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DEPARTMENT OF
WATER RESOURCES

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Collectively: American Falls Spaceholders

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. 01-02017, 01-02032, 01-
	)	02046, 01-10382, 01-10383, 01-10384, 01-
<u>CASE NO. 39576</u>	)	10531 and 01-10532
	)	(American Falls Hydropower Natural Flow
	)	Subcases)
	)	
	)	Subcase Nos. 01-10485, 01-10486, 01-
	)	10487, 01-02064
	)	(American Falls Hydropower Storage
	)	Subcases)
	)	
	)	
	)	AMERICAN FALLS SPACEHOLDERS
	)	MEMORANDUM IN SUPPORT FOR
	)	SUMMARY JUDGMENT
	)	
	)	
	)	

COMES NOW Aberdeen Springfield Canal Company, together with the following Upper Valley American Falls Spaceholders, namely: Blackfoot Canal Company, Burgess Canal Company, Butte & Market Lake Canal Company, Corbett Slough Ditch Company, Dilts Irrigation Company, Enterprise Canal Company, Enterprise Irrigation District, Harrison Canal Company, Idaho Irrigation District, Lenroot Canal Company, New Sweden Irrigation District, Osgood Canal Company, Peoples Canal & Irrigation Company, Poplar, Progressive Irrigation District, Reid Canal Company, Rudy Irrigation Company, Snake River Valley Irrigation District, Trego Ditch Company, and Woodville Canal Company, hereinafter collectively the “American Falls Spaceholders,” and by and through counsel, respectfully support the State of Idaho and the United States’ independent Motions For (Partial) Summary Judgments and further file this Brief in support of their own Motion for an order granting summary judgment pursuant to Rule 56 of the Idaho Rules of Civil Procedure on the following issue:

1. Idaho Power has consistently represented to American Falls Spaceholders that its hydropower water rights are subordinate to water uses for irrigation with the exception of its storage rights in American Falls Reservoir, which are limited to 45,000 acre-feet. The Company should therefore be precluded from claiming otherwise under the doctrines of equitable estoppel and quasi estoppel.
2. The American Falls Spaceholders should be awarded their reasonable attorney fees and costs pursuant to Idaho Code §§ 12-120(3) and/or 12-121 because Idaho Power’s claim to ownership of a large portion of water in excess of its 45,000 acre-feet storage right is a blatant attempt to renege on past promises to the American Falls Spaceholders and other irrigators above American Falls Reservoir.
- 3.

INTRODUCTION

Hundreds of water users rely on the storage capacity of American Falls Reservoir (“the Reservoir”) to supply water for agricultural purposes in the event of shortage or drought. In promoting and expanding its hydropower operations on the Snake River over the last century, Idaho Power has consistently and continuously represented to water users for irrigation that its

entire system of hydropower facilities were to be considered secondary to water uses for irrigation. The support of irrigators was an absolute necessity for the Company's continued growth and prosperity; without it, many of Idaho Power's hydropower installations would not exist today. The irrigators' acquiescence to Idaho Power's facilities at Hells Canyon, Twin Falls, and American Falls was conditioned entirely upon the Company's repeated assurances that its hydropower rights would be subordinate to irrigation. The only exception to that promise of subordination was a recognized storage right at American Falls Reservoir totaling approximately 45,000 acre-feet, or 2.65% of the Reservoir's total capacity.

Idaho Power's current effort to claim ownership of 300,000 acre-feet, fully 17% of the storage capacity of the Reservoir constitutes an outright betrayal of the Company's solemn promise to irrigators that the Company's operations would not threaten agriculture in Southern Idaho. With repeated promises, Idaho Power induced the Spaceholders and other water users to pledge their support of the Company's efforts to expand its power operations on the Snake River. Idaho Power's current position is a complete reversal of its prior position as represented to irrigators, state officials and the United States Congress regarding the Company's rights at American Falls and is impermissible under principles of equitable estoppel and quasi-estoppel. The American Falls Spaceholders have relied in good faith upon Idaho Power's pledge and file this motion and supporting memorandum in defense of the promises made by Idaho Power that its right to generate power at American Falls is subordinate to water uses for irrigation and that its right to demand releases of water from the reservoir is limited to 45,000 acre-feet.

LEGAL STANDARDS

Summary Judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "All disputed

facts are to be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party.” *Robert Comstock, LLC v. Keybank Nat’l Assn.*, 142 Idaho 568, 571, 130 P.3d 1106, 1109 (2006).

Equitable estoppel precludes relief “(1) [w]hen a party makes a false representation or concealment of material fact with actual or constructive knowledge of the truth; (2) it is made with the intent that it be relied upon; (3) the party asserting estoppel does not know or could not discover the truth; and (4) the party asserting estoppel relies on it to the party’s prejudice.” *Allen v. Reynolds*, 145 Idaho 807, 813, 186 P.3d 663, 668 (Idaho 2008) (quoting *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 782, 839 P.2d 1192, 1196 (1992)).

Quasi-estoppel is properly invoked “against a person asserting a claim inconsistent with a position previously taken by that person with knowledge of the facts and his or her rights, to the detriment of the person seeking application of the doctrine.” *The Highlands, Inc. v. Hosac*, 130 Idaho 67, 70, 936 P.2d 1309, 1312 (1997) (citing *KTVB, Inc. v. Boise City*, 94 Idaho 279, 282, 486 P.2d 992, 995 (1971)). “This doctrine applies when: (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.” *Atwood v. Smith*, 143 Idaho 110, 114, 138 P.3d 310, 314 (2006) (citing *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 145, 75 P.3d 194, 199 (2003)). “The doctrine classified as quasi-estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits; and the principle precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him.” *Thomas v. Arkoosh Produce, Inc.*, 137

Idaho 352, 357, 48 P.3d 1241, 1246 (2002) (citing Schoonover v. Bonner County, 113 Idaho 916, 919, 750 P.2d 95, 99 (1988)).

ARGUMENT

A. IDAHO POWER COMPANY HAS CONSISTENTLY PLEDGED THAT ITS HYDROPOWER RIGHTS ARE SECONDARY AND SUBORDINATE TO WATER USES FOR IRRIGATION WITH THE EXCEPTION OF ITS 45,000 ACRE-FOOT STORAGE RIGHT IN AMERICAN FALLS RESERVOIR.

As a vital resource to southern Idaho, water in the Snake River Basin has long been a potential battle ground for the competing interests of irrigation and hydropower generation. For most of the 20th century, however, this battle was averted by the mutually beneficial cooperation of both Idaho Power Company and irrigators in seeking to optimize the beneficial use of Snake River water. This is most clearly demonstrated in what has become known as the “two rivers” concept, whereby the part of the river upstream from Milner Dam, being more conducive to irrigation would be primarily used for that purpose. Most power generation was concentrated downstream from Milner Dam, where topographical features make irrigation less feasible. Vital to this arrangement was the agreement, indeed the insistence, of the power company that its water rights for hydropower generation would be secondary and subordinate to water rights for irrigation.

This arrangement benefitted both the agricultural community and Idaho Power Company. Idaho Power encouraged irrigators to divert more water, both from surface and ground water sources, because it increased demand for electricity and greatly expanded Idaho Power’s customer base. The irrigators received inexpensive electricity in return. Fundamental to this relationship were the repeated assurances of Idaho Power that irrigation was to take precedence over hydropower generation, and the reliance thereon by irrigators.

The purpose of the construction of American Falls Reservoir in the early 1920's was to maximize storage of water for irrigation use above Milner Dam. It was clear to all parties involved, including Idaho Power, that the effect of maximizing storage would be to largely dry up the river below American Falls during the storage season. "[I]t is generally recognized that the development of [American Falls] reservoir will shut off the winter flow at that point, which will thereby to a very large extent deprive the remaining power sites of the winter water which now passes American Falls." Minutes of Public Hearing at Rupert, Idaho Oct. 7, 1921, at 25. *In the Matter of the Application of the Idaho Power Company for a Preliminary Permit, Twin Falls Power Site* (Federal Power Commission) In furtherance of the goals of optimizing the amount of water stored for irrigation, the 1923 American Falls Contract between the United States and Idaho Power, the Company sold most of its American Falls water rights to the United States and the remainder of the rights were severely limited so as to not interfere with the storage of water in the reclamation project. *See* Contract between the United States and the Idaho Power Company, Relative to Power Rights at American Falls, Idaho, Contract No. 11r-733 (June 15, 1923) (hereinafter "1923 American Falls Contract" as heretofore filed in the respective sub-cases).

The 1923 American Falls Contract was just one of the many instances in which Idaho Power acknowledged the subordinate nature of its hydropower rights. In the federal power license for its project at Twin Falls, the Company agreed to the following language:

All rights to the use of water for power purposes heretofore or hereafter acquired for the development of power at the site of this project shall be held and considered at all time to be subject, inferior and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation purposes, except (a) the right to use for power development at this project the water from the 45,000 acre-feet of primary storage capacity which the Licensee holds in American Falls Reservoir...

Federal Power Commission, License on Government Lands, Project No. 18, Idaho, Idaho Power Company, June 11, 1934, Art. 14. In its battle against the federal government to defeat the federal high dam project at Hells Canyon in favor of its own complex of three smaller power plants during the late 1940's and early 1950's, Idaho Power made repeated public representations as to its long standing policy of subordination to irrigation:

- 1947: "The principles which have been practiced in the coordination of the use of water for both irrigation and power purposes in the Snake River Valley are simple. They are based on the premise that the most valuable use for water is for the irrigation of land. It logically follows that hydroelectric power development is of secondary consideration." *Facts About Idaho Power Company* at 4 (a pamphlet enclosed with a letter from C.J. Strike, President and General Manager of Idaho Power Company, to the Honorable Henry Dworshak, United States Senate) (Feb. 14, 1947)).
- 1947: "...[O]ur system is developed along this line; by taking the water as it enters into the canyons we in no way interfere with the rights of irrigators. Our first plant, for example, is at American Falls where we gave up our water rights, surrendered them, sold them to the government. **Ninety-five percent of the release of water at American Falls is for irrigation purposes** and we merely tie in and use it as it is available under those circumstances. ...at no place on the Snake River have we ever taken the position that where our water rights for power were developed have we in any way deprived irrigation people of what we believe to be the first and most important use of water." See *In the Matter of the Application of the Idaho Power Company, a corporation, for temporary permit for low dam construction at the Ox Bow location on the Snake River, Before Hydroelectric Commission of the State of Oregon*, Transcript of Proceedings, Salem Capitol Building, Salem, Oregon, September 15, 1947 (emphasis added) attached as Exhibit A.
- 1951: "The Idaho Power Company for over thirty years has recognized the importance of irrigation to the economic development of southern Idaho and has consistently developed its own projects on the basis of irrigation having prior rights to the water. The Company has worked with the Bureau of Reclamation to make the most advantageous use of the power from multiple purpose plants for the benefit of the irrigators." *Statement by Idaho Power Company Submitted to Congressional Appropriations Committees – 1951* at 9 (signed by T.E. Roach, President and General Manager of Idaho Power Company).

- 1952: “Idaho Power Company fully recognizes the primary importance in southern Idaho of the use of water for reclamation and irrigation purposes, and over more than 35 years of its existence has cooperated fully with water users in the Snake River valley. **Our system has been planned and built accordingly, and in the entire history of the Company, I know of no instance where the Company has ever protested a water appropriation filing, or raised any objection to diversion or use of water, for such purpose.**” Letter from A.C. Inman, Vice-President and Secretary, Idaho Power Company, to the Honorable Len Jordan, Governor of the State of Idaho (Mar. 14, 1952) (emphasis added).
- 1952: “. . . [I]n all of its long history Idaho Power Company has never—not even once—protested or filed objection to subsequent water permit filings for the diversion of water for irrigation or reclamation. This is in conformity with the Company’s long-established and well-known policy of recognizing that the first and most important use for the waters of the Snake River is for the irrigation of the land. . . . which policy makes the use for power purposes subordinate to irrigation and reclamation.” Letter from T.E. Roach, Idaho Power Company, to Ed Ermine, Editor, Idaho Farm Journal at 2 (July 31, 1952) (emphasis added).
- 1952: “. . .Historically, the [Company] has always conceded that the water rights for future irrigation development shall have precedence over their hydroelectric water rights.” Opening Statement of R.P. Parry before the Federal Power Commission in the Matter of Idaho Power Company (July 1952) at 6.
- 1953: “Well, our company for a period of 37 years or more has had a very firm and fixed policy of complete coordination of the use of the Snake River waters for the development of hydroelectric power with the needs of that water for irrigation and has followed the policy of always placing the use of that water for irrigation in a prior position to the use of the water for hydroelectric development.” Official Stenographer’s Report Before the Federal Power Commission, *In the Matter of: Idaho Power Company* (Project Nos. 1971, 2132, 2133) at 1419 (July 8, 1953) (examination of Thomas E. Roach, President, General Manager and Chairman of the Board of Directors, Idaho Power Company).
- Unknown: “. . .Throughout its entire existence, Idaho Power has followed a strict policy of subordinating its needs of water for power to those of water for irrigation. [The Hells Canyon] project continues and strengthens that policy. See *The Hells Canyon Issue in Simple Terms* at 12. attached as Exhibit B.

These assurances were particularly important to the irrigation lobby as they decided whether to throw their considerable clout behind the Company or the federal agencies vying for the right to build at Hells Canyon. Ultimately, Idaho Power proposed that the Federal Power License for its Hells Canyon project have an explicit condition subordinating its rights to future upstream uses, as a result, the irrigators acted as a powerful lobbying force in support of Idaho Power's efforts. Likewise, when it came time to rebuild the American Falls Dam, the American Falls Spaceholders agreed to a partnership with Idaho Power only after receiving the Company's promise that it would subordinate any power production to uses of water for irrigation. Idaho Power's representations regarding the American Falls Dam were entirely consistent with its prior position in the Hells Canyon proceedings that its hydropower rights were subordinate to rights for irrigation:

- 1966: "Idaho Power Company has consistently recognized that the use of water for reclamation should obtain a higher priority than the use for other purposes." *Statement of Idaho Power Company To Irrigation And Reclamation Subcommittee, House Interior and Insular Affairs Committee Regarding H.R. 13914, Southwest Idaho Water Development Project, September 9, 1966* at 1.
- 1967: "Our position with respect to this permission [to divert from the backwaters of the Lower Salmon power plant] is in conformity with the Company's long established policy of subordinating the need of water for power to that of water for irrigation." Letter from James E. Bruce, Secretary, Idaho Power Company, to Grindstone Butte Mutual Canal Company (Apr. 6, 1967) at 1.
- 1968: "These rights of Idaho Power Company have been voluntarily subordinated by the Company to present and future irrigation and other consumptive uses in the Snake River watershed." *Statement of Idaho Power Company to the Technical Advisory Committee of the Idaho Water Resource Board, January 15, 1968* at 1.
- 1972: "In response to your request of August 24, there is enclosed a tabulation of the major Water Permits held by Idaho Power Company for its various hydroelectric power plants. ... You will note that the 'power right' is subordinate to irrigation use in each case." Letter from R.A. Hogg listing Idaho Power

Company hydropower water rights for the Bliss, Lower Salmon, Upper and Lower Malad, Swan Falls, Twin Falls, Upper Salmon, American Falls, Clear Lakes and CJ Strike at 1.

These statements were consistent with Idaho Power's historic position and reaffirmed the fundamental premise of the Company's relationship with irrigation interests in the Snake River Basin.

As seen above, Idaho Power Company has long pledged that its hydropower rights would be secondary to rights for irrigation. Relying on that pledge, the American Falls Spaceholders and other water users actively supported the Company in its operations and expansion over time. Although a strange marriage, it truly was the collaboration and cooperation of Idaho Power and the Spaceholders and other agricultural interests that led to optimal development of the Snake River Basin. The position that Idaho Power now takes is akin to reneging on a vow it has consistently renewed over the past 75 years, and the Company should therefore be estopped from pursuing its storage water right claims.

B. IDAHO POWER COMPANY HAS CONTINUOUSLY ASSERTED THAT ITS STORAGE RIGHTS IN AMERICAN FALLS RESERVOIR ARE LIMITED TO 45,000 ACRE-FEET, OR 2.65% OF THE RESERVOIR'S CAPACITY. IT IS THEREFORE ESTOPPED FROM CLAIMING AN ADDITIONAL 255,000 ACRE-FEET OF STORAGE RIGHTS.

Idaho Power Company has repeatedly represented that its storage rights at American Falls are limited to the approximately 45,000 acre-feet (2.65% of the reservoir's storage capacity) described as primary storage in the 1923 contract between the Company and the United States. The amount of water that Idaho Power Company now seeks in addition to its 45,000 acre-feet of primary storage is no insignificant matter, in fact it is roughly equivalent to the

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amount of storage water currently held by the American Falls Spaceholders, or approximately 17% of the total storage capacity of the reservoir. Idaho Power's unabashed claim to such a large amount of water after repeated avowals to the contrary represents an unconscionable change in position. The Company reaped great benefit as a result of the good will of the American Falls Spaceholders and other irrigators who, acting in reliance on Idaho Power's promises as to the limited nature of its American Falls storage, supported the Company in its proposal to develop the hydropower potential of the American Falls reclamation project. The Company's current effort to exert dominion over 255,000 acre-feet of storage water in excess of the 45,000 it has historically claimed was the limit of its storage rights in the reservoir constitutes the ultimate act of bad faith.

Idaho Power has consistently represented that its right to storage water in American Falls is limited to 45,000 acre-feet or 2.65% of the total storage capacity. Many of the Company's representations on that point have been made in the course of congressional hearings and testimony offered to obtain action favorable to Idaho Power, such as approval of the Company's Hells Canyon proposal and federal hydropower licensing for American Falls. The American Falls Spaceholders relied on Idaho Power's representations. They would not have done so if they had known Idaho Power was holding in its pocket an additional claim to 255,000 acre-feet of storage space. Idaho Power should therefore be estopped from claiming more than 45,000 acre-feet (2.65%) of storage in these proceedings.

Given the historic tension between hydropower interests and agricultural interests in the Snake River Basin, the Company has often had to reassure state and federal officials that its hydropower needs would not threaten the use of water for irrigation above Milner Dam. A central point of the assurances made by Idaho Power describe the limited nature of the

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Company's right at American Falls reservoir. In order to receive a license from the Federal Power Commission for its Twin Falls facility, for example, the Company agreed to language subordinating its right to irrigation interests, and detailing how much American Falls storage could be used for power development. The Company (Licensee) stipulated:

All rights to the use of water for power purposes heretofore or hereafter acquired for the development of power at the site of this project shall be held and considered at all time to be subject, inferior and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation purposes, except (a) the right to use for power development at this project the water from the 45,000 acre-feet of primary storage capacity which the Licensee holds in American Falls Reservoir... Federal Power Commission, License on Government Lands, Project No. 18, Idaho, Idaho Power Company, June 11, 1934, Art. 14.

C.J. Strike, then president of Idaho Power, testified in 1947 about this very issue in seeking support for the Company's Hells Canyon proposal:

...[O]ur system is developed along this line; by taking the water as it enters into the canyons we in no way interfere with the rights of irrigators. Our first plant, for example, is at American Falls where we gave up our water rights, surrendered them, sold them to the government. **Ninety-five percent of the release of water at American Falls is for irrigation purposes** and we merely tie in and use it as it is available under those circumstances.

In the Matter of the Application of the Idaho Power Company, a corporation, for temporary permit for low dam construction at the Ox Bow location on the Snake River, Before Hydroelectric Commission of the State of Oregon, Transcript of Proceedings, Salem Capitol Building, Salem, Oregon, September 15, 1947 (emphasis added). As described above, the Hells Canyon project was ultimately approved and to the extent that Idaho Power's representations as to its rights and operations at American Falls facilitated its support and approval the Company should be estopped from asserting something different today.

In 1973, in a statement before the House Interior and Insular Affairs Sub-Committee on Water and Power Resources on the replacement of the American Falls Dam, former vice-

president of Idaho Power, Robert Hogg explicitly linked Idaho Power's interest in the replacement to its concern for irrigators, stating that the Dam "must be replaced at the earliest possible date to ensure the safety of the Dam and to restore the reservoir operation to provide the irrigators with the full reservoir capacity of 1,700,000 acre-feet of water." Hearing Before the Subcommittee On Water and Power Resources of the House Committee On Interior and Insular Affairs, 93d Cong., 1st Sess., at 42 (Oct. 6, 1973). Emphasizing the minimal nature of the Company's storage capacity, Mr. Hogg explained that "[t]he Company's interest as a spaceholder is very modest in contrast to the irrigators' interest; however, **the Company's 45,000 acre-feet of storage capacity** is important in meeting the Company's power supply requirements during the irrigation season." *Id.* at 43 (emphasis added). Later in the testimony, Mr. Hogg reiterated that "[t]he storage, of course, the water going through American Falls Dam, of course, is first used for irrigation service. **We have a right to utilize only 45,000 acre-feet upon our demand.** So the only control we have is on its use in the downstream powerplant." *Id.* at 47 (emphasis added).

In 1975, the Reservoir District, with the support of the Company, lobbied to have the tax code amended so that the American Falls bonds would qualify for tax exempt status. The main argument for broadening the exemption to include the American Falls Replacement Dam was that the Company's right to stored water was exceedingly small, and therefore, "substantially all" the water in the reservoir would be used for irrigation. In a letter to the Commissioner of Internal Revenue, dated January 31, 1975, American Falls Reservoir District submitted a brief prepared in part by R. P. Parry, which stated that

Pursuant to Public Law 93-206, a falling water contract has been drafted which specifically states that the Company has no right to call upon the Bureau of Reclamation or the spaceholders for the release of water from the American Falls

Reservoir (except for the 45,000 acre-feet which the Company owns as a spaceholder of the 1,700,000 acre-feet capacity.)

Letter from Phillip H. Holm to the Honorable Donald C. Alexander, Commissioner of Internal Revenue at 3. (Jan. 31, 1975) (emphasis added).

In its Report recommending that Congress extend the tax-exempt status to the bonds issued to finance the replacement dam, the Committee on Ways and Means pointed to the following in support of its recommendation:

It was intended that in normal circumstances, substantially all of the falling water would be made available to the Power Company only when water was released from the dam for irrigation purposes. There has been no intention to release water specifically for use by the Idaho Power Company to generate electricity, **except for 45,000 acre-feet (2.65 percent of the storage capacity)** whose release the power company can schedule for the purpose of generating electric energy. Thus, the use of water for electric energy would be subordinated to the use of the water for irrigation. ... In this case the Idaho Power Company has a limited spaceholder right (**under 3 percent**)....

H.R. Rep. No. 94-531, at 3 (emphasis added). In comments to the United States House of Representatives on the proposed amendment of Section 103 of the Internal Revenue Code to extend exempt status to bonds issued to store water in a dam which will have a subordinate use in generating electric energy, Mr. Ketchum reiterated that:

There has been no intention to release water specifically for the power company **except to the extent of the approximately 2.65 percent** of the dam storage capacity. Released water in that amount could be used by the power company for the purpose of scheduling the generation of electric energy. Therefore, the use of water for electrical generation purposes would clearly be subordinate to the use for irrigation.

121 Cong. Rec. 31868 (1975) (emphasis added). The same comments were repeated to the United States Senate in the December 16, 1975, Report of the Committee on Finance, which also recommended that the tax exemption be extended to the bonds issued to finance the replacement dam. *See* S. Rep. 94-570, at 3 (1975).

The resultant legislation, titled the Revenue Adjustment Act of 1975, was enacted on December 23, 1975 and stated that:

“A dam for the furnishing of water for irrigation purposes which has a subordinate use in connection with the generation of electric energy by water shall be treated as meeting the requirements of subsection (c) (4) (G) if – (1) substantially all of the stored water is contractually available for release from such dam for irrigation purposes, and (2) the water so released is available on reasonable demand to members of the general public.

Pub. Law 94-164, 89 Stat. 970, 976 (Dec. 23, 1975). Remarks about the nominal size of Idaho Power’s right to stored water (2.65% of the reservoir capacity) figured prominently throughout the legislative process leading to the Revenue Adjustment Act. Irrigators would never have made such representations or supported Idaho Power’s proposal had the Company claimed at the time the 17.6% of storage capacity it is now claiming in the SRBA. Under the legislation, as enacted, the Replacement Dam could not have met the requirement that substantially all water stored in the dam be available for irrigation, if Idaho Power had claimed the amount of water it now purports to own. On the contrary, Idaho Power’s current claims would have doomed the proposal and the Company would not have realized the substantial power benefits it now holds at American Falls. As a consequence, the Company should be estopped from now taking a position contrary to its prior representations.

Additional representations that the extent of Idaho Power’s right to stored water in American Falls is limited to 2.65% or 45,000 acre-feet appear throughout documents pertaining to the American Falls Replacement Dam. In the Falling Water Contracts between the American Falls Reservoir District and the Company, it states:

So long as any of the Bonds or Interim Notes are outstanding and unpaid, the Idaho Power Company will not acquire, on a permanent contractual basis, an additional amount of the water accruing to the active storage capacity in the Replacement Dam for the purpose of scheduled releases for generating electric

energy, which together with the **amount of active storage capacity presently owned by the Idaho Power Company under its Spaceholder Contract (2.7471%)** would exceed eight percent (8%) of the active storage capacity of the Replacement Dam.

Falling Water Contract, dated Mar. 31, 1976, at 13 (emphasis added). The 1976 Spaceholder Contract states:

STORAGE CAPACITY TO BE MADE AVAILABLE TO SPACEHOLDER...(b) The United States will continue to make available to the Spaceholder stored water accruing to 2.641% of the active storage capacity of the Replacement Dam unless the Spaceholder is in default under the terms and conditions of the Existing Spaceholder Contract or this Spaceholder Contract.

1976 Spaceholder Contract at 10, Part II, art. 21 (Mar.31, 1976). Similarly, in the American Falls Replacement Dam Bonds, dated December 1, 1980, it states:

Pursuant to the Idaho Power Company Spaceholder Contract, **Idaho Power Company is entitled to the use of stored water accruing to 2.6741% (approximately 45,000 acre-feet)** of the active water storage capacity of the Replacement Dam (approximately 1,700,000 acre-feet) for power generation.

See American Falls Reservoir District Idaho American Falls Replacement Dam Bonds, dated Dec. 1, 1980 at 15 (emphasis added) attached as exhibit C. Finally, in an Amended Findings of Fact and Conclusion of Law issued by the District Court in 1977, Idaho Power Company is listed among the other waterusers with rights to active storage capacity in the existing American Falls Dam as only owning 2.6471% of the active storage capacity. *In the Matter of the Petition of the Boards of Directors of the American Falls Reservoir District et al*, Civil No. 28378, May 18, 1977 at 2.

Idaho Power has repeatedly and consistently represented that its rights to water stored in the American Falls Reservoir are limited to 2.65% of the total storage capacity of the dam. Those representations form an important part of Idaho Power's historic strategy to earn and keep

the support and trust of the agricultural community using Snake River water for irrigation. Moreover, when made to induce reliance on the part of the Spaceholders and other irrigators, those representations became part of a contract between Idaho Power and a great number of water uses who relied in good faith upon the Company's promises. The American Falls Spaceholders, among others, took the Company at its word and gave their support accordingly. The benefit of the Spaceholders' and irrigators' support for Idaho Powers operations over the years is incalculable and to allow the Company to now take a position contrary to its prior representations would result in great inequity for the Spaceholders, who historically supported Idaho Power's participation in the construction and replacement of American Falls Dam. Idaho Power should therefore be estopped from pursuing its current claim for storage rights in excess of 45,000 acre-feet, or 2.65% of the total capacity of American Falls Reservoir.

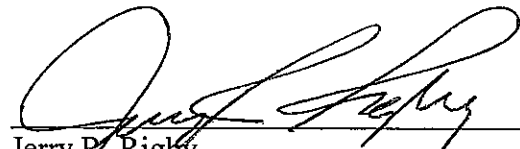
C. American Falls Spaceholders should be awarded their attorneys fees and costs because Idaho Power Company's claim of 300,000 acre-feet of storage in American Falls Reservoir constitutes an improper change in the Company's historic position that is without a reasonable basis in fact or law.

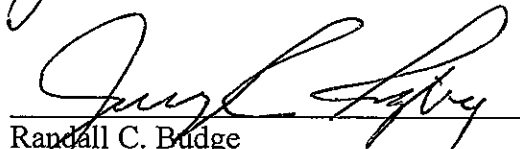
As a result of the utter lack of evidence to support Idaho Power's inconsistent position, the American Falls Spaceholders have unnecessarily been forced to retain legal counsel in order to protect their legal and historical interests and therefore should be awarded their reasonable attorneys fees and costs incurred in defending against Idaho Power's improper change of position and attempt to gain dominion over 255,000 acre-feet in excess of its heretofore professed spaceholder right to 45,000 acre-feet of storage.

CONCLUSION

The American Falls Spaceholders have relied on Idaho Power's promises for more than 75 years. They have consistently supported the Company through its expansion of operations on the Snake River, its application for federal power licenses and its part in the reconstruction of American Falls Dam. They have acted in good faith reliance on Idaho Power's assurances regarding the limited nature of its storage at American Falls (2.65% or 45,000 acre-feet) and the Company's pledge to subordinate its hydropower rights to irrigation and other upstream uses. The American Falls Spaceholders therefore request an order adjudging that Idaho Power Company is estopped from claiming any storage rights in the American Falls Reservoir other than its spaceholder contract for 45,000 acre-feet or 2.65% of the total capacity of American Falls Reservoir. Furthermore, given the utter lack of evidence to support Idaho Power's inconsistent position, the American Falls Spaceholders respectfully request an award of their reasonable attorneys fees and costs incurred in defending against Idaho Power's improper change of position and attempt to gain dominion over 255,000 acre-feet in excess of its heretofore professed spaceholder right to 45,000 acre-feet of storage.

DATED this 8th day of December, 2009.


Jerry R. Rigby
On behalf of Upper Valley AF Spaceholders


Randall C. Budge
Thomas J. Budge
On behalf of Aberdeen Springfield CC

CERTIFICATE OF MAILING

I certify that on December 8, 2009, I mailed the original and copies of the Brief in Support of Motion for Partial Summary Judgment including all attachments, to the following persons:

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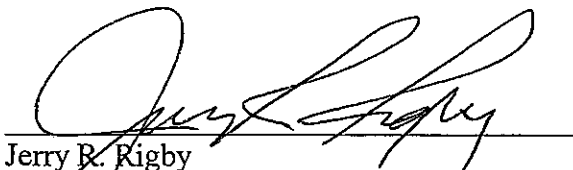
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