Malad Project operates in run-of-river mode and contributes to Idaho Power's electric generating resources.

51. The energy generated at the project is used to meet Idaho Power's system load requirements. Idaho Power operates 17 hydroelectric facilities, totaling 1,707 MW of nameplate capacity. These hydroelectric facilities provide about 1,071 average megawatts, or about 60 percent, of Idaho Power's total system requirements under median water conditions. The balance of Idaho Power's firm generation resources are coal-fired thermal, gas-fired combustion turbine, purchases from independent power producers, and wholesale power purchases. In recent years, the peak load growth in southwest Idaho has averaged 50 MW per year.

52. In addition to Idaho Power's need for power, we looked at the regional need for power. The Malad Project is located in the Northwest Power Pool (NWPP) area of the Western Electricity Coordinating Council (WECC) region. The NWPP area includes all or major portions of the states of Washington, Oregon, Idaho, Wyoming, Montana, Nevada, and Utah; a small portion of northern California; and the Canadian provinces of British Columbia and Alberta. For the period 2003 through 2012, WECC anticipates peak demand and annual energy requirements in the NWPP area to grow at annual compound rates of 2.5 and 2.3 percent, respectively. Resource capacity margins for this winter-peaking area range between 30.5 and 42.1 percent of firm peak demand over this 10-year period, assuming planned additions totaling 11,863 MW are constructed on schedule. For the WECC region as a whole, the summer reliability margin is projected to fall below the recommended minimum of 14 to 15 percent by about 2010 without the new capacity additions that were uncommitted as of the December 2003 date of the WECC's Ten-Year Coordinated Plan Summary.

53. We conclude that the region has a need for power over the near term and that the Malad Project, which supplies a part of the current regional electricity demand, could continue to help meet part of the regional need for power. We conclude further that present and future use of the project's power, its low cost, its displacement of nonrenewable fossil-fired generation, and its contribution to a diversified generation mix support a finding that the power from the Malad Project will help meet a need for power in the northwest and throughout the entire WECC region in both the short and long term.

F. Transmission Services

54. The project transmission facilities that are required to be licensed include the 0.76-mile-long, 46-kV transmission line connecting the project power from the upper development powerhouse to Idaho Power's integrated transmission system. Idaho Power proposes no changes that would affect transmission facilities.

G. Cost Effectiveness of Plans

55. Idaho Power is not proposing, nor does this order approve, any change in the installed capacity at the Malad Project. Idaho Power does propose numerous plans and operational procedures for the protection, mitigation, and enhancement of environmental resources in the Malad River Basin. Idaho Power's past record as a licensee indicates it is likely to carry out these plans in a cost-effective manner.

H. Actions Affecting the Public

56. In its license application, Idaho Power cited examples of actions it has taken that affect the public, including: development of recreation sites within the project and offering educational programs to schools and other groups on electrical safety, efficient use of electricity, and the environment. Idaho Power also pays taxes annually to local and state governments, and the project provides employment opportunities.

Economic Benefits of Project Power

57. In determining whether a proposed project will be best adapted to a comprehensive plan for developing a waterway for beneficial public purposes, the Commission considers a number of public interest factors, including the economic benefit of the project power. As was articulated in *Mead Corp.*,⁵¹ we employ an analysis that uses current costs to compare the costs of the project and likely alternative power, with no forecasts concerning potential future inflation, escalation, or deflation beyond the license issuance date. The basic purpose of the analysis is to provide general estimates of the potential power benefits and costs of a project, and reasonable alternatives to project power.

58. Under the no-action alternative, the Malad Project generates 177,574 MWh annually. The current annual value of this amount of power is \$9.070 million (about \$51/MWh), and the current annual cost is \$1.373 million (about \$8/MWh), resulting in a

⁵¹72 FERC ¶ 61,027 (1995).

net annual benefit of \$7.697 million (about \$43/MWh).⁵² As proposed by Idaho Power, the project would generate 175,843 MWh annually, with a power value of \$8.969 million (about \$51/MWh), an annual cost of \$1.410 million (about \$8/MWh), and a net annual benefit of \$7.558 million (about \$43/MWh).

59. As licensed in accordance with the requirements adopted herein, the project will produce the same amount of energy and have the same power value as Idaho Power's proposal. The cost of production will increase to \$1.625 million annually (about \$9/MWh), resulting in a net annual benefit of \$7.343 million (about \$42/MWh). Thus, based on current costs, the project's average net benefits will decrease by \$0.354 million annually compared to the no-action alternative.

License Term

60. Section 15(e) of the FPA,⁵³ specifies that any new license issued shall be for a term that the Commission determines to be in the public interest, but not less than 30 years or more than 50 years from the date on which the license is issued. Our general policy is to establish 30-year terms for projects with little or no proposed redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures; 40-year terms for projects with a moderate amount thereof; and 50-year terms for projects with an extensive amount thereof.⁵⁴

61. We find that the environmental mitigation measures required by this license are minor in scope, and therefore a 30-year term is appropriate.

Comprehensive Development

62. Sections 4(e) and 10(a)(1) of the FPA⁵⁵ require the Commission, in acting on license applications, to give equal consideration to the developmental and non-developmental uses of the waterway on which a project is located. Any license issued shall be such as in the Commission's judgment is best adapted to a comprehensive plan

⁵² All generation and cost information is taken from the EA. Power value is based on the cost of replacing project power with new combined cycle combustion turbine capacity.

⁵³ 16 U.S.C. § 808(e).

⁵⁴ See *Consumers Power Company*, 68 FERC ¶ 61,077 at 61,383-384 (1994).

⁵⁵ 16 U.S.C. § 797(e) and 803(a)(1).

for improving or developing a waterway or waterways for all beneficial public uses. The decision to license this project, and the terms and conditions included herein, reflect such consideration.

63. In analyzing public interest factors, the Commission takes into account that hydroelectric projects offer unique operational benefits to the electric utility system (ancillary benefits). Although the Malad Project does not have any appreciable storage, which is required for some ancillary service purposes, it will retain under this license any ancillary capabilities it currently provides to Idaho Power’s system.

64. Based on our review of Idaho Power’s relicensing proposal and other alternatives, we conclude that operation of the Malad Project as proposed, with the additional enhancement measures recommended by staff, will be best adapted to a comprehensive plan for the use, conservation, and development of the Malad River and its tributaries for beneficial public purposes. Operation of the project in the manner required by this license will protect and enhance fish and wildlife resources, water quality, recreational resources, and cultural resources. The electricity generated from the Malad Project will be beneficial, because it will continue to reduce the use of fossil-fueled, electric generating plants, thereby conserving nonrenewable energy resources and reducing atmospheric pollution.

The Commission orders:

(A) This license is issued to Idaho Power Company (licensee) to operate and maintain the Upper and Lower Malad Hydroelectric Project, for a period of 30 years, effective the first day of the month in which this order is issued. The license is subject to the terms and conditions of the FPA, which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the FPA.

(B) The project consists of:

(1) All lands, to the extent of the licensee's interests in those lands, enclosed by the project boundary shown by Exhibit G, filed on March 28, 2003.

<u>Exhibit G-</u>	<u>FERC Drawing</u>	<u>Showing</u>
1	<u>No. 2726-</u> 1009	Project Boundary

(2) Project works consisting of:

The upper development consists of: (1) a concrete diversion dam with a 100-foot-long gated spillway section and a 44-foot-wide flume intake section; (2) an impoundment, about 0.9 acres in surface area with a total volume of about 5 acre-feet; (3) a 4,635-foot-long, 15-foot-wide concrete flume with an 80-foot-long overflow spillway and three reject siphons located 304.5 feet upstream of the penstock intake structure; (4) a 105-foot-long, 5-foot-high diversion dam diverting Cove Creek flows to the flume via a 90-foot-long, 3-foot-radius semi-circular steel aqueduct; (5) an 80.5-foot-long, 21-foot-wide concrete intake structure; (6) a 238-foot-long, 10-foot-diameter welded steel penstock; (7) a reinforced concrete powerhouse containing one vertical Francis turbine generator having an installed capacity of 8.27 megawatts (MW); (8) a 0.76-mile-long, 46-kilovolt transmission line running from the powerhouse to the Hagerman substation; and (9) appurtenant facilities.

The lower development consists of: (1) a concrete diversion dam located immediately downstream of the upper development powerhouse consisting of a 163-foot-long gated spillway section and a 56-foot-wide flume intake section; (2) an impoundment about 0.7 acre in surface area with a total volume of about 5 acre-feet; (3) a 5,318-foot-long, 17-foot-wide concrete flume with a 250-foot-long reject overflow spillway located 2,194 feet upstream of the penstock intake structure and a reject overflow structure located 157 feet upstream of the penstock intake structure; (4) an 85-foot-long, 23-foot-wide concrete intake structure; (5) a 301-foot-long, 12-foot-diameter welded steel penstock; (6) a reinforced concrete powerhouse containing one vertical Francis turbine generator having an installed capacity of 13.5 MW; and (7) appurtenant facilities.

The following parts of exhibit A and the following exhibit F drawings conform to the Commission's rules and regulations and are to be approved and made a part of the license:

Exhibit A:

Sections A.1, A.2, and A.3 of the Exhibit A, filed on March 28, 2003.

Exhibit F:

Exhibit F drawings as shown by Exhibit F, filed on March 28, 2003.

<u>Exhibit F-</u>	<u>FERC Drawing</u> <u>No. 2726-</u>	<u>Showing</u>
1	1001	General Site Plan
2	1002	Upper Malad Dam & Flume
3	1003	Cove Creek Diversion

<u>Exhibit F-</u>	<u>FERC Drawing</u> <u>No. 2726-</u>	<u>Showing</u>
4	1004	Upper Malad Site Plan
5	1005	Cross Section Units 1, 2 & 3
6	1006	Upper Malad Powerhouse
7	1007	Lower Malad Dam & Diversion
8	1008	Lower Malad Powerhouse

(3) All of the structures, fixtures, equipment or facilities used to operate or maintain the project and located within the project boundary, all portable property that may be employed in connection with the project and located within or outside the project boundary, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) Exhibits A, F, and G, as designated in ordering paragraph (B) above, are approved and made a part of this license.

(D) Idaho Power Company's Cove Creek Snail Protection Plan, filed on September 26 2003, is approved and made a part of this license.

(E) This license is subject to the conditions submitted by the Idaho Department of Environmental Quality under section 401 of the Clean Water Act, as those conditions are set forth in the Appendix to this order.

(F) This license is subject to articles set forth in Form L-10 (October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting The Interests of Interstate or Foreign Commerce", and the following additional articles.

Article 201. Administrative Annual Charges. The licensee shall pay the United States the following annual charges, effective as of the first day of the month in which this license is issued:

For the purposes of reimbursing the United States for the Commission's administrative costs, pursuant to Part I of the Federal Power Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 21,770 kilowatts.

Article 202. Amortization Reserve. Pursuant to section 10(d) of the Federal Power Act, a specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. The licensee shall set aside in a project

amortization reserve account at the end of each fiscal year one half of the project surplus earnings, if any, in excess of the specified rate of return per annum on the net investment. To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year, the licensee shall deduct the amount of that deficiency from the amount of any surplus earnings subsequently accumulated, until absorbed. The licensee shall set aside one-half of the remaining surplus earnings, if any, cumulatively computed, in the project amortization reserve account. The licensee shall maintain the amounts established in the project amortization reserve account until further order of the Commission.

The specified reasonable rate of return used in computing amortization reserves shall be calculated annually based on current capital ratios developed from an average of 13 monthly balances of amounts properly included in the licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rate for such ratios shall be the weighted average cost of long-term debt and preferred stock for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10-year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

Article 203. Exhibit Drawings. Within 45 days of the date of issuance of this license, the licensee shall file the approved exhibit drawings in aperture card and electronic file formats.

a) Three sets of the approved exhibit drawings shall be reproduced on silver or gelatin 35mm microfilm. All microfilm shall be mounted on type D (3-1/4" X 7-3/8") aperture cards. Prior to microfilming, the FERC Drawing Number (*e.g.*, P-1234-#### through P-1234-####) shall be shown in the margin below the title block of the approved drawing. After mounting, the FERC Drawing Number shall be typed on the upper right corner of each aperture card. Additionally, the Project Number, FERC Exhibit (*e.g.*, F-1, G-1, etc.), Drawing Title, and date of this license shall be typed on the upper left corner of each aperture card.

Two of the sets of aperture cards shall be filed with the Secretary of the Commission, ATTN: OEP/DHAC. The third set shall be filed with the Commission's Division of Dam Safety and Inspections Portland Regional Office.

b) The licensee shall file two separate sets of exhibit drawings in electronic format with the Secretary of the Commission, ATTN: OEP/DHAC. A third set shall be filed with the Commission's Division of Dam Safety and Inspections Portland Regional Office. The drawings must be identified as (CEII) material

under 18 CFR § 388.113(c). Exhibit G drawings should be submitted as non-internet public (NIP) information in accordance with 18 C.F.R. § 388.112 (2004). Each drawing must be a separate electronic file, and the file name shall include: FERC Project Drawing Number, FERC Exhibit, Drawing Title, date of this license, and file extension [*e.g.*, P-1234-#####, G-1, Project Boundary, MM-DD-YYYY.TIF]. Electronic drawings shall meet the following format specification:

IMAGERY - black & white raster file
FILE TYPE – Tagged Image File Format, (TIFF) CCITT Group 4
RESOLUTION – 300 dpi desired, (200 dpi min)
DRAWING SIZE FORMAT – 24” X 36” (min), 28” X 40” (max)
FILE SIZE – less than 1 MB desired

Each Exhibit G drawing that includes the project boundary must contain a minimum of three known reference points, arranged in a triangular format. The latitude and longitude coordinates, or state plane coordinates, of each reference point must be shown and identified on the drawing. In addition, each project boundary drawing must be stamped by a registered land surveyor.

c) The licensee shall file three separate sets of the project boundary vector data in a geo-referenced electronic file format (such as ArcView shape files, GeoMedia files, MapInfo files, or any similar format) with the Secretary of the Commission, ATTN: OEP/DHAC. The file name shall include: FERC Project Number, data description, date of this license, and file extension [*e.g.*, P-1234, boundary vector data, MM-DD-YYYY.SHP]. The geo-referenced electronic boundary data file must be positionally accurate to ± 40 feet in order to comply with National Map Accuracy Standards for maps at a 1:24,000 scale. A single electronic boundary data file is preferred and must contain all reference points shown on the individual project boundary drawings. The latitude and longitude coordinates, or state plane coordinates, of each reference point must be shown. The data must be accompanied by a separate text file describing the map projection used (*i.e.*, UTM, State Plane, Decimal Degrees, etc), the map datum (*i.e.*, North American 27, North American 83, etc.), and the units of measurement (*i.e.*, feet, meters, miles, etc.). The text file name shall include: FERC Project Number, data description, date of this license, and file extension [*e.g.*, P-1234, project boundary metadata, MM-DD-YYYY.TXT].

Article 204. Headwater Benefits. If the licensee's project was directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement during the term of the original license (including extensions of that term by annual licenses), and if those headwater benefits

were not previously assessed and reimbursed to the owner of the headwater improvement, the licensee shall reimburse the owner of the headwater improvement for those benefits, at such time as they are assessed, in the same manner as for benefits received during the term of this new license. The benefits shall be assessed in accordance with Part 11, Subpart B, of the Commission's regulations.

Article 301. Contract Plans and Specifications. At least 60 days before starting any license-related construction activities, the licensee shall submit one copy to the Division of Dam Safety and Inspections, Portland Regional Engineer, and two copies to the Commission (one of these shall be a courtesy copy to the Director, Division of Dam Safety and Inspections) of a supporting design report and final contract plans and inspections. The Commission may require changes to the plans and specifications to assure the work is completed in a safe and environmentally sound manner. Construction may not commence until authorized by the Regional Engineer.

Article 302. Quality Control and Inspection Program. At least 60 days before starting any license-related construction or ground-disturbing activities, the licensee shall submit one copy to the Division of Dam Safety and Inspections, Portland Regional Engineer, and two copies to the Commission (one of these shall be a courtesy copy to the Director, Division of Dam Safety and Inspections), of the Quality Control and Inspection Program (QCIP) for the Commission's review and approval. The QCIP shall include a sediment and erosion control plan.

Article 303. Cofferdams. Before starting construction, the licensee shall review and approve the design of contractor-designed cofferdams. At least 30 days before starting construction of the cofferdams, the licensee shall submit one copy to the Division of Dam Safety and Inspections, Portland Regional Engineer, and two copies to the Commission (one of these shall be a courtesy copy to the Director, Division of Dam Safety and Inspections), of the approved cofferdam construction drawings and specifications and the letters of approval.

Article 304. Temporary Emergency Action Plan. At least 60 days before starting any license-related construction activities, the licensee shall submit one copy to the Division of Dam Safety and Inspections, Portland Regional Engineer, and two copies to the Commission (one of these shall be a courtesy copy to the Director, Division of Dam Safety and Inspections) of the Temporary Emergency Action Plan (TEAP) for the Commission's review and approval. The TEAP shall describe emergency procedures in case of failure of a cofferdam, large sediment control structure, or any other water retaining structure that could endanger construction workers or the public. The TEAP

shall include a public notification list of emergency response agencies, a plan drawing of the proposed cofferdam arrangement, the location of safety devices and escape routes, and a brief description of testing procedures.

Article 305. *As-Built Drawings.* Within 90 days of completion of construction of the facilities authorized by any article of this license, the licensee shall file, for Commission approval, eight copies of the revised Exhibits A, F, and G, as applicable, to describe and show the project as built. The licensee shall file six copies with the Commission's Secretary, one copy to the Division of Dam Safety and Inspections – Portland Regional Engineer, and one copy to the Director, Division of Hydropower Administration and Compliance, Office of Energy Projects.

Article 401. *Project Operation.* The licensee shall operate the project in a run-of-river mode for the protection of aquatic resources in the Malad River, Cove Creek, and the Snake River.

The licensee shall at all times act to minimize fluctuations of the surface elevations of the upper reservoir on the Malad River and Cove Creek by maintaining a discharge from the upper development so that, at any point in time, flows, as measured immediately downstream from the upper development tailrace, when combined with spill flows and other upper development releases, approximate the sum of inflows to the upper development reservoir.

The licensee shall at all times act to minimize fluctuation of the lower reservoir surface elevation by maintaining a discharge from the lower development so that, at any point in time, flows, as measured immediately downstream from the lower development tailrace when combined with spill flows and other lower development releases, approximate the sum of inflows to the lower development reservoir.

Run-of-river operation may be temporarily modified if required by operating emergencies beyond the control of the licensee, and for short periods upon mutual agreement among the licensee, Idaho Department of Fish and Game, U.S. Fish and Wildlife Service, and Idaho Department of Environmental Quality. If run-of-river operation is so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each such incident.

Article 402. *Minimum Flow.* The licensee shall release from the lower dam into Malad River an average daily minimum flow of 100 cubic feet per second (cfs), as measured at the United States Geological Survey gage no. 13153500, or inflow to the lower development reservoir, whichever is less, for the protection of aquatic resources in the Malad River.

The flow release shall at no time drop below an instantaneous minimum flow of 90 cfs, or inflow, if less.

The average daily minimum flow requirement may be reduced by up to 5 percent for no more than one day (24-hour period) per event in order to allow the licensee the flexibility to respond to changes in inflow.

The licensee may release part or all of the minimum flow through the lower development upstream fishway required by Article 408.

This flow requirement may be temporarily modified if required by operating emergencies beyond the control of the licensee, and for short periods upon mutual agreement among the licensee, Idaho Department of Fish and Game, U.S. Fish and Wildlife Service, and Idaho Department of Environmental Quality. If the flow is so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each such incident.

Article 403. Project Shutdowns. The licensee shall limit planned powerhouse shutdown events at the project for maintenance, repair, and inspections to the following periods: (1) from April 1 through April 30 at the project's lower development; and (2) from April 1 through April 30 and from October 15 through November 30 at the upper development. The purpose of the controlled shutdown events is to protect spawning, incubation, and early rearing habitat of rainbow trout and to protect all life stages of the Bliss Rapids snail (Taylorconcha serpenticola).

The above schedule for planned powerhouse shutdowns may be temporarily modified for short periods upon mutual agreement among the licensee, Idaho Department of Fish and Game, U.S. Fish and Wildlife Service (FWS), and Idaho Department of Environmental Quality. If the schedule is so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each such incident.

In the event of emergency or forced powerhouse shutdowns, the project's plants shall be brought back on line, or rejection flows released into the rejection spillways, as soon as possible to minimize disturbance to the natural river channel. Pursuant to condition (d) of the FWS biological opinion filed on January 10, 2005, the licensee shall notify the FWS within 48 hours of emergency shutdowns that occur during the period between April 30 and October 15 and/or November 30 and April 1.

Article 404. *Project Ramping Rates.* Pursuant to condition (b) of the U.S. Fish and Wildlife Service (FWS) biological opinion filed on January 10, 2005, the licensee shall, when shutting down project operation at the Malad Project for planned maintenance, repair, and inspections, ramp flows at a rate of 300 cubic feet per second per hour. The purpose of the ramping rate is to protect and enhance the biological integrity of the Malad River. Flows shall be measured at the project's upper and lower diversion structures, as appropriate.

The ramping rates may be temporarily modified, if required by operating emergencies beyond the control of the licensee and for short periods of time upon mutual agreement among the licensee, Idaho Department of Fish and Game, Idaho Department of Environmental Quality, and FWS. If the ramping rates are so modified, the licensee shall notify the Commission and the agencies as soon as possible, but no later than 10 days after each incident.

Article 405. *Operational Compliance Monitoring Plan.* Within six months of license issuance, the licensee shall file with the Commission, for approval, an operational compliance monitoring plan.

The plan shall include at a minimum:

- (1) a description of the exact location, method of calibration, and frequency of recording for each gage or measuring device, and a monitoring schedule;
- (2) a description of how the project shall maintain compliance with the operational requirements of Articles 401, 402, and 404;
- (3) an operations maintenance schedule showing how planned project shutdowns shall be scheduled to maintain compliance with Article 403;
- (4) a provision for maintaining a log of project operation and generation;
- (5) a provision for annually reporting to the U.S. Fish and Wildlife Service (FWS) the dates, times, durations, and purpose of all shutdown events, and in the case of planned shutdown events ramping rates and river stage changes as stipulated in FWS biological opinion filed on January 10, 2005;
- (6) a provision for providing the gaging and project operation and generation data to the FWS, Idaho Department of Fish and Game (Idaho DFG), and Idaho Department of Environmental Quality (Idaho DEQ) within 30 days of the date of the agency's request for the data; and

- (7) an implementation schedule for the plan.

The licensee shall prepare the plan after consultation with the U.S. Geological Survey (USGS), FWS, Idaho DFG, Idaho DEQ, the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, and the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies and tribes, and specific descriptions of how the agencies' and the tribes' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies and tribes to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Implementation of the plan shall not begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 406. Cove Creek Snail Protection Plan. The licensee shall implement the Cove Creek Snail Protection Plan included as part of the "Response to FERC Additional Information Request 9: Listed Snails – Cove Creek – Final Report" filed on September 26, 2003, approved in Ordering Paragraph (D), with the exception that project operation shall be as stipulated in Article 401 instead of as stipulated in section 6.1.1.1.2 of the plan.

Any proposed changes in the plan, including further restriction or elimination of public access to Cove Creek as contemplated in section 6.1.1.1.5 of the plan, shall be filed with the Commission for approval after consultation with the U.S. Fish and Wildlife Service, the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, and the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation. The licensee shall allow a minimum of 30 days for the agency and tribes to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

By January 31 of each license year, the licensee shall file with the Commission the snail monitoring report specified in section 6.1.2.1.2 of the plan. If the results of the monitoring indicate that changes in project structures or operations are necessary to protect federally listed snails, the Commission may direct the licensee to modify project structures or operations.

Article 407. *Bliss Rapids Snail Monitoring Plan.* Pursuant to the monitoring and reporting requirements of the U.S. Fish and Wildlife Service (FWS) biological opinion filed on January 10, 2005, the licensee shall file within six months of license issuance a Bliss Rapids Snail Monitoring Plan for Commission approval. The purpose of the monitoring plan is to determine the distribution and densities of Bliss Rapids snails in the reaches of the Malad River affected by project shutdowns.

The monitoring plan shall include the following items: (1) a description of the monitoring methods; (2) a provision to conduct the monitoring on a biennial (every two years) basis; and (3) a schedule for filing the monitoring results with the FWS and the Commission.

The licensee may combine the report on the monitoring results with the annual report it files with the FWS pursuant to its scientific sampling and recovery permit issued under section 10 of the Endangered Species Act.

The licensee shall prepare the plan after consultation with the FWS, the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, and the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations of the plan after it has been prepared and provided to the FWS and the two tribes, and specific descriptions of how the agency's and tribes' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agency and tribes to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 408. *Fish Passage Plan.* Within one year of license issuance, the licensee shall file for Commission approval a Fish Passage Plan for purposes of providing upstream and downstream fish passage at the upper and lower diversion dams of the Malad Project.

The plan at a minimum shall include:

(1) a provision to construct, operate, and maintain upstream and downstream fishways at the project and establish fishway and population monitoring protocols and

reporting requirements as conceptually described and scheduled in section 2.4.3 of the licensee's "Response to FERC Additional Information Request 8: Fish Passage – Final Report" filed on September 26, 2003;

(2) a provision to file at least 90 days before the start of any land-clearing or land-disturbing activities associated with constructing a particular passage facility, detailed design drawings of the facility together with a plan for monitoring and evaluating the effectiveness of the facility to provide upstream or downstream passage or to reduce entrainment of fish, as appropriate;

(3) a provision to include with each of the monitoring plans, criteria for determining the success of upstream or downstream passage, as appropriate;

(4) a provision for the licensee to prepare each design drawing and monitoring plan after consultation with the U.S. Fish and Wildlife Service (FWS), the Idaho Department of Fish and Game (Idaho DFG), the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, and the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation; and

(5) an implementation schedule.

The licensee shall prepare the plan after consultation with the FWS, Idaho DFG, the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, and the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation. The licensee shall include with the design drawings and plan documentation of consultation, copies of comments and recommendations on the plan after it has been prepared and provided to the agencies and tribes, and specific descriptions of how the agencies' and tribes' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the consulted parties to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the drawings and plan. Land-clearing or land-disturbing activities associated with constructing a facility shall not begin until the licensee is notified by the Commission that the filing is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 409. Habitat Enhancement Program. Within one year of license issuance, the licensee shall file for Commission approval and, upon approval, implement a habitat enhancement program to control state-listed noxious weed species and high-priority non-native invasive weeds during and following project-related ground-disturbing activities. At a minimum, the plan shall include:

- (1) a description of weed control methods to be used;
- (2) a description of plant species that shall be used and planting densities for reseeding with native species or other desirable plants for wildlife;
- (3) fertilization and irrigation requirements, if any;
- (4) a monitoring program to regularly evaluate the effectiveness of the weed control and reseeding efforts;
- (5) provisions for coordinating with the Idaho Department of Parks and Recreation (Idaho DPR) about management of invasive cheatgrass at Malad Gorge State Park adjacent to the project;
- (6) a description of procedures to be followed if monitoring reveals that weed control and reseeding efforts are not successful;
- (7) an implementation schedule that provides for annual weed control and reseeding, as well as weed control and reseeding efforts as soon as practicable after the beginning of any land-clearing or land-disturbing activities within the project area; and
- (8) provisions for filing monitoring and management reports with the Commission.

The plan shall be developed in consultation with the U.S. Fish and Wildlife Service, Idaho DPR, Idaho Department of Fish and Game, the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, and the Gooding County weed control superintendent. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consulted parties, and specific descriptions of how the agencies and tribes' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the

agencies and tribes to comment and to make recommendations prior to filing the plan with the Commission for approval. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the habitat enhancement program. Upon Commission approval, the licensee shall implement the program, including any changes required by the Commission.

Article 410. Columbia River Basin Fish and Wildlife Program. The Commission reserves the authority to order, upon its own motion or upon the recommendation of federal and state fish and wildlife agencies, affected Indian Tribes, and the Pacific Northwest Electric Power and Conservation Planning Council, alterations of project structures and operations to take into account to the fullest extent practicable the regional fish and wildlife program developed and amended pursuant to the Pacific Northwest Electric Power Planning and Conservation Act.

Article 411 Recreation Plan. Within six months of license issuance, the licensee shall file for Commission approval and, upon approval, implement a final recreation plan to enhance project recreational facilities and opportunities. The plan shall provide for the following within the project:

- (1) continued operation and maintenance of Fountain Park, located at the northwest corner of the U.S. Highway 30 Bridge over the Malad River;
- (2) continued operation and maintenance of the Malad/Snake Confluence Whitewater Access Site to provide whitewater boating access;
- (3) an interpretive and education program to provide information regarding Malad River flow to boaters using the river from March through October;
- (4) a litter pick-up program consisting of litter pick-up at least 3 times per year at public access areas within the project boundary;
- (5) enhancements to visitor access to Lower Malad Park by developing a hardened trail and concrete walkway that shall be designed to accommodate the needs of the disabled;
- (6) improvements to the turnaround parking area near the access gate to the project's upper diversion dam;
- (7) installation of portable toilets at Fountain Park and near the project's lower diversion dam during the recreation high-use season;

- (8) construction and maintenance of a kayak portage trail around the lower diversion dam;
- (9) construction and maintenance of a kayak access trail downstream of the upper diversion dam; and
- (10) placement and maintenance of rock barriers to better define the existing parking area midway between the upper and lower diversion dams.

The plan shall also include, at a minimum, the following:

- (1) final site plans for the recreation facilities, including portage trails;
- (2) design drawings of signs and kiosks and a description of where they shall be located;
- (3) a discussion of how the needs of the disabled were considered in the planning and design of the recreation facilities;
- (4) appropriate erosion and sediment control measures;
- (5) an implementation schedule, and
- (6) estimated costs for the construction and maintenance of each facility.

The licensee shall prepare the final recreation plan in consultation with Idaho Department of Parks and Recreation, Idaho State Historic Preservation Officer, Idaho Department of Fish and Game, U.S. Fish and Wildlife Service, Bureau of Land Management, National Park Service, and Idaho Rivers United. The licensee shall include with the plan the name of the entity responsible for operating and maintaining the facilities; documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consulted parties, and specific descriptions of how the consulted parties' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the consulted parties to comment and to make recommendations prior to filing the plan with the Commission for approval. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. No ground-disturbing or land-clearing activities shall begin until the licensee is notified the plan is approved. Upon approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 412. Design Guidelines Plan. Within six months of license issuance, the licensee shall file for Commission approval and, upon approval, implement a design guidelines plan to ensure that future improvements at the project blend with natural features in the project area by addressing form, line, color, and texture for structures, and appropriate plant species for landscaping in the area. The licensee shall also include a color scheme and a time schedule for painting existing project facilities with colors identified to reduce the visual contrast of existing project facilities. At a minimum, the color scheme and design schedule shall be prepared for the project's upper and lower penstocks; railings, secondary flume features, and other appurtenant features; gantry cranes; and project residences and accessory buildings.

The licensee shall prepare the design guidelines plan in consultation with the Idaho Department of Parks and Recreation. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agency, and specific descriptions of how the agency's comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agency to comment and to make recommendations prior to filing the plan with the Commission for approval. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Upon approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 413. Programmatic Agreement and Historic Properties Management Plan. The licensee shall implement the "Programmatic Agreement Among the Federal Energy Regulatory Commission and the Idaho State Historic Preservation Officer for Managing Historic Properties that May be Affected by a License Issuing to the Idaho Power Company for the Continued Operation of the Malad Hydroelectric Project in Gooding County, Idaho (FERC No. 2726-012)", executed on November 9, 2004, and including but not limited to the Historic Properties Management Plan (HPMP) for the project. Pursuant to the requirements of this Programmatic Agreement, the licensee will file for the Commission's approval an HPMP within one year of issuance of this order. The Commission reserves the authority to require changes to the HPMP at any time during the term of the license. If the Programmatic Agreement is terminated prior to Commission approval of the HPMP, the licensee shall obtain approval from the

Commission and the Idaho State Historic Preservation Officer before engaging in any ground-disturbing activities or taking any other action that may affect any historic properties within the project's area of potential effects.

Prior to filing the HPMP with the Commission, the licensee shall consult with the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation (Shoshone-Paiute Tribes) and the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation (Shoshone-Bannock Tribes) and incorporate into the HPMP the following items: (1) a protocol on how the licensee shall consult with the Shoshone-Paiute Tribes and the Shoshone-Bannock Tribes on the development of the HPMP, (2) procedures for ensuring confidentiality between the licensee and the Shoshone-Paiute and Shoshone-Bannock Tribes regarding sensitive cultural resource information, (3) a process for conducting future ethnographic studies, if needed, involving the Shoshone-Paiute and Shoshone-Bannock Tribes in identifying traditional cultural properties in the project's area of potential effects, and (4) any additional measures or modifications based upon recommendations from the Shoshone-Paiute or Shoshone-Bannock Tribes. If the licensee does not agree with the recommended measure(s), the licensee shall attempt to resolve the issue in accordance with the provisions in section II.C of the Programmatic Agreement.

Article 414. Use and Occupancy. (a) In accordance with the provisions of this article, the licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensee shall also have continuing responsibility to supervise and control the use and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The type of use and occupancy of project lands and waters for which the licensee may grant permission without prior Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and

facilities that can accommodate no more than 10 water craft at a time and where said facility is intended to serve single-family type dwellings; (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline; and (4) food plots and other wildlife enhancement. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the use and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the licensee shall: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the licensee's costs of administering the permit program. The Commission reserves the right to require the licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensee may convey easements or rights-of-way across, or leases of project lands for: (1) replacement, expansion, realignment, or maintenance of bridges or roads where all necessary state and federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir. No later than January 31 of each year, the licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary federal and state water quality certification or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric

transmission lines that require erection of support structures within the project boundary, for which all necessary federal and state approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 water craft at a time and are located at least one-half mile (measured over project waters) from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from project waters at normal surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 60 days before conveying any interest in project lands under this paragraph (d), the licensee must submit a letter to the Director, Office of Energy Projects, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G map may be used), the nature of the proposed use, the identity of any federal or state agency official consulted, and any federal or state approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the licensee to file an application for prior approval, the licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

- (1) Before conveying the interest, the licensee shall consult with federal and state fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.
- (2) Before conveying the interest, the shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.
- (3) The instrument of conveyance must include the following covenants running with the land: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project; and (iii) the grantee shall not unduly restrict public access to project waters.

- (4) The Commission reserves the right to require the licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G drawings would be filed for approval for other purposes.

(g) The authority granted to the licensee under this article shall not apply to any part of the public lands and reservations of the United States included within the project boundary.

(G) The licensee shall serve copies of any Commission filing required by this order on any entity specified in this order to be consulted on matters related to that filing. Proof of service on these entities must accompany the filing with the Commission.

(H) This order is final unless a request for rehearing is filed within 30 days of the date of its issuance, as provided in section 313 of the FPA. The filing of a request for rehearing does not operate as a stay of the effective date of this license or of any other date specified in this order, except as specifically ordered by the Commission. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

Appendix
WATER QUALITY CERTIFICATION
FOR
PROJECTS INVOLVING TMDL/303(d) MALAD RIVER (or BIG WOOD RIVER)
FERC Project No. 2726 for Upper and Lower Malad

ISSUED TO: Idaho Power Company

P.O. Box 70

Boise, Idaho 83707

ATTENTION: Chris Randolph, Manager Environmental Affairs

This water quality certification is issued under the authority of Section 401 of the Federal Water Pollution Control Act and its Amendments (Clean Water Act), Idaho Code sections 39-101 through 39-130, 39-360 1 through 39-3623 and the Idaho Water Quality Standards and Wastewater Treatment Requirements (Idaho Water Quality Standards) IDAPA 58.01.02. This certification is in response to Idaho Power's request for certification dated July 1, 2002. The Department of Environmental Quality (DEQ) has reviewed the application submitted to FERC for a new license and hereby certifies pursuant to section 401 of the Clean Water Act that, provided the facility operates as described in the application, there is a reasonable assurance the proposed project will comply with applicable requirements of sections 301,302,303,306 and 307 of the Clean Water Act and the Idaho Water Quality Standards.

Description of Certified Project:

The Upper Malad Development consists of (1) the 25-foot and 150-foot-long concrete Upper Malad Dam, with Tainter gates, (2) and open concrete conduit about 4,6000 feet long and 15- foot wide, (3) a 10-foot diameter and 230-foot long welded steel plate penstock, (4) a 7,200- kilowatt vertical outdoor type generator; (5) a 0.6 mile long transmission line connecting the development to the Hagerman Substation; and (6) other appurtenances as defined in the license. No construction is planned on this project.

The Lower Malad Development consists of (1) the 8.5 foot high and 160 foot long concrete Lower Malad Dam with Tainter gates, (2) an open concrete conduit about 5,450 feet long and 17 feet wide, (3) a 12 foot diameter and 287 foot long welded steel plate penstock, (4) a reinforced concrete powerhouse with an installed capacity of 13,500 kilowatts, and (5) other appurtenances as defined in the license. No construction is planned on this project.

A total maximum daily load (TMDL) has been defined by the DEQ, and was approved by the U.S. Environmental Protection Agency on May 15, 2002. As part of the Big Wood River system, the Malad River is considered a high priority water body. It is listed for

sediment and nutrients. DEQ's review of the project indicates that there is a reasonable assurance the proposed project will comply with applicable requirements of sections 301,302,303,306 and 307 of the Clean Water Act and will not violate Idaho's water quality standards or other applicable requirements of state law. In addition, review of the new license application by DEQ indicates that the project is consistent with the Big Wood River Watershed Management Plan. DEQ encourages strongly that IPC participate actively and regularly with the Wood River WAG.

This § 401-certification decision may be appealed pursuant to the Idaho Environmental Protection and Health Act, Idaho Code § 39-107(5) and the Idaho Administrative Procedure Act. Such an appeal is a prerequisite to any district court action and must be initiated by filing a petition for a contested case in accordance with the Rules of Administrative Procedure before the Department of Environmental Quality (DEQ) Board (IDAPA 58.01.23) within thirty-five (35) days of the date of DEQs decision regarding the 401 certification.

The certification holder shall comply with the conditions listed below:

GENERAL CONDITIONS

1. The certification holder shall notify the DEQ, in writing, upon transferring this ownership or responsibility for compliance with these conditions to another person. The new owner/operator shall request, in writing, transfer of this water quality certification to his/her name.
2. The certification holder shall allow the DEQ or its representative to inspect the project area at reasonable times and to inspect records regarding this project.

SPECIAL CONDITIONS

1. The Malad River is currently on the 303(d) list for the state of Idaho and is covered by the Big Wood River Watershed Management Plan (Big Wood River TMDL, approved 2002). The applicant must comply with the TMDL for the Malad River as set forth in the Big Wood River Watershed Management Plan. The applicable provisions of the TMDL are incorporated as a condition of this water quality certification.

This certification does not relieve the applicant of responsibility for obtaining any other approvals, licenses or permits in accordance with federal, state, or local requirements and does not authorize commencement of the proposed project.

CERTIFICATION APPROVED

Doug Howard, Regional Administrator

3/13/03