



U.S. Department of Justice

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Diana R. Delaney, Chief Deputy Clerk
Snake River Basin Adjudication
DISTRICT COURT
253 Third Ave., North
Twin Falls, Idaho 83303-2707

RECEIVED
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Department of Water Resources

Re: SRBA Case No. 39576
Consolidated Subcase Nos. 65-11412 and 65-11412A

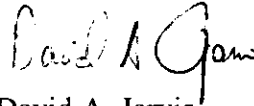
Dear Ms. Delaney:

Enclosed for filing is the following original document in the above mentioned subcase:

1. **UNITED STATES' MOTION FOR SUMMARY JUDGMENT**
2. **MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT**

Thank you for your time and attention in this matter.

Sincerely,


David A. Jarvis
Paralegal

Enclosure

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase Nos. 65-11412 and 65-11412A
	)	
Case No. 39576	)	UNITED STATES' MOTION FOR
	)	SUMMARY JUDGMENT
_____.	)	

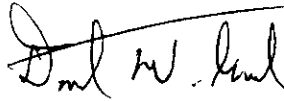
Pursuant to Id. R. Civ. P. 56(c), the United States respectfully moves this Court for an Order of Summary Judgment dismissing Objection of the Emmett Irrigation District to the United States claim to water right 65-11412 and disallowing the counter claim of the Emmett Irrigation District for water right 65-11412A.

The United States' motion is supported by the accompanying MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

DATED this 7th Day of February, 2003.

Respectfully submitted,

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	)	THE UNITED STATES' MOTION FOR
	)	SUMMARY JUDGMENT
_____	)	

Introduction

At issue in this case is the right, adjudicated to the United States in the Payette Adjudication, to divert 220 cubic feet per second (cfs) of water from the Payette River, use that water to operate hydro-pumps located within Black Canyon Dam and discharge the water back into the river. Black Canyon Dam, owned and operated by the United States, is located seven miles northeast of Emmett, Idaho. The dam is part of the Bureau of Reclamation's Boise Project, which provides irrigation water to approximately 390,000 acres of land in southwestern Idaho and eastern Oregon. Boise Project Databook, at 1, 4 (attached as Exhibit 1). The dam diverts

the waters of the Payette River for multiple purposes: operation of the hydro-pumps, generation of hydro-power and delivery of water into two irrigation canals. *See Id.*

Although the lands of the Emmett Irrigation District (“EID”) are not part of the Boise Project, EID receives water diverted at Black Canyon Dam through a Warren Act contract.^{1/} Boise Project Databook, Exh. 1 at 3. EID receives some of its irrigation water through an irrigation canal shared with the Black Canyon Irrigation District and located on the south side of the dam; however, the bulk of its irrigation water is delivered via a smaller irrigation canal on the north side of the dam located approximately 25 feet above the reservoir’s level.^{2/}

The hydro-pumps located in the powerhouse of Black Canyon Dam are used to pump Emmett’s irrigation water to the north side canal.^{3/} As is shown by the Water Routing Diagrams attached as Exhibit 2, water is diverted from the dam to the powerhouse via two penstocks, one for each pump. Each penstock splits approximately fifteen feet before it reaches the hydro-pump. Approximately forty percent of the water in each penstock drops into a pipe that splits off the bottom of the penstock and is delivered to drive the hydro-pump’s turbine located on the bottom of the pump. The turbine powers a centrifugal pump, located directly above the turbine and, connected to it by a shaft. The water used to drive the turbine impellers

^{1/} The Warren Act authorizes the Bureau of Reclamation to use storage or carrying capacity in excess of that needed for project lands for the benefit of non-project lands. 43 U.S.C. § 523-25.

^{2/} EID’s water rights for irrigation purposes are not at issue in this case.

^{3/} In addition to the hydro-pumps, there are four electrically operated pumps located on the northwest corner of the dam which also deliver water to the north side canal. The use of those pumps is not at issue in this case.

then falls through an "L" shaped pipe and is discharged into the river. *See* Water Routing Diagrams, Exhibit 2; *see also* EID's Answer to Interrogatory No. 19, attached as Exhibit 3 ("As a general proposition, the water which is used to power the turbines does return to the Payette River"). The remaining sixty percent of the diverted water continues to the centrifugal pumping section in the upper half of the hydro-pump where it is pumped through a valve into a single discharge pipe and deposited to the north side canal. At maximum delivery, approximately 537 cfs of water flows into the inlet of the hydro-pump penstocks with 317cfs of the water being delivered to the north side canal, and 220 cfs being discharged back into the river. *See* Black Canyon Dam, Standing Operating Procedures at II-29 ("Black Canyon SOP," relevant pages of the SOP are attached as Exhibit 4).

Despite the United States' more than seventy year history of diverting up to 220 cfs from the Payette River to operate its hydro-pumps, EID now seeks title to the water right used to operate the hydro-pumps. In this brief the United States establishes that it is entitled to summary judgment that the United States holds title to the water rights for the hydro-pumps because the United States is the beneficial user of the water rights and because EID should be estopped from disputing the United States' ownership of the water rights.

Background

The winter of 1919-1920 was not kind to the Emmett Irrigation District. An "extraordinary run of ice" had severely damaged its then existing crib dam, leaving the dam in "precarious condition."⁴ Contract between the United States and Emmett Irrigation District

⁴ A crib dam is constructed of an interlocking framework of timbers filled with stones. *See* www.ferc.fed.us/hydro/docs/engguide/pdf_files/chap10.pdf at 10-51, 10-55, 10-56.

dated November 18, 1921 (“1921 Contract”) at ¶ 4 (attached as Exhibit 5); *see also* Wiley Report, attached as Exhibit 6, at 1.⁵⁷ The rest of the irrigation system was hardly in better shape. Part of the District’s flume had collapsed and other parts of its system were in danger of doing so. Jan. 24, 1921 Memorandum For Project Manager, Boise Project at ¶ 2 (attached as Exhibit 7); Wiley Rpt., Exh. 6 at 3. Maintenance expenses were costing the District more than \$100,000 *per year*. March 1, 1921 Memo from Director, Reclamation Service to Secretary of the Interior, at 2 (attached as Exhibit 8)(“Director’s Memo”); *see also* Wiley Rpt., Exh. 6 at 8 (estimating it would cost \$800,000 just to fix the canal system). Even with those great expenditures, the District’s own engineer estimated that EID’s irrigation works could “not reasonably be expected to last and remain capable of carrying water for more than two years longer.” 1921 Contract, Exh. 5 at ¶ 10. Compounding EID’s difficulties was the fact that its irrigation system was undersized—its engineer had determined that EID’s main canal was only half the size it needed to be to adequately supply the lands of the District. *Id.* at ¶5; Wiley Rpt., Exh. 6 at 2.

EID’s problems with its physical system were severe and its financial problems were no less so. Those financial difficulties prevented the District from being able to sell bonds to fund construction of the new dam its engineer had recommended. 1921 Contract, Exh.5 at ¶¶ 13-14.

The answer to the District’s problems lay with the government. The government had long been interested in using the Payette River to supply water for an irrigation project. *E.g.*, Report on Payette-Boise Project, Idaho, February 13 - 16, 1905 (attached as Exhibit 9). By 1921,

⁵⁷ A.J. Wiley was a consulting engineer hired by EID to investigate the condition of the District’s irrigation works. He recommended replacing EID’s diversion works and some of their canal system with a dam to be built at Black Canyon. His report was issued in February of 1920.

the Department of the Interior had plans to irrigate 56,000 acres of arid land through the Black Canyon Division of the Boise Project and had plans to build a dam on the Payette river to provide water for the project. Director's Memo, Exh. 8, at 1. EID petitioned the government for a contract which would accelerate the construction of irrigation works on the Payette River. *Id.* at 2. EID was willing to pay for at least part of the cost of the construction because the dam would enable EID to abandon its existing canal system and the attendant excessive maintenance costs. *Id.* at 2-3. The United States would benefit because EID's participation would lower the cost of the Black Canyon Division of the Boise Project. 1921 Contract, Exh.5 at ¶¶ 18-20; Director's Memo, Exh. 8 at 3.

Contracting with the United States was more than beneficial to EID; as the District's Board explained, the contract with the United States was "necessary" to allow the District to continue to carry out its purposes. March 15, 1921 Minutes of the Emmett Irrigation District at 3 (attached as Exhibit 10). EID's financial difficulties, however, made the United States hesitant to contract with the District. Typically in a repayment contract the United States would obtain a first lien as security for payment of water charges. Director's Memo, Exh. 8 at 3. EID's indebtedness made that option impossible. *Id.* Nonetheless, the Director of the Reclamation Service went to bat for the District. He argued that an exception should be made for EID because the District was fully developed and the elimination of its expensive dam and sixteen miles of canal would save it enough money to make the payments to the United States.

Eventually the Director's arguments prevailed. In November of 1921, the Secretary of the Interior agreed to contract with EID "in order to save the Emmett Irrigation District and the entire community from the great loss which would result from the failure of the

present canal system and the water supply of the District” and to increase the financial feasibility of the Black Canyon Division. 1921 Contract, Exh. 5 at ¶ 22.

1. The 1921 Contract and subsequent supplemental contracts.

The 1921 contract allowed EID “use” of the proposed Black Canyon dam and pumping plant. EID did not receive “use” of the dam in the physical sense of being able to operate the dam—the dam’s works were, and still are, operated by the United States. *See* Standard Operating Procedures at 1-4 (attached as Exhibit 4); 43 U.S.C. § 498. Instead, the United States contracted to operate the dam’s works to divert and deliver EID’s irrigation water in exchange for EID’s payment to the United States and compliance with the terms of the contract. 1921 Contract, Exh. 5 at ¶ 28.

The United States agreed “to pump into the District’s said North Side Canal such amount not exceeding Two Hundred Sixty-six (266) second-feet of water...” *Id.* The terms of the contract make it clear that EID has no more than a contractual right to the use the United States’ Black Canyon facilities for delivery of EID’s irrigation water. EID’s payments were “a prerequisite to the right of the District to receive water from the said works to be constructed by the United States [Black Canyon Dam];” any right of the District to use or receive water from the Dam was “condition[ed] upon the District having made all the payments due to the United States prior to that time.”⁹ 1921 Contract, Exh. 5 at ¶ 43. Further, the Secretary reserved the right to “permanently terminate all right of the District and of any owners of lands therein, to receive water from or by means of said [Black Canyon] dam” upon two years of non-payment. 1921

⁹ Nor did making the payments give EID complete discretion over the water--any water received by the District was required to be distributed pursuant to the Reclamation Extension Act. 1921 Contract, Exh. 5 at ¶ 46.

Contract, Exh. 5 at ¶ 47. The District agreed that upon termination, it and the landowners of the District would have no further interest in the Dam, irrigation works or water diverted or made available by means of such works; and that all rights to receive water under the contract would “terminate and revest in the United States as fully and completely as if no contract had ever been made and no water had ever been furnished from said works.” *Id.*

The contract also explained where the water to be delivered to EID would come from. EID would not receive water which had been stored by the United States. 1921 Contract, Exh. 5 at ¶ 29. Rather, any water delivered to EID would come out of the unregulated flow of the Payette River and any storage EID was able to provide. *Id.* In other words, the United States would be delivering irrigation water EID either already had a right to or would later appropriate.⁷

The United States claimed the water necessary to allow it to meet its contractual obligations by filing application 21578 (Permit #15182) for 2500 cfs with the Idaho Department of Reclamation. Application 21578, attached as Exhibit 11. One thousand, three hundred (1,300) cfs of that right was intended for power generation and 1,200 cfs for providing irrigation water to the Black Canyon Irrigation District.⁸ *Id.* at ¶¶ 2, and page 2. The United States

⁷ That point is reiterated by paragraph 28 of the 1921 Contract, which recognized that the quantity of water delivered to EID would be “subject to such limitations as may be placed by Decree of Order of Court upon the right of the District to divert the waters of the Payette River and subject to the priorities decreed by the Court, if such decree be made....” *Id.* at ¶ 28. In other words, the United States would deliver water pursuant to EID’s water rights, when those rights were in priority.

⁸ The United States filed proof of beneficial use under permit #15182 for 1,300 cfs for the purpose of generating power in 1936 and obtained License and Certificate of Water Right 15182 on August 17, 1937. License No. 15182, Proof of Beneficial Use (both attached as Exhibit 12). After obtaining a series of continuing permits, the United States filed proof of beneficial use for 1,200 cfs for irrigation under Permit #18720. License No. 18720, Proof of Beneficial Use (both attached as Exhibit 13).

apparently did not obtain a separate water right for the hydro-pumps because it viewed the 1,300 cfs power water right as being available for use either to generate hydropower or to generate the power need to run the hydro-pumps. *See* January 15, 1931 Memo re: Proposed Contract, at ¶ 18 (attached as Exhibit 14)(“Proposed Contract Memo.”).

Almost immediately after Reclamation constructed Black Canyon Dam, Reclamation began, when it could do so without conflicting with its contractual obligations to other parties, delivering more water to EID than the District was entitled to by the terms of the contract. Aug. 17, 1928 Memo re: Request of EID for Third Pumping Unit at ¶ 3 (attached as Exhibit 15). EID responded by attempting to make that practice permanent through changing the terms of the 1921 contract so that it would be provided an additional 30 second feet through the South Side Canal and 54 additional second feet of water delivered by the hydro-pumps to the North Side Canal. *See* Nov. 16, 1926 Memo from District Counsel to Commission of Reclamation (attached as Exhibit 16). The United States was hesitant to do so because EID did not offer to pay anything for the additional water it sought. Proposed Contract Memo, Exh. 14 at 3. The request for additional water for EID’s north side canal was particularly problematic because after the flood season ended each additional acre foot pumped to EID “would require approximately two acre feet of storage,- one acre foot to supply the additional water pumped into the canal and another acre foot to supply the additional water to be run through the pumping plant to pump the additional supply into the canal.” *Id.* at ¶ 8. Each acre foot of water used for EID “would deplete the water supply available for the government power plant and also the water supply available for the Black Canyon District,” once that project was constructed. *Id.*

Despite the United States’ refusal to modify the contract terms, EID continued to

receive more water than it was entitled to throughout the 1920s. It also received its water on terms more favorable than those that enjoyed by other irrigation districts. August 29, 1927 Memo at ¶ 3 (attached as Exhibit 17)(noting that the Gem District was paying the United States about \$4 an acre per year under its power contract while EID paid \$ 1). Nonetheless, EID's financial difficulties continued and the District had a poor record in meeting its payment obligations to the United States. *Id.*

Despite its poor payment record, EID continued to demand more water and even pushed for the construction of a third hydro-pump. In 1928, EID took its request to the Commissioner of Reclamation. The Commissioner was sympathetic to EID's desires, but explained to the District that lining their canal was a more realistic approach to obtaining additional water because building a third pump would be expensive to the District and would deplete the water supply Reclamation held for the Gem Irrigation District. August 17, 1928 Aug. 17, 1928 Memo re: Request of EID for Third Pumping Unit, Exh. 15 at ¶¶ 1, 4 & 6. EID did not follow the Commissioner's advice. Instead, it took its case to Congress.

EID contacted Representative Burton French asking for his help in obtaining a third hydro-pump, an extension of its payment terms and a reduction in its total monetary obligation to the government. Nov. 18, 1930 Letter from EID to Rep. French, at 16 (attached as Exhibit 18). The United States responded that it was willing to reduce EID's obligation and lengthen the payment terms, but had not done so because EID would not accept a contract doing so unless the contract also provided EID with more water. *See Proposed Contract Memo*, Exh. 14 at ¶ 10. The United States objected to providing EID more water for a number of reasons. First, EID already received more water per acre than on other Reclamation projects in Idaho. *Id.*

at ¶ 4. Second, EID continued to refuse to pay for additional water. *Id.* ¶ 5. Third, the Gem District was objecting to the United States practice of giving EID more water than it was contractually entitled to because in doing so the United States caused hardship for Gem. *Id.* at ¶ 14. Finally, providing additional water to EID would mean putting more water through the hydro-pumps which diminished the quantity of water available to generate hydropower. *Id.* at ¶ 18.

A temporary accommodation by Idaho Power provided EID with more water for the 1931 season⁹ and in 1932, EID and the United States entered into a contract which substantially revised the payment terms of the 1921 contract and provided EID with a contractual right, under certain circumstances, to more water than it had received in the 1921 contract. *See* June 30, 1932 Contract (attached as Exhibit 20). Nonetheless, the contract provided EID with less water than it had been seeking and did not provide for the construction of a third hydro-pump.¹⁰ *See* 1932 Contract, Exh. 20 at ¶¶ 9, 24 & 47.

2. The 1955 Contract

While the 1932 Contract provided EID with additional water in certain circumstances, EID finally firmed up its water supply by contracting with the United States for storage space at Deadwood Reservoir in 1955. *See* October 4, 1955 Contract (“1955 Contract”) (attached as Exhibit 22). The contract served to (1) provide EID with 50,000 acre-feet of storage

⁹ *See* June 17, 1931 Contract (attached as Exhibit 19).

¹⁰ Article 45 of the 1932 Contract allowed EID to install, at its own expense, electric pumps with a capacity of not more than 50 cfs within Black Canyon and called for the United States to provide EID with power for those pumps once the United States had completed the Owyhee Tunnels project. The United States and EID entered into a contract finalizing that arrangement on July 18, 1934 (the 1934 Contract is attached as Exhibit 21).

space in Deadwood Reservoir; (2) obligate EID to repay a portion of the expense incurred in constructing Deadwood; and (3) obligate EID to pay for a portion of the cost of rehabilitating Black Canyon dam. July 20, 1955 Memo, at 1 (attached as Exhibit 23). The 1955 contract superceded the prior contracts and defines the relationship between EID and the United States to this day. 1955 Contract, Exh. 22 at ¶ 8.

The 1955 Contract continues the basic arrangement the prior contracts had set: the United States owns, maintains and operates the hydro-pumps (referred to as the direct connected pumps in the contract ^{11/}) and EID pays the United States to operate the hydro-pumps to provide water to EID's canal system. 1955 Contract, Exh. 22 at ¶ 11(b). Pursuant to the contract, the United States delivers up to 330 cfs into EID's north side canal. *Id.* at ¶ 16(a).

The 1955 Contract included language virtually identical to that of the 1921 Contract explaining that the water the United States would be delivering would be that which EID had water rights for.^{12/} *See Id.* at ¶ 16(a). In short, the contract provides EID with the right to use the United States' facilities to divert water to the District for distribution to its farmers, the ultimate users of the water delivered by the United States to EID's canal system.

The 1955 Contract also provides that the United States is to "operate and maintain" the reserved works. *Id.* at ¶ 11(a). The contract defines "reserved works" as comprising "Black Canyon Dam and Reservoir, including the direct-connected pumping installation serving the north side lands of the District, but exclusive of the Black Canyon

^{11/} The hydro-pumps are referred to as the "direct-connected pumps" because the pumps are directly connected to the power generating turbines. *See* Boise Project Databook, Exh. 1 at 4.

^{12/} The contract did recognize that some of that water would be coming from "the stored water entitlement of the District in Deadwood Reservoir." *Id.*

Powerplant.” *Id.* at ¶ 7(f). Thus the contract recognizes both that the United States operates and maintains the hydro-pumps and that the hydro-pumps are part of Black Canyon Dam. The contract further explains that the United States holds title to Black Canyon Dam, “including all properties incidental and appurtenant thereto, and all other reserved works....” *Id.* at ¶ 12. Thus the contract recognized that the United States owns not only the Dam and the hydro-pumps that are part of the Dam, but also any rights appurtenant thereto.¹³

3. *The Payette Adjudication.*

In 1969, the State of Idaho initiated an adjudication of the Payette River. The State’s Department of Reclamation sent a letter to all water users explaining that “if you are using water and fail to assert a claim within the time stated, you may be forever barred and estopped from claiming a right to the waters within the Payette River drainage basin.” May 15, 1970 Idaho Dept. of Reclamation Letter at 1 (attached as Exhibit 24). The United States filed its claim on October 5, 1971. Based on permits and licenses it had previously been issued by the State, the United States claimed 1,300 cfs for power purposes at Black Canyon Dam; a right to store 163,000 acre-feet of water for irrigation and power development in Deadwood Reservoir and at Black Canyon Dam; storage rights at Cascade Reservoir; and 1,200 cfs for irrigation within the Black Canyon Irrigation District. United States’ Notice of Claim, (attached as Exhibit 25).

Like the United States, EID participated in the Payette Adjudication. In 1977 it filed a number of claims seeking water for irrigation purposes (EID’s claims are attached as

¹³ The contract recognizes that the United States’ title is subject, as all federal property is, to Congress’ right of disposal. *See Id.* at ¶ 12(a).

Exhibit 26). EID did not file a claim for the water necessary to operate the hydro-pumps.

The Idaho Department of Water Resources ("IDWR") reviewed the claims submitted by the United States, realized no claim had been filed for the hydro-pumps and suggested the United States submit a late claim. *See* February 8, 1982 IDWR Letter (attached as Exhibit 27); January 22, 1982 Regional Director Memo, at 1 (attached as Exhibit 28). IDWR then provided the United States with advice regarding the procedures to be used to file a late claim. *Id.*

In the fall of 1983, EID requested that the United States ensure that a water right be secured for the hydro-pumps. *See* March 14, 1984 Memo (attached as Exhibit 29). The United States took EID's advice and filed a claim in March of the following year for the 220 cfs of water beneficially used by the United States to operate the hydro-pumps.¹⁴

IDWR agreed that the United States was entitled to a water right based on the beneficial use of 220 cfs by the United States to operate the hydro-pumps and IDWR so stipulated with the United States in 1988. *Stipulation Resolving Late Objection of the U. S. Bureau of Reclamation* (Gem County Case 3667), filed November 21, 1988 (attached as Exhibit 31). The following January, Judge Doolittle entered a partial decree which recognized the United States' right as set out in the stipulation. *Partial Decree pursuant to Rule 54(b) I.R.C.P.* (Gem County Case 3667), filed January 4, 1989 (attached as Exhibit 32).

¹⁴ Because the United States' claim was late, it was filed in the form of a Motion to Permit Late Filing of Objection to Proposed Findings of Water Rights. *Motion of United States of America to Permit Late Filing of Objection to Proposed Findings of Water Rights* (Gem County Case 3667), dated March 12, 1984, and *Objection of United States of America to Proposed Findings Objection to Proposed Findings [sic] of Water Rights* (Gem County Case 3667), dated March 12, 1984 (both attached as Exhibit 30).

4. *The Snake River Basin Adjudication*

The Payette Adjudication was never completed. Instead, a comprehensive adjudication of all the waters of the Snake River Basin (the “SRBA”) began in 1987.^{15/} See *State ex rel. Higginson v. United States*, 115 Idaho 1, 764 P.2d 78 (1988). In 1989 the United States filed claim 65-11412 addressing its water rights used to operate the Black Canyon hydro-pumps. The United States claimed the right to take 220 cfs from the Payette River with a priority date of March 15, 1924 for the purpose of generating power to operate the hydro-pumps. More than a decade later, EID filed a competing claim to the same water. EID explained that it was filing the claim “since the land owners within EID Irrigation District are the beneficiaries of the water delivered by the hydro pumps.” February 29, 2000 Memo from David Shaw to Don Shaff (attached as Exhibit 33).

In the Preliminary Director’s Reports, IDWR recommended the United States’ claim be decreed and that EID’s claim be disallowed. Preliminary Directors Reports 65-11412, 65-11412A. EID then filed a notice of error explaining that the District disagreed with IDWR’s recommendation that the right for the hydro-pumps be decreed to the United States and that the District would like to hold the water right in its name, “or at least in conjunction with the Bureau of Reclamation.” Notice of Error Reply (April 5, 2001)(attached as Exhibit 34). In the final Director’s Report, IDWR again recommended the United States’ claim be decreed and that EID’s claim be disallowed. EID then filed an objection to the disallowal of their claim 65-11412A.

^{15/} On February 8, 2001 Judge Burdick issued an order which consolidated the Payette Adjudication with the SRBA and directed that thereafter “all matters concerning the Payette Adjudication shall be considered, heard, and determined in the proceedings relating to Basin 65 in the SRBA. **Order Consolidating the Payette Adjudication...** at 3 (February 8, 2001).

SF1 Objection (December 7, 2001).

The United States now moves for summary judgment asking this Court to determine as a matter of law and undisputed fact that the United States holds title to the water right used to operate the hydro-pumps.

Argument

The issue to be resolved by the parties' motions for summary judgment is whether the water rights used to operate the hydro-pumps at Black Canyon dam should be decreed in the name of the United States, as was recommended by the Director of IDWR. Below the United States will demonstrate that the Director was correct in doing so for two reasons. First, the United States will prove that it has taken the steps necessary to perfect an appropriation of the water under Idaho law. Second, the United States will demonstrate that EID should be estopped from disputing the United States' title as EID agreed through the terms of the 1955 Contract that title to the water rights for the hydro-pumps is held by the United States.

I. THE UNITED STATES HAS PERFECTED AN APPROPRIATION.

At the time Black Canyon Dam was built, it was well established that two actions were necessary to appropriate water: (1) diversion and (2) application to a beneficial use.

Nielson v. Parker, 19 Idaho 727, 115 P. 488 (1911); *Sandpoint Co. v. Panhandle Co.*, 11 Idaho 405, 83 P. 347 (1905). The documentary evidence before this court establishes that it was the United States, not EID, which took those actions and appropriated water to operate the hydro-pumps.

The United States constructed, owns and operates Black Canyon Dam. *See* Black Canyon SOP, Exh. 4 at 1-4 (Bureau of Reclamation is responsible for the operation and

maintenance of Black Canyon Dam, Powerplant and related facilities); 43 U.S.C. § 498 (title to and management and operation of works constructed pursuant to the Reclamation Act remains in the Government until conveyed).¹⁶ Thus it is the United States that diverts water from the Payette River through the dam's penstocks where it is beneficially used to spin a turbine which generates power to operate the hydro-pump's centrifugal pump.¹⁷

Idaho's constitution recognizes that generating power is a beneficial use. Idaho Const. art. XV, § 3; *see also Idaho Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 443, 530 P.2d 924, 927 (1974). The United States' beneficial use of the water is complete once the water runs through the hydro-pump turbines and generates power. Having been beneficially used, the water exits the turbines and is discharged to the river. *See* Water Routing Diagrams, Exh. 2; *see also* EID's Answer to Interrogatory No. 19, Exh. 3 ("As a general proposition, the water which is used to power the turbines does return to the Payette River").

In short, since 1925 the United States has been diverting water and applying it to the beneficial use of generating power. As a result, the United States has completed an appropriation of up to 220 cfs of water for the purpose of operating the hydro-pumps. *Nielson v. Parker*, 19 Idaho 727, 115 P. 488 (1911); *Sandpoint Co. v. Panhandle Co.*, 11 Idaho 405, 83 P. 347 (1905).

¹⁶ The conveyance of reclamation works requires Congressional action. *E.g.* Pub. L. No. 105-351, 112 Stat. 3219-21 (1998), An act to authorize the Secretary of the Interior to convey certain facilities of the Minidoka project to the Burley Irrigation District.

¹⁷ The United States acknowledges that EID officials often play an advisory role in determining how Black Canyon Dam is operated. It is standard practice for the Bureau to consult with contract holders regarding the operation of the Bureau's dams. *See* Black Canyon SOP, Exh. 4 at 1-5. However, the United States retains both the ultimate authority over, and responsibility for, operation of those facilities. 43 U.S.C. § 498.

II. THE EMMETT IRRIGATION DISTRICT SHOULD BE ESTOPPED FROM OBJECTING TO THE UNITED STATES' OWNERSHIP OF THE HYDRO-PUMP WATER RIGHTS.

The doctrine of quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him. *Keese v. Fetzek*, 111 Idaho 360, 362, 723 P.2d 904, 905 (Id. App. 1986). The doctrine is broadly remedial. As a result it is often applied on an *ad hoc* basis to specific facts. *Id.* (citing *KTVB, Inc. v. Boise City*, 94 Idaho 279, 281, 486 P.2d 992, 994 (1971)). The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit. *Floyd v. Board of County Comm'rs of Bonneville County*, 137 Idaho 718, 52 P.3d 863, 871 (2002); accord *Clontz v. Fortner*, 88 Idaho 355, 364-65, 399 P.2d 949, 954 (1965). To invoke quasi estoppel, the United States must show that EID has gained an advantage to itself through its actions or produced a disadvantage to the United States.¹⁸ *Id.*

Here the court is warranted in applying quasi-estoppel because EID entered into a contract acknowledging that the United States holds title to the water rights for the hydro-pumps and waited almost fifty years before asserting otherwise. In the meantime, EID has enjoyed the benefits of the terms of the parties' contract. Moreover, EID's action places the United States at a disadvantage; it forces the United States to litigate a previously closed question, and should the United States lose, would deprive the United States of a property right previously decreed to it.

¹⁸ Unlike equitable estoppel, quasi-estoppel does not require misrepresentation by one party or actual reliance by the other. *Evans v. Idaho State Tax Comm'n*, 97 Idaho 148, 540 P.2d 810 (1975).

A. Emmett Irrigation District Is a Party to the 1955 Contract Which States That the United States Holds Title to All Rights Appurtenant to Black Canyon Dam.

Paragraph 12(a) of the parties' 1955 contract states:

Title to Black Canyon and Deadwood Dams and Reservoirs, including all properties incidental and appurtenant thereto, and all other reserved works, shall remain in the United States until otherwise provided by Congress.

Thus the 1955 Contract represents EID's agreement that the United States' holds title to all rights appurtenant to Black Canyon Dam, of which the hydro-pumps are a part.^{19/} See Boise Project Databook, Exh. 1 at 4; see also 1955 Contract, Exh. 22, ¶ 7.

B. The Water Rights For the Hydro-Pumps are Appurtenant to Black Canyon Dam.

Like so much of western water law, the doctrine of appurtenance arose through necessity: without a legal mechanism for attaching water rights to property, the property could be rendered valueless. Thus one of the earliest water related decisions by a court recognized that when a saw mill powered by water was sold, the water right necessary to operate the mill was implicitly transferred as well because without the water right the mill would have been valueless. *McDonald v. Bear River and Auburn Mining Co.*, 13 Cal. 220, 233, 235-36 (1859). In doing so, the court recognized that the water right was appurtenant to the mill. The courts determined early on that the question of appurtenance would be decided by use—a water right would be appurtenant to land or other object if water was necessary for its use. *E.g.*

^{19/} Thus the contract presents grounds for the application of estoppel by contract, which provides a bar against a person denying a term or fact arising from a contract that the person has entered into. BLACK'S LAW DICTIONARY 571 (7th ed. 1999); see also *Estate of Wilson v. Lease*, 134 Cal. Rptr. 749, 757 (Cal. App. 1977).

Crooker v. Benton, 93 Cal. 365, 369 (1892).

The idea that a water right is appurtenant to the object upon which the right is part of Idaho's water code. I.C. § 42-101 provides that public waters "shall become the complement of, or one of the appurtenances of, the land *or other thing* to which, through necessity, said water is being applied." (emphasis added). Here the water at issue is being applied to drive the hydro-pumps. As a result, under Idaho law the water right at issue in this case is appurtenant to the hydro-pumps within Black Canyon Dam. *See* Boise Project Databook, Exh. 1 at 4; *see also* 1955 Contract, Ex. 22, ¶ 7(f) (defining "Black Canyon Dam and Reservoir" as "including the direct-connected pumping installation serving the north side lands of the [Emmett Irrigation] District, but exclusive of the Black Canyon Powerplant.").

C. EID Has Benefitted From Its Action and Its Change in Position Has Disadvantaged the United States.

For almost 50 years EID has benefitted from the operation of the 1955 Contract as the United States has provided EID with its irrigation water pursuant to the terms of the contract.²⁰ This history perhaps explains why when the Idaho Department of Reclamation initiated the Payette Adjudication and directed all water users to claim their rights, EID filed a number of claims for irrigation water but did not assert ownership of the water rights for Black Canyon's hydro-pumps. *Cf.* Exhibit 26 (EID's claims filed in the Payette Adjudication). Moreover, EID was advised of the United States' plans to file a claim for the hydro-pump water rights and subsequent filing of the claim but did not object. *See* March 14, 1984 Memo, Exh. 29.

The adjudication of the Snake River and all its tributaries began on November 19,

²⁰ Indeed, when the 1921 Contract governed the parties relationship, for years the United States provided EID with *more* than it was entitled to under the terms of the contract.

1987. *State ex rel. Higginson v. United States*, 115 Idaho 1, 764 P.2d 78 (1988). Notice of the commencement of the adjudication was served on potential claimants within Basin 65 in 1988. Status Report, November 15, 1988 (attached as Exhibit 35). The United States filed its claims with the IDWR on July 5, 1989. More than a decade later, EID first asserted a claim to the water the United States uses to operate the hydro-pumps within Black Canyon Dam. *Notice of Claim to a Water Right* (Civil Case No. 39576)(attached as Exhibit 36).

Not only has EID long benefitted from the operation of the 1955 Contract, but its sudden change in position disadvantages the United States. First, it forces the United States to spend money and resources litigating an issue which, if ever previously in doubt, was closed by the terms of the 1955 contract. Second, should EID prevail, that would further disadvantage the United States. The United States has honored the terms of the contract calling for it to operate the hydro-pumps to deliver irrigation water to EID for nearly 50 years. Nonetheless, it is conceivable that the parties could agree to modify the contract so that the water is delivered by another mechanism, or even that the parties could terminate the contract. If that happens, the water right would be available to be used by the United States for any purpose authorized by Congress.^{21/} Conversely, should EID prevail, the United States would be divested of the water right decreed to it in the Payette Adjudication.

Conclusion

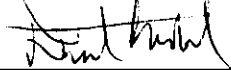
For more than seventy-five years the United States has been diverting water from the Payette River and applying it to the beneficial use of generating power. By doing so, the

^{21/} As one possible example, that could include using the water right to produce hydropower revenue to be used to pay off the project earlier.

United States has appropriated up to 220 cfs of water for power purposes. Moreover, EID's agreement in the 1955 Contract and long acquiescence in the United States' ownership of the hydro-pump water rights leave EID estopped from disputing the United States' ownership.

Dated this 7th day of February, 2003.

Respectfully Submitted,



David W. Gehlert
Attorney for the United States

Certificate of Service

I certify that on this 7th day of February 2003, I caused to be served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF THE UNITED STATES'**

MOTION FOR SUMMARY JUDGMENT to:

via Hand Delivery:

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