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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

Case No. 39576

)
) Subcase No. 01-02064
)

) (American Falls Hydropower Storage
) Subcase)
)

) **BRIEF IN SUPPORT OF AMENDED**
) **MOTION FOR PARTIAL SUMMARY**
) **JUDGMENT**
)
_____)

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

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I. PROCEDURAL BACKGROUND

On February 19, 2010, the parties to the American Falls Hydropower Natural Flow Subcases, including Idaho Power, filed Standard Form 5s in those subcases.¹ The parties agreed that Idaho Power's natural flow hydropower water rights at the company's American Falls power plant would be junior and subordinate to all other water rights in the state of Idaho:

The right for the use of water acquired under this right shall be junior and subordinate to all other rights for the use of water within the State of Idaho with a priority date later in time than the priority of this right and shall not give rise to any claim against any future rights for the use of water within the State of Idaho initiated later in time than the priority of this right.²

In addition, Idaho Power dismissed its independent claims for storage for hydropower in the American Falls Reservoir. Thus, the United States Bureau of Reclamation's (USBOR) water right, no. 01-02064, is the only remaining claim for storage for hydropower in the American Falls Reservoir. It is this hydropower aspect of water right no. 01-02064 that is the subject of this motion for summary judgment.

The Idaho Department of Water Resources (IDWR) Director recommended water right no. 01-02064 in the name of the USBOR. The recommendation provided for a total storage capacity of ~1,700,000 acre-feet, which included ~1,655,000 acre-feet for irrigation storage and ~300,000 acre-feet for hydropower storage. The Director's recommendation also included an explanatory remark that made the hydropower aspects of water right no. 01-02064 junior and subordinate to all other water rights except other hydropower rights:

The appropriator shall exercise this right in a manner that recognizes the historic practice that the use of water for power generation is incidental to the rights of others to the use of water for other purposes. The appropriator shall not make a delivery call for hydropower generation except as against junior hydropower rights.

¹ See e.g., Standard Form 5: Stipulated Elements of a Water Right, *In re SRBA Case No. 39576, Subcase nos. 01-02017 et al.* (Idaho 5th Dist. Ct. Feb. 19, 2010).

² See *id.*

The State of Idaho filed an objection to the Director's recommendation, asserting that the amount of power storage under water right no. 01-02064 should be limited to 2.65% of the storage capacity of the American Falls Reservoir. Idaho Power filed an amended objection to water right no. 01-02064 that seeks the inclusion of remarks on the quantity and purpose of use elements that would require the USBOR to bypass flows for use at the company's downstream power plants based upon an alleged contractual right arising from its 1923 spaceholder contract.

The State seeks summary judgment affirming its objection to water right no. 01-02064 and denying Idaho Power's objection.

II. ISSUES PRESENTED ON SUMMARY JUDGMENT

1. Whether power storage at American Falls should be decreed in the name of the United States in the amount of ~45,000 acre-feet (2.65% of reservoir capacity); and
2. Whether water in excess of ~45,000 acre-feet (2.65% of reservoir capacity) must be released past the American Falls Dam specifically for Idaho Power's power generation purposes rather than stored in the Upper Snake River reservoir system.

III. FACTUAL BACKGROUND

As more fully discussed in the State of Idaho's memorandums in support of its motion for partial summary judgment in the Milner Zero Flow subcases,³ in the 1920s, the USBOR, Idaho Commissioner of Reclamation, Twin Falls Canal Company, and North Side Canal Company formed a joint Board of Engineers, which was tasked with, among other things, developing a definite plan for the development of the water resources of the Snake River.⁴ As set forth in its

³ See Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment re: Milner Zero Minimum Flow, *In re SRBA Case No. 39576, Subcase Nos. 00-92002GP et al.* (Idaho 5th Dist. Ct. Oct. 19, 2009); Reply in Support of State of Idaho's Motion for Partial Summary Judgment re: Milner Zero Minimum Flow, *In re SRBA Case No. 39576, Subcase Nos. 00-92002GP et al.* (Nov. 12, 2009).

⁴ Report of Board of Engineers to Consider Projects in Snake River Valley Which May Affect the Proposed American Falls Reservoir at 2-3 (Apr. 10, 1920).

report, the Board of Engineers concluded that the entire flow above Milner Dam should be conserved for irrigation purposes: “[T]he greatest use of the water of Snake River will be found in the dedication of the entire flow of the stream to irrigation [above Milner Dam]”⁵ The Board of Engineers concluded that: “The American Falls Reservoir [would] be essential to a complete development of the irrigation resources,”⁶ and that, “[o]ne of the results of the development of the American Falls Reservoir [would] be to destroy as a source of firm power, the . . . power plants and the partial development of the additional rights of the Idaho Power Company, located at American Falls.”⁷

In 1923, in furtherance of the Board of Engineers’ definite plan for development of the irrigation potential above Milner Dam, the United States and Idaho Power entered into a contract that paved the way for the United States’ construction of the American Falls Dam as part of the Minidoka Reclamation Project. Pursuant to that contract, the United States acquired from Idaho Power two of the company’s three power plants located at American Falls, most of the company’s water rights, and certain real property.⁸ Idaho Power was allowed to continue to operate its remaining power plant on the east side of the river immediately below the American Falls Reclamation Dam, but the company’s right to demand releases of water from the dam was exceedingly limited by the 1923 American Falls Contract.⁹ The federal Reclamation dam and Idaho Power’s private power plant would remain physically disconnected until it became necessary to replace the dam in the 1970s.

⁵ *Id.* at 5.

⁶ *Id.* (Letter of Transmittal at 3).

⁷ *Id.* at 21.

⁸ See 1923 American Falls Contract (June 15, 1923) (aka Contract between the United States and the Idaho Power Company, Relative to Power Rights at American Falls, Idaho, Contract No. 11r-733).

⁹ Planning and development during the ensuing decades confirmed that the conservation and storage of flows above Milner Dam for irrigation purposes and the subordination of hydropower for such purposes were fundamental principles of the Snake River basin. See Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment re: Milner Zero Minimum Flow at 21–48, *In re SRBA Case No. 39576, Subcase Nos. 00-92002GP et al.* (Idaho 5th Dist. Ct. Oct. 19, 2009).

A. USBOR'S PROPOSAL TO REPLACE THE AMERICAN FALLS DAM

As early as 1930, abnormal cracking in the American Falls dam's concrete had been observed.¹⁰ In the 1940s, the USBOR identified a chemical reaction between the aggregate and the alkalis in the cement as the cause of the deterioration. In 1964, the USBOR removed samples of the concrete and determined that the dam no longer met USBOR safety standards. As a result, the USBOR restricted storage by eight feet during the winter times to prevent ice-loading on the compromised structure.

In 1966, the USBOR issued a report that concluded the American Falls Dam could not be permanently rehabilitated, and therefore, the entire structure would have to be replaced.¹¹ The report formulated two alternative plans for the replacement of the dam, both of which included provisions to develop additional storage for irrigation use:

There is more good land in the upper Snake River basin than water to develop it and opportunities for new upper Snake basin storage are limited. It would be far more economical to develop new storage space at the American Falls site than at other sites in the upper Snake basin.¹²

Under the first alternative, the dam would be rebuilt to its existing elevation and capacity; however, an attempt would be made to secure Idaho Power's existing 45,000 acre-feet of hydropower storage for irrigation use:

The use of the 1,655,000 acre-feet of space held by irrigators, under existing contracts, would be left unchanged. Because of large benefits from the use of storage for irrigation, an effort should be made to convert to irrigation use the 45,000 acre-feet of space now used for private power production. These two components account for the 1,700,000 acre-feet of space in the existing reservoir.¹³

Under the second alternative, the USBOR proposed developing even more irrigation storage by enlarging the capacity of the dam itself. The USBOR estimated that 252,000 acre-feet of

¹⁰ American Falls Dam Replacement: Information Report (USBOR Dec. 1966).

¹¹ *Id.* at 1.

¹² *Id.* at 17.

¹³ *Id.* at 3.

irrigation storage could be created by raising the dam six feet and that 598,000 acre-feet of irrigation storage could be created by raising the dam thirteen feet.¹⁴

In addition to developing additional irrigation storage through the replacement of the American Falls dam, the USBOR also sought to accomplish another long-pursued objective of the USBOR—federal power generation. The 1966 report provided that any replacement dam would maintain the power features already existing at the dam and that the USBOR would further study the possibility of installing a federal power plant below the site.¹⁵ This was not the first time the USBOR contemplated installing a power plant at American Falls. The original dam included four 15-foot penstocks on the west side of the dam intended to deliver water to a federal power plant, and Congress had previously authorized the construction of a federal power plant at the site. For several reasons, including Idaho Power's opposition, a federal power plant was never constructed, but the 1966 report indicated that the replacement of the dam was the perfect opportunity for the USBOR to finally develop this power resource.

In 1972, the USBOR issued its final feasibility report for the replacement of the American Falls Dam.¹⁶ By that time, the USBOR had further restricted the reservoir, leaving no more than two-thirds of the total capacity of 1,700,000 acre-feet available for storage.¹⁷ Accordingly, the report emphasized the importance and immediacy of the situation:

The storage provided by this reservoir is the foundation of the existing irrigation development in the upper Snake River basin. The largest storage reservoir in the upper Snake River basin, American Falls Reservoir contributes almost half of the usable storage on the main stem of the upper Snake River. Nearly 900,000 acres of land now receive irrigation water from the reservoir.¹⁸

Citing concerns over possible inundations and environmental effects, the USBOR determined

¹⁴ *Id.* at 28.

¹⁵ *Id.* at 3.

¹⁶ American Falls Dam Replacement: Executive Summary Report (USBOR Dec. 1972).

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 1.

that the dam should remain at its existing size:

The irrigation organizations and individuals which now own 1,655,000 acre-feet of space in American Falls Reservoir would continue this arrangement; no change in existing irrigation rights or entitlements would occur. The remaining 45,000 acre-feet of reservoir space is now used for private power production.¹⁹

The USBOR also determined that the new dam should maintain provisions for possible federal power development:

Under the plan, the replacement dam would not interfere with the operation of the Idaho Power Company powerplant just downstream. However, the new dam would include four capped penstocks to permit future construction of a powerplant, if determined feasible at a later date. These penstocks are included in line with current planning guidelines.²⁰

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

The 1972 USBOR feasibility report indicated that replacement of the dam was unlikely to be completed any time soon. The USBOR estimated that it would take up to five years after federal funding was secured to complete the project.²¹ Because of these potential delays and the overall cost of reconstruction, the American Falls spaceholders formed an executive committee to investigate alternatives for replacing the dam more expeditiously.

In December 1972, the reservoir district representatives met with Idaho Power to determine whether the company would be interested in assisting with the financing of the reconstruction of the dam in exchange for the right to use the releases made at the new dam for power generation, subject however to the express condition that the Reclamation purposes of the project not be affected:

The reservoir district representatives met with the Idaho Power Co., to determine if a falling water contract might be a possibility, with the insurance that no change

¹⁹ *Id.* at 4; *see also id.* at 11.

²⁰ *Id.* at 5.

²¹ *Id.* at 3.

in operation of the reservoir would be incurred and that *the irrigation preference would remain the same*.²²

In February 1973, Idaho Power presented a proposal to the executive committee of the American Falls spaceholders whereby the company proposed to share in the cost of the reconstruction of the American Falls Dam.²³ The Idaho Power proposal was based on the following assumptions: (1) a replacement dam could be constructed for approximately \$20,700,000; (2) the dam could be completed within 18 months following initiation of construction; (3) American Falls Reservoir District (AFRD)²⁴ would finance the construction through tax-exempt bonds; and (4) Idaho Power would pay \$19 million plus tax-exempt interest to AFRD over a 40-year period.²⁵

In exchange for its financial assistance in the reconstruction of the American Falls dam, Idaho Power sought the right to construct a new power plant that would: (a) attach directly to the new dam thereby significantly increasing the head available to the company for power generation; and (b) allow the company to use all of the water released from the dam for power generation. Both of these features constituted a dramatic change in Idaho Power's existing operations, resulting in a significant increase in power production. Idaho Power estimated that by utilizing almost all of the flows released by the USBOR and by increasing the head at its power plant to 100 feet, the company could increase average annual production from 146 million

²² *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 65 (1973) (Statement of Tom Olmstead, AFRD) (emphasis added).

²³ Idaho Power Company Proposal Presented to Executive Committee of Spaceholders (Feb. 27, 1973).

²⁴ AFRD was originally organized at the time of the construction of the original American Falls Dam. The companies that comprise AFRD include the Twin Falls Canal Company, the North Side Canal Company, the Aberdeen-Springfield Canal Company, the Woodville Canal Company, and the Martin Canal Company. *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 67 (1973) (Statement of Tom Olmstead, AFRD).

²⁵ Idaho Power Company Proposal Presented to Executive Committee of Spaceholders (Feb. 27, 1973); *see also* *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 65 (1973) (Statement of Tom Olmstead, AFRD).

KWH to 370 million KWH.²⁶ Moreover, the company's proposal would put to an end any effort by the USBOR to construct a competing federal power plant at American Falls.

On March 2, 1973, twenty-six of the thirty-six spaceholder entities met with Idaho Power's Robert Hogg to discuss Idaho Power's proposal.²⁷ Also present were Keith Higginson, IDWR Director; Bill Burpee, Attorney for the USBOR; and John Howe, Assistant to Idaho Governor Andrus. Those in attendance seemed most interested in two issues: (1) the continued availability of the highway crossing at the dam site; and (2) Idaho Power's position on its relationship to irrigation rights in the reservoir. On this latter matter, Idaho Power's proposal expressly assured the water users that if granted the right to participate in the reconstruction of the dam, hydropower generation would continue to be subordinate to irrigation: "[I]rrigation rights shall always have priority in the operation hereof, subject to the rights of the Company as a spaceholder."²⁸ Idaho Power reassured the spaceholders at a meeting that its generation of hydropower at American Falls would be subordinate to irrigation rights:

A question from the floor was directed to the Idaho Power Company concerning their position on Irrigation Water rights. Mr. Bob Hogg assured the group that Irrigation rights shall always have priority in the operation.²⁹

After being assured irrigation water rights would always have a preference over power production, two-thirds majority of the spaceholders voted in favor of authorizing the executive committee to "enter into such negotiations and obtain such legislation as may be required to pursue the proposal of Idaho Power Company to replace the Dam."³⁰

²⁶ Idaho Power Company Proposal Presented to Executive Committee of Spaceholders at 4, 7 (Feb. 27, 1973).

²⁷ American Falls Spaceholders' Minutes (Mar. 2, 1973).

²⁸ Idaho Power Company Proposal Presented to Executive Committee of Spaceholders at 8 (Feb. 27, 1973); *see also* *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 65 (1973) (Statement of Tom Olmstead, American Falls Reservoir District) ("The Idaho Power Co. proposal fully recognized the irrigation preference . . .").

²⁹ American Falls Spaceholders' Minutes at 2 (Mar. 2, 1973) (Bob Hogg appearing on behalf of Idaho Power).

³⁰ *Id.* at 3.

C. FEDERAL LEGISLATION AUTHORIZING PRIVATE FINANCING OF AMERICAN FALLS DAM RECONSTRUCTION

Even before securing approval from the spaceholder executive committee, Idaho Power started laying the groundwork for securing the federal legislation necessary for its proposal. On February 28, 1973, Idaho Power forwarded a copy of its proposal to Senator Frank Church.³¹ At that time, Senator Church was Idaho's senior senator as well as a member of the Senate Committee on Interior and Insular Affairs and the chair of the Subcommittee on Water and Power Resources. His support proved crucial to obtaining the congressional authorization necessary for a privately-financed, non-federal reconstruction of the American Falls Dam.

In apparent response to Idaho Power's proposal, Dan Dreyfus, Committee on Interior and Insular Affairs staff member, prepared a memorandum for Senator Church dated March 11, 1973.³² Dreyfus concluded that generally the urgency of the need, the relatively low cost, the favorable cost-benefit ratio, and the repayment history of the irrigators all supported a favorable outlook for federal authorization.³³ Yet, because of the negative attitude of the administration toward Reclamation projects and a backlog of authorized construction facing the USBOR, Dreyfus was not optimistic about the prospect of securing expeditious federal funding for the reconstruction of the American Falls dam. Dreyfus also opined, however, that the "unconventional" private-financing proposal of Idaho Power would face pitfalls of its own.³⁴

Dreyfus's primary concern with Idaho Power's proposal was that any private-financing arrangement clearly preserve the USBOR's control over the project as a Reclamation facility: "As I understand the [Idaho Power] proposal, the irrigation preference is intended to be

³¹ Letter from L.E. Lanham, Director of Public Affairs, Idaho Power Company to Senator Frank Church (Feb. 28, 1973).

³² Memorandum from Dan Dreyfus, Staff Member of Committee on Interior and Insular Affairs, to Senator Church (Mar. 11, 1973).

³³ *Id.* at 1.

³⁴ *Id.* at 1-2.

preserved except for Idaho Power Company's spaceholder rights."³⁵ Accordingly, Dreyfus concluded that it was essential the legislation expressly provide that the USBOR, and not Idaho Power, would be in control of the project:

It appears essential that the operation of the replacement dam be vested in the Secretary of the Interior. . . .

[B]ecause of the interrelationship of the dam with the Minidoka project and other Federal obligations on the River, it would appear to be necessary for the Secretary to be a party to all of the water contracts and perhaps to the contract with the Idaho Power Company. . . .

It might be preferable to authorize the Secretary to enter into the appropriate agreements as part of the Minidoka project (originally authorized by the Secretary on April 23, 1904). This would incorporate the whole body of policy relating to the project without specific references and insure the integrity of operation of the river under the new contracts.³⁶

In conclusion, Dreyfus recommended that, given the "great many unknown factors in this proposal," Idaho's representatives should introduce bills as soon as possible.³⁷

Heeding Dreyfus's recommendations, Idaho's congressional delegation, led by Senator Church, moved quickly. On April 10, 1973, Church introduced Senate Bills 1528 and 1529 on behalf of himself and Senator McClure. That same day, Idaho Representatives Hansen and Symms introduced House Resolutions 6781 and 6782.

Senate Bill 1528 and House Resolution 6781 presented a conventional approach to Reclamation project development.³⁸ They authorized the Secretary of the Interior to reconstruct the dam, financed largely by the irrigation spaceholders. As contemplated in the USBOR's 1972 feasibility report,³⁹ S. 1528 and H.R. 6781 also provided that penstocks would be installed in the

³⁵ *Id.* at 4.

³⁶ *Id.* at 3, 4.

³⁷ *Id.* at 4.

³⁸ S. 1528, 93rd Cong. (1973).

³⁹ American Falls Dam Replacement: Executive Summary Report 5 (USBOR Dec. 1972).

new dam to allow the United States to develop hydropower of its own at American Falls.⁴⁰

Senate Bill 1529 and House Resolution 6782 authorized the Secretary of the Interior to contract out the construction of the replacement dam to AFRD, provided the United States would take title to the dam upon completion at which time the dam would continue to be operated as a feature of the Minidoka Reclamation Project.⁴¹ The legislation also authorized AFRD to contract with a non-federal entity—i.e., Idaho Power—for the use of the releases from the dam for hydropower generation to defer the costs of the reconstruction.⁴² S. 1529 and H.R. 6782 provided, however, that any such contract could not impair the purposes of the Minidoka Project.⁴³

In his remarks before the Senate on May 10, 1973, Church noted that the two measures he was introducing, S. 1528 and S. 1529, took entirely different “approaches to accomplish the replacement.”⁴⁴ S. 1528 was the “conventional” approach, whereby the Secretary of the Interior would construct, operate, and maintain the dam and costs would be allocated according to existing Reclamation laws.⁴⁵ The senator observed, however, that “reclamation project proposals have seldom been endorsed by the administration,” “construction of authorized projects has been inadequately funded, and congressional additions to budget request have been impounded.”⁴⁶ With those obstacles in mind, the water users “sought other means of expeditiously replacing the dam.”⁴⁷

According to Senator Church, S. 1529 would “accommodate a plan developed by the

⁴⁰ S. 1528, 93rd Cong. §§ 1, 6 (1973).

⁴¹ S. 1529, 93rd Cong. § 1 (1973).

⁴² *Id.* at § 4.

⁴³ *Id.*

⁴⁴ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 2 (1973) (Opening Statement of Senator Frank Church).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

water users in which they would finance and construct a replacement dam without Federal assistance. The Secretary would be authorized to take title to the dam and operate it as a feature of the Federal Upper Snake River Reclamation project.”⁴⁸ The water users were authorized to contract with a “non-federal entity” for the use of the falling water leaving the dam to generate hydropower for a period of fifty years, provided that it “[did] not impair the efficiency of the project to serve the other purposes of the Upper Snake River project.”⁴⁹

During the hearings on the alternative bills, the potential impact that integrating a private power plant into a federal Reclamation dam would have on water and storage rights did not raise much concern, because Section 4 of S. 1529 plainly stated Idaho Power’s use of the releases leaving the dam could not impair the Reclamation project purposes. It was understood the new dam would continue to be under the control of the USBOR for Reclamation project purposes:

John Barker, President, AFRD: “The reservoir would be operated in the same manner in which it is now operated, observing the preference for irrigation.”⁵⁰

Tom Olmstead, AFRD: “The Idaho Power Co. proposal fully recognized the irrigation preference”⁵¹

Senator McClure: “It is not contemplated to have releases solely for power production?” Robert A. Hogg, Idaho Power Company: “Not at all. The releases, certainly in the summertime, will be entirely dependent upon the irrigation requirements.”⁵²

Thomas Nelson, Attorney for AFRD: “[The dam] would become Federal property and thereafter remain in Federal ownership to be maintained and operated by the Bureau of Reclamation in the same manner as it has been heretofore operated,

⁴⁸ *Id.*

⁴⁹ S. 1529, 93rd Cong. § 4 (1973).

⁵⁰ *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. 50 (1973) (Statement of J. Barker, President, AFRD).

⁵¹ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 65 (1973) (Statement of T. Olmstead, AFRD).

⁵² *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 102–03. (1973) (Testimony of R.A. Hogg, Idaho Power Company).

including the existing preference for irrigation rights.”⁵³

As it related to storage rights, section 2 of S. 1529 provided that the replacement of the dam would not “alter or change the present proportionate storage rights of present spaceholders”⁵⁴ In his testimony, AFRD representative Tom Olmstead insisted: “In substance, there will be no change in the operation of the American Falls Reservoir. The relationships of the present spaceholders shall remain the same if the spaceholders so select.”⁵⁵ In terms of Idaho Power’s storage space, the status quo was understood to mean that the company had a right to 45,000 acre-feet of storage for power purposes:

Federal Power Commission: “As a spaceholder in the reservoir, the Company has primary storage in the amount of 45,000 acre-feet.”⁵⁶

E.F. Sullivan, Assistant Commissioner, USBOR: “The Idaho Power Co., under a contract executed in 1923, has been utilizing 45,000 acre-feet of space for use in its powerplants located downstream from American Falls Dam.”⁵⁷

Jack Horton, Assistant Secretary of the Interior: “The Idaho Power Co., under a contract executed in 1923, has been utilizing 45,000 acre-feet of space for use in its power plants located downstream from American Falls Dam.”⁵⁸

Idaho Power’s own statements were consistent with, and confirmed, the understanding of the federal officials:

Hearing Testimony of Robert A. Hogg, Idaho Power Company: “The 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

⁵³ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 152 (1973) (Statement of T. Nelson, Attorney for AFRD).

⁵⁴ S. 1529, 93rd Cong. § 2 (1973).

⁵⁵ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 65 (1973).

⁵⁶ S. Rep. No. 93-223, at 16 (1973) (Federal Power Commission Report on S. 1529 (1973)).

⁵⁷ *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. 29 (1973) (Statement of E.F. Sullivan, Ass’t Comm’r, USBOR).

⁵⁸ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 54 (1973) (Statement of J. Horton, Ass’t Sec’y of Interior; accompanied by E. Sullivan, Regional Director, USBOR).

demand.”⁵⁹

Prepared Statement of Idaho Power Company to United States House of Representatives: “The Company’s interest as a spaceholder is very modest in contrast to the irrigator’s 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.”⁶⁰

Prepared Statement of Idaho Power Company to United States Senate: “The Company’s interest as a spaceholder is very modest in contrast to the irrigator’s interest; however, the Company’s 45,000 acre-feet of storage capacity is important in meeting the Company’s power supply requirements in the irrigation season.”⁶¹

While concerns over the control of the federal project were appeased, another potential problem was identified. During the hearings before the Senate Subcommittee, Senator Church questioned Thomas Nelson, AFRD’s attorney, as to whether he was confident the bonds issued by AFRD to finance the reconstruction would be tax-exempt, as intended by all parties involved. Mr. Nelson acknowledged there was a “potential problem in that area.”⁶² Mr. Nelson noted, however, that AFRD was moving forward with an application to the Internal Revenue Service (IRS) for a formal determination on the question of whether the bonds would be tax-exempt and that he had been informed “by tax counsel that the chances are good we can obtain a favorable ruling.”⁶³ Nelson also pointed out that the spaceholders had advanced more than \$1 million toward the reconstruction effort, and while the spaceholders were “risking this money,” he felt it was “a good gamble.”⁶⁴

⁵⁹ *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. 47 (1973) (Testimony of R. A. Hogg, Idaho Power Company).

⁶⁰ *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. 43 (1973) (Prepared Statement of Idaho Power Company).

⁶¹ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 107 (1973) (Prepared Statement of Idaho Power Company).

⁶² *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 54 (1973) (Testimony of Thomas Nelson, Attorney for AFRD).

⁶³ *Id.*

⁶⁴ *Id.*

The Senate subcommittee, and the rest of Congress, apparently agreed. On December 28, 1973, Public Law 93-206 was signed into law. The “Act to Authorize the Secretary of the Interior to Enter into Agreements with Non-Federal Agencies for the Replacement of the Existing American Falls Dam,” Pub. L. 93-206, 87 Stat. 904 (1973), enacted S. 1529, as amended. Public Law 93-206 seemingly addressed the pressing need to rebuild the American Falls Dam at a relatively low cost and in a relatively short time period. For all the problems that Public Law 93-206 solved, however, it created others.

D. FEDERAL LEGISLATION PROVIDING A TAX-EXEMPTION FOR THE PRIVATE FINANCING OF AMERICAN FALLS DAM RECONSTRUCTION

The most significant problem that arose following the authorization of the privately financed reconstruction of the American Falls dam was AFRD’s inability to secure a tax exemption for the financing bonds. As the Senate Committee on Interior and Insular Affairs later reported, all parties assumed back in 1973 that AFRD would be able to secure the tax exemption and “[t]hat understanding was not challenged throughout Congressional action and subsequent passage of [Public Law 93-206].”⁶⁵ Bond counsel Chapman and Cutler secured by AFRD, advised AFRD that a declaratory ruling from the IRS was necessary to assure the bonds could be successfully marketed. AFRD sought such a ruling in June 1974, but the IRS demurred on issuing an official decision because of substantial questions over whether Idaho Power’s involvement in the matter disqualified the project from benefitting from a tax exemption.

At the heart of the IRS’s apparent reticence was the lingering question of whether the construction of the new American Falls Dam was an irrigation project with incidental hydropower features, or vice versa. IRS officials repeatedly sought clarification on Idaho Power’s role in the reconstruction, seemingly unconvinced that the project was indeed intended,

⁶⁵ S. Rep. No. 94-263, at 2 (1975).

first and foremost, to serve irrigation interests. The IRS went so far as to request the engineering plans and designs as well as copies of Idaho Power's Federal Power Commission (FPC) license application in an attempt to better understand how the power features related to the stated primary irrigation purpose.⁶⁶

In January 1975, AFRD attempted to dispel any perception that Idaho Power would gain control over what was a federal Reclamation project. Bond counsel Chapman and Cutler, along with AFRD legal counsel Parry, Robertson, Daly & Larson, filed a brief with the IRS flatly declaring that the "use of the falling water by the Idaho Power Company . . . having been authorized by Congress for only incidental phase of the Project is not a primary or independent end in itself."⁶⁷ Because title to the dam would be transferred to the United States as part of the Minidoka Reclamation Project, AFRD asserted the relationship between irrigation and power at the new dam was to be governed by the principles set forth by the United States Court of Appeals in *Burley Irrigation District v. Ickes*, 116 F.2d 529 (1940). In its brief to the IRS, AFRD stated that the following quote from *Ickes* was equally applicable to the new American Falls replacement dam:

The production of power for pumping in connection with irrigation is an important incident to this main object. Disposition of surplus power, not required for pumping or other uses of irrigation, for commercial uses is authorized by an amendatory act of April 16, 1906, set forth below. But the development and sale of such power is authorized only as an incidental phase of reclamation, not as a primary or independent end in itself. The statute and its amendments are reclamation acts, not commercial power development acts. The legislation is entirely inconsistent with the development and sale of commercial power whenever that may interfere with the development or irrigation or "impair the efficiency of the irrigation project."⁶⁸

AFRD explained that all those involved with the dam replacement recognized American

⁶⁶ See Letter from P. Holm, Chapman and Cutler, to D. C. Alexander, IRS Comm'r (Nov. 27, 1974).

⁶⁷ Brief of AFRD to IRS at 1 (Jan. 31, 1975).

⁶⁸ *Id.* at 3 (quoting *Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 530-31 (1940)).

Falls would remain a Reclamation project, and therefore, the primary irrigation purpose of the project would not be affected by Idaho Power's generation of power incidental to the release of water for irrigation and other project purposes:

The Congress of the United States, the Idaho Legislature, the Idaho Supreme Court, the Bureau of Reclamation, the Spaceholders, and the Company recognize that the purpose of the Project is irrigation and that the purpose of the issuance of the Bonds by the District is for the reconstruction of a dam which is part of a reclamation project the primary purpose of which is the reclamation of arid lands through irrigation.⁶⁹

AFRD made it clear that while Idaho Power was entitled to use the water released past American Falls Dam by the USBOR, the company had no right to control or demand the USBOR to make those releases, beyond its 45,000 acre-feet of storage:

The Company will have no control over the release of water other than in its capacity as a Spaceholder which is exceedingly nominal. . . .

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).⁷⁰

AFRD stated that Idaho Power's hydropower generation would be "subordinate to" the other purposes of the project, and therefore, the new dam and reservoir constituted facilities "for the furnishing of water . . . available on reasonable demand to members of the general public," as required by the Internal Revenue Code.⁷¹

The IRS was unswayed. Thus, the parties pursued an amendment to the Internal Revenue Code. Introduced on October 2, 1975, House Resolution 9968 proposed to amend the Internal Revenue Code by inserting a new tax exemption for "Certain Irrigation Dams:"

A dam for the furnishing of water for irrigation purposes which has a subordinate

⁶⁹ Brief of AFRD to IRS at 4 (Jan. 31, 1975).

⁷⁰ *Id.* at 4, 6.

⁷¹ *See id.* at 7.

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.⁷²

On October 6, 1975, the House considered the bill. Representative Ullman of Oregon, the bill's sponsor, explained the purpose of the bill as being to clarify the existing tax exemption for "facilities for the furnishing of water . . . available on reasonable demand to members of the general public" should apply not only to irrigation projects, but also to irrigation projects with subordinate hydropower purposes:

[T]he bill, H.R. 9968 deals with the tax-exempt status of obligations the proceeds of which are to be used to reconstruct the American Falls Dam in Idaho. The dam is used for irrigation purposes but the water also will have a subordinate use in generating electric energy. Under present law, an industrial development bond whose proceeds are used to build a dam that stores water for irrigation purposes may be eligible for tax-exempt status. However, in this case where the water has a subordinate use in generating electric energy, the eligibility of the bond issue for tax-exempt status is uncertain.⁷³

Representative Ullman explained that Idaho Power's rights at American Falls were so minimal (2.65% of storage capacity)⁷⁴ that Idaho Power's presence in no way transformed the project into anything other than an irrigation project:

It is anticipated that normally, substantially all the falling water from the dam would be made available to the Idaho Power Co. only when the water was released from the dam for irrigation purposes. There has been no intention to release water specifically for the power company except to the extent of approximately 2.65 percent of the dam storage capacity. . . . Therefore, the use of water for electric generation purposes would clearly be subordinate to the use for irrigation.⁷⁵

Recognizing the subordinate role that hydropower would play at the new dam, the bill

⁷² H.R. Rep. No. 94-531, at 9 (1975); *see also* 121 Cong. Rec. 31515 (1975).

⁷³ 121 Cong. Rec. 31868 (1975).

⁷⁴ The 2.65% of storage capacity equates to ~45,000 acre-feet of storage in the American Falls reservoir, which has a total storage capacity of ~1.7 million acre-feet.

⁷⁵ 121 Cong. Rec. 31868 (1975).

created a “new exception to industrial development bond treatment to specifically allow tax-exempt status for the bonds issued to reconstruct the American Falls Dam.”⁷⁶ The exception was to apply only “to obligations for a dam which furnishes water for irrigation purposes which has a subordinate use in connection with the generation of electric energy by water if substantially all of the stored water is contractually available for release from the dam for irrigation purposes and if the water released is available on reasonable demand for members of the general public.”⁷⁷ Congress expressly defined “subordinate use” as limiting the amount of storage capacity that could be owned for hydropower purposes on a permanent basis to less than 10% of storage capacity:

House Report: “The committee intends that subordinate use of water for generating electric energy means that less than 10 percent of the normal supply of stored water may contractually be scheduled for release by the power company and used for generating electric energy.”⁷⁸

Senate Report: “The committee intends that subordinate use of water for generating electric energy means that less than 10 percent of the normal supply of stored water may contractually be scheduled for release by the power company and used for generating electric energy.”⁷⁹

Congress understood the 10% limitation would not be an issue at American Falls, because Idaho Power had a permanent right to only 2.65% of the storage capacity in the reservoir (~45,000 acre-feet):

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.⁸⁰

In this case the Idaho Power Company has a limited spaceholder right (under 3

⁷⁶ H.R. Rep. No. 94-531, at 4 (1975).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ S. Rep. No. 94-570, at 4 (1975).

⁸⁰ H.R. Rep. No. 94-531, at 3 (1975).

percent) ⁸¹

There has been no intention to release water specifically for the power company except to the extent of approximately 2.65 percent of the dam storage capacity.⁸²

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, in its capacity as a spaceholder in the irrigation district, can schedule for the purpose of generating electric energy.⁸³

In this case the Idaho Power Company has a limited spaceholder right (under 3 percent) ⁸⁴

Accordingly, H.R. 9968, as amended, was signed into law on December 23, 1975 as Public Law 94-164, 89 Stat. 970 (1975) ("Revenue Adjustment Act of 1975"), providing AFRD the tax exemption necessary to move forward with the reconstruction of the dam.

E. FEDERAL POWER COMMISSION LICENSING OF IDAHO POWER'S AMERICAN FALLS POWER PLANT

The deterioration of the dam was not the only issue Idaho Power was dealing with at American Falls in the 1970s. Idaho Power had been engaged in a decades-long battle to secure a Federal Power Commission (FPC) license for its existing power plant at American Falls. As a result of the Hells Canyon licensing process, the FPC had concluded in 1955 that "[t]he Snake River from its junction with the Columbia River up to the mouth of Henrys Fork is a navigable water of the United States."⁸⁵ Thus, the FPC formally requested Idaho Power to apply for licenses for its unlicensed projects at Upper Salmon Falls, Shoshone Falls, and American Falls. On February 13, 1959, Idaho Power filed an application to license those three facilities as a single project, Project No. 2258.

In 1962, the Department of the Interior filed a response in opposition to Idaho Power's

⁸¹ H.R. Rep. No. 94-531, at 3 (1975).

⁸² 121 Cong. Rec. 31868 (1975).

⁸³ S. Rep. No. 94-570, at 3 (1975).

⁸⁴ *Id.*

⁸⁵ Order Issuing License, Project No. 1971 at 2 (FPC Aug. 4, 1955).

application for a license for the three projects on two primary grounds: (1) the company illegally constructed system components on public lands without permission; and (2) any license for occupation and use of public lands must include provisions that expressly subordinate the company's hydropower water rights to irrigation.⁸⁶ On the first point, Assistant Interior Secretary Kenneth Holum noted that each of the company's three facilities were located in part on public lands without authorization, and thus, Idaho Power clearly stood to benefit from that occupation should the company be given a license.⁸⁷ Thus, Holum asserted that the FPC should limit the term of the license to 50 years from the time of the enactment of the 1920 Federal Power Act or from the beginning of construction by the company "in order to discourage further unauthorized entry on public lands for the construction of hydroelectric stations and not to give advantage to companies which do so."⁸⁸

On the second point, Holum insisted that the FPC insert provisions in the FPC license that expressly subordinated the company's rights at the three facilities. Holum observed that since 1916, when Idaho Power first took over operation of power plants located along the Snake River, the USBOR had "repeatedly advised" the company "that the best development of the waters of the Snake River require there be no power developments below Milner Dam which rely upon flows of water past Milner Dam for power production."⁸⁹ The federal government had undertaken a multi-decade effort on the Upper Snake River to construct a "reservoir system in excess of 4,500,000 acre-feet, all of which is operated with the objective of conserving the water to minimize spills past Milner Dam."⁹⁰ While Holum acknowledged that Idaho Power's plants at Shoshone Falls and Upper Salmon Falls partially relied upon spills past Milner, the Department

⁸⁶ Letter from K. Holum, Ass't Sec. of the Interior, to J.C. Swidler, Chairman, FPC (Aug. 30, 1962).

⁸⁷ *Id.*

⁸⁸ *Id.* at 5.

⁸⁹ *Id.* at 4.

⁹⁰ *Id.*

of the Interior had, since the early 1920s when the Idaho Power first sought to license a plant at Twin Falls, insisted upon subordination of such hydropower use to upstream development.⁹¹ Holum was adamant that since Idaho Power had frequently expressed its support for such subordination over the years, that “there should be no objection and it is in the public interest” that the following subordination clause governing the operations of the Shoshone Falls and Upper Salmon Falls developments be included in the Company’s FPC licenses:

The power company shall agree for itself, its successors and assigns, that all rights for the use of water for power purposes heretofore or hereafter acquired for the development of power at the company's site, shall be held and considered at all times inferior and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation or other beneficial uses.⁹²

Holum went even further in his recommendations for the American Falls facility. Of the three plants, American Falls was most objectionable, in his opinion, as its location also “infringe[d] upon” release of stored water reserved for the Minidoka Project and potentially compromised “the integrity of operation of the Federal reclamation project.”⁹³ Holum, therefore, urged inclusion of three provisions in the American Falls license that at a “minimum” were required “to protect the operating integrity and financial investment of the United States” in the

⁹¹ As discussed more fully in the Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment re: Milner Zero Minimum Flow, at the time the United States was planning for the construction of the American Falls dam, Idaho Power was seeking a federal power license for its Twin Falls project. *In re SRBA Case No. 39576, Subcase Nos. 00-92002GP et al.* at 30–35 (Idaho 5th Dist. Ct. Oct. 19, 2009). Thus, as part of the 1923 American Falls Contract, the United States on a provision limiting Idaho Power Company’s right “to demand the turning out of water from the reservoir for release by and use below Milner,” 1923 American Falls Contract at 21, and a provision granting it the “[t]he right to limit all other rights of the company on the Snake River . . . insofar as and no further than the rights allowed and granted to the United States to store and use water as herein provided may interfere with any rights of the company at any lower points on Snake River.” *Id.* at 11. Thus, as part of the FPC license for the Twin Falls Project, Idaho Power stipulated that “the use of water for power purposes heretofore or hereafter acquired for the development of power at the [Twin Falls] project shall be held and considered at all times 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 under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923, and the discharge of which it may control under the terms of said contract . . .” Order Issuing License, Project No. 18 at 11, art. 14 (FPC May 11, 1934).

⁹² Letter from K. Holum, Ass’t Sec. of the Interior, to J.C. Swidler, Chairman, FPC at 4–5 (Aug. 30, 1962).

⁹³ *Id.* at 1, 3.

Minidoka and American Falls projects.⁹⁴ Those provisions required: first, that the operations of the company's American Falls plant not "interfere with the release of water by the Government at American Falls," and therefore, at the Government's request, Idaho Power must "draw down the elevation of water in its forebay pool sufficiently to permit the waters to flow from the Government's American Falls Dam . . . at rates of flow required for irrigation operations as determined by this Department."⁹⁵ Second, Idaho Power was to "agree for itself, its successors and assigns" that at American Falls:

all rights for the use of water for purposes heretofore or hereafter acquired for the development of power at the company's site, shall be held and considered at all times inferior and subordinate to all rights heretofore or hereafter acquired by the United States or other parties for irrigation or other beneficial uses.⁹⁶

Third, the power company was to enter into an operating agreement with the United States to cooperate with the USBOR, "in making the maximum justifiable development of the power resources of the site"—a provision that required, among other things, Idaho Power to supply electrical power to the federal government using the United States' water entitlements at American Falls for irrigation pumping, power for which the company would be reimbursed.⁹⁷

Although Idaho Power objected to the USBOR's proposed conditions, the debate came to an abrupt halt when it was determined that the American Falls Dam needed to be replaced. In a 1969 letter, Deputy Assistant Secretary James Watt requested that the FPC "hold in abeyance the issuing of a license to the company for its American Falls Powerplant."⁹⁸ Watt wrote that the "implications of the complete replacement of American Falls . . . cast an entirely new light on the rights and obligations of the company at American Falls, the possible development of the full

⁹⁴ *Id.* at 3.

⁹⁵ *Id.* at 2.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Letter from J.G. Watt, Ass't Sec'y of the Interior, to Chairman, FPC at 1 (Dec. 16, 1969).

power resource, and the operation of company and Federal government facilities at the site.”⁹⁹

In other words, all of the issues that the Interior Department and Idaho Power had been debating were about to come to a head with the replacement of the dam. This was not a fact lost on Idaho Power. Quite to the contrary, Idaho Power used its involvement with the reconstruction to enlist the spaceholders as advocates in the FPC proceedings. As part of Idaho Power’s initial proposal to the spaceholders, AFRD was to agree to assist the Idaho Power in licensing its power plant.¹⁰⁰ Following the enactment of Public Law 93-206, Idaho Power filed a new FPC application for a preliminary permit for the new power plant to be constructed at American Falls, Project No. 2763. AFRD intervened in support of Idaho Power’s FPC license, but only upon the recognition that the company’s generation would be entirely incidental to the USBOR’s operation of the project for other purposes:

Under the proposal, the Idaho Power Company would be entitled to generate power only at such times as releases are made in the normal operation of the reservoir in accordance with the rights of Spaceholders.¹⁰¹

On March 31, 1975, the FPC moved forward on Idaho Power’s application for license for its existing facility at American Falls.¹⁰² As discussed above, Idaho Power’s application for Project No. 2258 covered the company’s Upper Salmon Falls, Shoshone Falls, and American Falls facilities. In its March 31, 1975 order, the FPC split those facilities into individual projects, leaving American Falls as the only facility designated under Project No. 2258. The FPC largely imposed the conditions that the Interior Department had sought, including the following subordination provision:

⁹⁹ *Id.*

¹⁰⁰ See Idaho Power Company Proposal Presented to Executive Committee of Spaceholders at 8 (Feb. 27, 1973) (“American Falls Reservoir District would agree with Idaho Power Company: . . . (b) To assist the Company in obtaining a 50-year FPC license for the Company to build, own, operate and maintain a power plant to utilize the water released from the dam.”).

¹⁰¹ Petition of AFRD to Intervene in Support of Application for License at 3 (Jan. 25, 1974).

¹⁰² Order Issuing Major License (Constructed), Project No. 2258 (FPC Mar. 31, 1975).

The project shall be operated in such a manner as will not conflict with the future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the backwater created by the project for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.¹⁰³

On March 31, 1975, the FPC also issued Idaho Power a license for the new, unconstructed power plant that was to be connected to the new Reclamation dam, Project No. 2763. The Department of Interior requested that the same subordination condition found in Project No. 2258 be included in the license for the unconstructed power plant as well. Noting that Idaho Power had agreed to Interior Department's recommendation, the FPC found the condition unnecessary where Idaho Power would have no control over the releases from the dam once it was reconstructed:

Even though the Applicant would agree to insertion of the provision contemplated by Interior in (a) above, we consider it unnecessary from a practical standpoint and do not require its inclusion. The use of falling water releases for power generation is so thoroughly under the control of Reclamation in its releases for irrigation and other purposes of the Minidoka Project that *the Applicant would have no opportunity to operate the project in a manner to conflict with future depletion or diversion of the water of the Snake River*. The use of the resource is a non-depleting one and under the Act of December 28, 1973, and related contracts, the operation of the hydroelectric facility shall not impair the efficiency of the Replacement Dam Program to serve the other purposes of the Minidoka Project.¹⁰⁴

The FPC concluded: "Applicant has no control over the water releases at the Replacement Dam."¹⁰⁵

F. AMERICAN FALLS REPLACEMENT CONTRACTS

Following the passage of the tax-exemption legislation and the issuance of the FPC licenses, the United States, AFRD, and Idaho Power entered into three main contracts that effectuated the purposes and intent of the authorizing statute, the Revenue Adjustment Act of

¹⁰³ *Id.* at 21, § 32.

¹⁰⁴ Order Issuing Major License (Unconstructed), Project No. 2736 at 11–12 (FPC Mar. 31, 1975) (emphasis added).

¹⁰⁵ *Id.* at 3.

1975, and the FPC licenses. Those contracts helped define the operations of the new American Falls Dam and Reservoir and the rights of the parties relevant thereto.¹⁰⁶

The contracts memorialized the limitations placed upon the project by the federal legislation, including the following two principles that resonated throughout the Replacement Program proceedings: (i) Idaho Power would have no control over, and no right to demand, any releases beyond its storage right; and (ii) Idaho Power would only have a right to 45,000 acre-feet of storage at American Falls (i.e., 2.65% of storage capacity).

i. 1976 GOVERNMENT CONTRACT

The 1976 Government Contract, the first of the three main American Falls reconstruction contracts, was entered into between the United States and AFRD. It recognized that the United States was the sole owner and operator of the project and that the project was to be operated as a feature of the Minidoka Reclamation Project. The Government Contract set forth the criteria by which the project was to be operated, consistent with the project's Reclamation purposes. The operating criteria made it clear the United States would control the releases from the dam and that Idaho Power's use of those releases was entirely incidental and subordinate to the United States' determination of how and when those releases were to be made:

The Replacement Dam will be operated by the United States in a manner so that

¹⁰⁶ In the decades following execution of the 1923 American Falls Contract, additional reservoir development and changes in project operations called many of the provisions of the contract into question, including Idaho Power's claim to 255,000 acre-feet of secondary storage in the American Falls Reservoir. In recognition of the need to place the 1923 American Falls Contract into context with the Replacement Program authorizing statute, the Revenue Adjustment Act of 1975, the FPC licenses, and the three new American Falls operating contracts, the parties inserted Article 19(a) into the 1976 Spaceholder Contract, which provided that in the event of a conflict between the 1923 Contract and the 1976 Spaceholder Contract the provisions of the 1976 Spaceholder Contract controlled:

[T]he provisions of this [1976] Spaceholder Contract with respect to the Replacement Dam, including but not limited to the operation and maintenance thereof and the distribution of water therefrom, shall prevail over the provisions of the [1923] Existing Spaceholder Contract wherever and to whatever extent the provisions Existing Spaceholder Contract are in conflict with the provisions of the Spaceholder Contract.

1976 Spaceholder Contract at 6–7, part I, art. 19(a) (Mar. 31, 1976). Article 19(a) also acknowledged that certain provisions of the 1923 contract may no longer be applicable.

. . . the primary irrigation purpose and the incidental purpose of the Minidoka Project *shall not be impaired by the subordinate utilization for power generation at the Powerplant of the water released from the Replacement Dam*. The United States is not obligated to operate the Replacement Dam in a manner to have water in the Replacement Dam at elevations for power generation or to operate to increase the head in the Replacement Dam for power generation.¹⁰⁷

[T]he right to utilize the water released from the Replacement Dam for power generation at the Powerplant is subject to the provisions hereof, particularly to the limitation that the water releases from the Replacement Dam are to be determined at all times by the [USBOR].¹⁰⁸

Although not a party to the Government Contract, Idaho Power explicitly agreed to and adopted the operating criteria set forth above through the company's 1976 Falling Water Contract.¹⁰⁹

In terms of storage, the Government Contract prescribed that hydropower was to have only a "subordinate use" of the storage capacity at American Falls consistent with the language of the Revenue Adjustment Act of 1975 in that no more than 10% of the storage capacity at American Falls could be permanently obtained for hydropower generation purposes:

[T]he Constructing Agency and the Idaho Power Company have entered into the Falling Water Contract . . . to utilize for power generation at the Powerplant the water released from the Replacement Dam in return for the Falling Water Payments, *which utilization is and shall continue to be subordinate to the furnishing of water from the Replacement Dam for irrigation purposes, in that less than 10 percent of the water accruing to the active storage capacity in the Replacement Dam may be contractually scheduled for release by the Idaho Power Company . . .*¹¹⁰

The Government Contract also expressly confirmed the representations made by Idaho Power throughout the legislative proceedings that it only owned 2.65% of storage capacity: "the amount

¹⁰⁷ 1976 Government Contract at 10, art. 16 (Mar. 31, 1976) (aka 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) (emphasis added).

¹⁰⁸ *Id.* at 15, art. 18(f).

¹⁰⁹ See 1976 Falling Water Contract at 19, art. IV, § 4.6(A) (Mar. 31, 1976) (aka Falling Water Contract by and between AFRD and Idaho Power Company) ("The Idaho Power Company agrees to the provisions of the Government Contract governing operation and maintenance of the Replacement Dam.").

¹¹⁰ 1976 Government Contract at 14, art. 18(a) (Mar. 31, 1976) (emphasis added).

of active storage capacity presently owned by the Idaho Power Company under its Spaceholder Contract (2.6471 percent)”¹¹¹

ii. 1976 FALLING WATER CONTRACT

The 1976 Falling Water Contract, the second of the three contracts, was entered into between Idaho Power and AFRD and was approved by the Secretary of the Interior. In that contract, Idaho Power expressly agreed that the United States was the sole owner and operator of the project and that the project was to be operated pursuant to the Reclamation Laws:

The Act of December 28, 1973, and the Government Contract provide that the United States shall take title to the Replacement Dam, the Related Facilities, and the Water Quality Facilities upon the determination by the Secretary that construction is substantially complete. Such title shall remain in the United States until otherwise provided by Congress. . . . [T]he United States will operate and maintain the Replacement Dam and the Related Facilities as part of the Minidoka Project for the beneficial use of the water on the land within the service areas of the Spaceholders pursuant to Section 8 of the Reclamation Act of June 17, 1902 (32 Stat. 388).¹¹²

Idaho Power recognized the 10% limitation of the Revenue Adjustment Act of 1975: “Less than ten per cent [sic] (10%) of the water accruing to the active storage capacity in the Replacement Dam may be contractually scheduled for release from the Replacement Dam by the Idaho Power Company.”¹¹³ In addition, Idaho Power represented and warranted that “the amount of active storage capacity presently owned by the Idaho Power Company under its Spaceholder Contract [is] (2.6471%)”¹¹⁴

iii. 1976 SPACEHOLDER CONTRACT

In the 1976 Spaceholder Contract, the last of the three main contracts, Idaho Power

¹¹¹ *Id.* at 13, art. 17(e); *see also id.*, Ex. A (listing Idaho Power as holding ~45,000 acre-feet or 2.6471% of active capacity).

¹¹² 1976 Falling Water Contract at 18, art. IV, § 4.5 (Mar. 31, 1976); *see also id.* at 10, art. II § 2.1(d) (“The utilization by the Idaho Power Company of the Falling Water at the Powerplant for power generation is and shall continue to be subordinate to the furnishing of water from the Replacement Dam for irrigation purposes.”).

¹¹³ 1976 Falling Water Contract at 10, art. II § 2.1(e) (Mar. 31, 1976).

¹¹⁴ *Id.* at 12–13, art. II § 2.3.

reiterated its acknowledgement that the United States, and not the company, would operate the project and that the project would be operated pursuant to the principles of Reclamation Law:

[T]he United States will operate and maintain the Replacement Dam and the Related Facilities as a part of the Minidoka Project for the beneficial use of the water on the land within the service areas of the Spaceholders pursuant to Section 8 of the Reclamation Act of June 17, 1902 (32 Stat. 388).¹¹⁵

Idaho Power also recognized, without equivocation, that it only owned a storage right for 2.65% of the storage capacity of the American Falls reservoir:

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.¹¹⁶

G. POST-RECONSTRUCTION

Since the reconstruction of the American Falls Dam was completed in 1978, the USBOR has continued to recognize that Idaho Power has no control over, or right to demand, any releases past the American Falls Dam for use at its power plant, except for its 45,000 acre-foot storage right. For example, the USBOR's 1996 "Description of Bureau of Reclamation System Operations Above Milner Dam" expressly acknowledged:

Power generation is secondary or incidental to flood control and irrigation water supply at Federal dams and no water is released from Reclamation facilities specifically for power generation except for water held under spaceholder contracts (IPC is the only electric utility that has a spaceholder contract and that contract amount is 44,275 acre-feet in American Falls Reservoir). . . . The only control that IPC can use to regulate river flows is to release water from the 44,275 acre-feet of its contract space in American Falls Reservoir.¹¹⁷

¹¹⁵ 1976 Spaceholder Contract at 14, part IV, art. 28(a) (Mar. 31, 1976) (aka 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, Contract No. IL-733S).

¹¹⁶ *Id.* at 10, part II, art. 21.

¹¹⁷ The Upper Snake River Basin: A Description of Bureau of Reclamation System Operations Above Milner Dam at 32-34 (USBOR Jan. 1996).

IV. ARGUMENT

A. POWER STORAGE AT AMERICAN FALLS SHOULD BE DECREED IN THE NAME OF THE UNITED STATES IN THE AMOUNT OF ~45,000 ACRE-FEET (2.65% OF RESERVOIR CAPACITY).

Hydropower storage at American Falls is limited to 2.65% of reservoir capacity (~45,000 acre-feet) as a matter of law pursuant to the following legal theories:

- i. The Storage Capacity Available For Hydropower Generation Purposes At The American Falls Reservoir Was Statutorily Limited By The Revenue Adjustment Act Of 1975.
- ii. Idaho Power Is Collaterally Estopped From Claiming American Falls Storage Greater Than The 2.65% Apportioned To It In The Confirmation Proceedings Accompanying The American Falls Rebuild.
- 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.
- iv. By Supporting And Aiding In The Procurement Of Public Law 93-206, The Revenue Adjustment Act Of 1975, FPC License Nos. 2258 And 2736, And The 1976 Contracts Based Upon The Representations That Idaho Power Had A Right To Only 2.65% Of Storage (~45,000 Acre-Feet), Idaho Power Is Estopped From Now Asserting That It Owns More Than Six Times That Amount (~300,000 Acre-Feet).

Idaho Power's claim to 300,000 acre-feet for hydropower storage at American Falls far exceeds what is available as a matter of law, and therefore, the Court should disallow any claim to hydropower storage above 2.65% of reservoir capacity.

i. THE STORAGE CAPACITY AVAILABLE FOR HYDROPOWER GENERATION PURPOSES AT THE AMERICAN FALLS RESERVOIR WAS STATUTORILY LIMITED BY THE REVENUE ADJUSTMENT ACT OF 1975.

One of the key assumptions of the private-financing plan to reconstruct the American Falls Dam was that the interest on the bonds issued to finance the deal would be tax-exempt.¹¹⁸ At the time the venture was authorized by Congress, the Internal Revenue Code provided tax-

¹¹⁸ 121 Cong. Rec. 21385 (1975) (Statement of Sen. Church) ("It was the expectation of those of us involved with the project and with the act that bonds issued by the reservoir district to finance construction would be tax exempt.").

exempt status to industrial development bonds used to develop “facilities for the furnishing of water, if available on reasonable demand to members of the general public.” H.R. Rep. No. 94-531, at 2 (1975). It was assumed that AFRD’s bonds would qualify under that provision, and in June 1974, AFRD applied to the Internal Revenue Service for a ruling to confirm the tax-exempt status of its bonds.¹¹⁹ The Internal Revenue Service raised questions as to whether the exemption applied, however, given Idaho Power’s plans for commercial power generation at the dam.¹²⁰ Congress responded by passing the Revenue Adjustment Act of 1975, which amended the Internal Revenue Code to provide tax-exempt status to “irrigation dams” that “ha[ve] a subordinate use in connection with the generation of electric energy by water” Revenue Adjustment Act of 1975, Pub. L. 94-164, § 7, 89 Stat. 970, 976 (1975). Congress explicitly “underst[ood] that the American Falls project conform[ed] with this requirement.” H.R. Rep. No. 94-531, at 4 (1975); S. Rep. No. 94-570, at 4 (1975). The Revenue Adjustment Act of 1975 reads, in part:

CERTAIN IRRIGATION DAMS.—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 [the Internal Revenue Code’s tax-exempt provisions] 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. L. 94-164, § 7, 89 Stat. 970, 976 (1975).

- 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.**

“[T]he starting point for interpreting a statute is the language of the statute itself.”

¹¹⁹ 121 Cong. Rec. 21386 (1975).

¹²⁰ H.R. Rep. No. 94-531, at 2 (1975); 121 Cong. Rec. 31868 (1975) (“It is the interrelationships of the use of the dam for furnishing water for irrigation purposes and the use of the water for electric energy that raises questions with the interpretation of the tax-exempt status of the industrial development bonds.”).

Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980). Here, the plain language of the Revenue Adjustment Act of 1975 establishes that Congress intended the statute to benefit only those irrigation dams that meet two criteria: “(1) substantially all of the stored water is contractually available for release from such dam for irrigation purposes, and (2) the water released is available on reasonable demand to members of the general public.” Pub. L. 94-164, 89 Stat. 970, 976 (Dec. 23, 1975). While the text of the statute does not specifically define the storage allocation necessary to meet the requirements of criteria (1), the legislative history incontrovertibly establishes that the phrase “substantially all” requires that no more than 10% of the capacity of a qualified irrigation reservoir can be controlled for hydropower generation purposes.

The committee reports supporting the Revenue Adjustment Act of 1975 demonstrate Congress’s intent that irrigation dams benefitting from the new tax-exemption could not contract out more than 10% of storage capacity to hydropower purposes. In surveying legislative authority, the “authoritative source” for finding Congress’s intent lies in the committee reports on the bill, “which ‘represen[t] the considered and collective understanding of those Congressman involved in drafting and studying proposed legislation.’” *Garcia v. United States*, 469 U.S. 70, 76 (1984) (citations omitted). In this case, both the House Ways and Means report and the Senate Finance report show that Congress intended to limit the control that a hydropower interest could have at an irrigation dam benefitting from the new tax-exemption to that of a spaceholder with no more than 10% storage capacity. Both reports explicitly set forth this 10% limitation: “The committee intends that subordinate use of water for generating electric energy means that less than 10 percent of the normal supply of stored water may contractually be scheduled for release by the power company and used for generating electric energy.” H.R. Rep.

No. 94-531, at 4 (1975); S. Rep. No. 94-570, at 4 (1975). Thus, irrigation reservoir projects subject to the provisions of the Revenue Adjustment Act of 1975 were statutorily restricted from contracting out more than 10% of their storage capacity for hydropower purposes.

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.

The Revenue Adjustment Act of 1975 created a new exemption to recognize that Idaho Power's minimal right to demand release of water from the American Falls project for power generation did not defeat the project's primary purpose of supply water for irrigation. Prior to the passage of the Revenue Adjustment Act of 1975, a tax exemption existed for the financing of a specific type of public activity—i.e., “facilities for the furnishing of water, if available on reasonable demand to members of the general public.” H.R. Rep. No. 94-531, at 2 (1975). Whether the American Falls project would qualify under that exemption was called into question due to Idaho Power's proposed use of the water for hydropower generation.¹²¹ Congress reviewed the facts involved with the American Falls reconstruction and created a new public-activity exemption through the enactment of the Revenue Adjustment Act of 1975.

Congress's conclusion that this was in fact a public project warranting a tax exemption was predicated upon its findings that Idaho Power's control over the releases from American Falls was to be limited to an inconsequential 2.65% of storage capacity. Both the House and Senate reports describe Congress's intention that Idaho Power's use of the water at American Falls would be incidental and subordinate to the USBOR's operation of the reservoir for other purposes:

It was intended that in normal conditions, substantially all of the falling water would be made available to the Power Company only when water was released

¹²¹ H.R. Rep. No. 94-531, at 2 (1975); S. Rep. No. 94-570, at 2 (1975).

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.

H.R. Rep. No. 94-531, at 3 (1975); *see also* S. Rep. No. 94-570, at 3 (1975) (using substantially the same language). In other words, the only right Idaho Power had to demand release of water from the American Falls project for power generation was its 45,000 acre-feet storage right.

On the House floor, Representative Ketchum of California reiterated the intentions set forth in the committee reports that Idaho Power's control over releases from American Falls was to be limited to 2.65% of reservoir storage:

It is anticipated that normally, substantially all the falling water from the dam would be made available to the Idaho Power Co. only when the water was released from the dam for irrigation purposes. There has been no intention to release water specifically for the power company except to the extent of approximately 2.65 percent of the dam storage capacity. . . . Therefore, the use of water for electric generation purposes would clearly be subordinate to the use for irrigation.

121 Cong. Rec. 31868 (1975); *see also* H.R. Rep. No. 94-531, at 3 (1975) ("In this case the Idaho Power Company has a limited spaceholder right (under 3 percent) . . ."). Accordingly, the legislative history is clear that the Revenue Adjustment Act of 1975 was enacted with the explicit congressional intent that no more than 2.65% of the storage capacity of the American Falls reservoir was available for release for power generation.

c. Idaho Power's Rights To American Falls Storage Is Limited As A Matter Of Federal Law.

The text of the Revenue Adjustment Act of 1975 plainly demonstrates Congress's intention to limit the quantity of storage that could be permanently obtained for hydropower purposes at American Falls to no more than "10 percent of the normal supply of stored water" H.R. Rep. No. 94-531, at 4 (1975); S. Rep. No. 94-570, at 4 (1975). The legislative

history of the Act, however, establishes that Congress in fact intended to limit Idaho Power's storage rights even further. The committee reports and supporting record show Congress's intent that no more than 2.65% of the American Falls Reservoir shall be dedicated to hydropower purposes by the Idaho Power Company.

The Company will have no control over the release of water other than in its capacity as a Placeholder which is exceedingly nominal. . . . 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). Brief of AFRD to IRS at 4, 6 (Jan. 31, 1975).

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. H.R. Rep. No. 94-531, at 3 (1975).

In this case the Idaho Power Company has a limited spaceholder right (under 3 percent) H.R. Rep. No. 94-531, at 3 (1975).

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, in its capacity as a spaceholder in the irrigation district, can schedule for the purpose of generating electric energy. S. Rep. No. 94-570, at 3 (1975).

In this case the Idaho Power Company has a limited spaceholder right (under 3 percent) S. Rep. No. 94-570, at 3 (1975).

There has been no intention to release water specifically for the power company except to the extent of approximately 2.65 percent of the dam storage capacity. 121 Cong. Rec. 31868 (1975).

Thus, the State is entitled to summary judgment as a matter of federal law that no more than 2.65% of the storage capacity of the American Falls reservoir may be contractually obligated for release for power generation purposes.

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ii. **IDAHO POWER IS COLLATERALLY ESTOPPED FROM CLAIMING AMERICAN FALLS STORAGE GREATER THAN THE 2.65% APPORTIONED TO IT IN THE CONFIRMATION PROCEEDINGS ACCOMPANYING THE AMERICAN FALLS REBUILD.**

Implementation of the Idaho Power proposal to finance the American Falls reconstruction through a public-private venture with the spaceholder irrigation districts involved both state and federal litigation. In 1974, the Idaho Legislature added chapter 22 to title 43 of the Idaho Code. Idaho Code §§ 43-2201-07. The provisions of that chapter authorized irrigation districts to reconstruct, rehabilitate, replace and improve dams and related structures, Idaho Code § 43-2201(A), to enter into contracts for that purpose, Idaho Code § 43-2201(B), and to issue bonds to finance the improvements. Idaho Code § 43-2201(C). Prior to the sale and issuance of any such bonds, however, irrigation district were required to petition the district court for confirmation proceeding. Idaho Code § 43-2204.

On May 12, 1976, those irrigation districts supporting the American Falls reconstruction program filed a petition in the Fifth Judicial District Court for judicial review and confirmation of the various acts, proceedings, and contracts relating to the proposed bond issue by AFRD.¹²² After eight days of trial, the Fifth Judicial District Court issued a memorandum decision confirming the actions and contracts related to the American Falls reconstruction program.¹²³ Among the district court findings was a determination that Idaho Power was only entitled to 2.65% of the storage capacity at American Falls:

Those persons and entities ("Waterusers") which have rights in the active water storage capacity of the Existing Dam pursuant to existing contracts with the Bureau of Reclamation, together with their respective percentage of total active water storage capacity, are as follows:

¹²² Amended Findings of Fact and Conclusions of Law, *In the Matter of the Petition of the Boards of Directors of the American Falls Reservoir District*, No. 28378 (Idaho 5th Dist. Ct. May 18, 1977).

¹²³ Memorandum Decision, *In the Matter of the Petition of the Boards of Directors of the American Falls Reservoir District*, No. 28378 (Idaho 5th Dist. Ct. Mar. 7, 1977).

Name of Wateruser	Percentage of Total Active Storage Capacity
Idaho Power Company	2.6471%

Amended Findings of Fact and Conclusions of Law at 5, *In the Matter of the Petition of the Boards of Directors of the American Falls Reservoir District*, No. 28378 (Idaho 5th Dist. Ct. May 18, 1977).

Where the Fifth Judicial District Court has already determined that Idaho Power is entitled to only 2.65% of storage capacity at American Falls (~45,000 acre-feet) in the proceedings confirming the American Falls reconstruction program, Idaho Power is barred by collateral estoppel from now asserting a claim to more than six times that amount in the SRBA (~300,000 acre-feet).

The five factors considered in determining whether to bar the relitigation of an issue as a matter of collateral estoppel include:

(1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Ticor Title Co. v. Stanion, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007) (citation omitted).

a. Idaho Power Had A Full And Fair Opportunity To Litigate Its Apportionment Of The Storage Capacity At American Falls.

Idaho Power was free to appear, and had a duty to appear, to litigate any issue raised in the petition under Idaho Code § 43-2204. That section allows any “person interested in the contracts or proposed contracts” to appear and answer said petition. *See* Idaho Code 43-2204. Clearly, Idaho Power had an interest in the American Falls reconstruction program contracts, both as a contractor for the falling water and as a spaceholder. Thus, Idaho Power had a full and

fair opportunity to litigate the issues raised in the confirmation proceedings pursuant to Idaho Code § 43-2204. In fact, Idaho Power played a role in the confirmation proceedings. Robert Hogg, Idaho Power's former vice president and the person responsible for the development of Idaho Power's proposal to assist the American Falls spaceholders in the reconstruction of the dam, testified at the trial of the confirmation proceedings.¹²⁴

Idaho Power's choice not to officially appear in the proceedings is not a defense. Pursuant to Idaho Code § 43-2204, confirmation proceedings petitioned under chapter 22 are binding not only over those appearing in confirmation proceedings, but also over those "person[s] interested in the contracts or proposed contracts":

Any owner of property in any district joining in the petition or any other person interested in the contracts or proposed contracts may appear and answer said petition at any time prior to the date fixed for said hearing or within such further time as may be allowed by the court; *and the petition shall be taken as confessed by all persons who fail so to appear.*

Idaho Code § 43-2204 (emphasis added). The statute unambiguously binds Idaho Power as a "person interested in the contracts or proposed contracts." *See also Kerner v. Johnson*, 99 Idaho 433, 444, 583 P.2d 360, 371 (1978) (finding that the American Falls confirmation proceeding was "essentially an *in rem* proceeding").

Idaho Code § 43-2204 not only provided Idaho Power an opportunity to litigate the issues of its storage allocation in the confirmation proceedings, it also made Idaho Power a privy to that litigation. The Court in *Gubler by and through Bubler v. Brydon* found that privity may be established through a "direct interest in the outcome of the former litigation" 125 Idaho 107, 110, 867 P.2d 981, 985 (1994). Where Idaho Power's rights as a "person[s] interested in the contracts or proposed contracts" were directly at issue in the confirmation proceedings, Idaho Power had a "direct interest" in the outcome of that litigation. Therefore, Idaho Power is not

¹²⁴ See Transcript on Appeal, *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

only bound as a matter of statute, but also under the doctrine of collateral estoppel.¹²⁵

b. 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.

The confirmation proceedings record clearly establishes that Idaho Power had a right to only 2.65% of the storage capacity at American Falls. In the Court's *Amended Findings of Fact and Conclusions of Law*, the Court set forth the spaceholders' rights to the stored water at American Falls:

Those persons and entities ("Waterusers") which have rights in the active water storage capacity of the Existing Dam pursuant to existing contracts with the Bureau of Reclamation, together with their respective percentage of total active water storage capacity, are as follows:

Name of Wateruser	Percentage of Total Active Storage Capacity
Idaho Power Company	2.6471%

Amended Findings of Fact and Conclusions of Law at 5, *In the Matter of the Petition of the Boards of Directors of the American Falls Reservoir District*, No. 28378 (Idaho 5th Dist. Ct. May 18, 1977). Where the Fifth Judicial District Court has already determined that Idaho Power is entitled to only 2.65% of storage capacity at American Falls (~45,000 acre-feet), Idaho Power is barred by collateral estoppel from now asserting a claim to more than six times that amount here in the SRBA (~300,000 acre-feet).

c. 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.

In a subsequent federal court case involving the American Falls reconstruction, Idaho Power went so far to say that the confirmation proceedings were binding on "the world at large":

Under Idaho law a confirmation decree entered by a court of competent jurisdiction is conclusive not only upon all landowners within the District,

¹²⁵ The final judgment of the district court was affirmed in *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

whether or not they appear at the confirmation proceedings, but it also binds the world at large.

Reply Brief of the Non-Federal Defendants at 7, *Kerner v. United States*, No. 1-76-204 (D. Idaho Apr. 6, 1979). To the extent that Idaho Power argues before this Court that it is not part of the “world at large,” Idaho Power should be judicially estopped from doing so. *See Heinze v. Bauer*, 145 Idaho 232, 235, 178 P.3d 597, 600 (2008) (finding that judicial estoppel “precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.”) (citation omitted). Regardless, the Court need not determine whether Idaho Code § 43-2204 binds the world at large, because the statute clearly binds Idaho Power to the findings of the Court in the confirmation proceedings as a “person interested in the contracts or proposed contracts.”

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.

Idaho Power should be judicially estopped from arguing that it has more than ~45,000 acre-feet of storage capacity at American Falls. Under the doctrine of judicial estoppel, “a litigant who obtains a judgment, advantage, or consideration from one party through means of sworn statements is judicially estopped from adopting inconsistent and contrary allegations or testimony, to obtain a recovery or a right against another party, arising out of the same transaction or subject matter.” *Heinze v. Bauer*, 145 Idaho 232, 235, 178 P.3d 597, 600 (2008) (citation omitted). The policies underlying judicial estoppel “are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. Judicial estoppel is intended to prevent a litigant from playing fast and loose with the courts.” *Id.* (citations omitted).

Following the filing of the petition in the confirmation proceedings, a lawsuit was filed

against the United States, AFRD, Idaho Power, and others in the federal district court of Idaho on behalf of certain persons and entities objecting to the American Falls replacement program. In its discovery responses, Idaho Power admits under oath that the Fifth Judicial District Court's Amended Findings of Fact and Conclusions of Law entered in the confirmation proceedings set forth an "accurate and complete statement as to the respective percentage of total active storage capacity in the American Falls Reservoir" Answers and Objections of Idaho Power Company to Plaintiff's First Request for Admissions at 56-56, *Kerner v. United States*, No. 1-76-204 (D. Idaho July 25, 1978).

REQUEST FOR ADMISSION NO. 87: Admit that the defendant irrigation districts, water and canal companies, persons and private corporations have, pursuant to contract similar to those referred to above, contracted with the defendant, United States of America, and have paid or are paying therefore, pursuant to the authority of the Reclamation Act of 1902 and Acts amendatory and supplementary thereof, and have acquired . . . the following percentage of the space in the active storage capacity of the American Falls Reservoir:

Name of Wateruser	Percentage of Total Active Storage Capacity
Idaho Power Company	2.6471%

ANSWER AND OBJECTIONS TO REQUEST FOR ADMISSION NO. 87: The defendant Idaho Power . . . admits the percentage of space and the active storage capacity of the American Falls Reservoir as set forth in this Request for Admission with the exception that the percentage of total storage capacity for the Burgess Canal & Irrigating Company should read ".5586%" rather than ".5568%". The defendant Idaho Power further states that a more accurate and complete statement as to the respective percentage of total active storage capacity in the American Falls Reservoir is contained in Section VI of Findings and Facts and Conclusions of Law entered on May 18, 1977, by State Court in the Confirmation Action [i.e., Amended Findings of Fact and Conclusions of Law].

Answers and Objections of Idaho Power Company to Plaintiff's First Request for Admissions at 56-56, *Kerner v. United States*, No. 1-76-204 (D. Idaho July 25, 1978); *see also id.* at 4 ("Any and all Findings of Fact and Conclusions of Law made by that State Court are binding upon the plaintiffs and cannot be waived by the parties to this action.").

Where Idaho Power has admitted under oath in another lawsuit dealing with the American Falls reconstruction program that it owns only 2.65% of storage capacity at American Falls (~45,000 acre-feet), the Court should bar Idaho Power from now claiming a right to more than six times that amount here in the SRBA (~300,000 acre-feet). To allow otherwise would be contrary to the orderly administration of justice.

- iv. **BY SUPPORTING AND AIDING IN THE PROCUREMENT OF PUBLIC LAW 93-206, THE REVENUE ADJUSTMENT ACT OF 1975, FPC LICENSE NOS. 2258 AND 2736, AND THE 1976 CONTRACTS BASED UPON THE REPRESENTATIONS THAT IDAHO POWER HAD A RIGHT TO ONLY 2.65% OF STORAGE (~45,000 ACRE-FEET), IDAHO POWER IS ESTOPPED FROM NOW ASSERTING THAT IT OWNS MORE THAN SIX TIMES THAT AMOUNT (~300,000 ACRE-FEET).**

As discussed above, Idaho Power repeatedly represented that it has no right to demand any water past American Falls Dam, except for 45,000 acre-feet of storage. Those representations have been made in the course of congressional hearings, written contracts, and administrative proceedings for the purpose of inducing action favorable to Idaho Power. Idaho Power's claims to 300,000 acre-feet of storage at American Falls is entirely inconsistent with those prior representations, and thus, Idaho Power should be estopped from claiming that it owns storage rights in excess of ~45,000 acre-feet (2.65% of reservoir capacity).

Public Law 93-206 was premised on the representations of Idaho Power that it controlled only 45,000 acre-feet of storage at American Falls. Those representations included:

The Company's interest as a spacedholder is very modest in contrast to the irrigator's 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.¹²⁶

Senator McClure: "It is not contemplated to have releases solely for power production?"

Robert A. Hogg, Idaho Power Company: "Not at all. The releases, certainly in the

¹²⁶ *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. 43 (1973) (Prepared Statement of Idaho Power).*

summertime, will be entirely dependent upon the irrigation requirements.”¹²⁷

The Company’s interest as a spacedholder is very modest in contrast to the irrigator’s 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.¹²⁸

The Company’s proposal includes the necessity of building a new power plant under a 50-year FPC license to develop the full energy potential of the site. This, in no way, would affect the water release nor water rights of the irrigators as they now exist. . . . We have a right to utilize only 45,000 acre-feet upon our demand.¹²⁹

See also Final Env’tl Statement: American Falls Dam Replacement and Powerplant at 8 (Department of Interior Nov. 13, 1974) (“All the space in American Falls Reservoir is active. Irrigators use a total of 1,655,000 acre-feet, and the remaining 45,000 acre-feet is used by the Idaho Power Company.”) (listing Idaho Power as one of the entities from which comments were requested).

Following the passing of Public Law 93-206, representations were made during the proceedings leading to the enactment of the Revenue Adjustment Act in 1975 confirming the understanding that Idaho Power had a right to only 45,000 acre-feet of storage at American Falls.

See supra Section III.A.i.

After securing the tax exemptions necessary to finance the reconstruction, the parties negotiated several contracts that guided the operations and rights of the parties at American Falls. In each of the three main 1976 American Falls contracts, Idaho Power “represented and warranted” that it only owned 2.65% of the storage capacity in the American Falls Reservoir:

[T]he amount of active storage capacity presently owned by the Idaho Power

¹²⁷ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 102-03. (1973).

¹²⁸ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 107 (1973) (Prepared Statement of Idaho Power).

¹²⁹ *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. 42, 47 (1973) (Testimony of Robert A. Hogg, Idaho Power).

Company under its Spaceholder Contract (2.6471 percent)”¹³⁰

“The Idaho Power Company represents and warrants as follows: . . . the amount of active storage capacity presently owned by the Idaho Power Company under its Spaceholder Contract (2.6471%)”¹³¹

STORAGE CAPACITY TO BE MADE AVAILABLE TO SPACEHOLDER . . .
The United States will continue to make available to the Spaceholder stored water accruing to 2.6471% of the active capacity of the Replacement Dam unless the Spaceholder is in default under terms and conditions of the Existing Spaceholder Contract or this Spaceholder Contract.¹³²

During the 1976 bond confirmation proceedings, this Fifth Judicial District Court found, and the Idaho Supreme Court affirmed, that the percentage of storage capacity used by Idaho Power was 2.6471%. *See supra* Section III.A.ii.

In the subsequent 1978 federal court proceedings regarding Idaho Power’s private-financing proposal, Idaho Power confirmed the Fifth Judicial District Court’s findings regarding storage space allocation. *See supra* Section III.A.iii:

Finally, in order for Idaho Power to assume liability as the guarantor for the payment on the bonds to be issued by AFRD to finance the reconstruction of the dam, Idaho Power had to apply to the Idaho Public Utilities Commission (IPUC) for approval. In support of its application, case no. U-1006-171, Idaho Power submitted an opinion from bond counsel Chapman and Cutler, attesting that the interest on AFRD’s bonds would be tax-exempt. That opinion, which was based in part on representations of Idaho Power, stated that the company owned a storage right in American Falls for only 2.65% of capacity:

Pursuant to the Idaho Power Company Spaceholder Contract, Idaho Power Company is entitled to the use of stored water accruing to 2.6471% (approximately 45,000 acre-feet) of the active storage capacity of the Replacement Dam (approximately 1,700,000 acre-feet) for power generation.

¹³⁰ 1976 Government Contract at 13, art. 17(e) (Mar. 31, 1976); *see also* Exhibit A to 1976 Government Contract (listing Idaho Power as holding ~45,000 acre-feet or 2.6471% of active capacity).

¹³¹ 1976 Falling Water Contract at 12–13, art. II § 2.3 (Mar. 31, 1976).

¹³² 1976 Spaceholder Contract at 10, art. 21 (Mar. 31, 1976).

Bond Counsel Opinion at 15 (Chapman and Cutler Dec. 1, 1980). Idaho Power offered a similar bond counsel opinion in a subsequent application to the IPUC as well:

Pursuant to the Idaho Power Company Spaceholder Contract, Idaho Power Company is entitled to the use of stored water accruing to 2.6471% (approximately 44,275 acre-feet) of the present active water storage capacity of the Replacement Dam (approximately 1,672,590 acre-feet) for power generation.¹³³

The record is clear that Idaho Power played a central role in the procurement of the various legislative, judicial, and administrative approvals necessary to effectuate the private-financing proposal to reconstruct the American Falls Dam. The record is also clear that Idaho Power made representations throughout those processes that it would have no right to demand any flows past the dam, except for its ~45,000 acre-foot storage right. Moreover, the congressional and agency documents show that the parties relied upon those representations in approving the privately financed reconstruction program. It would be unconscionable to allow Idaho Power to now assert that power storage at American Falls is greater than 2.65% of reservoir capacity (~45,000 acre-feet), and thus, Idaho Power should be estopped from doing so.

B. IDAHO POWER'S PROPOSED EXPLANATORY REMARKS THAT WOULD REQUIRE WATER IN EXCESS OF ~45,000 ACRE-FEET (2.65% OF RESERVOIR CAPACITY) BE RELEASED PAST THE AMERICAN FALLS DAM SPECIFICALLY FOR IDAHO POWER'S POWER GENERATION PURPOSES RATHER THAN STORED IN THE UPPER SNAKE RIVER RESERVOIR SYSTEM IS CONTRARY TO FEDERAL LAW AND THE COMPANY'S OWN ADMISSIONS.

It would be antithetical to federal law and to Idaho Power's own admissions to pass water through the American Falls Dam strictly for the company's power generation purposes below Milner Dam rather than storing the water for irrigation. Pursuant to federal law and FPC licenses, Idaho Power's use of the flows leaving the American Falls Dam is entirely dependent upon, and incidental to, the operation of the project by the USBOR. Idaho Power has no control

¹³³ Bond Counsel Opinion at 20 (Chapman and Cutler Feb. 21, 1990) (submitted by Idaho Power in IPC-E-89-15).

over, or right to demand, any releases past the American Falls Dam, except for a limited storage right for ~45,000 acre-feet. Instead, Idaho Power simply has permission pursuant to federal law to connect its American Falls power plant to the dam in order to utilize the full potential of the flows otherwise released by the USBOR. Accordingly, Idaho Power's objections seeking the inclusion of remarks on the quantity and purpose of use elements that would require the USBOR to bypass flows for use at the company's downstream power plants to the detriment of upstream storage should be disallowed.

i. THE AMERICAN FALLS DAM IS A RECLAMATION DAM TO BE OPERATED AS A FEATURE OF THE MINIDOKA RECLAMATION PROJECT.

The statute authorizing the reconstruction of the American Falls Dam, Public Law 93-206, clearly provided that the dam would be nothing other than a Reclamation project upon reconstruction. Public Law 93-206 states: "The United States shall take title to the dam upon a determination by the Secretary that the construction is substantially complete, and the dam shall be a feature of the Minidoka reclamation project The Secretary shall operate and maintain the replacement dam as a feature of the Minidoka project." Public Law 93-206, § 1, 87 Stat. 904, 904 (1973).

ii. AS PART OF THE MINIDOKA PROJECT, THE AMERICAN FALLS DAM MUST BE OPERATED PURSUANT TO RECLAMATION LAW PRINCIPLES, INCLUDING THE LIMITATIONS SET FORTH IN *BURLEY IRRIGATION DISTRICT V. ICKES*.

As discussed in the Factual Background above, following the enactment of Public Law 93-206 the IRS raised questions as to whether Idaho Power's hydropower generation at the proposed replacement dam would disqualified the project as an irrigation dam. *See supra* Section II.D. In response, Bond counsel, Chapman and Cutler, along with AFRD legal counsel Parry, Robertson, Daly & Larson, filed a brief with the IRS flatly declaring that hydropower generation at the replacement dam was entirely incidental to the operation of the project for Reclamation

purposes: “The use of the falling water by the Idaho Power Company . . . having been authorized by Congress for only incidental phase of the Project is not a primary or independent end in itself.” Brief of AFRD to IRS at 1 (Jan. 31, 1975).

As AFRD explained to the IRS, because the dam remains under the ownership of the USBOR as a feature of the Minidoka Project, hydropower generation at the dam is governed by the principles set forth by the United States Court of Appeals in *Burley Irrigation District v. Ickes*, 116 F.2d 529 (1940). In that case, the Burley Irrigation District (BID) brought an action against the United States, arguing that BID owned a right to a portion of the profits produced at the Minidoka Dam power plant and that the United States had exceeded its authority when it determined that it was in the best interests of the Minidoka Project to store the winter flows of the Snake River for irrigation use rather than sending the water past Minidoka for power production.

First, the *Ickes* court found that the United States, and not BID, owned “without qualification” the water rights at the Minidoka Dam:

[B]y adjudication of the state court of Idaho in 1913, and later of the United States District Court for the District of Idaho, priorities in the appropriations and rights to receive the waters of the Snake River were determined, and those applicable to lands within the project, including that for power at Minidoka Dam, were decreed to the United States. Thus the Government originally owned without qualification not only the works of the project, but the water right from the use of which plaintiff asserts its claim here. That ownership continues unabated

Ickes, 116 F.2d at 53; *see also id.* at 539 (“The United States remains the owner of the plant, the water right and the business, as it has been from the beginning, because these properties have not been transferred to the districts, and the conditions upon which transfer might be made have either not been prescribed by Congress or not been fulfilled.”).

Second, the *Ickes* court found that hydropower generation at the Minidoka Reclamation Dam was fully incidental and subordinate to other Reclamation purposes, as a matter of law.

According to the *Ickes* court, Reclamation Law “is entirely inconsistent with the development and sale of commercial power whenever that may interfere with the development of irrigation or ‘impair the efficiency of the irrigation project,’” *Id.* at 531, and therefore, the United States is required to “assure that the secondary conservation of power will not impair the primary conservation of water for irrigation” *Id.*; *see also id.* (“The statute and its amendments are *reclamation* acts, not commercial power development acts.”); *id.* at 541 n. 15 (“It would seem that the statute’s clear mandate would subordinate the commercial uses of power to those of irrigation in any case where the two uses might be in conflict.”). Accordingly, the *Ickes* court found that the United States had the authority “to stop the winter flow of water through the Minidoka plant, to cease producing power there in the nonirrigating season, . . . [and] to enter into a the contract for supplemental power with the Idaho Power Company.” *Id.* at 539–40.

Here, all those involved with authorizing the dam replacement program recognized that the new American Falls Dam would be operated as a Minidoka Reclamation Project feature consistent with the principles of Reclamation Law set forth in *Ickes*:

AFRD: “The Congress of the United States, the Idaho Legislature, the Idaho Supreme Court, the Bureau of Reclamation, the Spaceholders, and the Company recognize that the purpose of the Project is irrigation and that the purpose of the issuance of the Bonds by the District is for the reconstruction of a dam which is part of a reclamation project the primary purpose of which is the reclamation of arid lands through irrigation.”¹³⁴

Idaho Power Company: “[I]rrigation rights shall always have priority in the operation hereof, subject to the rights of the Company as a spaceholder.”¹³⁵

Dan Dreyfus, Staff Member of Committee on Interior and Insular Affairs: “It might be preferable to authorize the Secretary to enter into the appropriate agreements as part of the Minidoka project (originally authorized by the Secretary on April 23, 1904). This would incorporate the whole body of policy relating to the project without specific references and insure the integrity of operation of the

¹³⁴ Brief of AFRD to IRS at 4 (Jan. 31, 1975).

¹³⁵ Idaho Power Company Proposal Presented to Executive Committee of Spaceholders at 8 (Feb. 27, 1973).

river under the new contracts.”¹³⁶

Robert A. Hogg, Idaho Power Company: “The 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.”¹³⁷

John Barker, President, AFRD: “The reservoir would be operated in the same manner in which it is now operated, observing the preference for irrigation.”¹³⁸

Tom Olmstead, AFRD: “The Idaho Power Co. proposal fully recognized the irrigation preference”¹³⁹

Senator McClure: “It is not contemplated to have releases solely for power production?”

Robert A. Hogg, Idaho Power Company: “Not at all. The releases, certainly in the summertime, will be entirely dependent upon the irrigation requirements.”¹⁴⁰

Thomas Nelson, Attorney for AFRD: “[The dam] would become Federal property and thereafter remain in Federal ownership to be maintained and operated by the Bureau of Reclamation in the same manner as it has been heretofore operated, including the existing preference for irrigation rights.”¹⁴¹

The incidental nature of hydropower generation at the new American Falls Dam was reconfirmed when the project went before Congress in pursuit of the Revenue Adjustment Act of 1975. The Act expressly required that hydropower generation was to be a “subordinate use” at the dam, and Congress clearly defined what it meant that term to mean:

The committee intends that subordinate use of water for generating electric energy means that less than 10 percent of the normal supply of stored water may contractually be scheduled for release by the power company and used for

¹³⁶ Memorandum from Dan Dreyfus, Staff Member of Committee on Interior and Insular Affairs, to Senator Church at 4 (Mar. 11, 1973).

¹³⁷ *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. 47 (1973) (Testimony of R. A. Hogg, Idaho Power Company).

¹³⁸ *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. 50 (1973) (Statement of J. Barker, President, AFRD).

¹³⁹ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 65 (1973) (Statement of T. Olmstead, AFRD).

¹⁴⁰ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 102–03. (1973) (Testimony of R.A. Hogg, Idaho Power Company).

¹⁴¹ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 152 (1973) (Statement of T. Nelson, Attorney for AFRD).

generating electric energy.¹⁴²

In other words, Idaho Power had no right to demand any releases past the dam, except for its storage rights which were required to be minimal. In passing the Revenue Adjustment Act of 1975, Congress clearly understood that Idaho Power's rights at American Falls were so limited:

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.¹⁴³

There has been no intention to release water specifically for the power company except to the extent of approximately 2.65 percent of the dam storage capacity.¹⁴⁴

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, in its capacity as a space holder in the irrigation district, can schedule for the purpose of generating electric energy.¹⁴⁵

Idaho Power's FPC licenses similarly confirmed that Idaho Power was to have no control over, or right to demand, any flows past American Falls Dam. On April 25, 1975, Idaho Power testified to "its acknowledgement of acceptance of all of the provisions, terms and conditions of th[e] license[s]," including the following:

The project shall be operated in such a manner as will not conflict with the future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the backwater created by the project for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.¹⁴⁶

Applicant has no control over the water releases at the Replacement Dam.¹⁴⁷

The use of falling water releases for power generation is so thoroughly under the control of Reclamation in its release for irrigation and other purposes of the Minidoka Project that *the Applicant would have no opportunity to operate the*

¹⁴² H.R. Rep. No. 94-531, at 4 (1975); S. Rep. No. 94-570, at 4 (1975).

¹⁴³ H.R. Rep. No. 94-531, at 3 (1975).

¹⁴⁴ 121 Cong. Rec. 31868 (1975).

¹⁴⁵ S. Rep. No. 94-570, at 3 (1975).

¹⁴⁶ Order Issuing Major License (Constructed), Project No. 2258 at 21 § 32 (FPC Mar. 31, 1975).

¹⁴⁷ Order Issuing Major License (Unconstructed), Project No. 2736 at 3 (FPC Mar. 31, 1975).

*project in a manner to conflict with future depletion or diversion of the water of the Snake River.*¹⁴⁸

Having accepted these provisions of the license, Idaho Power has adopted them as if they were its own.

The 1976 Government Contract, Falling Water Contract, and Spaceholder Contract all confirmed the provisions of Public Law 93-206 and the Revenue Adjustment Act of 1975, providing that Idaho Power has no right to, or control over, the flows at American Falls:

The Replacement Dam will be operated by the United States in a manner so that . . . the primary irrigation purpose and the incidental purposes of the Minidoka Project shall not be impaired by the subordinate utilization for power generation at the Powerplant of the water released from the Replacement Dam. The United States is not obligated to operate the Replacement Dam in a manner to have water in the Replacement Dam at elevations for power generation or to operate to increase the head in the Replacement Dam for power generation.¹⁴⁹

[T]he right to utilize the water released from the Replacement Dam for power generation at the Powerplant is subject to the provisions hereof, particularly to the limitation that the water releases from the Replacement Dam are to be determined at all times by the [USBOR].¹⁵⁰

The utilization by the Idaho Power Company of the Falling Water at the Powerplant for power generation is and shall continue to be subordinate to the furnishing of water from the Replacement Dam for irrigation purposes.¹⁵¹

[T]he United States will operate and maintain the Replacement Dam and the Related Facilities as part of the Minidoka Project for the beneficial use of the water on the land within the service areas of the Spaceholders pursuant to Section 8 of the Reclamation Act of June 17, 1902 (32 Stat. 388).¹⁵²

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¹⁴⁸ Order Issuing Major License (Unconstructed), Project No. 2736 at 11–12 (FPC Mar. 31, 1975) (emphasis added).

¹⁴⁹ 1976 Government Contract at 10, art. 16 (Mar. 31, 1976); 1976 Spaceholder Contract at 14, part IV, art. 28(e) (Mar. 31, 1976).

¹⁵⁰ 1976 Government Contract at 15, part IV, art. 18(f) (Mar. 31, 1976).

¹⁵¹ 1976 Falling Water Contract at 10, art. II § 2.1(d) (Mar. 31, 1976).

¹⁵² 1976 Falling Water Contract at 18, art. IV, § 4.5 (Mar. 31, 1976); 1976 Spaceholder Contract at 14, part IV, art. 28(a) (Mar. 31, 1976).

iii. IDAHO POWER ADMITS THAT THE CONSERVATION OF WATER FOR IRRIGATION AND OTHER PURPOSES HAS PRIORITY OVER THE RELEASE OF WATER FOR POWER GENERATION PURPOSES IN THE UPPER SNAKE RIVER RESERVOIR SYSTEM.

During its deposition testimony in this subcase, Idaho Power admitted that the conservation of water for irrigation and other purposes has priority over the release of water for hydropower generation in the Upper Snake River reservoir system. Idaho Power also admitted that it has no control over the USBOR's decision to make releases from the reservoirs:

A. Well, you know, it's really the company's position that irrigation comes before hydropower. And if an irrigator is using that water or needs that capacity, then it's never been the company's position to try to circumvent that or usurp that.¹⁵³

A. And I think all along we've always contended through the history of the American Falls project that irrigation was the highest priority. The project was built for irrigation, and that was a high priority.¹⁵⁴

A. I think, generally speaking, that the company does believe that the upstream projects are for irrigation first. I don't know how else to say that.¹⁵⁵

A. Well, we've talked about that previously. But I think the projects were designated as irrigation first and hydropower second.¹⁵⁶

A. Idaho Power has no control over the operation of the Upper Snake system.¹⁵⁷

A. [A]nything released past American Falls is at the control of the Bureau.¹⁵⁸

The record is clear that the USBOR, and not Idaho Power, owns both the American Falls Dam and the right to control the releases therefrom. Idaho Power's assertion that water must be passed through the American Falls Dam for hydropower generation purposes rather than stored for irrigation indicates an element of control and entitlement at odds with federal Reclamation Laws, the replacement program legislation, the FPC licenses, and Idaho Power's own

¹⁵³ Rule 30(b)(6) Deposition of Idaho Power Company: Testimony of Jon Bowling at 40, *In re SRBA Case No. 39576, Subcase no. 01-02064* (Idaho 5th Dist. Ct. May 3-4, 2010).

¹⁵⁴ *Id.* at 42.

¹⁵⁵ *Id.* at 51.

¹⁵⁶ *Id.* at 72.

¹⁵⁷ *Id.* at 52.

¹⁵⁸ *Id.* at 80-81.

admissions. Accordingly, Idaho Power's objections seeking the inclusion of remarks on the quantity and purpose of use elements that would require the USBOR to bypass flows for use at the company's downstream power plants to the detriment of upstream storage should be disallowed.

IV. CONCLUSION

Power storage at American Falls should be decreed in the name of the United States in the amount of ~45,000 acre-feet (2.65% of reservoir storage capacity). Furthermore, Idaho Power's objections seeking the inclusion of remarks on the quantity and purpose of use elements that would require the USBOR to bypass flows for use at the company's downstream power plants to the detriment of upstream storage should also be disallowed.

RESPECTFULLY SUBMITTED this 5th day of October 2010.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

A handwritten signature in black ink, appearing to read 'D. Stanish', with a horizontal line extending to the right.

DAVID I. STANISH
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 5th day of October 2010, I caused to be served the original and copies of the **BRIEF IN SUPPORT OF AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT** on the following persons by the methods indicated:

1. Original to:

CLERK OF THE DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
253 THIRD AVENUE NORTH
PO BOX 2707
TWIN FALLS, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
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- ☐ Statehouse Mail

2. Copies to:

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Represented by:
JAMES C TUCKER
IDAHO POWER CO
PO BOX 70
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- ☐ Federal Express
- ☐ Facsimile:
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ABERDEEN AMERICAN FALLS GWD
BINGHAM GWD
BONNEVILLE JEFFERSON GWD
CAREY VALLEY GWD
IGWA INC
JEFFERSON CLARK GWD
MADISON GWD
MAGIC VALLEY GWD
NORTH SNAKE GWD
Represented by:

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
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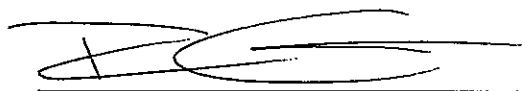
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DAVID I. STANISH
Deputy Attorney General