

ORIGINAL

LODGED
DISTRICT COURT - SRBA
TWIN FALLS CO. IDAHO
FILED
2009 DEC 4 PM 4 39

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG (ISB No. 2207)
Deputy Attorney General
Chief, Natural Resources Division

DAVID I. STANISH (ISB No. 7310)
Deputy Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
Facsimile: (208) 854-8072

Counsel for the State of Idaho

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,
	)	01-10531, and 01-10532
Case No. 39576	)	(American Falls Hydropower Natural Flow
	)	Subcases)
	)	
	)	Subcase Nos. 01-10485, 01-10486,
	)	01-10487, and 01-02064
	)	(American Falls Hydropower Storage
	)	Subcases)
	)	
	)	BRIEF IN SUPPORT OF MOTION
	)	FOR PARTIAL SUMMARY
	)	JUDGMENT

The State of Idaho, by and through the undersigned deputy attorney general, hereby submits its *Brief in Support of Motion for Partial Summary Judgment* in the above-entitled subcases.

TABLE OF CONTENTS

I.	Procedural Background.....	1
A.	American Falls Hydropower Natural Flow Subcases: 01-02017, 01-02032, 01-02046, 01-10382, 01-10383, 01-10384, 01-10531 AND 01-10532.....	1
B.	American Falls Hydropower Storage Subcases: 01-10485, 01-10486, 01-10487 AND 01-02064.....	2
II.	Factual Background.....	2
A.	USBOR's Proposal To Replace The American Falls Dam.....	4
B.	Idaho Power's Proposal To Assist Financially With The Reconstruction Of The American Falls Dam In Exchange For The Use Of The Falling Water.....	6
C.	Federal Legislation Authorizing Private Financing Of American Falls Dam Reconstruction.....	9
D.	Federal Legislation Providing A Tax Exemption For The Private Financing Of American Falls Dam Reconstruction.....	15
E.	Federal Power Commission Licensing Of Idaho Power's American Falls Powerplant.....	20
F.	American Falls Replacement Contracts.....	25
i.	1976 Government Contract.....	26
ii.	1976 Falling Water Contract.....	28
iii.	1976 Spaceholder Contract.....	28
G.	Post-Reconstruction.....	29
III.	Argument.....	30
A.	Idaho Power's Natural Flow Water Rights At American Falls Should Be Disallowed.....	30
i.	Idaho Power's Ownership Of Power Rights At The American Falls Dam Is Contrary To Reclamation Law.....	30

a.	The American Falls Dam Is A Reclamation Dam To Be Operated As A Feature Of The Minidoka Reclamation Project.....	30
b.	As Part Of The Minidoka Project, The American Falls Dam Must Be Operated Pursuant To Reclamation Law Principles, Including The Limitations Set Forth In <i>Burley Irrigation</i> <i>District v. Ickes</i>	30
c.	Allowing Idaho Power To Own Water Rights To The Releases From The American Falls Dam Would Be Contrary To The Reclamation Law.....	36
ii.	By Supporting And Aiding In The Procurement Of Public Law 93-206, The Revenue Adjustment Act Of 1975, And FPC Licenses Nos. 2258 And 2736 Based Upon The Representations That Idaho Power Had No Right To The Releases From The American Falls Dam, Except For Its Storage Water, Idaho Power Is Estopped From Now Asserting That It Owns Water Rights To 16,136 Cfs At America Falls.....	36
iii.	Idaho Power Should Be Judicially Estopped From Asserting That It Owns Any Water Rights To The Natural Flows Released From American Falls.....	40
B.	If The Court Finds That Idaho Power Has rights To The Flows Leaving American Falls, Those Rights Should Be Subordinated Consistent With The Director's Report And Idaho Power's FPC Licenses.....	41
i.	Idaho Power Is Bound As A Matter Of Law By Its Voluntary Agreement To Accept The Director's Report Remark Language As A condition Of Its FPC License, Project No. 2258.....	41
ii.	By Supporting And Aiding In The Procurement Of Public Law 93-206, The Revenue Adjustment Act Of 1975, FPC Licenses Nos. 2258 And 2736 Based Upon The Representations That Idaho Power Had No Right To The Releases From The American Falls Dam, Except For Its Storage Water, Idaho Power Is Estopped From Now Asserting That Its Water Rights Should Not Be Subordinated Consistent With The Director's Report Remark.....	44
C.	Idaho Power's Three Alternative Claims For Storage Rights At American Falls Should Be Disallowed As A Matter Of Law.....	44
D.	Hydropower Storage At American Falls Reservoir Is Limited to 2.65% Of The Storage Capacity Of The Reservoir (~45,000 Acre-feet) As A Matter Of Law.....	47

i.	The Storage Capacity Available For Hydropower Generation Purposes At The American Falls Reservoir Was Statutorily Limited By The Revenue Adjustment Act Of 1975.....	48
a.	The Legislative History Of The Revenue Adjustment Act Of 1975 Establishes Congress's Intent That Less Than 10% Of The Storage Capacity In Tax-Exempt Irrigation Reservoirs Could Be Obtained For Hydropower Purposes As A Statute.....	49
b.	The Purpose And Operation Of The Revenue Adjustment Act Of 1975 Establishes Congress's Intent To Limit Idaho Power's Control Over The Releases From The American Falls Dam To That Of A Spaceholder With Limited Storage Rights.....	50
c.	Idaho Power's Rights To American Falls Storage Is Limited As A Matter Of Federal Law.....	52
ii.	Idaho Power Is Collaterally Estopped From Claiming American Falls Capacity Greater Than The 2.65% Apportioned To It In The Confirmation Proceedings Accompanying The American Falls Rebuild.....	53
a.	Idaho Power Had A full And Fair Opportunity To Litigate Its Apportionment Of The Storage Capacity At American Falls.....	54
b.	Idaho Power Is Barred By Judicial Estoppel From Asserting That It Is Not Bound By The Findings Of The District Court In The Confirmation Proceeding.....	56
c.	Idaho Power's Rights To Use The Water Stored At American Falls Was Actually And Necessarily Determined In the Confirmation Proceedings As A Matter Of Law.....	56
iii.	Idaho Power Is Barred By Judicial Estoppel From Asserting That It Has A Storage Right At American Falls Greater Than 2.65% Of Reservoir Capacity.....	57
iv.	By Supporting And Aiding In The Procurement Of Public Law 93-206, The Revenue Adjustment Act Of 1975, And FPC Licenses Nos. 2258 And 2736 Based Upon The Representations That Idaho Power Had A Right To Only 2.65% Of Storage Capacity (~45,000 Acre-Feet), Idaho Power Is Estopped From Now Asserting That It Owns More Than Six Times That Amount (~300,000 Acre-Feet).....	59
VI.	Conclusion.....	64

TABLE OF AUTHORITIES

CASES

<i>Atwood v. Smith</i> , 143 Idaho 110, 138 P.3d 310 (2006)	37
<i>Bubler v. Brydon</i> , 125 Idaho 107, 867 P.2d 981 (1994)	55
<i>Burley Irrigation District v. Ickes</i> , 116 F.2d 529 (1940)	16, 30, 31, 32
<i>Consumer Product Safety Comm'n v. GTE Sylvania</i> , 447 U.S. 102 (1980)	49
<i>Erickson v. Idaho Bd. of Registration of Prof'l Engineers and Prof'l Land Surveyors</i> , 146 Idaho 852, 203 P.3d 1251 (2009)	45, 46, 47
<i>Garcia v. United States</i> , 469 U.S. 70 (1984)	50
<i>Heinze v. Bauer</i> , 145 Idaho 232, 178 P.3d 597 (2008)	40, 56, 57
<i>Idaho Power Co. v. State</i> , 104 Idaho 575, 661 P.2d 741 (1983)	42, 43
<i>Kerner v. Johnson</i> , 99 Idaho 433, 583 P.2d 360 (1978)	55, 56, 58, 62
<i>Thomas v. Arkoosh Produce, Inc.</i> , 137 Idaho 352, 48 P.3d 1241 (2002)	37
<i>Ticor Title Co. v. Stanion</i> , 144 Idaho 119, 157 P.3d 613 (2007)	54

IDAHO STATUTES

Idaho Code §§ 43-2201-07	53
Idaho Code § 43-2201(A)	53
Idaho Code § 43-2201(B)	53
Idaho Code § 43-2201(C)	53
Idaho Code § 43-2204	passim
Idaho Code § 67-5201(12)	46
Idaho Code § 67-5201(4)	46
Idaho Code §§ 67-5243(1)	46

Idaho Code § 67-5246(1)-(3).....	46
Idaho Code § 67-5273(2)	46

FEDERAL STATUTES

Pub. L. 93-206, 87 Stat. 904 (1973).....	passim
Pub. L. 94-164, 89 Stat. 970 (1975).....	1, 20, 49

CONGRESSIONAL RECORD AND REPORTS

121 Cong. Rec. 21385 (1975).....	48
121 Cong. Rec. 31515 (1975).....	18
121 Cong. Rec. 31868 (1975).....	passim
Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529, 93rd Cong. (1973).....	passim
Hearing before the House Subcommittee on Water and Power Resources on H.R. 6781, H.R. 6782, and S. 1529 to Authorize the Replacement of the American Falls Dam in Idaho, 93rd Cong. (1973).....	passim
H.R. Rep. No. 94-531 (1975).....	passim
S. 1528, 93rd Cong. (1973).....	10, 11
S. 1529, 93rd Cong. (1973).....	passim
S. Rep. No. 93-223 (1973)	13
S. Rep. No. 94-263 (1975).....	15
S. Rep. No. 94-570 at 2 (1975).....	passim

OTHER AUTHORITIES

1923 American Falls Contract - Contract between the United States and the Idaho Power Company, Relative to Power Rights at American Falls, Idaho, Contract No. I1r-733 (June 15, 1923).....	3, 4, 26
---	----------

1976 Government Contract - Contract between the United States and the AFRD for Construction and Operation and Maintenance of the American Falls Replacement Dam Program, Contract No. 14-06-100-9041 (Mar. 31, 1976).....	passim
1976 Falling Water Contract - Falling Water Contract by and between AFRD and Idaho Power Company (Mar. 31, 1976).....	passim
1976 Spaceholder Contract - Spaceholder Contract among the United States, the AFRD, and Idaho Power Company for Storage in the American Falls Replacement Dam and for Construction and Operation and Maintenance of the American Falls Replacement Dam Program (Mar. 31, 1976)	26, 28, 29, 6
Amended Findings of Fact and Conclusions of Law, <i>In the Matter of the Petition of the Boards of Directors of the American Falls Reservoir District</i> , CV No. 28378 (Idaho 5th Dist. Ct. May 18, 1977).....	passim
American Falls Dam Replacement - Executive Summary Report (USBOR, Dec. 1972).....	5
American Falls Dam Replacement - Information Report (USBOR Dec. 1966).....	4
American Falls Spaceholders' Minutes (Mar. 2, 1973).....	8
Answer to Order to Show Cause, <i>In the Matter of Permits No. 15201/01-2041 and R-273/01-2065 in the Name of Idaho Power Company</i> (IDWR Dec. 1, 1970).	45, 46
Answers and Objections of Idaho Power Company to Plaintiff's First Request for Admissions, <i>Kerner v. United States</i> , CV. No. 1-76-204 (D. Idaho July 25, 1978).....	40, 58, 63
Bond Counsel Opinion (Chapman and Cutler, Dec. 1, 1980).....	64
Bond Counsel Opinion (Chapman and Cutler, Feb. 21, 1990).....	64
Brief of AFRD to IRS at 1 (Jan. 31, 1975)	16, 17, 32, 61
Final Env't'l Statement: American Falls Dam Replacement and Powerplant (Department of Interior Nov. 13, 1974)	60
Idaho Power Company Proposal Presented to Executive Committee of Spaceholders (Feb. 27, 1973)	7, 8, 24, 33
Letter from K. Holum, Ass't Sec. of the Interior, to J.C. Swidler, Chairman, FPC (Aug. 30, 1962).....	21, 22
Letter from J.G. Watt, Ass't Sec'y of the Interior, to Chairman, FPC (Dec. 16, 1969).....	23

Letter from L.E. Lanham, Director of Public Affairs, Idaho Power Company to Senator Frank Church (Feb. 28, 1973).....	9
Letter from P. Holm, Chapman and Cutler, to D.C. Alexander, IRS Comm'r (Nov. 1974).....	16
Memorandum Decision, <i>In the Matter of Permit Nos. 01-2041 and 01-2065 in the Name of Idaho Power Company</i> (IDWR Apr. 21, 1971).....	45, 46
Memorandum Decision, <i>In the Matter of the Petition of the Boards of Directors of the American Falls Reservoir District</i> , CV No. 28378 (Idaho 5th Dist. Ct. Mar. 7, 1977).....	53
Memorandum from Dan Dreyfus, Staff Member of Committee on Interior and Insular Affairs, to Senator Church (Mar. 11, 1973).....	9, 10, 33
Memorandum in Support of Defendants Motion to Dismiss, <i>Kerner v. United States</i> , Civ. No. 1-76-204 (D. Idaho Feb. 28, 1977).....	40
Order Issuing Major License (Constructed), Project No. 2258 (FPC Mar. 31, 1975)	passim
Order Issuing Major License (Unconstructed), Project No. 2736 (FPC Mar. 31, 1975).....	passim
Order Issuing License, Project No. 18 (FPC May 11, 1934).....	22
Order Issuing License, Project No. 1971 (FPC Aug. 4, 1955)	20
Order to Show Cause, In the Matter of Permits No. 15201/01-2041 and R-273/01-2065 in the Name of Idaho Power Company (IDWR Oct. 1, 1970).....	45
Petition of AFRD to Intervene in Support of Application for License (Jan. 25, 1974).....	24, 39
Reply Brief of the Non-Federal Defendants, <i>Kerner v. United States</i> , CV. No. 1-76-204 (D. Idaho April 6, 1979).....	56
Report of Board of Engineers to Consider Projects in Snake River Valley which may affect the Proposed American Falls Reservoir (Apr. 10, 1920).....	3
Transcript on Appeal, <i>Kerner v. Johnson</i> , 99 Idaho 433, 583 P.2d 360 (1978).....	55
Upper Snake River Basin: A Description of Bureau of Reclamation System Operations Above Milner Dam (USBOR Jan. 1996)	29

○ ○

**CONTENTS OF BRIEF
(NUMBERING 66 PAGES)**

ON FILE WITH THE

COURT

To request a copy, (\$1.00 per page) please contact
Clerk of the Court at 208-736-3011.