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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

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Subcase No.: 01-02064

**MEMORANDUM IN SUPPORT OF
THE UNITED STATES' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

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I. INTRODUCTION.

In testimony before Congress, Idaho Power clearly delineated both the relationship between hydropower and irrigation in the use of water flowing into American Falls Reservoir, and Idaho Power's ability to demand use of that water:

The storage. . . the water going through American Falls Dam, of course is first used for irrigation service. We [the Idaho Power Company] have a right to utilize only 45,000 acre-feet upon our demand.^{1/}

At the time Idaho Power made that statement, the Company was attempting to gain the support of Congress – and keep the support of the American Falls irrigators – for a new powerplant at American Falls that would allow Idaho Power to connect its penstock directly to the dam and thereby generate power and revenue from water released for irrigation and other purposes. Idaho Power estimated that those changes would allow a six-fold increase in hydropower generation.

Today, the reservoir long since constructed and the revenues rolling in, Idaho Power claims the right to demand the use of up to 300,000 acre-feet of the water entering the reservoir. Idaho Power does so despite decades in which it acquiesced to Reclamation's non-delivery of water and despite the obvious impact such a dramatic change in reservoir operations would have on the irrigation community. Even were that not the case, however, this Court would still be compelled to conclude that Idaho Power's right to demand water from American Falls Reservoir is limited to 45,000 acre-feet of water.^{2/} The statutes and contracts resulting

^{1/} *Replacement of the American Falls Dam in Idaho, Part 1, Hearing Before the Subcommittee on Water and Power Resources...*, House of Representatives, 93d Cong., 1st Sess., at 47 (1973) (Statement of Robert A. Hogg, Idaho Power Co.) ("House Testimony") (Attached as Exhibit A to the Affidavit of David A. Jarvis ("Jarvis Aff")).

^{2/} Because of sedimentation, today Idaho Power's contractual right to 2.671 percent of the available capacity of American Falls Reservoir equates to 44,275 acre-feet of space when the

from the re-construction of American Falls Reservoir in the 1970s allow no other conclusion. Those statutes and contracts brought Idaho Power many benefits, including a new powerplant with far greater capacity and access to far more water for power generation than had been available under the Company's 1923 Spaceholder Contract. They did so, however, at a cost - termination of the "secondary" water provisions of the 1923 Contract that are the foundation of Idaho Power's objection to the United States' water right.

In addition to seeking recognition of a contractual right terminated long ago, Idaho Power asks this Court to hold that the United States' water right is subject to a trust obligation in favor of Idaho Power. Simply put, there is no credible basis for that claim. Numerous courts have considered the proposition that Reclamation has trust obligations to the users of project water. All have rejected it, including the SRBA. Those courts did so for good reason - outside of the Indian context, federal trust obligations cannot be implied.

In sum, the United States is entitled to partial summary judgment ruling that the United States' water right 01-2064 is not subject to a trust obligation and that the quantity of water assigned to hydropower use under that right is exactly what Idaho Power informed Congress and later contracted for: 45,000 acre-feet.

reservoir is filled. Nonetheless, for the sake of simplicity the quantity is often rounded to 45,000 acre-feet, as will be done in this memorandum.

II. FACTUAL BACKGROUND

A. Idaho Power's Claims.

Idaho Power's objections to the United States' water right 01-2064 ask this Court to grant Idaho Power two contractual rights: (1) the right to store up to 45,000 acre-feet of water on the same terms as the other spaceholders and (2) the right to demand that the United States release or forego storage of up to 255,000 acre-feet of water in American Falls Reservoir so that the water can flow downstream and be used by Idaho Power to generate electricity. STANDARD FORM 1 OBJECTION - AMENDED, ¶ 7 (Jan. 21, 2010) ("OBJECTION"). Idaho Power's claims are premised on provisions of its 1923 Contract with the United States which, as will be shown below, were terminated by statutes and contracts brought about by the reconstruction of American Falls Reservoir in the 1970s.

The history of the 1923 Contract is long and involved. The first stop in that history is the plain language of the 1923 Contract, which demonstrates that even before the contract was modified, Idaho Power held no more than a contractual right to use 45,000 acre-feet of storage space and the ability to temporarily use 255,000 acre-feet of storage capacity when its use did not harm the irrigation entities that owned that space. Through the coming decades, Idaho Power would vacillate on many issues but remain true to one principle: its hydropower rights would not be operated to the detriment of irrigation.

B. The 1923 Contract Purports to Reserve Water Obtained Through a Permit From IDWR and Allows Idaho Power the Use of 45,000 Acre-feet of "Primary" Storage Space and 255,000 Acre-feet of "Secondary" Storage Space Held by Irrigation Contractors.

A severe drought in 1919 demonstrated that the existing reservoirs on the Upper

Snake (Lake Walcott and Jackson Lake) could not ensure a reliable water supply for irrigation of the valley. Water Supply for Palisades Reservoir Project Idaho at 5, ¶ 13 (1946) (“REPORT OF THE REGIONAL DIRECTOR”) (Jarvis Aff., Ex. B); *see also* Contract No. Ilr-733 at ¶ 2, lines 18-21 (June 15, 1923) (“1923 Contract”) (Jarvis Aff., Ex. C). The Bureau of Reclamation determined that American Falls was the best location for another dam, but the site was not available because Idaho Power already had three small power facilities and a diversion dam at that location. *See* 1923 Contract at ¶¶ 4-5. The 1923 Contract was the means by which the United States acquired Idaho Power’s interests and paved the way for the construction of American Falls Reservoir.

The 1923 Contract is a lengthy document, but only a handful of its provisions are directly relevant to Idaho Power’s claims in this proceeding. Idaho Power’s claims are rooted in Paragraph 19 of the 1923 Contract, which purported to “reserve” 300,000 acre-feet of water “flowing into the reservoir after October 1st of any year . . . and actually storable therein.”^{3/} 1923 Contract, ¶ 19, lines 471-75. That reservation was given effect by two provisions of the contract. The first, Paragraph 16 provided the Company with “primary storage capacity,” *i.e.*, the “perpetual use of 45,000 acre-feet of storage capacity in the reservoir” on an equal basis with the contractual storage held by irrigation companies. 1923 Contract at ¶ 16, lines 420-21. Idaho Power’s ability to use that space and attendant water has been expressly continued by a subsequent contract, the 1976 Spaceholder Contract, discussed below.

The remaining 255,000 acre-feet of the purported reservation (“secondary water”) was implemented through Paragraph 18, which gave Idaho Power “secondary storage capacity,”

^{3/} As will be discussed below, the reservation relied on a water right permit application which was cancelled by IDWR and never ripened into a water right.

i.e., “a secondary right to use not to exceed 255,000 acre-feet of storage capacity in the reservoir” for the purpose of “regulating and controlling the water reserved to the company.”^{4/} *Id.* at 19, lines 451-57. The contract limited Idaho Power’s use of this secondary water in several important ways.

First, Idaho Power’s purported reservation of water applied only to water “actually storable” in the reservoir. *Id.* at 20, lines 474-75. Thus, the only water available to Idaho Power under the secondary water provisions was water that could have been stored in the reservoir. In other words, when the reservoir was out of priority, Idaho Power had no right to water.

Second, unlike its “primary storage capacity,” the company’s use of the “secondary storage capacity” was not on an equal basis with the irrigation contractors use of storage capacity. To the contrary, the contract made Idaho Power’s use of the “secondary storage capacity” subordinate to the storage of water for irrigation. The space could be used for regulation of the reserved water “only when such capacity [was] not then required and not being used by the owners of irrigation rights to the use of such capacity.” *Id.*, lines 457-59.

Third, the 1923 Contract specified that Idaho Power could not use the “secondary storage capacity” before October 1 and that its right ended once “the reservoir is first filled each season.” *Id.*, lines 460-62. Even in the years in which the reservoir did not fill, the right was of limited duration. The 1923 Contract required the Company to release all claims to the water on

^{4/} The “secondary storage capacity” also allowed Idaho Power to regulate and control water acquired pursuant to Paragraph 10 of the 1923 Contract (Paragraph 10 allowed the Company to import water from other basins and/or acquire storage in future reservoirs above American Falls). Idaho Power’s Rule 30(b)(6) deponent Jon Bowling confirmed that the Company has not acquired any water pursuant to Paragraph 10. Transcript of the Deposition of Jon Bowling (“Bowling Depo.”) at 25, ll. 4-24 (pertinent pages, Jarvis Aff., Ex. D).

April 1, except 60,000 acre-feet, and to release any claim to the water remaining thereafter on June 10th. *Id.*, lines 463-66.

In essence, what Idaho Power's secondary storage capacity provided was an ability to make use of irrigation storage space during a limited portion of the year. *See* B. C. Russell, Memorandum – Contracts Between Idaho Power Company and U.S. Bureau of Reclamation. . . (July 14, 1949) (Jarvis Aff., Ex. E) (secondary storage space “means that it is stored in space belonging to someone else and, therefore, must be used or given up at certain definite periods when the owners of the space would be apt to require it.”). Use of that space made it possible to deliver water to Idaho Power's downstream powerplants.⁵⁷ *See* 1923 Contract at 20 - 21, ll. 517-24.

Idaho Power's temporary use of the irrigator's storage space was made possible by the parties' belief that there would be substantial quantities of water the United States could release or bypass as the reservoir was filling and still fill the reservoir.⁵⁸ As H.L. Stoner, a field engineer associated with Idaho Power, would later explain, given the relatively small size of the reservoir compared to the Snake River's runoff, use of the Company's secondary storage capacity would “merely delay[] the time when the reservoir becomes full.” H. L. Stoner, American Falls Storage at 1-2 (Jan. 12, 1928) (Jarvis Aff., Ex. F). Indeed, the belief that water was plentiful led

⁵⁷ The contract limited the quantity of water that could be provided to the downstream plants. As measured at Twin Falls, those flows ranged from 590 c.f.s. during the period from Feb. 13 through April 15, to 790 c.f.s. during the period December 1 through January 31. 1923 Contract, ¶ 21, lines 523-530; ¶ 22, lines 554-555.

⁵⁸ That understanding comports with the Reclamation Act, which authorizes the use of Reclamation facilities for the development of commercial power only where such use would not “impair the efficiency of the irrigation project.” *Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 530-31 & n.1 (D.C. Cir. 1940) (*quoting* the Act of April 16, 1906).

Reclamation to assume that American Falls Reservoir would fill every year and to “reserve” one-quarter of the reservoir’s capacity for the development of new land. REPORT OF THE REGIONAL DIRECTOR (Jarvis Aff., Ex. B) at 5, ¶ 13.

Thus, the secondary water provisions of the 1923 Contract are best seen as a laudable attempt to make the most efficient use of water and storage capacity by generating power with water not needed for irrigation.⁷ From the earliest days of the contract, two things were understood about the “secondary” water provisions. First, as the contract’s plain language made clear, the needs of the irrigators came first.⁸ Second, “secondary” water provided to Idaho Power was water that could have been stored for the benefit of the irrigators. Thus when it was looking like 1927 would be a dry year, Idaho Power expressed a willingness to waive its right to the secondary storage water if the weather continued such that the water would likely later be needed for irrigation purposes. Memo from B. E. Stoutemyer, District Counsel, to Commissioner of Reclamation at 2, ¶ 5 (Nov. 12, 1926) (Jarvis Aff., Ex. G).

As implementation of the Contract proceeded through the 1920s, Idaho Power benefitted from two things. First, its interests largely allied with those of Reclamation and the irrigators. In order to provide inexpensive power for the irrigators, throughout the winter Reclamation send large quantities of water through its Minidoka powerplant. Much of that water

⁷ As will be discussed below, the present Falling Water Contract is to much the same effect. It allows water released from the reservoir for irrigation and other purposes to be used for power generation.

⁸ Idaho Power continues to have that understanding. *See* Bowling Depo. (Jarvis Aff., Ex. D) at 41, ll. 14-29 (“[I]t’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 or usurp that.”).

flowed past water Milner Dam with two results: it kept Idaho Power's turbines at Shoshone Falls spinning and filled the government's obligations under the secondary water provisions of the contract. *E.g.* Letter from Vice President, Idaho Power to Clay C. Boswell, Electric Bond & Share Company (October 3, 1927) (Noting that Reclamation planned to release 600,000 acre-feet of water between November 1 and April 1 for the Minidoka powerplant.) (Jarvis Aff., Ex.H).

The drought that hit Idaho in the 1930s demonstrated that the assumptions on water availability underlying the 1923 Contract were overly optimistic and lead to curtailment of the use of the "secondary" water. Before that would happen, however, IDWR would reject Idaho Power's efforts to complete the proposed appropriation of storage water at American Falls that had been the basis for Idaho Power's "reservation" of water.

C. IDWR Declines to Certificate Idaho Power's Permit.

Idaho Power's "reservation" of storage water in the 1923 Contract rested on permit R-269 it had received from IDWR in 1921. *See* 1923 Contract at ¶ 6, lines 41-44; *see also* APPLICATION FOR A PERMIT (June 13, 1921) (Jarvis. Aff., Ex. I). That permit was submitted pursuant to an agreement with the United States in order to facilitate completion of the 1923 Contract. Idaho Power had demanded water, as well as money, as compensation for its American Falls facilities. When Reclamation questioned whether the Secretary had authority to provide the Company with water, Idaho Power's solution was to have the company apply for a permit from the State and then "reserve" the water right initiated by the permit.^{9/} Letter from B. E.

^{9/} Idaho Power's solution, while creative, was legally flawed. In 1923 it was already well settled that a permit application does not create a property interest. Rather, it creates only "a contingent right" which "is not real property." *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, ___, 263 P. 45, 52 (1927); *see also* *Speer v. Stephenson*, 16 Idaho 707, 102 P. 365 (1909) (a permit serves as the State's consent to later acquire real property). Consequently, Idaho Power

Stoutemyer, District Counsel, to Chief Counsel at ¶ 2 (March 18, 1921) (Jarvis Aff., Ex. J).

The United States and Idaho Power then entered into a Memorandum of Agreement in which the United States agreed to delay filing the permit application it had prepared, and Idaho Power agreed its permit would be subject to the terms of the contract. *See* MEMORANDUM OF AGREEMENT (March 17, 1921) (“MOA”) (Jarvis Aff., Ex. K). As a result, Idaho Power filed for a permit for 300,000 acre-feet of storage in March of 1921 (Permit R-273) and less than two weeks later, the United States filed on the same storage water (Permit R-269).¹⁰ *See* Leo Bresnahan, Idaho Asst. Attorney General, Memorandum at 2-3 (Feb. 10, 1933) (“Bresnahan Memo.”) (Jarvis Aff., Ex. L).

The United States completed construction of American Falls Reservoir in 1927 and submitted a Proof of Completion of Works to IDWR on May 16, 1931. IDWR certificated the government’s storage right on July 12, 1932. Bresnahan Memo. at 3. A month after the United States submitted its Proof, Idaho Power submitted a Proof of Completion of Works which claimed the United States’ reservoir as the Company’s completed “works.” IDWR informed Idaho Power that it intended to reject that filing because the Company’s right to store water in American Falls Reservoir was set by the 1923 Contract, and therefore a Certificate of Completion of Works for Idaho Power’s permit “would be a nullity and would only serve to further complicate the situation.” Letter from Idaho Commissioner of Reclamation to Idaho

had no property right it could reserve.

¹⁰ The 1923 Contract addressed the permits and allowed either party to apply “proof on the permit of the earliest priority.” 1923 Contract at ¶ 37, lines 832-38; *see also* Bresnahan Memo. at 10 (opining that the contract allowed United States to submit proof under Idaho Power’s permit).

Power Co., at 5 (Sept. 29, 1932) (Jarvis Aff., Ex. M).

Idaho Power responded by abandoning its claim for an independent water right. Instead, it asked to be awarded a Completion of Works with a qualification that would have made Idaho Power's storage right "a part of" the United States' permit. Letter from Idaho Commissioner of Reclamation to Idaho Power Co. at 1 (Dec. 31, 1932) (Jarvis Aff., Ex. N). IDWR rejected that proposal. *Id.* at 2. IDWR apparently believed no further action was necessary because Idaho Power's permit would languish for more than thirty years before a new Director would return to the matter and cancel the permit.

D. Idaho Power's 1934 Federal Power Commission License Limits its Use of the "Secondary" Water.

While Idaho Power was seeking water rights from IDWR, it was also seeking a license for a powerplant at Twin Falls from the Federal Power Commission ("FPC"). Through its FPC license Idaho Power agreed to make *all* rights to the use of water for power purposes the company then held, or would later acquire, "subject [to], inferior, and subordinate to *all* rights heretofore or hereafter acquired by the United States *or other parties* for irrigation purposes."^{11/} LICENSE, PROJECT 18 at 11, Art. 14 (May 11, 1934) (emphasis added) (Jarvis Aff., Ex. O). Thus had there been any initial doubt that Idaho Power's use of the secondary water was fully subordinate to irrigation uses, by no later than 1934 no doubt remained.

E. A 1935 Contract Further Restricts Use of the Secondary Water.

The drought of the 1930s made conflict between Idaho Power's use of the

^{11/} There were two exceptions to that subordination: (1) the 45,000 acre-feet of storage capacity the company had obtained through Paragraph 16 of the 1923 Contract; and (2) any "seepage, percolation, drainage, spring or springs, waste and/or other influent water" arriving in the channel of the Snake River between Milner Dam and Twin Falls. *Id.*

secondary water and the irrigators' use of water unavoidable. Consequently, during each of the storage seasons beginning in 1931, the Company took actions to ensure water would be available for irrigation purposes. *See* Letter from K. M. Robinson, Vice President, Idaho Power to B. E. Stoutemyer, District Counsel at 1-2 (Nov. 9, 1933) (Jarvis Aff., Ex. P). Reclamation also took immediate action to aid the irrigators by making the water previously reserved for new lands available to existing American Falls contractors through relatively short term leases. REPORT OF THE REGIONAL DIRECTOR (Jarvis Aff., Ex. B) at 5-6, ¶ 14.

To provide longer term relief, Reclamation and Idaho Power engaged in discussions to modify the 1923 Contract. The result was a contract intended to address the water shortage by limiting the release of water for hydropower so that additional water could be stored. Contract No. Ilr-801 ("1935 Contract") (Jarvis Aff., Ex. Q) at 3; *see also* Bowling Depo. (Jarvis Aff., Ex. D) at 151, ll. 22-25 & 152, ll. 1-10. Through the 1935 Contract Idaho Power agreed that release of any water from the secondary storage capacity would be "subject to the direction and limitations of the Bureau of Reclamation," so long as the company received the flow rates at Shoshone Falls specified in the Paragraph 21 of the 1923 Contract from October 1 through March 15.¹²⁷ 1935 Contract at 4-5. Thus, the new contract had the effect of shortening the period water was available through the "secondary" storage capacity by three months.

The Company's willingness to limit its use of the secondary water did not stem from altruism. The 1923 Contract had allowed for the possibility of the government constructing a powerplant at American Falls and Congress had appropriated money for that purpose in 1926.

¹²⁷ Reclamation also agreed to release the full 255,000 acre-feet to Idaho Power at least once every five years. *Id.* at 5.

See Upper Snake River Basin - SUMMARY REPORT at 7-64 (excerpts, Jarvis Aff., Ex. R). The company realized that a federal powerplant would dramatically cut into its revenues. *See* Memo from B. C. Russell, General Superintendent, Idaho Power to T. E. Roach, General Office, Idaho Power at 3 (June 4, 1948) (estimating that a government powerplant at American Falls would cut the company's generation by more than half) (Jarvis. Aff., Ex. S). Accordingly, the 1935 Contract was contingent on the United States foregoing construction of a powerplant at American Falls. 1935 Contract at 8-9, § A.3.

F. The United States Obtains an Unencumbered Storage Water Right for American Falls Reservoir.

As noted above, IDWR refused to issue Idaho Power a Proof of Completion of Works because the agency had already issued one to the United States for American Falls Reservoir. In 1941 the United States followed up on its Proof of Completion of Works with its proof establishing beneficial use of the water. The following year, IDWR issued the United States a License and Certificate of Water Right confirming the United States' right to divert and store up to 1,800,000 acre-feet of water in the Reservoir. LICENSE AND CERTIFICATE OF WATER RIGHT R-269/01-2064 (July 9, 1942) (Jarvis Aff., Ex. T). Despite Idaho Power's earlier request that its permit be made a part of the United States' water right, the license issued to the United States made no reference to Idaho Power's interests.

G. The Renewed Threat of a Federal Powerplant Leads Idaho Power to Ask for Water Pursuant to the 1923 Contract.

In 1950 Congress authorized the construction of both Palisades Reservoir and a

federal powerplant at American Falls.^{13/} See Pub. L. 81-864, 64 Stat. 1083 (1950) (“1950 Act”).

The prospect of a federal powerplant at American Falls caused Idaho Power to claim the right to use the full 255,000 acre-feet of secondary water at its own American Falls powerplant.

Reclamation rejected that claim. See Memo from H.T. Nelson, Regional Director, to Chief Engineer at 1 (Feb. 16, 1953) Jarvis Aff., Ex. V).

In November of 1953 the Company followed those assertions with a letter to Reclamation formally requesting the release of water for use at the Company’s American Falls powerplant. Letter from H.R. Moore, Idaho Power to Glen Simmons, Bureau of Reclamation (Nov. 10, 1953) (Jarvis Aff., Ex. W). The resulting meeting is noteworthy, both because Idaho Power reiterated its long standing policy of “cooperat[ing] with the water users in insuring a full supply of water in the reservoir for irrigation use” and because it illustrates that factors other than the 1923 Contract, continued to drive water to Idaho Power’s downstream powerplants. See Letter from Lynn Crandall, Watermaster to N. Sharp, Chairman, Committee of Nine, Nov. 20, 1953 at 2 (“Crandall Letter”) (Jarvis Aff., Ex. X) (emphasis added).

Officials from Idaho Power and Reclamation met with Lynn Crandall, the Watermaster for Water District 36 (now Water District 01) on Nov. 19, 1953. Memorandum from Asst. Reg. Counsel and Chief, BOR Resources & Contracts Branch at 1 (Dec. 4, 1953) (Jarvis Aff., Ex. Y). Watermaster Crandall explained that historically Idaho Power had

^{13/} The 1950 Act also ended the need for the 1935 Contract by requiring repayment contracts to include winter water savings provisions that served the same purpose that the 1935 Contract had. *Id.* at § 4(b). The 1935 Contract was formally terminated that same year. Contract Symbol and No. I174r-1506 (Jarvis Aff., Ex. U). The 1950 Act also finally allocated the water that had been “reserved” when American Falls Reservoir was first planned. All of the water went to irrigation uses. See 1950 Act at § 3.

benefitted from “canal diversion requirements,” the irrigators’ practice of running water through their canals all winter for stock and domestic use.^{14/} Reclamation’s calculations showed that practice led to more than 150,000 acre-feet of water flowing out of American Falls Reservoir and downstream to Idaho Power’s powerplants. *See id.* at 2.

At the conference, the parties agreed to increase flows out of the reservoir, but the 1923 Contract played no role in that decision. Rather, the flows were increased in order to maximize the United States’ power generation at Minidoka Dam and thereby allow the irrigators to avoid making the power loss payments required under the Palisades contracts. *Id.* at 3. Indeed, Water Master Crandall reported that “[i]t was distinctly understood that this action was taken to increase the flow at the Minidoka dam and *not* in recognition of any claims by the Power Company for release of its secondary storage right.”^{15/} Crandall Letter at 3 (emphasis added).

H. Idaho Power Abandons Its Claim to a Water Right.

Not long after Keith Higginson became Director of IDWR in 1967, he decided to formally close Idaho Power’s permit file. That July he asked the Company to comment on his

^{14/} The irrigators’ practice of running their canals through the winter would begin to be curtailed in the year following the meeting and would be completely eliminated by 1959. August 5, 1968 Status Report at 4 (Jarvis Aff., Ex. Z).

^{15/} The Company was likely quite pleased that the 1923 Contract had not been the reason for the decision because one of its goals appears to have been to leave unresolved the dispute over what rights the 1923 contract provided the company. After noting “that the Company had never demanded release of water under the 1923 contract when such releases would jeopardize the interests of the irrigators and did not propose to do so in the future,” Mr. Inman, the Company’s representative, proposed that “no attempt should be made to resolve the question of Company rights under the 1923 contract.” Memo. From Ass’t Reg. Counsel at 4. The Company’s internal memorandum addressing the meeting reports that the parties agreed to “destroy, or otherwise ignore” the Company’s written request for water. Memorandum to Files at 1 (Nov. 20, 1953) (Jarvis Aff., Ex. AA).

proposal to cancel the permits. MEMORANDUM DECISION, In the Matter of Permit Nos. 01-2041 and 01-2065 at 1 (April 21, 1971) ("MEM. DECISION") (Jarvis Aff., Ex. BB). Idaho Power surprised the Department by requesting that it be granted a license. See Letter from H.R. Moore, Vice President, Idaho Power to State Dept. of Reclamation (Nov. 9, 1967) (Jarvis Aff., Ex. CC). The Department refused to do so. Instead, IDWR issued an Order to Show Cause why the permits should not be cancelled. MEM. DECISION at 1.

Idaho Power's response to that Order surprised the Department once again. Idaho Power reversed course and asked that the Director enter an order finding that all of its water rights covered by Permit No. R-273 – the permit that had been the basis for Idaho Power's purported "reservation" of water – were "merged into the rights granted to the Secretary of the Interior...." ANSWER TO ORDER TO SHOW CAUSE at 6 (Dec. 1, 1970) ("ANSWER TO SHOW CAUSE," Jarvis Aff., Ex. DD). Director Higginson agreed to do so and therefore cancelled Idaho Power's permits.^{16/} MEM. DECISION at 2; ORDER OF CANCELLATION (April 22, 1971) (Jarvis Aff., Ex. EE). Five years later, Idaho Power would enter into a series of contracts in which would "warrant" that it owns only 45,000 acre-feet of storage capacity in American Falls Reservoir. Those contracts were brought about by the reconstruction of American Falls Reservoir.

I. Idaho Power Informs Congress That it Holds Only 45,000 Acre-feet of Storage Space in American Falls Reservoir.

American Falls Reservoir had been plagued by abnormal cracking almost from the

^{16/} Director Higginson also found "that by reason of contracts and agreements entered into between the Company and the United States and America, those rights are held in trust for use by the Company under the water rights of the United States at American Falls Reservoir." MEM. DECISION at 2. Mr. Higginson, however, did not explain how a state administrative official could impose a trust upon the United States, particularly in a proceeding to which the United States was not even a party.

day it was constructed. In the mid-1960s Reclamation determined that the dam was unsafe and needed to be replaced. To ensure a margin of safety until that happened, Reclamation reduced the dam's storage capacity during the winter. In 1972, Reclamation cut the capacity again, to roughly two-thirds of what it had been initially. *See* S.Rep. No. 93-223 (1973) at 4 (Jarvis Aff., Ex. FF). That same year, Reclamation issued a Final Feasibility report calling for the replacement dam to include penstocks for a possible federal powerplant. American Falls Dam Replacement: Executive Summary Report at 5 (Dec. 1972) (Jarvis Aff., Ex. GG).

The prospect of a federal powerplant at American Falls had long haunted Idaho Power. The 1935 Contract had fended off the powerplant for a period of time, but in 1950 Congress had reinvigorated the threat by authorizing a federal powerplant at American Falls. 1950 Act at § 2. Moreover, Idaho Power had spent much of the 1950s and 1960s fending off the construction of a large federal dam and powerplant at Hells Canyon. Idaho Power had defeated that proposal by currying the support of irrigators. *See generally* Capital Press, Dams Roil with Controversy (March 21 2008) (available at www.bluefish.org/damsroil.htm (last visited Sept. 22, 2010)). The Company would pursue the same strategy at American Falls.

When it looked like federal construction of a new dam would be a long time coming, Idaho Power and the other American Falls spaceholders were natural allies in an effort to develop a proposal that would reconstruct the dam faster, and, most importantly to Idaho Power, without a federal powerplant. The irrigators agreed to support private financing of the reservoir on two conditions: all spaceholders would maintain their "present proportionate capacity rights" and irrigation would "always have priority in the operation [of the reservoir]." Resolution (Jan. 6, 1973) (Jarvis. Aff., Ex HH). Idaho Power and the irrigators reached an

agreement where Idaho Power would finance much of the cost of the new reservoir in exchange for the irrigators supporting Idaho Power's efforts to obtain (1) a powerplant directly incorporated into the dam¹⁷ and (2) the ability to generate hydropower with water released from the dam for any purpose. *See See* R. A. Hogg, Idaho Power, Proposed AMERICAN FALLS DAM Replacement Plan (Feb. 27, 1973) (Jarvis Aff. Ex. JJ). Idaho Power expected that those two changes would allow the Company to increase its average annual power production six-fold. *Id.* at 4-6.

Idaho Power's testimony before Congress later that year lived up to the promises the company had made to the irrigators. The Company was careful to inform Congress that its "interest as a spaceholder is very modest in contrast to the irrigator's interest." *American Falls Dam, Upper Snake River Project, Idaho: Hearing Before the Subcommittee on Water and Power Resources of the Committee on Interior and Insular Affairs, United States Senate, 93d Cong., 1st Sess., at 109, 111 (1973) (Statement of Robert A. Hogg, Idaho Power Co.) ("Senate Testimony," Jarvis Aff., Ex. KK); House Testimony (Jarvis Aff., Ex. A) at 43.*

When questioned, the Company's spokesman explained that "the water going through American Falls Dam, of course, is first used for irrigation service" and clarified that the Company had a right to "demand" no more than 45,000 acre-feet of water. House Testimony at 47. Thus, Idaho Power went on record that it could demand that no more than 45,000 acre-feet

¹⁷ Having the powerplant directly incorporated into the dam would allow much more efficient use of water than Idaho Power's then existing powerplant. *See* Financial Study of .. American Falls Powerplant at 2 (explaining that a powerplant incorporated into the dam would be able to use both the head developed by the river and than developed by the dam) (Jarvis Aff., Ex. II).

of water be used for hydropower generation.^{18/}

With Idaho Power and the irrigators united behind the proposal for a privately built dam, Congress authorized the American Falls Reservoir District to reconstruct American Falls Dam in 1973. Pub. L. 93-206, 87 Stat. 904 (1973) (“1973 Dam Replacement Legislation”). Congress ensured the new reservoir would be subject to Reclamation law by directing that the dam would be “a feature of the Minidoka reclamation project.” *Id.* at § 1. The enabling legislation also included both points the irrigators had demanded in their resolution. First, it directed that reconstruction of American Falls Dam “shall in no way alter or change the present proportionate storage rights of present spaceholders” and reaffirmed the Spaceholders’ contract rights, “except as otherwise provided in [the] Act.”^{19/} *Id.* at § 2(a). Second, it ensured that irrigation use would continue to take priority over power generation by addressing the use of water, other than Idaho Power’s “present proportionate storage rights,” for power generation. Section 4 of the Act directed that such use (1) would be pursuant to a contract for the use of “falling water” and (2) could “not impair the efficiency of the project to serve the other purposes of the Minidoka project. *Id.* at § 4.

Despite Congress’ action, two more hurdles remained. First, if there was going to

^{18/} Presumably that limitation was acceptable to Idaho Power because the legislation the company sought – and which was later enacted – would make essentially all of the water released from the dam available for hydropower generation by authorizing the “falling water” contract discussed below. *See* Pub. L. 93-206 at § 4.

^{19/} Idaho Power’s “present proportionate storage rights” were understood by all to be 45,000 acre-feet. Not only had the Company repeatedly represented to Congress that it held only 45,000 acre-feet of storage, but at that time IDWR only accounted for 45,000 acre-feet of storage for Idaho Power – as is still the case today. Excerpt from Water Distribution and Hydrometric Work (1969); Excerpt from 2009 Water District 1 Storage Report (both attached as Jarvis Aff., Ex. LL).

be a powerplant on the new dam, Idaho Power would have to obtain a license from the Federal Power Commission. Second, the American Falls spaceholders would have to agree to a series of new contracts required by the authorizing legislation. Those contracts would take several years to complete. During that time both the Federal Power Commission and two Committees of Congress would review the contracts in essentially complete form and find that the Contracts tightly cabined Idaho Power's use of water.

J. The Federal Power Commission Determines that Under the 1973 Dam Reconstruction Act and Related Contracts, Hydropower Operations Cannot Impair the Efficiency of American Falls Reservoir to Serve the Other Purposes of the Minidoka Project.

Idaho Power had first applied to license its American Falls powerplant in 1959.

By the time the need to reconstruct American Falls Dam brought that effort to a halt, the proceedings had done little more than reveal that the Company and the Department of the Interior disagreed over whether the American Falls license should have an express subordination to irrigation, as the 1934 license for the Company's Twin Falls powerplant did. After Congress authorized reconstruction of the reservoir, Idaho Power submitted a new application to the Federal Power Commission ("FPC").

In the new proceedings, Idaho Power executed yet another about face and supported a term in its license which expressly made hydropower subordinate to irrigation. Nonetheless, in March of 1975 the FPC issued the license without it. As the FPC explained, the subordination was "unnecessary from a practical standpoint" because Reclamation's control over reservoir operations left Idaho Power with "no opportunity to operate the project in a manner to conflict with future depletion or diversion of the water of the Snake River." ORDER ISSUING

MAJOR LICENSE, Project No. 2736 at 11-12 (Mar. 31, 1975) (Jarvis Aff. Ex. MM). Moreover, the agency added, under the 1973 Dam Replacement Legislation and the related contracts (then in draft form), hydropower operations were forbidden to “impair the efficiency of [American Falls Reservoir] to serve the other purposes of the Minidoka Project.” *Id.* at 12.

K. Contract Negotiations.

Drafting of at least some of the contracts had begun before Congress authorized the re-construction of American Falls Dam. *See* Memorandum on Section 14.2 of the Falling Water Contract (Jarvis Aff., Ex. NN). Once Congress acted, the efforts accelerated and draft contracts were exchanged throughout 1974 and 1975. Because the private financing of a Reclamation reservoir was something that had not been done before, most of the correspondence relating to the draft contracts discusses financial issues, particularly the potential use of tax-exempt bonds. By September of 1975, drafting had advanced to a point where the Committee submitted copies of the proposed contracts to all Spaceholders in preparation for the elections required for the irrigation spaceholders to adopt the contracts. *See* Memorandum from Contract Negotiating Committee (Sept. 5, 1975) (Jarvis Aff., Ex. OO). Some revisions were made to the three “unique” spaceholder contracts (those for American Falls Reservoir District, the Michaud Division of the Fort Hall Indian Reservation and Idaho Power; the other contracts were standardized) and copies of those contracts were provided to Reclamation its review on October 10, 1975. Letter from John Rosholt to William Burpee, Office of the Solicitor (October 10, 1975) (Jarvis Aff., Ex. PP).

The draft spaceholder contract raised the question of what the agency should do

with the 1923 Contract.²⁰ Various branches of the agency produced internal memoranda suggesting one approach or another. Finally, the Assistant Regional Director informed Idaho Power that the agency preferred to terminate the 1923 Contract and replace it with a contract effectively incorporating the central premises of what became the 1976 Spaceholder Contract (45,000 acre-feet of storage capacity) and the Falling Water Contract (the ability to use irrigation water releases for power generation). Letter from Asst. Regional Director to John Rosholt (Nov. 3, 1975) (Jarvis. Aff., Ex. RR). Idaho Power objected.

When Reclamation relented and proposed to amend the 1923 Contract instead of terminating it, Idaho Power complained that it was too late in the process to revise the 1923 Contract and suggested that revision of the contract be handled through a separate process. *See* Letter from Robert Hogg to Bond Counsel (Nov. 18, 1975) (Jarvis Aff., Ex. SS). Mr. Hogg's letter hints at the tremendous time constraint the parties were operating under. The reduced storage capacity of American Falls left the irrigation community – Idaho Power's customer base – exposed to reduced crop production and jeopardized the area's "future economic stability." House Testimony (Jarvis Aff. Ex. A) at 42. Initially the parties had hoped to begin construction in 1974, but the bond issues had delayed matters. Now that those issues were finally being resolved by Congress, the parties were anxious to get the contracts in place and begin construction. *See e.g.*, Rosholt Memo to Spaceholders (Mar. 12, 1976) (Jarvis Aff., Ex. TT).

²⁰ Reclamation faced this question regarding all of the existing Spaceholder contracts. Ultimately all were addressed in the same basic manner – the existing contracts would continue in force and the new contracts would have language providing that their terms would prevail wherever there was a conflict. *See* Memorandum from G. G. Stamm, Commissioner of Reclamation to the Secretary of the Interior at 13 (Feb. 25, 1976) ("Secretarial Approval Memo") (Jarvis Aff., Ex. QQ).

Through the holiday season of 1975, Idaho Power and Reclamation exchanged drafts of what became Paragraph 19(a) of the 1976 Placeholder Contract. *See* Routing Slip and attached drafts (Nov. 28, 1975) (Jarvis Aff., Ex. UU). Idaho Power sought an express recognition that the any “water. storage, use or flow right obtained or reserved by the Idaho Power Company under the [1923 Contract]” would continue. *See id.* The United States would not agree to Idaho Power’s proposed language. In the end, the need to complete the contract in a timely manner took precedence. *See* Memo. from N. H. Moore, Asst. Regional Director to the Commissioner of Reclamation (Jan. 26, 1976) (Jarvis Aff., Ex. VV). The United States and Idaho Power agreed to language that acknowledged unidentified aspects of the 1923 Contract were obsolete, specified that the 1976 Placeholder Contract would control in the event of a conflict and called for the parties to meet and review the 1923 Contract for possible revision. Reclamation was confident that the 1973 Dam Replacement Legislation and the terms of the contracts protected its interests. *See id.* Even so, before the contracts would be completed, Congress would enact legislation that would only strengthen the agency’s position.

L. Congress Finds the Contracts Intend That Only 45,000 Acre-feet of Water Would Be Intentionally Released for Idaho Power’s Use and Forbid the Company From Contractually Scheduling the Release of More than 170,000 Acre-feet.

The legislation authorizing reconstruction of American Falls had assumed that the project would be financed by tax-exempt bonds. H.R. Rep. No. 93-701 (1973) at 9 (Jarvis Aff., Ex. WW). Existing Reclamation law allowed the use of tax-exempt revenue bonds used to finance construction of Reclamation reservoirs, but the presence of hydro-electric power generated by a for-profit entity raised the question of whether that law would apply. *See* H.R.

Rep. No. 94-531 (1975) (Jarvis Aff., Ex. XX) at 1. AFRD sought a ruling from the IRS on the issue, but the agency's delay led the District to take the issue to Congress. *See id.* at 2.

A House Report issued on October 3, 1975 explained that AFRD, Idaho Power, the Secretary of the Interior and other water users had negotiated "various contracts including a contract for the use of falling water." *Id.* at 3. The Reports describe Idaho Power's interests under the contracts with particularity: "the Idaho Power Company has a limited spaceholder right (under 3 percent) and . . . use of the falling water for its hydroelectric power generation purposes." *Id.* at 3; S. Rep. 94-570 (1975) at 3 (Jarvis Aff., Ex. YY).

The Reports also explained the intent behind the contracts: "in normal circumstances, substantially all of the falling water would be made available to the Power Company *only* when water was released from the dam for irrigation purposes." *Id.* (emphasis added). Further, there was

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; S. Rep. No. 94-570, at 3.

Having found that the contracts limited Idaho Power's interests and effectively subordinated the company's generation of hydropower to the use of water for irrigation, the Committees considering the legislation then added another layer of protection for irrigation. The Committees issued reports defining the "subordinate use of water for generating electric energy" as allowing no more "than 10 percent of the normal supply of stored water [to be] contractually []

scheduled for release by the power company and used for generating electric energy.’^{21/} H.R. Rep. No. 94-531 at 4; S. Rep. No. 94-570 at 4. Confident that irrigation was protected, Congress paved the way for American Falls Reservoir’s reconstruction by authorizing the use of tax-exempt bonds to finance a Reclamation reservoir where the generation of electricity was a “subordinate use” to irrigation and “substantially all” water from the project would be contractually available for irrigation use. Pub. L. 94-164, § 7(e), 89 Stat. 970 (1975) (codified at 26 U.S.C. § 103) (“1975 Bond Legislation”).

Bond Counsel for Idaho Power and the American Falls Reservoir District recognized that Congress’ new instructions required that the proposed contracts be revised and drafted language implementing the new legislation. *See* Letter from Phillip H. Holm, to William Burpee, Field Solicitor (Oct. 7, 1975) (Jarvis Aff., Ex. ZZ); Memorandum from Phillip Holm to John Rosholt at 1 (Nov. 12, 1975) (Jarvis Aff., Ex. AAA). That language would closely follow the terms of the Committee Reports and substantially limit the quantity of American Falls Reservoir water that can be made available for hydropower generation.

M. Idaho Power Enters Into New Contracts Which Confirm that Idaho Power’s Contractual Ability to Demand Water is Limited to 45,000 Acre-feet.

The contracts contemplated by the 1973 Dam Replacement Legislation authorizing the reconstruction of American Falls Reservoir all were effective March 31, 1976, the date they were signed by the United States. Three of those contracts directly bear on Idaho Power’s ability to use water stored in American Falls Reservoir:

- (1) A construction contract between the United States and the American Falls

^{21/} Ten percent of American Falls Reservoir’s capacity is roughly 170,000 acre-feet or a little more than half the 300,000 acre-feet of water Idaho Power now claims.

Reservoir District, known as the "Government Contract;"^{22/}

- (2) A contract between the American Falls Reservoir District and Idaho Power Company, through which agreed to pay for the use of "falling water" from the reservoir to defray the cost of construction ("Falling Water Contract");
- (3) The spaceholder contract between existing reservoir spaceholders, the United States and the American Falls Reservoir District which assigned repayment and operation and maintenance responsibilities and also allocated storage space in the reservoir. Idaho Power's spaceholder contract, Contract No. Ilr-733S, will be referred to as the "1976 Spaceholder Contract."^{23/}

1. The Spaceholder Contract Confirms Idaho Power Holds Only 45,000 Acre-feet of Storage Space.

The Spaceholder Contract identifies Idaho Power's interest as a spaceholder – *i.e.*, its right to delivery of water from American Falls Reservoir. *See* Pub. L. 93-206 at § 3. Section 21 identifies the "Storage Capacity to be Made Available to Spaceholder." Consistent with Idaho Power's representations to Congress that it holds a right to demand only 45,000 acre-feet of water, the contract obligates the United States to

continue to make available to the Spaceholder [Idaho Power] stored water accruing to 2.6471% of the active capacity of the Replacement Dam unless the Spaceholder is in default....

1976 Spaceholder Contract at 10, ¶ 21(b) (Jarvis Aff., Ex. BBB). To confirm that the Spaceholder Contract would be the final word on a spaceholder right to demand delivery of

^{22/} The Government Contract is not discussed in detail in this Memorandum because Idaho Power agreed to its provisions through the Falling Water Contract and the pertinent provisions of the Government Contract either repeat provisions of the other contracts or are incorporated verbatim into the Falling Water Contract.

^{23/} Spaceholder contracts are also called "repayment contracts" because they are the means by which the entities having use of the stored water pay for the construction costs and operation and maintenance of a reservoir. *See* Pub. Law 93-206 at § 3; *see also* 1976 Spaceholder Contract at ¶¶ 22-24, 28.

water, Idaho Power's Placeholder Contract directs that its terms regarding the distribution of water "shall prevail" over the terms of prior placeholder contracts "wherever and to whatever extent" the provisions of the two contracts are in conflict.^{24/} *Id.* at 6, ¶ 19(a).

Consistent with Congress' intentions in the 1973 Dam Replacement Legislation and the 1975 Bond Legislation – as well as Idaho Power's representations over the years – the contracts included a number of provisions intended to ensure that the use of American Falls Reservoir to generate hydropower would not impair its irrigation purposes. The Placeholder Contract directs that American Falls Reservoir will be operated 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." *Id.* at 14, ¶ 28(e). In short, the new Placeholder Contract both confirmed that Idaho Power holds only 45,000 acre-feet of storage and that its use of that water would continue to be subordinate to irrigation.

The contract makes Idaho Power's use of that 45,000 acre-feet of storage contingent on Operation and Maintenance payments. *Id.* at ¶ 28(b). The contract's Operation and Maintenance (O & M) provisions were negotiated along with the rest of the contract provisions. *See* Negotiating Committee Memo. at 5 (Jarvis Aff., Ex. OO). The United States is not aware of any material in the record that explains either the substance of those negotiations or the basis for the O & M provisions ultimately adopted in the contracts.

^{24/} That direction was necessary because *all* of the new Placeholder Contracts state that they constitute a "reaffirmation" "of the rights of the Placeholder under the Existing Placeholder Contract, except as modified by this Placeholder Contract. . . and in the Government Contract." *See e.g.*, Aberdeen Springfield Contract at ¶ 19(a) (Jarvis Aff., Ex. CCC).

One possible explanation for the lack of a negotiating record is that the 1973 Dam Replacement Legislation had directed that the new repayment contracts be consistent with the terms of operation and maintenance costs provisions of the existing contracts. Pub. L. 93-206 at § 3. The resulting repayment contracts were certainly consistent with the existing spaceholder contracts; each spaceholder, including Idaho Power, continued to pay the same percentage of the basic O & M charges as it had paid under the prior spaceholder contracts.²⁹ Idaho Power may have agreed to pay the same amount of O & M because doing so allowed Idaho Power to avoid a conflict with the irrigators, who had been instrumental in Idaho Power getting Congressional approval for both a new powerplant and use of substantially more water through the falling water contract.

The Spaceholder Contract was supplemented by a second contract, the Falling Water Contract, which, like the 1923 Contract's "secondary storage capacity" provisions, allowed Idaho Power to generate hydropower with water stored in space held by irrigators.

2. The Falling Water Contract Allows Idaho Power to Generate Hydropower With Water Released for Other Purposes.

The Falling Water Contract allows Idaho Power to generate hydropower from

²⁹ For purposes of calculating Operation and Maintenance payments, the 1923 Contract instructed that each acre-foot of secondary storage capacity "shall be considered as the equivalent of 7/20 (seven-twentieths) of an acre-foot of primary storage capacity." *Id.* at 18, lines 434-37. The contract then set out a formula which resulted in Idaho Power paying 7.1388 percent of the total O & M fees. The 1976 Spaceholder Contract dispensed with the formula and instead simply required Idaho Power to pay 7.1388% of the total cost of operation and maintenance of the dam and related facilities. *See* 1976 Spaceholder Contract at ¶ 28(b). Despite the clear statement of Idaho Power's obligation in the 1976 Contract, bills and receipts issued to Idaho Power have continued to reference the 1923 Contract. *See e.g.*, Bill for Collection (Feb. 15, 1983) (Jarvis Aff., Ex. DDD). Why that is cannot be determined with certainty, but it is of no consequence. The quantity of water Idaho Power is entitled to from American Falls Reservoir is governed by the express language of the contracts, not that of bills or receipts.

“falling water,” water that is released from the dam “for irrigation and other purposes incidental thereto.” Falling Water Contract at 6 (Jarvis Aff., Ex. EEE). In order to ensure that irrigation would not be affected, and to ensure the tax-exempt status would be retained, the contracts imposed a hard cap on the quantity of water that could be scheduled for hydropower use. *See id.* at 10, Secs. 2.1 (d) & (e); *see also* Secretarial Approval Memo at 8 (Jarvis Aff., Ex. QQ) and Letter from Phillip H. Holm, to William Burpee, Field Solicitor (Oct. 7, 1975) (Jarvis Aff., Ex. ZZ) (both explaining the basis for the limitation on the use of water for hydropower). Thus both the Government Contract and the Falling Water Contract direct that “no more than ten percent (10%) of the water accruing to the active storage capacity [of American Falls Reservoir] may be contractually scheduled for release from [American Falls] Dam by the Idaho Power Company.” Falling Water Contract at 10, Sect. 2.1(e); 1976 Government Contract at ¶ 18(a) (Jarvis Aff, Ex. FFF).²⁶

Like the Spaceholder Contract, the Falling Water Contract included provisions intended to insure that the use of water for hydropower generation would not interfere with irrigation. *See Id.* at 10, § 2.1(d) (making use of falling water for power purposes “subordinate to the furnishing of water for irrigation purposes”). Further, through the Falling Water Contract, Idaho Power agreed to the terms of Article 16 of the Government Contract, which require that new reservoir be operated so that “the primary irrigation purpose and the incidental purposes of

²⁶ The provisions of both contracts include exceptions not relevant here. *See id.* A similar provision, applicable only while the bonds and notes that funded the reconstruction are unpaid is even stricter. In that provision, Idaho Power warranted that would not hold “on a permanent contract basis” more than “eight per cent (8%) of the active storage capacity” of American Falls Dam “for the purpose of scheduled releases for generating electric energy.” Falling Water Contract at 13, Section 2.3(i).

the Minidoka Project shall not be impaired by the subordinate utilization for power generation at the [American Falls] Powerplant....”²⁷ *Id.* at 19, § 4.6(A).

N. Decades Pass In Which Reclamation Does Not Deliver the Secondary Water.

As was noted above, the 1976 Placeholder Contract called for the United States and Idaho Power to meet and review the 1923 Contract for possible revision. 1976 Contract, at 7, § 19(a). That approach had been acceptable to the United States because “the Act of December 18, 1973, and the provisions of the Government and Placeholder Contracts take precedence over the provisions of the existing [1923] contract whenever and to whatever extent there is a conflict.” Memo from Ass’t Regional Director at 1 (Jarvis Aff., Ex. VV).

The following year, Merrill Martz, the Regional Supervisor of Power, produced a memorandum questioning the need for such a meeting. Mr. Martz’s memorandum discussed various provisions of the 1923 Contract he felt “would be in conflict” with the new contracts. Memorandum from Merrill J. Martz, Regional Supervisor of Power, to Regional Director of Reclamation at 2 (Aug. 2, 1977) (Jarvis Aff., Ex. GGG). One such conflict was Idaho Power’s presumed “wish to retain the rights it has under the 1923 contract to have certain flows below the Milner Dam maintained by releases of water stored in the Company’s 255,000 acre-feet of secondary storage capacity.” *Id.* at 3. Mr. Martz thought it “unlikely” a dispute over those provisions would arise, though he did note that such a conflict would give rise to “an interesting set of legal considerations.” *Id.* In any event, Mr. Martz concluded that “it would be more practical and easier” to solve any problems arising from the 1923 Contract “on a case-by-case

²⁷ To reiterate that point, the contract explains that Reclamation is not obligated to operate the reservoir to have water at elevations for power generation or to increase head for power generation purposes. *Id.*

basis when and if they arise without negotiating an amendment.” *Id.* at 4.

Although it is unclear to what extent others within Reclamation agreed with Mr. Martz, the record makes two things clear. One, no meeting was ever held. Two, Reclamation did not operate the reservoir to provide the target flows specified by the 1923 Contract. THE UPPER SNAKE RIVER BASIN: A DESCRIPTION OF BUREAU OF RECLAMATION SYSTEM OPERATIONS ABOVE MILNER DAM at 32-34 (1996) (explaining that the only water released specifically for power generation is the 45,000 acre-feet Idaho Power holds pursuant to the 1976 Spaceholder Contract) According to Idaho Power’s calculations, from 1977 through 1981 and again from 1987 through 1997, the company did not receive its full contractual entitlement. E-mail from Jon Bowling to James Tucker (October 10, 2001) (Bowling E-mail) (Jarvis Aff., Ex. HHH). The evidence shows that only once during that period -- in 1980 -- did Idaho Power ask for water under the secondary water provisions of the 1923 Contract. Idaho Power did not receive the water it now claims it is entitled to in that year, or in the following, year, and after a few wet years in the mid-1980s, for an entire decade from 1987 through 1997. *Id.* There is no evidence that Idaho Power effort sought to enforce the contractual right it now claims despite more than a decade of consistent “shortages.” Indeed, is questionable whether Idaho Power was even tracking the flows it now claims to be entitled to. *See* Bowling Depo. (Jarvis Aff., Ex. D) at 134, ll. 17-21 (stating that Mr. Bowling had been unable to locate any evidence that the Company had tracked flows pursuant to the 1923 Contract between 1969 and when he started doing so in 1998).

Two things would happen before Idaho Power finally stirred. First, at some point in the late 1990s, Mr. Bowling “discovered” the secondary water provisions and began

monitoring contract releases for the company. *See* Bowling Depo. at 131, ll. 7-19. Second, the dawn of the new century brought discussions aimed at settling the Nez Perce Tribe's water right claims in the SRBA. Those discussions raised the prospect of a substantial quantity of water stored in Reclamation facilities being used to provide flow augmentation to assist in the recovery of endangered fish species. *See* Letter from James C. Tucker, Idaho Power to J. William McDonald, Reclamation and D. Robert Lohn, Northwest Regional Administrator, National Marine Fisheries Service at 2 (Oct. 18, 2001) (Jarvis Aff., Ex. III).

O. Idaho Power Asks for Water Pursuant to the 1923 Contract.

As the authorization of a federal powerplant at American Falls had in the 1950s had, the perceived threat from flow augmentation led the Company to assert it was entitled to water pursuant to the secondary water provisions of the 1923 Contract. *See* Letter from James C. Tucker to J. William McDonald at 2-3 (October 18, 2001) (Jarvis Aff., Ex. JJJ). Because decades had passed with no indication from Idaho Power that it believed its held any water other than the 45,000 acre-feet contracted for in the Placeholder Contract, Reclamation was caught off guard by Idaho Power's request. The agency responded that it would look into the matter. Letter from Regional Director to James C. Tucker (Dec. 31, 2001) (Jarvis Aff., Ex. KKK). In the end, however, the agency did not provide Idaho Power with the water it sought.

III. ARGUMENT

The United States' position is simple: Idaho Power's right to use water from

American Falls Reservoir is exactly what it contracted for in 1976 — the contractual right to use up to 45,000 acre-feet of space, and the right to generate hydropower through the use of “falling water,” water that is released from the dam for purposes other than generating hydropower.

Below we demonstrate both the legislation and the contracts resulting from the re-construction of American Falls Reservoir preclude Idaho Power from being awarded a right to demand 300,000 acre-feet of water. First, however, we demonstrate that the Company’s actions leave it estopped from even asserting that claim.

A. Idaho Power Must be Estopped From Asserting Claims Which Are Inconsistent With its Representations to IDWR, Congress and the United States.

Idaho courts have repeatedly recognized that the doctrine of quasi-estoppel prevents a party from being able to gain an unconscionable advantage, or impose an unconscionable disadvantage upon another, by changing positions. *E.g., Garner v. Bartschi*, 139 Idaho 430, 437, 80 P.3d 1031, 1038 (2003); *Mundell v. Brigham*, 97 Idaho 216, 541 P.2d 1184 (1975) (affirming the application of quasi-estoppel to a contract claim). Quasi-estoppel applies where:

- (1) a party is asserting a right inconsistent with a position previously taken;
- (2) the party having changed positions has gained an advantage or produced a disadvantage in another; and
- (3) it would be unconscionable to allow a party to maintain a position inconsistent with one in which he acquiesced or of which he accepted a benefit.

Id. (citing *Eastern Idaho Agricultural Credit Ass'n v. Neibaur*, 133 Idaho 402, 410, 987 P.2d 314, 322 (1999)). Each of those elements is present here.

1. Idaho Power’s prior positions before Congress, and in contracts with

the United States, contradict its claims.

- a. *Idaho Power informed Congress it had a contractual right to demand no more than 45,000 acre-feet of water.***

As discussed above, structural problems with American Falls Reservoir led the spaceholders, including Idaho Power, to seek Congressional approval for the reconstruction of the reservoir. One issue before Congress was the extent to which hydropower use would remain subordinate to irrigation. Consequently, the Company's representative was asked directly if there would be water released solely for power production. His answer: "Not at all." House Testimony at 102-03. In answer to a subsequent question he clarified that the reservoir would be operated to provide Idaho Power the water it is entitled to as a Spaceholder. *Id.* Idaho Power's written testimony described its interest as a Spaceholder as "very modest in contrast to the irrigator's interest" and specifically identified it as "45,000 acre-feet of storage capacity." House Testimony at 109, 111; Senate Testimony at 43.

Once Congress authorized a new reservoir, questions emerged over whether the presence of hydropower would preclude the use of tax-exempt bonds to fund its construction of the reservoir. There is no evidence that Idaho Power asserted a right to 300,000 acre-feet of water. Instead Congress was led to believe that the use of water for generating electricity "would be subordinated to the use of the water for irrigation;" that "Idaho Power has a limited spaceholder right (under 3%);" and that "there has been no intention to release water specifically for use by the Idaho Power Company to generate electricity, except for the 45,000 acre-feet" of water continued in the 1976 Spaceholder Contract. H.R. Rep. No. 94-531 at 3; S. Rep. No. 94-570 at 3.

b. *Idaho Power agreed through contract that it has only a right to demand no more than 45,000 acre-feet of water.*

Idaho Power's claims before this Court stand in stark contrast to what it agreed to in the 1976 Contracts. Article 21 of the 1976 Spaceholder Contract Idaho Power designates the "storage capacity to be made available" to the Company. The provision is quite simple. The sole obligation it imposes on the United States is to make available stored water accruing to 2.6471% of the reservoir capacity, which is equivalent to approximately 45,000 acre-feet of space. Spaceholder Contract at 10, ¶ 21(b). Nowhere does it obligate the United States to provide 255,000 acre-feet of "secondary storage capacity" or water.

Indeed, Idaho Power agreed to terms in the Falling Water Contract which prohibit such a right. The Falling Water Contract instructs that the use of water for hydropower purposes "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. . . ." Falling Water Contract at § 2.1(e). Idaho Power also warranted that while the bonds financing the reservoir remain unpaid the Company would not hold "on a permanent contract basis" more than "eight per cent (8%) of the active storage capacity" of American Falls Dam "for the purpose of scheduled releases for generating electric energy." *Id.* at Section 2.3(i). Put simply, Idaho Power's current position that it is entitled to contractually demand up to 300,000 acre-feet of water is irreconcilable with the contracts it agreed to.²⁸

2. Idaho Power has benefitted from its representations to Congress and

²⁸ As is set forth below, even if Idaho Power were not estopped, the terms of the contracts preclude Idaho Power's claim to 255,000 acre-feet of secondary water as a matter of law.

the United States.

The representations described above brought Idaho Power huge benefit. First, they allowed Idaho Power to keep the peace with the irrigators, whose storage rights would suffer if Idaho Power had the right to compel that 255,000 acre-feet of storable water be released or bypassed. *See* Resolution of the American Falls Spaceholder Executive Committee (Jarvis Aff., Ex. HH) (endorsing reconstruction of American Falls Dam with private financing on the condition that irrigation rights shall always have priority in the operation of the reservoir).

The support of the irrigators, coupled with the Company's own representations, enabled Idaho Power to obtain three significant benefits from Congress: (1) a new powerplant connected to the reservoir, which greatly increased the efficiency of the Company's power generation; (2) the Falling Water Contract, which gave Idaho Power the use of far more water than it was entitled to under the 1923 Contract; and (3) the use of tax-free bonds to fund the new reservoir, which lowered Idaho Power's repayment obligation. Each of those benefits results in money in the bank for Idaho Power.

3. It would be unconscionable to award Idaho Power a water right that would flaunt Congressional instruction and deprive other spaceholders of water.

As noted above, Idaho Power represented to Congress it had a right to demand no more than 45,000 acre-feet of water for hydropower generation. It then signed a series of contracts which confirmed that, while also allowing Idaho Power the ability to generate hydropower with water released from American Falls Reservoir for any purpose. It is unconscionable for Idaho Power to now repudiate that position and claim a contractual right to demand that Reclamation forego storage of 255,000 acre-feet of water for two reasons.

First, Idaho Power acquiesced to non-delivery of its alleged secondary water entitlement for years. As was explained above, after Idaho Power asked for water in 1980, Reclamation did not provide it. According to Idaho Power, Reclamation's delivery of water fell short of Idaho Power's alleged entitlement again in 1981 and in every year from 1987 through 1997. *See* Bowling E-mail (Jarvis Aff., Ex. D) (noting delivery shortages). Idaho Power's acquiescence in more than a decade of non-delivery leaves it estopped from now claiming it has a right to that water. *Williams Lake Lands, Inc. v. LeMoyne Development, Inc.*, 108 Idaho 826, 829-30, 702 P.2d 864, 867-68 (Idaho App. 1985) (finding a change in position unconscionable after only six years of acquiescence).

Second, if Idaho Power prevails on its claim it is the other American Falls spaceholders – the very entities without whom Idaho Power could not have gained the benefit of a new powerplant and the falling water contract – who will suffer.^{29/} The 1923 Contract requires that any water made available to Idaho Power pursuant to its secondary water provisions be “storable.” Thus, should this Court award Idaho Power the “secondary” right it now claims, Idaho Power would have the ability to compel Reclamation to forego the storage of up to 255,000 acre-feet of water. That of course increases the probability that the reservoir will not fill. *Bowling Depo.* at 144, ll 16-20. In a water short year it could mean that 255,000 acre-feet less water is available for allocation under the contracts (including, ironically, Idaho Power's Spaceholder Contract) than otherwise would have been available. *See* *Bowling Depo.* at 167, ll.

^{29/} Although American Falls irrigators are the parties most likely to be injured by Idaho Power's claim, other parties could be injured as well. Water stored in reservoirs is the primary source of mitigation water. *Bowling Depo.* at 260, ll. 24-5 & 261, ll. 1-12. Thus junior water users needing mitigation water also face possible injury from a shortfall in storage resulting from Idaho Power's demand for more water.

2-14. The loss of that water could have a significant impact on irrigation. Moreover, even if sufficient water was left to provide for that year's crops, the decrease in carry-over resulting from the foregone storage could itself be injury. IDAPA 37.03.11.042.01.g; *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 879-80, 154 P.3d 433, 450-51 (Id. 2007) (affirming the constitutionality of the rule).

B. Even if Idaho Power Were Not Estopped From Asserting its Claim, the United States Would be Entitled to Partial Summary Judgment Because Idaho Power's Claims Are Precluded by Statute and Contract.

At issue in this case is how American Falls Reservoir will be operated to provide water for hydropower purposes. As the Ninth Circuit has explained, the terms upon which Reclamation facilities may be used to provide water "are for the United States to fix." *See Israel v. Morton*, 549 F.2d 128, 132-33 (9th Cir. 1977). Here the United States fixed those terms through statute and contract, both of which preclude Idaho Power's claim to 255,000 acre-feet of secondary water.

1. The 1973 Dam Replacement Legislation and the 1975 Bond Legislation demonstrate that Congress did not intend for Idaho Power to retain the secondary water it now claims.

The 1973 Dam Replacement Legislation expressly preserved the "present proportionate storage rights" of the spaceholders. Pub. L. 93-206, at § 2(a). The Legislation also reaffirmed "existing contract rights between the Secretary and the spaceholders *except as otherwise provided in this Act.*" *Id* (emphasis added). That exception is important because Congress addressed the use of water for power generation in Section 4 of the Act, which authorized the falling water contract. Section 4 provided Congress' instruction regarding the generation of hydropower with water other than Idaho Power's "proportionate storage right."

Congress made two important points. First, apart from the 45,000 acre-feet of water Idaho Power was entitled to as a Spaceholder, power generation was to be done pursuant to the Falling Water Contract. *Id.* at § 4. Second, that power generation was not to “impair the efficiency of the project to serve the other purposes of the Minidoka project.” *Id.*

Idaho Power’s claim here runs afoul of both of those principles. First, granting Idaho Power’s claim would establish a third source of water to be used for generating hydropower despite Congress identifying only two. Second, as was discussed above, awarding Idaho Power the right to compel Reclamation to forego storage of up to 255,000 acre-feet of water for the benefit of hydropower production would create the potential for hydropower to impair the ability of the project to serve irrigation.

Even if this Court were to conclude that the 255,000 acre foot secondary storage right survived the 1973 Dam Replacement Legislation, it would have to find that it was terminated by the 1975 Bond Legislation. The 1975 Bond Legislation allowed the reconstruction of American Falls Reservoir to be financed by tax-free bonds, but only if two conditions were met. The generation of electricity had to be a “subordinate use” of the reservoir’s water, and “substantially all” of the stored water had to remain contractually available for irrigation use. Pub. L. 94-164, § 7(e).

Because Congress did not expressly define what would constitute a “subordinate use” of the project’s water for hydropower generation, the House and Senate Committee Reports provide the most authoritative guidance. *See e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984). Both the House and Senate Committees considering the 1975 Bond Legislation directed that the “subordinate use of water for generating electric energy” requires that no more “than 10

percent of the normal supply of stored water [may be] contractually [] scheduled for release by the power company and used for generating electric energy.” H.R. Rep. No. 94-531 at 4; S. Rep. No. 94-570 at 4. The 45,000 acre-feet of water Idaho Power contracted for in 1976 falls comfortably within that limit. The 255,000 acre-feet of storable water Idaho Power now claims a contractual right to does not. Consequently, Idaho Power’s claim cannot be squared with Congress’ direction for the operation of the reservoir and therefore cannot be sustained.

2. The contracts Idaho Power agreed to confirm that the Company has only a contractual right to 45,000 Acre-feet of water.

a. *The contracts demonstrate that Idaho Power can compel no more than 45,000 acre-feet of water to be used for hydropower purposes.*

Not only do the 1976 Contracts provide ample grounds to estop Idaho Power’s claim, they confirm what was apparent from Idaho Power’s testimony before Congress: the Company holds only a contractual right to 45,000 acre-feet of storage and the use of falling water. Indeed, the plain terms of the contracts preclude any other result.

The 1976 Spaceholder Contract identifies Idaho Power’s interest as a spaceholder – *i.e.*, its right to delivery of water. *See* Pub. L. 93-206 at § 3. The sole provision addressing water delivery is Article 21, which identified the storage capacity to be made available to Idaho Power. Nowhere does the Article suggest that Idaho Power retains any secondary storage capacity or secondary water. Rather, the only obligation imposed on the United States is

to make available to the Spaceholder [Idaho Power] stored water accruing to 2.6471% of the active capacity of the Replacement Dam unless the Spaceholder is in default....

1976 Spaceholder Contract at 10, ¶ 21(b). To ensure that provision would be the United States

sole obligation to provide water to Idaho Power, Section 19(a) of the Contract directs that its terms regarding the distribution of water “shall prevail” over the terms of prior spaceholder contracts “wherever and to whatever extent” the provisions of the two contracts are in conflict. *Id.* at 6, ¶ 19(a). Allowing Idaho Power to demand the delivery of an additional 255,000 acre-feet of “secondary storage capacity” would conflict with the instruction in the 1976 Spaceholder Contract that the United States only obligation is to make 2.6471% (roughly 45,000 acre-feet) available to Idaho Power. Thus, the plain terms of 1976 Spaceholder Contract leave Idaho Power with no more than a right to demand that up to 45,000 acre feet of water be made available for hydropower use.³⁰

The other 1976 Contracts only reiterate that Idaho Power cannot have a right to compel that 300,000 acre-feet of storable water be used for hydropower purposes. The Falling Water contract imposed a hard cap on the quantity of water that can be scheduled for hydropower use. It directs that “no more than ten percent (10%) of the water accruing to the active storage capacity [of American Falls Reservoir] may be contractually scheduled for release from [American Falls] Dam by the Idaho Power Company.” Falling Water Contract (Jarvis Aff., Ex. EEE) at 10, Sect. 2.1(e).³¹ Further, Idaho Power warranted, that while the bonds and notes that funded the reconstruction are unpaid that it would not hold “on a permanent contract basis” more

³⁰ Even if the plain terms of the 1976 Contract did not require that its water delivery obligations prevail over those of the 1923 Contract, the 1976 Contract’s contradiction of the 1923 Contract’s obligations would act as a revocation of them. *See Silver Syndicate, Inc. v. Sunshine Mining Company*, 101 Idaho 226, 235, 611 P.2d 1011, 1020 (Id. 1979).

³¹ The Government Contract includes this same 10% limitation. 1976 Government Contract (Jarvis Aff., Ex. FFF) at ¶ 18(a).

than “eight per cent (8%) of the active storage capacity” of American Falls Dam “for the purpose of scheduled releases for generating electric energy.” *Id.* at 13, Section 2.3(I).

In short, the plain terms of the 1976 contracts demonstrate that Idaho Power’s claim to 300,000 acre-feet of water cannot be sustained. Indeed, that is the very conclusion Congress reached after reviewing the 1976 Contracts in substantially complete form. As both the House and Senate Reports addressing the 1975 Bond Legislation explained, Congress viewed the contracts as granting Idaho Power no more than “a limited spaceholder right (under 3 percent) and . . . use of the falling water for its hydroelectric power generation purposes.” H.Rep. 94-531 at 3; S. Rep. 94-570 at 3. Thus, as Congress observed, “in normal circumstances, substantially all of the falling water would be made available to the Power Company *only* when water was released from the dam for irrigation purposes.” *Id.* (emphasis added). Further, Congress emphasized that the Contracts provided

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; S. Rep. No. 94-570, at 3.

In sum, both the plain terms of the contracts and Congress’ review of the contracts lead to only one conclusion: the 1976 Contracts terminated Idaho Power’s ability to require the United States to forego the storage of up to 255,000 acre-feet of water in American Falls Reservoir.

- b. *Idaho Power's conduct over a period of decades demonstrates it acquiesced to the understanding that its contractual right to demand water for hydropower generation is limited to 45,000 acre-feet of water.*

Even if the plain language of the contracts did not preclude Idaho Power's claims, it is well established that a party to a contract may modify the terms of a contract by acquiescence. *See e.g., Scott v. Castle*, 104 Idaho 719, 724, 662 P.2d 1163, 1168 (Id. App. 1983) (*quoting Ore-Ida Potato Products, Inc. v. Larsen*, 83 Idaho 290, 296, 362 P.2d 384, 387 (1961)) (agreement to modification of a contract may be implied from a course of contract in accordance with the modification); *International Bus. Lists, Inc. v. AT & T*, 147 F.3d 636, 641 (7th Cir. 1998) (a contract is validly modified by acquiescence in the modification through a course of conduct consistent with acceptance of the modification).

As was explained above, Idaho Power's testimony before Congress and acquiescence to the limitations on hydropower required in order to obtain tax-free financing demonstrate that the Company understood the secondary water provisions had been terminated. Nonetheless in 1980 the Company asserted the right. It appears the Company's actions were only testing the water because its subsequent actions confirm what its actions before Congress demonstrated – that the Company understood the secondary storage provisions had been terminated. Reclamation did not deliver the water Idaho Power sought in 1980. Nor did it deliver the secondary water in 1981. The Company did nothing. Reclamation has continued to not deliver the secondary water. Despite that, a brief run of wet years followed 1981 and resulted flows exceeding the 1923 Contract targets. When drier years returned from 1987 through 1997, Idaho Power's own calculations show that it did not receive the water it now claims. Bowling E-

mail (Jarvis Aff., Ex. D). Yet the company still did not assert the right in now claims. Only when perceiving a threat from the Nez Perce settlement discussions did Idaho Power attempt to resurrect the 1923 Contract. By then it was too late to revive what had long been dead. See *Copenhaver v. Levin*, 92 Idaho 681, 684, 448 P.2d 774, 777 (1968) (quoting *Jensen v. Chandler*, 77 Idaho 303, 307, 291 P.2d 1116, 1118 (1955) (a contract will be treated as abandoned where the acts of one party inconsistent with its existence are acquiesced in by the other party). Moreover, Idaho Power's decade of acquiescence also acts as a waiver of its rights under the secondary water provisions of the 1923 Contract. *Grover v. Idaho Public Utilities Comm.*, 83 Idaho 351, ___, 364 P.2d 167, 171 (Id. 1961).

In sum, the relevant statutes, contracts and Idaho Power's conduct, all demonstrate that there is no basis for Idaho Power's objection to the United States' water right 01-02064.

C. There is No Basis to Impose a Trust Obligation on the United States.

Idaho Power asks this Court to rule that Director of IDWR somehow imposed a trust obligation on the Bureau of Reclamation's water right 01-2064 when he cancelled Idaho Power's permit. Assuming *arguendo* that Idaho Power's argument falls within the narrow exception to the rule against collateral attacks on licenses carved out by Judge Melanson in the MEMORANDUM DECISION AND ORDER....., Consolidated Subcase 91-63 at 29-30 (Sept. 2, 2004), this Court cannot grant Idaho Power's request to impose a trust obligation on the United States for three reasons.^{32/} First, the Director did not have jurisdiction to impose a trust obligation on

^{32/} In Subcase 91-63 Judge Melanson allowed a collateral attack on the United States' license only to the extent the court was "being asked to clarify existing law against which the water right holders were entitled to rely." *Id.* at 30. Here, as will be explained below, there is no

the United States. Second, courts with jurisdiction have repeatedly refused to find that Reclamation contracts create trust obligations. Third, general principles of federal trust law preclude a finding that the United States has a trust obligation to Idaho Power.

1. IDWR lacked jurisdiction to impose a trust on the United States.

IDWR Director Higginson's Memorandum Decision cancelling Idaho Power's permit also found "that by reason of contracts and agreements entered into between the Company and the United States and America, those rights are held in trust for use by the Company under the water rights of the United States at American Falls Reservoir." MEM. DECISION at 2. The Director, however lacked jurisdiction to construe the United States' contractual obligations for two fundamental reasons.

First, the United States was not a party to the proceedings before the Director. Second, as this Court is no doubt well aware, the United States is immune from suit unless it has expressly consented to be sued. *E.g., United States v. Sherwood*, 312 U.S. 584, 586 (1941). There is no waiver of sovereign immunity encompassing Idaho Power's proceedings before the Director. Consequently, the Director's Order cannot have imposed a trust obligation on the United States.

2. Courts have repeatedly concluded that Reclamation contracts do not create trust obligations.

The question of whether a Reclamation contract creates a trust obligation has been squarely addressed – and squarely rejected – by several courts. In *Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F. Supp. 2d 1224 (E.D. Cal. 2003) the court faced the same

body of law that even arguably imposes a trust obligation on the United States's water rights for Reclamation projects.

allegation that is before this Court – that a long ago State administrative proceeding had recognized the United States had trust obligations toward its Reclamation contractors. The Court not only rejected that claim, it found the claim “disingenuous” given that the Ninth Circuit had rejected a trust theory in *Israel v. Morton*, 549 F.2d 128, 132 (9th Cir. 1977) and the California administrative agency had itself rejected the theory in a later decision. *Id.* at 1249. The Tenth Circuit has also rejected a claim that reclamation law creates a trust obligation. *See Elephant Butte Irr. Dist. v. U.S. Dept. of Interior*, 269 F.3d 1158, 1166 (10th Cir. 2001). In short, no court has ever held that a Reclamation contract creates a federal trust obligation.^{33/} Moreover, there is a good reason why: general principles of federal trust law preclude that result.

3. There is no express statement of intent by the United States to assume a trust obligation.

Outside of the context of the government’s dealings with Indian tribes, fiduciary obligations on the part of the United States are not implied. Instead, there must be an express statement of intent to assume a fiduciary obligation. *E.g., Hohri v. United States*, 782 F.2d 227, 244 n.39 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). A contract to perform specific services, such as a Reclamation contract does not constitute the necessary statement of intent. *Id.* at 244. That is particularly the case here, where the 1923 Contract does not even purport to impose a “trust.” In sum, there is no basis by which this Court can find the United States holds a water right in trust for Idaho Power. Accordingly, the United States is entitled to partial summary judgment directing that its water right 01-2064 is not subject to a trust.

^{33/} Indeed, Judge Melanson has clarified that while I.C. § 43-316 imposes trust obligations on irrigation districts in their dealings with their patrons, no such relationship exists between Reclamation and its contractors. ORDER CLARIFYING MEMORANDUM DECISION..., Consolidated Subcase 91-63 (Oct. 4, 2004).

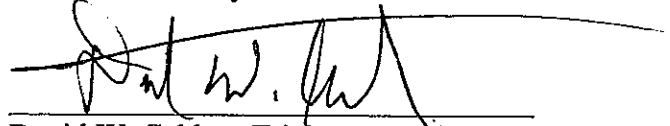
IV. CONCLUSION.

Again and again Idaho Power has informed Congress and other water users that it has no more than a right to 45,000 acre-feet of storage space in American Falls Reservoir. This Court should not allow Idaho Power to reverse course and argue for more. Even if this Court were to hear Idaho Power's claims, they have no merit. First, both Congress, by statute, and Idaho Power, by contract, have acted to limit the Company's right to demand water from American Falls Reservoir to 45,000 acre-feet. Second, as numerous courts have recognized, Reclamation contracts do not create trust obligations.

In sum, even if Idaho Power's claims were not barred, the United States would be entitled to partial summary judgment directing that the United States water right 01-2064 is not burdened by a trust and that the quantity of water subject to being released for hydropower purposes under that right is 45,000 acre-feet of water.

Dated this 4th day of October 2010.

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