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Collectively: American Falls Spaceholders

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

IN RE SRBA

CASE NO. 39576

Subcase No. 01-02064
(Hydropower Storage Claim at American
Falls)

**SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF AMERICAN FALLS
SPACEHOLDERS MOTION FOR
SUMMARY JUDGMENT**

COMES NOW Aberdeen Springfield Canal Company, and the following Upper Valley American Falls Spaceholders, namely: Blackfoot Canal Company, Burgess Canal Company, Butte & Market Lake Canal Company, Corbett Slough Ditch Company, Dilts Irrigation Company, Enterprise Canal Company, Enterprise Irrigation District, Harrison Canal Company, Idaho Irrigation District, Lenroot Canal Company, New Sweden Irrigation District, Osgood Canal Company, Peoples Canal & Irrigation Company, Poplar, Progressive Irrigation District, Reid Canal Company, Rudy Irrigation Company, Snake River Valley Irrigation District, Trego Ditch Company, and Woodville Canal Company, hereinafter collectively the “American Falls Spaceholders,” and by and through counsel, respectfully submit this supplemental memorandum in support of their Motion for Summary Judgment filed December 10, 2009.

SUPPORT FOR STATE’S MOTION FOR SUMMARY JUDGMENT

The American Falls Space Holders support the State of Idaho’s Amended Motion For Partial Summary Judgment. The State’s Brief in Support of its Motion contains argument that supports the American Falls Spaceholder’s Motion for Summary Judgment. Additionally, the American Falls Space Holder’s intend for this memorandum and the accompanying affidavit of Lyle Swank to support the State’s Motion.

ARGUMENT

A. Background

The American Falls Spaceholders are irrigation entities whose members rely on storage in American Falls Reservoir to support their farming livelihoods. On December 10, 2009, the American Falls Spaceholders filed a Motion for Summary Judgment on Idaho Power Company’s claim to ownership of 300,000 acre-feet of storage capacity in the American Falls Reservoir. With their motion, the American Fall Spaceholders also filed a Memorandum in

Support, asserting that Idaho Power Company holds no more than 45,000 acre-feet of storage capacity in American Falls Reservoir, and its right to use water in American Falls Reservoir to generate hydropower is incidental and subordinate to the use of water for irrigation. The American Falls Spaceholders relied on the doctrines of equitable estoppel and quasi-estoppel. In their Memorandum, the American Falls Spaceholders set out Idaho Power Company's representations regarding the subordination of Idaho Power Company's hydropower rights to irrigation and Idaho Power Company's representations that its storage rights are limited to 45,000 acre-feet. The American Falls Spaceholders also asserted that they should be awarded costs and fees pursuant to I.C. § 12-120(3) and 12-121 based on Idaho Power Company's behavior in this matter.

The American Falls Spaceholders submit this Supplemental Memorandum to clarify the following points in support of their initial Motion for Summary Judgment as well as the motions for summary judgment filed by the State of Idaho: 1) Idaho Power Company has never demanded or used its alleged right to 300,00 acre-feet of storage water, and 2) granting Idaho Power Company's claim to 300,000 acre-feet of storage water would cause serious damage to the American Falls Spaceholders, their individual member irrigators, and other irrigators upstream of the American Falls Reservoir.

B. Idaho Power Company has not demanded or used its alleged 300,000 acre-feet of storage rights.

Idaho Power Company's allegation that it has 300,000 acre-feet of storage rights in the American Falls Reservoir is not consistent with its own conduct. Lyle Swank, watermaster for Water District 1, affirms that Idaho Power Company has not exercised, demanded or even requested those alleged rights in the time Mr. Swank has worked on Water District 1. However,

Idaho Power Company has consistently exercised its right to the 45,000 acre-feet of storage rights which all parties agree belong to Idaho Power Company. Additionally, based on the representations of Idaho Power Company set out in the American Falls Spaceholder's memorandum in support of summary judgment filed December 10, 2009, and the State of Idaho's memorandum in support of summary judgment filed December 4, 2009, Idaho Power Company has not even claimed these rights since at least 1974.

Mr. Swank also describes the efforts of Mr. Bob Sutter in 1977 and 1978, to identify storage rights in the reservoir system in conjunction with developing the computer program used to model and track reservoir storage. Mr. Sutter did not include Idaho Power Company's alleged right of 300,000 acre-feet, but did include its undisputed right to 45,000 acre-feet of storage.

Based on the record before the Court, there is no question that Idaho Power has not used the 300,000 acre-feet of storage space it is now claiming, and has not claimed it until recently in its effort to pursue its SRBA claim.

C. Idaho Power Company's claim to 300,000 acre-feet of storage rights would do serious harm to other spaceholders in the American Falls Reservoir.

Idaho Power Company's claim would do serious harm to other users of American Falls Reservoir who have relied upon the historical storage limits of the reservoir and who initially subscribed to their storage right contracts with BOR fully understanding that Idaho Power Company's right included only the 45,000 acre-feet of storage. Mr. Swank states as follows:

All of the storage water in American Falls Reservoir and other Water District 1 reservoirs has been allocated. In the event the Court agrees with Idaho Power and conditions water right 01-2064 to require passage of 255,000 acre-feet of water for power storage past American Falls Reservoir, the storage lost would need to be debited from reservoir storage accounts. One potential method of accounting is to subtract 255,000 acre-feet from the overall storage available to other American Falls Reservoir contract holders. A second potential method is to recognize the refill or second fill of American Falls Reservoir to make up for the

255,000 acre-feet vacated by sending water past American Falls Reservoir. This method would reduce the amount of refill historically credited to other reservoir storage water rights. Both of these methods would dramatically change how water has been accounted for since I have been employed with Water District 01 and would negatively impact other storage contract holders.

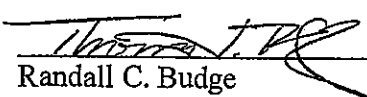
Three hundred thousand acre-feet of water is approximately 17% of the storage capacity of American Falls Reservoir. As Idaho Power Company has historically claimed and received 45,000 acre feet, or approximately 2.65% of the storage capacity, Idaho Power Company's claim would have the effect of decreasing the storage rights available for junior space holders by more than 14%.

For the above reasons, together with the reasons set out in American Falls Spaceholders initial Memorandum in Support of American Falls Spaceholders Motion for Summary Judgement, and the State's memorandum in support of its motion for partial summary judgment, we respectfully ask the Court to deny Idaho Power Company's claim to additional storage and award the American Falls Spaceholders reasonable attorney's fees and costs incurred in defending the claim.

DATED this 5th day of October, 2010.



Jerry R. Rigby
Hyrum Erickson
On behalf of Upper Valley AF Spaceholders



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

CERTIFICATE OF MAILING

I certify that on October 5, 2010, I mailed the original and copies of the Supplemental Memorandum in Support of American Falls Spaceholders Motion for Summary Judgment including all attachments, to the following persons:

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Idaho Power Company
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Idaho Power Company
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American Falls Reservoir
C/O C. Thomas Arkoosh
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Aberdeen American Falls GWD
Bingham GWD
Bonneville Jefferson GWD
Carey Valley GWD
IGWA Inc
Jefferson Clark GWD
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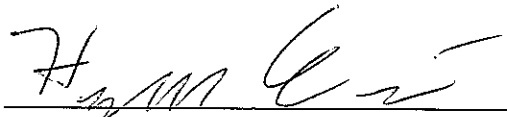
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Subcase No. 01-02064
(Hydropower Storage Claim at American Falls)

AFFIDAVIT OF LYLE SWANK

STATE OF IDAHO,)
)ss
County of Bonneville)

LYLE SWANK, being first duly sworn, deposes and says:

1. I am currently the Watermaster for Idaho Water District 01. I have held that position since March, 2006. Prior to my Watermaster position, I was employed in various water right agent or engineering positions of Water District 01 from the time of my first employment with the district in 1978.
2. Since my employment with Water District 01, I have been directly involved with the management of storage water rights associated with American Falls Reservoir.
3. During my time with Water District 01, Idaho Power Company has consistently made use of and requested releases from its 45,000 acre-feet of storage capacity in American Falls Reservoir. However, at no time since I have been employed at Water District 01, has Idaho Power Company requested or been credited with additional storage water or supplemental storage within American Falls Reservoir or elsewhere under a claim of its BOR contract.
4. I am personally aware that in 1977 and 1978, Mr. Bob Sutter with the Idaho Department of Water Resources was the primary author of the computer water right accounting software programs currently in use to model and track reservoir storage accrual within Water District 01. Furthermore, I am personally aware that while Mr. Sutter was creating the computerized programs he did substantial research into the existing and recognized storage water rights of all the reservoirs in the Water District 01 reservoir system. Clearly included within the computer programs is the 45,000 acre-feet historically recognized as storage rights owned by Idaho Power Company. However, nowhere in the

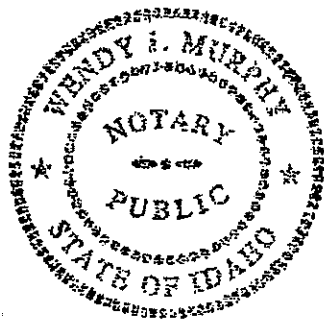
program was there any inclusion of the additional 255,000 acre-feet now claimed by Idaho Power Company or any portion thereof.

5. All of the storage water in American Falls Reservoir and other Water District 1 reservoirs has been allocated. In the event the Court agrees with Idaho Power and conditions water right 01-2064 to require passage of 255,000 acre-feet of water for power storage past American Falls Reservoir, the storage lost would need to be debited from reservoir storage accounts. One potential method of accounting is to subtract 255,000 acre-feet from the overall storage available to other American Falls Reservoir contract holders. A second potential method is to recognize the refill or second fill of American Falls Reservoir to make up for the 255,000 acre-feet vacated by sending water past American Falls Reservoir. This method would reduce the amount of refill historically credited to other reservoir storage water rights. Both of these methods would dramatically change how water has been accounted for since I have been employed with Water District 01 and would negatively impact other storage contract holders.

DATED this 5th day of October, 2010.

Lyle Swank
Lyle Swank

SUBSCRIBED AND SWORN to me this 5th day of October, 2010.



Wendy J. Murphy
Notary Public for the State of Idaho
Residing at:
My Commission Expires: