

COPY

RECEIVED
NOV 17 2010
DEPARTMENT OF
WATER RESOURCES

LAWRENCE G. WASDEN
Attorney General

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

DAVID I. STANISH (ISB No. 7310)
MICHAEL C. ORR (ISB No. 6720)
Deputy Attorneys General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
Facsimile: (208) 854-8072

Counsel for the State of Idaho

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

In Re SRBA

Case No. 39576

)
) Subcase No. 01-02064
)

) (American Falls Storage Subcase)
)

) **STATE OF IDAHO'S RESPONSE TO**
) **IDAHO POWER COMPANY'S MOTION**
) **FOR SUMMARY JUDGMENT OR IN**
) **THE ALTERNATIVE FOR MOTION**
) **FOR DECLARATORY JUDGMENT OF**
) **CONTRACT RIGHTS**
)
)
)

I. INTRODUCTION

Idaho Power Company's motion for summary judgment opens another chapter in the Snake River's long-running conflict between hydropower and irrigation.¹ An important aspect of this conflict, and the issue at the heart of Idaho Power's motion, is the question of the extent to which a private hydropower company may exercise control over the operation of the federal reclamation system in the upper Snake River basin. Idaho Power's motion seeks to resurrect and enlarge a "secondary" storage space right it unambiguously relinquished in the 1970s, and if granted would put the company in a position today to control far more storage space in American Falls Reservoir than ever before, and far more than was ever contemplated under any set of circumstances.

The undisputed historic backdrop for this case is more than a century of reclamation development in the upper Snake River basin, a fundamental principal of which has always been that generation of hydropower at federal reclamation dams is incidental and secondary to the primary objective of storing water for irrigation. The 1923 American Falls contract between Idaho Power and the United States implemented this principal, granting Idaho Power a minimal "primary" right to 45,000 acre-feet of reservoir storage capacity, and an even more limited "secondary" right to 255,000 acre-feet of storage capacity.

While the existence of this "secondary" right under the 1923 contract was never questioned prior to the rebuilding of American Falls Dam, the nature and extent of the right was always a source of disagreement between the United States Bureau of

¹ See Memorandum Decision And Order On Cross-Motions For Summary Judgment, *In re SRBA Case No. 39576 Consolidated Subcase No. 00-92023 (92-23)*, at 5 (Apr. 18, 2008) ("The inevitable conflict between those who use the water of the Snake River for power generation and those who use it for irrigation and other consumptive uses was foreseen prior to Idaho's statehood.").

Reclamation (“USBOR”) and Idaho Power. The dispute centered on the extent to which Idaho Power could demand the release of water that could otherwise be stored for irrigation, and was brought into sharp focus by the severe drought in the 1930s. The drought made it imperative to maximize the conservation and storage of winter flows above Milner Dam for later irrigation use. Idaho Power acquiesced to the USBOR’s irrigation-first policy by entering into supplemental contracts that significantly limited its disputed “secondary” storage right. The company did so, not out of charity, but rather out of enlightened self-interest: supporting continued irrigation development in the upper Snake River basin ultimately increased the market for the company’s electric power; and cooperating with the USBOR forestalled development of a federal hydropower plant at American Falls that would compete with Idaho Power, which presented a far greater threat to the company than the subordination of its limited “secondary” storage right.

In the 1970s, the need to rebuild the American Falls Dam presented similar risks and opportunities for Idaho Power, and once again forced to center stage the perennial issues of hydropower subordination and the control of the federal reservoir system in the upper Snake River basin. The USBOR’s reconstruction proposal included the federal power plant that Idaho Power had long opposed. Idaho Power responded with an alternative proposal under which the company would finance the reconstruction, but in return be allowed to build its own power plant directly into the federal reclamation dam and make use of essentially all the falling water at the site—more than doubling the company’s hydropower generation at American Falls, and effectively terminating the threat of competitive federal power development at the dam. Idaho Power’s proposal was attractive to the storage spaceholders because it provided for faster reconstruction, but it

also raised questions concerning the integration of a private hydropower facility into a federal dam with primary purposes of irrigation storage and reclamation: What rights would Idaho Power have in the reservoir? How much control would the company have over reservoir operations? Would hydropower remain subordinate to irrigation storage and reclamation purposes?

Idaho Power responded to these questions with repeated and unambiguous answers that were intended to marshal support for the company's proposal among wary water users, State and Federal officials, and the public at large: the company would have rights to only 45,000 acre-feet of storage; the company would have no control over dam and reservoir operations other than that incident to its 45,000 acre-foot storage right; and hydropower use would remain secondary to the federal reservoir's primary purposes of irrigation storage and reclamation. These reassurances were not simply accepted at face value—they were made explicit in the federal legislation, contracts and judicial orders authorizing the reconstruction of American Falls Dam under Idaho Power's proposal. Thus, any storage right claim by Idaho Power in excess of 45,000 acre-feet is precluded as a matter of both federal and state law.

Now, more than thirty years later, Idaho Power tells a different story. Idaho Power asserts that in addition to its 45,000 acre-foot "primary" storage right, it always intended to retain the 255,000 acre-foot "secondary" storage right, despite having repeatedly and consistently described the company's storage right as limited to 45,000 acre-feet in numerous meetings, hearings, written statements, contracts, and in state and federal litigation. Idaho Power now brazenly seeks not only to resurrect the relinquished "secondary" right but also to combine it with the "primary" right and obtain far more

than a contractual right to storage space in a federal reclamation reservoir: Idaho Power asks this Court to declare that the company has absolute control over 300,000 acre-feet of the storage capacity of American Falls reservoir.

Idaho Power's motion is contrary to the law and the undisputed facts, seeks to enlarge purely contractual rights by merging them into the elements of water right no. 01-02064, and would subvert the reclamation objectives of the reclamation projects in the Upper Snake river basin. The State, therefore, respectfully requests that this Court deny Idaho Power's motion.

II. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Castorena v. General Elec.*, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010) (quoting I.R.C.P. 56(c)). Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences are to be drawn in favor of the non-moving party. *Id.* The Court exercises free review over questions of law. *Id.*

The State of Idaho, the USBOR, Idaho Power and the American Falls Spaceholders² have all filed summary judgment motions based on the same facts, issues and theories. Thus, while each motion should be evaluated on its own merits, the parties have "essentially stipulate[d] there is no genuine issue of material fact that would

² The "American Falls Spaceholders" consist of: Aberdeen Springfield Canal Company, 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, Ruby Irrigation Company, Snake River Valley Irrigation District, Trego Ditch Company and Woodville Canal Company. *American Falls Spaceholders' Motion To Participate And File Late Objection* (Dec. 9, 2009).

preclude the district court from entering summary judgment.” *Stafford v. Klosterman*, 134 Idaho 205, 206, 998 P.2d 1118, 1119 (2000).

III. FACTS

The State incorporates herein by this reference the statements of facts in pages 2 -- 29 of the State’s “Brief In Support Of Amended Motion For Partial Summary Judgment” of October 5, 2010 (*State’s Opening Brief*), and the State’s “Brief In Support Of Motion For Partial Summary Judgment” of December 4, 2009. Other facts are discussed below and in the argument section, as appropriate.

A. AMERICAN FALLS RESERVOIR AND THE “DEFINITE PLAN” TO MAXIMIZE IRRIGATION DEVELOPMENT ABOVE MILNER DAM.

The American Falls Dam and Reservoir are integral parts of the USBOR’s Minidoka Project, which was approved in 1904 as one of the first projects authorized under the federal Reclamation Act of 1902.³ *Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 529-32 (D.C. Cir. 1940). The dam and reservoir were built largely in response to the great drought of 1919, which demonstrated that the USBOR’s storage facilities at Jackson Lake and Minidoka Dam (Lake Walcott) did not provide a sufficient storage supply for existing irrigation projects, much less for their expansion or new projects.⁴

Following the 1919 drought, a “Board of Engineers” consisting of representatives of the State, the USBOR, the Twin Falls Canal Company and the North Side Canal Company, was convened “to consider projects in the Snake River Valley which may

³ The Reclamation Act of 1902 was enacted under Public Law No. 57-161. 32 Stat. 388-90; *see also* 43 U.S.C. § 371.

⁴ *See generally* Memorandum In Support Of State Of Idaho’s Motion For Partial Summary Judgment Re: Milner Zero Minimum Flow, *In re SRBA Case No. 39576, Subcase Nos. 00-92002GP et al.*, at 25-27 (Oct. 19, 2009) (“*State’s Milner Zero Flow Brief*”) (Exhibit 49 to Affidavit of Michael C. Orr) (“Orr Aff.”).

affect the proposed American Falls Reservoir.”⁵ The Board of Engineers recognized that “the time had come for the formation of a definite plan” for development of the remaining water resources of the Snake River “on a broad and comprehensive basis which would inure to the state the maximum utility of the possibilities of the stream,”⁶ and in 1920 issued a much-anticipated report.⁷

The Board of Engineers concluded that the entire flow above Milner Dam should be conserved for irrigation purposes: “[T]he greatest use of the water of Snake River will be found in the dedication of the entire flow of the stream to irrigation [above Milner Dam]”⁸ The Board of Engineers further concluded that “[t]he American Falls Reservoir [would] be essential to a complete development of the irrigation resources,”⁹ and also recognized that such development ultimately would require the construction of other storage facilities in the future.¹⁰

The Board of Engineers pointed out that “[o]ne of the results of the development of the American Falls Reservoir will be to destroy as a source of firm power, the present power plants and the partial development of the additional rights of the Idaho Power Company, located at American Falls.”¹¹ This result was consistent with the report’s overall development plan, which was based on the principle of “secur[ing] as nearly as possible a total use of the waters for irrigation above Milner Dam, and to secure the

⁵ “REPORT OF BOARD OF ENGINEERS to consider Projects in Snake River Valley which may affect the proposed AMERICAN FALLS RESERVOIR, IDAHO” at 1-2) (Apr. 10, 1920) (“Board of Engineers Report”) (Exhibit 1 to Affidavit Of David I. Stanish) (Dec. 4, 2009) (“*First Stanish Aff.*”).

⁶ *Id.* at 3; *see also id.* at 12 (“It became apparent that . . . no one of the principal problems involved could be properly considered without taking into account its effect upon the general problem of the conservation of the waters of Snake River.”).

⁷ Letter from Barry Dibble, Minidoka Project Manager, to the Chief Engineer of the U.S. Reclamation Service) (Apr. 16, 1920) (Exhibit 50 to Orr Aff.) (“There is considerable demand for this report, and I believe some of the papers will be interested in printing parts of it.”).

⁸ Board of Engineers Report at 5.

⁹ Board of Engineers Report, Letter of Transmittal at 3.

¹⁰ *See id.* (“Manifestly any storage not provided in American Falls Reservoir must be provided at other sites.”)

greatest possible use for power below Milner Dam.”¹² This concept was based in large part on the geographic and hydrologic division of the Snake River basin at Milner Dam, and became a fundamental principle of reclamation and hydropower development in the basin in the years that followed.¹³

B. THE 1923 CONTRACT AND THE “SECONDARY” STORAGE RIGHT.

In furtherance of the Board of Engineers’ plan, the USBOR and Idaho Power entered into a contract in 1923 under which the United States acquired two of Idaho Power’s three power plants at American Falls, most of the company’s water rights, and certain real property.¹⁴ While Idaho Power retained the right to continue to operate its remaining power plant on the east side of the river immediately downstream from the American Falls reclamation dam, the company’s right to demand releases of water from the dam was sharply limited by the 1923 American Falls Contract.¹⁵ Under the 1923 contract, the United States granted to Idaho Power a “primary” right to 45,000 acre-feet of storage capacity in the federal reservoir that was to be “on an equal basis in all respects

¹¹ *Id.* at 21.

¹² *Id.* at 5.

¹³ *See id.* at 14-15, 32; *see also State’s Milner Zero Flow Brief* at 23-24. As the Department of the Interior stated in a 1962 letter to the Federal Power Commission urging that subordination conditions be included in the federal licenses for Idaho Power’s American Falls, Shoshone Falls and Upper Salmon Falls facilities, the USBOR had “repeatedly advised” Idaho Power “that the best development of the waters of the Snake River require there be no power developments below Milner Dam which rely upon flows of water past Milner Dam for power production.” Letter from K. Holum, Ass’t Sec. of the Interior, to J.C. Swidler, Chairman, Federal Power Commission, at 4 (Aug. 30, 1962) (“Holum Letter”) (Exhibit 5 to First Stanish Aff.). The letter further explained that the USBOR had undertaken a multi-decade effort on the Upper Snake River to construct a reservoir system in excess of 4,500,000 acre-feet, “all of which is operated with the objective of conserving the water to minimize spills past Milner Dam.” *Id.*

¹⁴ *See generally* 1923 American Falls Contract – Contract Between the United States and the Idaho Power Company, Relative to Power Rights at American Falls, Idaho, Contract No. Ilr-733) (June 15, 1923) (“1923 Contract”) (Exhibit 2 to First Stanish Aff.).

¹⁵ Planning and development during the ensuing decades confirmed that the conservation and storage of flows above Milner Dam for irrigation purposes and the subordination of hydropower for such purposes were fundamental principles of the Snake River basin. *See State’s Milner Zero Flow Brief* at 21-48.

with . . . other primary storage capacity rights in the reservoir,” that is, irrigation storage rights.¹⁶

The United States also granted Idaho Power a “secondary” storage right “not to exceed 255,000 acre-feet of capacity,” for purposes of “regulating and controlling the water reserved to the company under Paragraph 19.”¹⁷ This “secondary” storage right, however, was subject to significant qualifications and limitations in favor of the irrigation storage purposes of the reservoir. Unlike the company’s “primary” storage right, the “secondary” right was not “on an equal basis” with the “primary” storage rights in the reservoir, such as irrigation storage rights (or even Idaho Power’s own “primary” storage right). Indeed, the “secondary” rights to the 255,000 acre-feet of storage space were subordinate to irrigation storage: the company’s “secondary” storage capacity right was available only “when such capacity is not then required and not being used by the owners of irrigation rights to such capacity.”¹⁸ Moreover, unlike “primary” storage rights, the “secondary” storage right was available for only part of the year, terminating “after the reservoir is first filled each season, and the company shall in any event release on April 1st of each year all right and claim to such capacity and water stored therein.”¹⁹ At most, the “secondary” storage right could be in effect only during the period “[b]etween

¹⁶ 1923 Contract at 18. The “equal basis” provision notwithstanding, the 1923 Contract expressly made Idaho Power’s “primary” storage right of somewhat lesser status than irrigation storage rights in at least one regard: the contract forbade Idaho Power from carrying over any water from one year to the next in the company’s “primary” storage space. *See id.* at 21 (“the company’s right shall expire on November 15th to any amount so held over beyond that date.”).

¹⁷ *Id.* at 18. Paragraph 19 reserved 300,000 acre-feet of water flowing into the reservoir to fill the company’s “primary” and “secondary” storage space (i.e., 45,000 + 255,000 = 300,000). *See id.* at 21 (“The water required to fill the 45,000 acre-feet of primary storage capacity allowed the company . . . shall be a part of the 300,000 acre-feet of water reserved to the company under Paragraph 19”). The company’s right to call for this water was circumscribed by its “primary” and “secondary” storage rights, and by the 1923 Contract’s provision addressing “Company’s Rights Below Milner Dam.” *Id.*

¹⁸ *Id.* at 19.

¹⁹ *Id.*

October 1st of any year and June 10th of the following year.”²⁰ Finally, the company’s right to demand the release of water in its “secondary” storage capacity for use below Milner Dam was strictly limited to that portion of the 255,000 acre-feet necessary to maintain but not exceed certain minimum flows at Shoshone Falls.²¹

In effect, the “secondary” storage capacity right as defined by the 1923 Contract was not a storage right in the conventional sense, but rather was simply authorization for Idaho Power to use the water accruing to certain storage space that was subject first and foremost to the “primary” storage rights of irrigators. The company had a right to use the water accruing to this storage space only when and if the irrigators did not need the water.

The 1923 Contract was a compromise in that the United States had originally sought, consistent with the development principles and plans established in the Report of the Board of Engineers, to prevent hydropower from interfering with reclamation²² by purchasing all of Idaho Power’s American Falls water rights, and thus avoid having a private hydropower facility situated above Milner Dam in the middle of the federal reclamation project. Even though Idaho Power retained some limited storage rights under the 1923 Contract, federal officials viewed the outcome as consistent with reclamation policy and the Report’s “definite plan.”

Despite the clarity of the contractual limitations on the company’s secondary storage right, when the reservoir was completed disagreement developed between the

²⁰ *Id.*

²¹ *Id.* at 21-22. This provision excluded consideration of flows resulting from releases under the company’s “primary” storage right to 45,000 acre-feet for purposes of determining flows at Shoshone Falls. *Id.*

²² See Board of Engineers Report at 31) (“In granting power rights in the future the Federal Government and the State should so far as possible provide restrictions requiring its eventual surrender when and as the waters are required for application to the land.”).

USBOR and Idaho Power over the nature and extent of the “secondary” storage right,²³ particularly as to “the question of the right of Idaho Power Company to dictate the way in which its secondary storage shall be released.”²⁴ Idaho Power believed that the “secondary” storage right entitled the company to demand storage releases “in any amount and at any time we see fit without resorting to its releases in fairly uniform flow,”²⁵ a position that was potentially adverse to reclamation operations and that the USBOR found “unexpected and disconcerting.”²⁶ The USBOR viewed the “secondary” storage right as simply allowing for Idaho Power to withdraw and use stored water “at a fairly uniform rate throughout the fall and winter months.”²⁷ Although Idaho Power strongly disagreed with this interpretation, the company was reluctant to force the issue and take a position that would put it at odds with reclamation interests or result in a judicial interpretation of the 1923 Contract, and therefore decided to cooperate with the USBOR as much as possible.²⁸

C. THE DROUGHT OF THE 1930S AND LIMITING THE “SECONDARY” STORAGE RIGHT TO CONSERVE WATER FOR IRRIGATION.

The 1930s drought and the attendant need to conserve more water for irrigation storage were sufficiently acute that USBOR considered condemning all of Idaho Power’s storage rights in American Falls Reservoir.²⁹ This did not happen, but the drought, along

²³ Letter from James L. Boone, Attorney, Idaho Power Co., to W.R. Putnam, Idaho Power Co., at 3 (Nov. 8, 1926) (“First Boone Letter”) (Exhibit 51 to Orr Aff.) (“these [rights] at this time are a source of controversy”).

²⁴ Letter from C. C. Boswell, Electric Bond and Share Co., to W.R. Putnam, Vice Pres. & Gen. Mgr., Idaho Power Co., at 1 (Nov. 8, 1926) (“Boswell Letter”) (Exhibit 52 to Orr Aff.)

²⁵ First Boone Letter at 6.

²⁶ *Id.* at 4.

²⁷ *Id.* at 4-5.

²⁸ First Boone Letter at 8; Boswell Letter at 3.

²⁹ In a 1931 letter to Idaho Power’s Vice President, the company’s Secretary wrote:

[Bureau District Counsel] Stoutemyer said that he was firmly of the opinion, and likewise everybody else connected with the Reclamation Department, that it was the duty

with the parties' disagreement over the nature of the "secondary" storage right, resulted in agreements that limited the "secondary" right in favor of irrigation. One such agreement was a subordination stipulation that was inserted into the federal license for Idaho Power's Twin Falls power plant, which was located a few miles below Milner Dam.³⁰ While Idaho Power had sought to establish rights to flows above Milner for use at the Twin Falls plant, the USBOR insisted that the Twin Falls project be subordinate to irrigation and not be allowed to establish rights to any flows arising above Milner Dam.³¹

Ultimately the parties entered into a stipulation that subordinated all of Idaho Power's hydropower water rights at Twin Falls to irrigation, and the stipulation was incorporated into the facility's Federal Power Commission's license as Article 41.³² Notably, the stipulation expressly recognized Idaho Power's "primary" storage right to 45,000 acre-feet under the 1923 Contract, and provided that the company was entitled to

of that Department, so far as it was within its power to do so, to preserve for Southern Idaho the waters of Snake River for irrigation purposes. He quite frankly stated that necessity may arise which will require the condemnation of such parts of our power rights at American Falls and Shoshone Falls which may be further essential for irrigation purposes.

Letter from James L. Boone, Secretary, Idaho Power Co., to Mr. Hibbard, Idaho Power Co., at 1 (May 29, 1931) ("Second Boone Letter") (Exhibit 53 to Orr Aff.).

³⁰ See generally *State's Milner Zero Flow Brief* at 34-35 (discussing Article 14 of the federal license for Idaho Power's Twin Falls power plant).

³¹ In his 1931 letter to Idaho Power's Vice-President, the company's Secretary also wrote:

I had a conference with [Bureau District Counsel] Stoutemyer relating primarily to the Twin Falls Federal Power License

. . . . It was very clear to me that it is not his nor the Reclamation Department's intention that we shall gain, without his or their serious protest, any further prior rights to water of Snake River which may be used for irrigation purposes at or above Milner Dam.

Second Boone Letter at 1.

³² Federal Power Commission, License on Government Lands, Project No. 18, Idaho, Idaho Power Company, at 11 (May 11, 1934) ("Twin Falls License") (Exhibit 54 to Orr Aff.) The Article 14 stipulation also was deemed to be a covenant running with the title to the Twin Falls power plant and binding not only on Idaho Power but also on its successors and assigns. *Id.* Idaho Power's Board of Directors unanimously adopted and approved the license, expressly including the Article 14 stipulation. *Id.*; Idaho Power Company, Minutes of Special Meeting of Board of Directors, at 1-2 (May 11, 1934) (Exhibit 55 to Orr Aff.).

demand that water be released for power use at Twin Falls.³³ In contrast, the stipulation made no reference to the “secondary” storage right,³⁴ which Idaho Power interpreted as meaning the company had relinquished any claim that it could call upon the 255,000 acre-feet for use at Twin Falls.³⁵ The stipulation thus limited in favor of irrigation and storage the use of Idaho Power’s “secondary” storage right at the Twin Falls plant, and the parties were soon to agree to even further limitations.

Another conservation proposal pertaining to American Falls was to finally build a federal power plant at the dam, which had always been part of the original plan.³⁶ In addition to allowing for greater conservation and storage of winter water, such a federal power plant would produce surplus electricity that the USBOR could lease on the commercial market, so long as doing so would not “impair the efficiency of the irrigation project.” *Burley Irr. Dist.*, 116 F.2d at 530-31 (quoting 43 U.S.C. § 522). Further, construction of a federal power plant in the dam would have deprived Idaho Power’s American Falls plant of much of the water it used for power production.³⁷ Thus, the water shortage of the early 1930s threatened to put the federal government into direct

³³ Twin Falls License at 11.

³⁴ *Id.*

³⁵ Letter from D.F. McGee, Electric Bond and Share Co., to M.L. Hibbard, Vice Pres. & Gen. Mgr., Idaho Power Co. (Sept. 30, 1931) (Exhibit 56 to Orr Aff.).

³⁶ Contract between the United States and Idaho Power Company for conservation of Snake River water and furnishing transmission service, Contract No. Ilr-801, at 2 (dated Oct. 1, 1934; adopted May 9, 1935) (“1935 Contract”) (Exhibit Q to Affidavit of David A. Jarvis, filed Oct. 5, 2010) (“Jarvis Aff.”). The 1923 Contract and the original plans for American Falls Dam had contemplated construction of a federal power plant at the dam “for the purpose of more nearly insuring that the American Falls reservoir will fill from year to year,” *id.* at 3, and penstocks for the anticipated power plant were installed in the dam when it was built.

³⁷ B.C. Russell, Memorandum – Contracts Between Idaho Power Company and U.S. Bureau of Reclamation for Power at American Falls, at 3 (Jul. 14, 1949) (“should the government exercise its full rights at American Falls Idaho Power Company would have installed at that point approximately 10,000 kw of capacity which it would not be able to make use of and a considerable portion of the remainder of the plant would be used only a small part of the year”) (Exhibit E to Jarvis Aff.).

competition with Idaho Power for a water supply and for customers.³⁸ With this threat looming, Idaho Power advanced an alternative water conservation proposal that deferred construction of the federal power plant at American Falls and gave the USBOR control of the “secondary” storage right.³⁹

Idaho Power’s proposal was accepted, as modified to address USBOR objections,⁴⁰ in the “Contract between United States and Idaho Power Company for conservation of Snake River water and furnishing transmission service” (“1935 Contract”) (Symbol Ilr-801).⁴¹ Under the 1935 Contract, winter flows that normally had to be spilled past American Falls to satisfy the relatively senior downstream power right for the Minidoka Dam power plant⁴² were retained in American Falls Reservoir as irrigation storage,⁴³ and the surplus winter power forfeited due to the idling of the Minidoka power plant was replaced with power produced and delivered to the Minidoka plant by Idaho Power.⁴⁴

Further, the 1935 Contract made Idaho Power’s “secondary” storage right “subject to the direction and limitation of the Bureau,” reduced the target flows at

³⁸ Competition from the federal power plant at the Minidoka Dam already threatened Idaho Power. See 1935 Contract at 10 (limiting the sale of power from the Minidoka power plant).

³⁹ Letter from USBOR District Counsel B.E. Stoutemyer to USBOR Commissioner, at 9 (discussing “the alternative proposal of the Idaho Power Company to the proposal to build a power plant at American Falls”) (Mar. 20, 1934) (“Stoutemyer Letter”) (Exhibit 57 to Orr Aff.); see also 1935 Contract at 2-3 (“WHEREAS, the Company has proposed to furnish power . . . in such way as will effect a conservation of water in [American Falls] reservoir for storage for irrigation purposes . . .”).

⁴⁰ See Stoutemyer Letter at 6-16 (discussing Idaho Power’s proposal and the USBOR’s objections).

⁴¹ 1935 Contract at 1. While the 1935 Contract recites that it is dated October 1, 1934, Idaho Power’s Board of Directors adopted a resolution approving the contract in 1935.

⁴² The federal reclamation dam at Minidoka Dam was built with an integrated power plant that provided power for irrigation pumping. *Burley Irr. Dist.*, 116 F.2d at 532. Surplus power, including that produced in the winter, was sold to residents on the project and in adjacent towns for commercial purposes. *Id.* Federal law authorizes commercial sales of surplus power produced at federal reclamation facilities provided such sales do not “interfere with the development of irrigation or impair the efficiency of the irrigation project.” *Id.* at 531 (internal quotation marks).

⁴³ See 1935 Contract at 11 (“ . . . the water conserved and made available by this agreement is for storage in the American Falls Reservoir . . .”).

⁴⁴ 1935 Contract at 5-6.

Shoshone Falls, and shortened by two months the period during which such flows were required.⁴⁵ This arrangement resolved, at least temporarily, the simmering disagreement between the USBOR and Idaho Power over the nature, extent and administration of the “secondary” storage right, and allowed the USBOR to limit the exercise of the “secondary” right in order to maximize irrigation storage.⁴⁶

In return, the USBOR agreed to defer construction of a federal power plant at American Falls while the 1935 Contract remained in force, not to expand its power facilities at Minidoka Dam for 5 years, and to limit the amount of power it sold outside of the Minidoka project.⁴⁷ The USBOR also agreed that Idaho Power could use all water released from the dam for power production, rather than being limited to the quantities provided in the 1923 Contract.⁴⁸ In recognition of these significant benefits, Idaho Power further agreed that the power it supplied during the winter would be provided free of charge.⁴⁹ The 1935 Contract remained in force until the 1950s,⁵⁰ allowing Idaho Power to use essentially all water released from the dam and protecting the company from the threat of a federal power plant at American Falls.

⁴⁵ 1935 Contract at 4.

⁴⁶ The 1935 Contract did not permanently resolve the parties’ disagreement over the nature and extent of the “secondary” right, and Idaho Power was careful to insist that the contract otherwise expressly recognize and preserve the “secondary” right. *See* 1935 Contract at 4-5, 11 (requiring that the USBOR release water under the “secondary” storage right every five years “[f]or the sole purpose of preserving to the Company the right it might otherwise have,” and stating that the contract did not constitute a release, surrender or abandonment of the “secondary” right).

⁴⁷ 1935 Contract at 6, 9, 10.

⁴⁸ 1935 Contract at 3-4. Like the contracts executed in connection with the rebuilding of American Falls Dam in the 1970s, the 1935 Contract authorized Idaho Power to use essentially all of the water being released from the dam. The 1935 Contract, however, expressly recognized that Idaho Power had a “secondary” storage right in the reservoir and specifically reserved it. 1935 Contract at 4-5, 11. The contract executed in the 1970s contained no such express recognition or reservation of the “secondary” storage right.

⁴⁹ 1935 Contract at 6.

⁵⁰ Many contractual arrangements among the United States and water users in the Snake River basin changed during this time, in connection with the authorization of the Palisades Dam and Reservoir project.

D. CONTINUING DISAGREEMENTS OVER THE “SECONDARY” STORAGE RIGHT.

After the 1935 Contract terminated in the early 1950s, the parties’ disagreement over the “secondary” storage right re-surfaced. Idaho Power requested a release of water pursuant to its “secondary” storage right. When the company and the USBOR met in November 1953 to discuss the matter, it became apparent that the parties still had quite different views of the nature and extent of the “secondary” storage right.⁵¹ Escalation of the dispute was avoided when watermaster Lynn Crandall proposed to release some water, although not as much as Idaho Power sought, in order to prevent imposition of excessive power loss payments on water users pursuant to the Palisades contracts.⁵² While this measure also benefitted Idaho Power it was not deemed to be a response to Idaho Power’s request, which the parties agreed would be destroyed and ignored, with no response from the USBOR.⁵³ Idaho Power suggested that the parties handle future problems as they arose rather than by attempting to resolve their disagreement over the 1923 Contract.⁵⁴

In the meantime, Idaho Power had been aggressively expanding its own Snake River hydropower system and continuing its determined opposition to expansion of the federal power system, most notably by strongly advocating against proposals for federal

⁵¹ See generally Letter from Lynn Crandall, Watermaster, to N.V. Sharp, Chairman, Committee of Nine (Nov. 20, 1953) (“Crandall Letter”) (Exhibit X to Jarvis Aff.); Memorandum by USBOR Ass’t Regional Counsel Van Uden & Merrill J. Martz, Chief, USBOR Resources & Contracts Branch (Dec. 4, 1953) (“USBOR Memo”) (Exhibit Y to Jarvis Aff.); Memorandum by H.R. Moore of Idaho Power Co. entitled “Conference With U.S. Bureau Of Reclamation Concerning Secondary Storage Space In American Falls Reservoir” (Dec. 4, 1953) (“IPC Memo”) (Exhibit AA to Jarvis Aff.)

⁵² IPC Memo at 1-2; USBOR Memo at 3-4; Crandall Letter at 2-4.

⁵³ IPC Memo at 1; USBOR Memo at 4.

⁵⁴ USBOR Memo at 4.

hydropower development of Hells Canyon and in favor of its own plans.⁵⁵ In pursuing these objectives, the company enlisted the support of irrigation interests by representing that its hydropower system posed no threat to reclamation because the company's hydropower activities were secondary and incidental to irrigation,⁵⁶ and by expressly agreeing to subordination conditions for its C.J. Strike and Hells Canyon facilities.⁵⁷

This strategy had its roots in the 1935 Contract, under which Idaho Power had agreed to take steps that would increase irrigation water conservation and storage—such as allowing the USBOR to administer the disputed “secondary” storage right—in return for, among other things, the USBOR's shelving of its plans to build a federal power plant at American Falls. The strategy of aligning with irrigation interests was crucial to the company's victory in the Hells Canyon controversy,⁵⁸ and would again be crucial when Idaho Power successfully re-implemented the same strategy some twenty years later, to win the support of irrigators and Congress for the company's proposal for the rebuilding of American Falls Dam. At that time, as in the 1930s, Idaho Power once again stepped forward with an alternative proposal that precluded construction of a federal power plant

⁵⁵ See generally *Idaho Power Co. v. State*, 104 Idaho 575, 579-81, 661 P.2d 741, 745-747 (1983) (discussing the Hells Canyon controversy and the development of Idaho Power's system).

⁵⁶ See American Falls Spaceholders Memorandum In Support Of Motion For Summary Judgment at 7 (Dec. 9, 2009) (discussing and quoting representations made by Idaho Power to irrigators to obtain their support for the company's Hells Canyon proposals).

⁵⁷ As the Idaho Supreme Court stated in the Swan Falls case:

Faced with [Governor] Jordan's attitude, which was reflected by his administrative department charged with issuing state water right licenses, Idaho Power agreed to subordinate their state water right license at C.J. Strike to future upstream depletion. . . .

....
To obtain the influence of Jordan and the irrigators, then as now a powerful political force in the state, for its Hells Canyon three-dam project, Idaho Power proposed that the FPC license for the Hells Canyon project contain a clause subordinating its rights to future upstream depletion without condition.

Idaho Power Co., 104 Idaho at 580, 661 P.2d at 746.

⁵⁸ See *Idaho Power Co.*, 104 Idaho at 580, 661 P.2d at 746; See American Falls Spaceholders Memorandum In Support Of Motion For Summary Judgment at 7 (Dec. 9, 2009).

and also authorized Idaho Power to use essentially all of the water released through the dam for private hydropower purposes.

E. IDAHO POWER'S PROPOSAL FOR REPLACING AMERICAN FALLS DAM.

Progressive deterioration of the concrete in the American Falls Dam led the USBOR to significantly restrict the amount of water that could be stored in the reservoir after 1964, and in 1966 the USBOR concluded that the dam would have to be replaced.⁵⁹ The USBOR's replacement proposals included penstocks for the federal power plant long sought by the USBOR and long opposed by Idaho Power, but also acknowledged that it was likely to take at least five years to secure federal funding for the replacement project.⁶⁰ The American Falls Reservoir District therefore began exploring alternatives for replacing the dam more expeditiously, and, among other things, met with Idaho Power to determine whether the company would be willing to assist in financing the replacement project in exchange for the right to use releases from the dam for power generation.⁶¹ These discussions were based on the express understanding “that no change in operation of the reservoir would be incurred and that the irrigation preference would remain the same.”⁶²

The reservoir district's overtures presented an opportunity for Idaho Power to greatly expand its power production at American Falls and finally end the threat of a federal power plant there—provided Idaho Power's hydropower activities remained secondary to irrigation. Idaho Power seized this opportunity and agreed to assist in

⁵⁹ *State's Opening Brief* at 4, 23.

⁶⁰ *State's Opening Brief* at 6.

⁶¹ *State's Opening Brief* at 6.

⁶² *State's Opening Brief* at 6-7 (quoting *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 65 (1973) (Statement of Tom Olmstead, AFRD) (emphasis added)).

financing the replacement project if the company was allowed to build a new power plant attached directly to the dam (thereby increasing the head at the power plant to 100 feet) and was further allowed to use essentially all of the water released at the dam for producing power.⁶³ Under this arrangement, the company estimated that its average annual power production would more than double, increasing from 146 million KWH to 370 million KWH.⁶⁴ Another significant benefit was that Idaho Power's proposal would finally eliminate the possibility of a competing federal power plant at American Falls Dam.

Such a proposal for privately financing the reconstruction of a federal reclamation dam and building into it a private power plant was "unconventional,"⁶⁵ especially given the "inevitable conflict" between the company's hydropower activities and federal reclamation efforts in the upper Snake River basin.⁶⁶ Thus, while Idaho Power's program would replace the dam much sooner than the federal proposals,⁶⁷ the company's financial involvement and the integration of its power plant into the federal dam raised questions among the irrigators, as well as state and federal officials, over Idaho Power's position on its relationship to irrigation rights in the reservoir if the company's proposal were accepted.

⁶³ *State's Opening Brief* at 7 (citing Idaho Power Company Proposal Presented to Executive Committee of Spaceholders at 4, 7) (Feb. 27, 1973). The financing aspect of Idaho Power's proposal assumed that the reservoir district would finance the \$20.7 million replacement project through the sale of tax-exempt bonds, and the company would pay \$19 million plus tax-exempt interest to the reservoir district over a 40-year period. *Id.*; see also *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 65 (1973) (Statement of Tom Olmstead, AFRD) (Exhibit 18 to First Stanish Aff.).

⁶⁴ *State's Opening Brief* at 7-8 (citing Idaho Power Company Proposal Presented to Executive Committee of Spaceholders at 4, 7) ((Feb. 27, 1973).

⁶⁵ Memorandum from Dan Dreyfus, Staff Member of Committee on Interior and Insular Affairs, to Senator Church (Mar. 11, 1973) at 1-2 (Exhibit 15 to First Stanish Aff.).

⁶⁶ Memorandum Decision And Order On Cross-Motions For Summary Judgment, *In re SRBA Case No. 39576 Consolidated Subcase No. 00-92023 (92-23)*, at 5 (Apr. 18, 2008).

⁶⁷ Idaho Power's proposal called for completing a dam within 18 months of the start of construction. *State's Opening Brief* at 7.

These questions were raised in the meetings, congressional hearings, contract negotiations, FERC licensing proceedings, and the state and federal litigation necessary for authorization of Idaho Power's reconstruction proposal. Time and again throughout the long course of these multiple proceedings, Idaho Power and other interested parties unequivocally stated that the company's interest in and control over the reservoir was limited to 45,000 acre-feet, that this would not change as a result of the project, and that the irrigation purposes of the American Falls Dam and Reservoir would remain paramount after the reconstruction. These representations are set forth in detail in the *State's Opening Brief*, filed on October 5, 2010.⁶⁸ As also discussed therein, the applicable federal legislation, the governing contracts, and the judicial confirmation of the reconstruction plan, expressly defined and limited Idaho Power's rights in the reservoir to 45,000 acre-feet of storage capacity.⁶⁹

IV. ARGUMENT

A. IDAHO POWER'S MOTION RAISES AN ISSUE OF CONTRACT RIGHTS THAT IS PERIPHERAL TO DETERMINING THE ELEMENTS OF WATER RIGHT 01-02064.

Idaho Power's "Motion for Summary Judgment or in the Alternative Motion for Declaratory Judgment of Contract Rights" (Oct. 5, 2010) ("Idaho Power's Motion") is based on the 1923 Contract and seeks a judgment that Idaho Power's rights under the 1923 Contract, and especially the company's "primary" and "secondary" storage rights, are valid and enforceable and must be recognized by the State, the United States, and all other parties to this subcase. Idaho Power's Motion at 1-2.⁷⁰

⁶⁸ *State's Opening Brief* at 6-29.

⁶⁹ *Id.*

⁷⁰ *see also* Brief In Support Of Motion for Summary Judgment or in the Alternative Motion for Declaratory Judgment of Contract Rights (Oct. 5, 2010) ("*IPC Brief*"), at 1-2.

The motion should be denied as a matter of law because it seeks rulings on contractual matters that are peripheral to determining the elements of water right 01-02064. The question of what rights Idaho Power has under the 1923 Contract need not be addressed or determined for purposes of decreeing water right 01-02064. This Special Master's holding in a similar matter earlier this year is instructive. In the Minidoka and Palisades power rights subcases, Idaho Power and the Surface Water Coalition challenged subordination remarks proposed jointly by the State and the United States on grounds that the remarks allegedly were inconsistent with the Palisades contracts. As this Special Master held in rejecting these arguments, water rights are different from contract rights:

Water right decrees and contracts serve different purposes: A water right decree describes the nature and extent of the owner's right to the use of water from a particular system, whereas a contract memorializes an agreed-upon exchange of promises and consideration between two or more parties. . . . By their very nature, the Palisades Contracts may be amended from time to time as conditions change, all without court intervention.

. . . . While the State's and the United States' proposed remarks deleted reference to "contractual power loss provisions," the change recognized by such a provision is a contract right, not an element of a water right. Any claim of non-compliance under the Contracts is a matter for the Court of Federal Claims.⁷¹

Idaho Power's Motion should be denied for the same reasons. Idaho Power's Motion seeks a declaration pursuant to paragraphs 18 and 21 of the 1923 Contract that the company has a "secondary" right to 255,000 acre-feet of storage capacity in American Falls Reservoir.⁷² Even assuming, *arguendo*, that Idaho Power still has such a

⁷¹ Order Granting Motions For Summary Judgment and Special Master Report And Partial Recommendation, *In re SRBA Case No. 39576, Subcases: Minidoka Power Rights 01-217, 01-218, 01-4024, 01-4025; Palisades Power Rights 01-2068, 01-4054 (USDI/BOR)*, at 12 (Mar. 25, 2010) (internal quotation marks and citation omitted).

⁷² See Idaho Power's Motion at 1-2 (citing paragraphs 18 and 21 of the 1923 Contract).

“secondary” storage right, which it does not,⁷³ such a right “is a contract right, not an element of a water right.”⁷⁴ Like any contract right, the “secondary” storage right would be subject to change or amendment without court intervention, and any claim by Idaho Power that the USBOR has breached the 1923 Contract “is a matter for the Court of Federal Claims” rather than the SRBA.⁷⁵ Further, Idaho Power’s contention that entry of a declaratory judgment of the company’s contract rights is appropriate pursuant to the Idaho Declaratory Judgment Act and I.R.C.P. 57,⁷⁶ should be rejected because it seeks to impermissibly enlarge “the unique jurisdiction given [the SRBA] by the legislature.” *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993).⁷⁷

Moreover, in yet another similarity to the Minidoka and Palisades power rights subcases, Idaho Power in this subcase seeks to use an alleged contract right to force the USBOR to increase the amount of storage water dedicated to the company’s private commercial hydropower uses, which would inevitably be adverse to irrigation storage. In

⁷³ As discussed in subsequent sections of this brief, Idaho Power voluntarily relinquished the “secondary” storage right in seeking authorization for its proposal in the 1970s to reconstruct American Falls Dam, and further is barred by law from asserting a claim to a right for more than 45,000 acre-feet of storage capacity in the reservoir.

⁷⁴ Order Granting Motions For Summary Judgment and Special Master Report And Partial Recommendation, *In re SRBA Case No. 39576, Subcases: Minidoka Power Rights 01-217, 01-218, 01-4024, 01-4025; Palisades Power Rights 01-2068, 01-4054 (USDIBOR)*, at 12 (Mar. 25, 2010).

⁷⁵ *Id.* It should be noted that the 1971 memorandum decision of former IDWR Director R. Keith Higginson is consistent with the conclusion that Idaho Power’s Motion is an attempt to enforce contract rights. In that decision, Mr. Higginson based his determination that the company’s water right permits should be cancelled on the 1923 Contract. Memorandum Decision at 2, *In the Matter of Permit Nos. 01-2041 and 01-2065 in the name of Idaho Power Company* (IDWR, Apr. 21, 1971) (Exhibit BB to Jarvis Aff.). While Mr. Higginson also stated that Idaho Power’s water rights had been “merged” into the USBOR’s rights and were “held in trust” by the USBOR, *id.*, Mr. Higginson did not have the benefit of the USBOR’s views on this subject because the USBOR was not a party to the proceeding, and, in any event, he lacked authority to impose a trust on the USBOR. *See also* Memorandum In Support Of The United States’ Motion For Partial Summary Judgment at 14 & n.16, 33-36.

⁷⁶ *IPC Brief* at 47.

⁷⁷ The SRBA is a general stream adjudication proceeding initiated pursuant to chapter 14 of Title 42 of the Idaho Code, for the purpose of making “a comprehensive determination of the nature, extent and priority” of rights to the use of the waters of the Snake River basin. Idaho Code § 42-1406A (uncodified). Thus, the SRBA is not a court of general jurisdiction but rather “is, in effect, a separate division of the [District Court of the Fifth Judicial District],” and thus exercises only “the unique jurisdiction given it by the legislature.” *Walker*, 124 Idaho at 81, 856 P.2d at 871.

effect, Idaho Power is trying to create an operational limitation on the USBOR's right to store water for irrigation purposes, even though it is undisputed that the USBOR owns that water right and therefore under Idaho law has the authority to determine the extent to which hydropower will be subordinated to irrigation under water right 01-02064.⁷⁸ Idaho Power has no authority under Idaho law to dictate the extent to which hydropower must be subordinated to irrigation under the USBOR's water right.

Further, under federal law, commercial hydropower use of a federal reclamation reservoir is permitted only when it does not "impair the efficiency of the irrigation project." *Burley Irr. Dist.*, 116 F.2d at 531 (citation omitted).⁷⁹ The USBOR, as the operator of the federal reclamation system in the upper Snake River basin, has authority to determine whether Idaho Power's asserted contract rights would "impair the efficiency of the irrigation project." If Idaho Power believes the USBOR's determination on this question violates the company's rights under the 1923 Contract, its remedy is to pursue its claim in the Court of Federal Claims.

The fact that Idaho Power is only attempting to enforce alleged contract rights that are at best peripheral to the question of determining the nature and extent of water right 01-02064 is sufficient grounds for this Court to deny Idaho Power's Motion, and the Court need go no further. Even if this were not the case, Idaho Power's Motion must be

⁷⁸ In *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983), the Idaho Supreme Court held that Idaho law allows a water right holder to determine the extent to which to voluntarily subordinate hydropower to other uses: "We find nothing in the law of this state which precludes a person from voluntarily obtaining less than the full panoply of rights associated with the ownership of real property. . . . a voluntary subordination agreement is not in violation of Idaho's water law." *Id.* at 587, 661 P.2d at 753.

⁷⁹ See also Order Granting Motions For Summary Judgment and Special Master Report And Partial Recommendation, *In re SRBA Case No. 39576, Subcases: Minidoka Power Rights 01-217, 01-218, 01-4024, 01-4025; Palisades Power Rights 01-2068, 01-4054 (USD/BOR)*, at 12 (Mar. 25, 2010) ("Reclamation law, the Palisades Contracts, case law and historical administration of the BOR's hydropower water rights all dictate that power generation at the Minidoka and Palisades facilities is incidental to irrigation project purposes.").

denied because the company's storage rights in American Falls Reservoir are limited to 45,000 acre-feet, as discussed in the remainder of this brief.

B. POWER STORAGE AT AMERICAN FALLS IS LIMITED BY LAW TO 2.65% OF RESERVOIR CAPACITY (~45,000 ACRE-FEET).

As discussed in detail in the *State's Opening Brief*, Idaho Power's storage rights in American Falls Reservoir are limited to 2.65% of the reservoir's capacity (~45,000 acre-feet) as a matter of law because:

- Under the Revenue Adjustment Act of 1975, Congress statutorily limited Idaho Power's storage rights in American Falls Reservoir;
- This Court determined in the confirmation proceedings for the reconstruction of American Falls Dam that Idaho Power's storage rights are limited to 2.65% of the reservoir's capacity;
- Idaho Power is barred by judicial estoppel from asserting that it holds storage rights at American Falls for any more than 2.65% of reservoir capacity; and
- By supporting and aiding in the procurement of public law 93-206, the Revenue Adjustment Act of 1975 and the 1976 contracts based upon the representations that Idaho Power had a right to only 2.65% of storage (~45,000 acre-feet), Idaho Power is estopped from now asserting that it holds rights to more than six times that amount (~300,000 acre-feet).

It follows that Idaho Power's Motion, which seeks recognition of rights to an additional 255,000 acre-feet of storage space in American Falls Reservoir, must be denied as contrary to state and federal law. The supporting discussion of the above-listed points on pages 30-44 of the *State's Opening Brief* is incorporated herein by this reference, and summarized below.

i. UNDER THE REVENUE ADJUSTMENT ACT OF 1975, CONGRESS STATUTORILY LIMITED STORAGE RIGHTS IN AMERICAN FALLS RESERVOIR.

Idaho Power's proposal for reconstruction of American Falls Dam called for the

project to be financed by bonds issued by the American Falls Reservoir District ("AFRD") and underwritten by Idaho Power: the company would pay AFRD \$19 million plus tax-exempt interest over a 40-year period.⁸⁰ A key assumption of this plan was that the bonds would qualify under an Internal Revenue Code provision granting tax-exempt status to industrial development bonds used to develop "facilities for the furnishing of water, if available on reasonable demand to members of the general public."⁸¹

This assumption was thrown into doubt when the IRS declined AFRD's request to issue a ruling confirming the tax-exempt status of the bonds⁸² because Idaho Power's plans for commercial power generation at the dam raised questions as to whether the exemption applied.⁸³ AFRD attempted to convince the IRS otherwise by submitting to the agency a brief stating, among other things, that Idaho Power's storage right was limited to 45,000 acre-feet:

The Company will have no control over the release of water other than in its capacity as a Placeholder which is exceedingly nominal. . . . Pursuant to Public Law 93-206, a falling water contract has been drafted which specifically states that the Company has no right to call upon the Bureau of Reclamation or the spaceholders for the release of water from the American Falls Reservoir (except for the 45,000 acre feet which the Company owns as a spaceholder of the 1,700,000 acre feet capacity).⁸⁴

The IRS remained unswayed.

Congress responded by amending the Internal Revenue Code to provide tax-exempt status to "irrigation dams" that "ha[ve] a subordinate use in connection with the

⁸⁰ *State's Opening Brief* at 7.

⁸¹ H.R. Rep. No. 94-531, at 2 (1975) (Exhibit 31 to First Stanish Aff.); *see also* 121 Cong. Rec. 21385 (1975) (Statement of Sen. Church) ("It was the expectation of those of us involved with the project and with the act that bonds issued by the reservoir district to finance construction would be tax exempt.") (Exhibit 29 to First Stanish Aff.).

⁸² *Id.*

⁸³ H.R. Rep. No. 94-531, at 2 (1975) (Exhibit 31 to First Stanish Aff.); *see also* 121 Cong. Rec. 31868 (1975) ("It is the interrelationships of the use of the dam for furnishing water for irrigation purposes and the use of the water for electric energy that raises questions with the interpretation of the tax-exempt status of the industrial development bonds.") (Exhibit 32 to First Stanish Aff.).

⁸⁴ Brief of AFRD to IRS at 4, 6 (Jan. 31, 1975) (Exhibit 25 to First Stanish Aff.).

generation of electric energy by water” Revenue Adjustment Act of 1975, Pub. L. 94-164, § 7, 89 Stat. 970, 976 (1975). Congress explicitly “underst[ood] that the American Falls project conform[ed] with this requirement.”⁸⁵ The amendment was enacted in the Revenue Adjustment Act of 1975, which reads, in part:

CERTAIN IRRIGATION DAMS.—A dam for the furnishing of water for irrigation purposes which has a subordinate use in connection with the generation of electric energy by water shall be treated as meeting the requirements of [the Internal Revenue Code’s tax-exempt provisions] if— (1) substantially all of the stored water is contractually available for release from such dam for irrigation purposes; and (2) the water so released is available on reasonable demand to members of the general public.⁸⁶

While the plain language limited the exemption to dams where power generation was “subordinate” to irrigation and “substantially all of the stored water is contractually available for release from such dam for irrigation purposes,” the statute did not define these terms. Thus, their meaning and congressional intent were explored and established in the committee reports on the legislation.

The House Ways and Means report and the Senate Finance report for the Revenue Adjustment Act of 1975 concluded that the exemption was intended to apply only if “less than 10 percent of the normal supply of stored water” would be allocated to power use by Idaho Power: “The committee intends that subordinate use of water for generating electric energy means that less than 10 percent of the normal supply of stored water may contractually be scheduled for release by the power company and used for generating electric energy.”⁸⁷

⁸⁵ H.R. Rep. No. 94-531, at 4 (1975) (Exhibit 31 to First Stanish Aff.); S. Rep. No. 94-570, at 4 (1975) (Exhibit 33 to First Stanish Aff.).

⁸⁶ Pub. L. 94-164, § 7, 89 Stat. 970, 976 (1975) (emphasis added).

⁸⁷ H.R. Rep. No. 94-531, at 4 (1975) (Exhibit 31 to First Stanish Aff.); S. Rep. No. 94-570, at 4 (1975) (Exhibit 33 to First Stanish Aff.).

The House and Senate reports, and other portions of the legislative record also clearly establish Congress's understanding that Idaho Power's storage right was limited to 45,000 acre-feet—2.65%—of the reservoir's storage capacity:

It was intended that in normal conditions, substantially all of the falling water would be made available to the Power Company only when water was released from the dam for irrigation purposes. There has been no intention to release water specifically for use by the Idaho Power Company to generate electricity, except for 45,000 acre-feet (2.65 percent of the storage capacity) whose release the power company can schedule for the purpose of generating electric energy. Thus, the use of water for electric energy would be subordinated to the use of the water for irrigation.⁸⁸

It is anticipated that normally, substantially all the falling water from the dam would be made available to the Idaho Power Co. only when the water was released from the dam for irrigation purposes. There has been no intention to release water specifically for the power company except to the extent of approximately 2.65 percent of the dam storage capacity. . . . Therefore, the use of water for electric generation purposes would clearly be subordinate to the use for irrigation.⁸⁹

In this case the Idaho Power Company has a limited spaceholder right (under 3 percent) ⁹⁰

There has been no intention to release water specifically for use by the Idaho Power Company to generate electricity, except for 45,000 acre-feet (2.65 percent of the storage capacity) whose release the power company can schedule for the purpose of generating electric energy.⁹¹

There has been no intention to release water specifically for use by the Idaho Power Company to generate electricity, except for 45,000 acre-feet (2.65 percent of the storage capacity) whose release the power company, in its capacity as a spaceholder in the irrigation district, can schedule for the purpose of generating electric energy.⁹²

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

⁸⁸ H.R. Rep. No. 94-531, at 3 (1975) (Exhibit 31 to First Stanish Aff.); *see also* S. Rep. No. 94-570, at 3 (1975) (using substantially the same language) (Exhibit 33 to First Stanish Aff.).

⁸⁹ 121 Cong. Rec. 31868 (1975) (floor statement of Representative Ketchum of California) (Exhibit 32 to First Stanish Aff.).

⁹⁰ H.R. Rep. No. 94-531, at 3 (1975) (Exhibit 31 to First Stanish Aff.).

⁹¹ *Id.*

⁹² S. Rep. No. 94-570, at 3 (1975) (Exhibit 33 to First Stanish Aff.).

storage capacity.⁹³

Idaho Power's argument that this Court should ignore the 10% limitation as an "oblique" and meaningless reference is contrary to law. Congressional intent must be given effect, and when crucial statutory limitations are undefined, it is appropriate to consult the legislative history—especially the committee reports—to determine the congressional intent. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (stating that in surveying legislative authority, the "authoritative source" for finding Congress's intent lies in the committee reports on the bill, "which 'represen[t] the considered and collective understanding of those Congressman involved in drafting and studying proposed legislation.'") (citations omitted).

As discussed above, the committee reports and the legislative history leave no doubt that Congress intended the tax exemption to apply only if hydropower storage was less than 10% of reservoir capacity, and specifically intended the tax exemption to apply to the American Falls reconstruction because Idaho Power held only 2.65% of the reservoir's storage capacity.

Idaho Power did not object to these determinations or assert any right to an additional 255,000 acre-feet of storage capacity during the proceedings on the bond legislation, for the obvious reason that doing so would have meant that Idaho Power claimed more than 17% of the reservoir's 1.7 million acre-foot storage capacity—far above the tax exemption limit of 10% of storage capacity. In other words, any claim by Idaho Power to rights to an additional 255,000 acre-feet of storage capacity—and possibly any claim to anything more than 45,000 acre-feet of storage capacity—would have precluded the company's reconstruction proposal from qualifying for the tax

⁹³ 121 Cong. Rec. 31868 (1975) (Exhibit 32 to First Stanish Aff.).

exemption. Further, any such claim would have incurred the wrath of the water users, whose support was essential to the bond legislation and the reconstruction project. Thus, the company stood to gain much more than it lost by abandoning its claim to the 255,000 acre-feet. These points certainly were not lost on Idaho Power, and the company's failure to assert any claim to rights to an additional 255,000 acre-feet of storage capacity during the proceedings on the bond legislation clearly was calculated to secure passage of the legislation and obtain a congressional determination that the reconstruction project qualified for the tax exemption.

Further, and contrary to Idaho Power's assertions, the committee reports and the legislative record do not limit or qualify Idaho Power's interest to only "active" storage capacity. The term "active storage capacity" occurs, rather, in the 1976 contracts and in documents filed in the state and federal litigation on the reconstruction project. Further, Idaho Power's argument that "'active' storage capacity is clearly not intended to be the same as 'secondary' storage capacity"⁹⁴ must be rejected. This flawed argument is based on an attempt to erase the distinction between the "active storage capacity"—which by definition encompasses all of the storage capacity available to spaceholders—as opposed to the "primary" or "secondary" legal rights to the use of such capacity. This fundamental distinction and the nonsensical implications of Idaho Power's attempt to blur it are discussed in a subsequent section of this brief.

Accordingly, the Revenue Adjustment Act of 1975 bars as a matter of law Idaho Power's claim to an additional 255,000 acre-feet of storage capacity in the American Falls Reservoir, and requires that Idaho Power's motion for summary judgment be dismissed.

⁹⁴ *IPC Brief* at 27.

ii. **THIS COURT DETERMINED IN THE CONFIRMATION PROCEEDINGS FOR THE RECONSTRUCTION OF AMERICAN FALLS DAM THAT IDAHO POWER'S STORAGE RIGHTS ARE LIMITED TO 2.65% OF THE RESERVOIR'S CAPACITY.**

Idaho Power is barred by the doctrine of collateral estoppel from claiming rights to any more than 2.65% (~45,000 acre-feet) of the storage capacity of American Falls Reservoir because in the state court confirmation proceedings on the American Falls Dam replacement project, this Court determined that the company had rights to only 2.6471% of the reservoir's storage capacity.⁹⁵ The confirmation proceedings were required under the Idaho Code, which authorized spaceholder irrigation districts to reconstruct the American Falls Dam, enter into contracts for that purpose, and issue bonds to finance the project. Idaho Code § 43-2201(A) - (C). The statutes also provided that the irrigation districts obtained judicial review and confirmation of the project prior to issuing and selling the bonds. Idaho Code § 43-2204. The irrigation districts supporting the American Falls reconstruction program filed such a petition in the Fifth Judicial District Court in May 1976,⁹⁶ and after eight days of trial, this Court issued a memorandum decision confirming the actions and contracts related to the American Falls reconstruction program.⁹⁷

The company has admitted that the Fifth Judicial District Court's findings and determinations in the confirmation proceeding "are 'binding on the world at large,'" and therefore "the world . . . including . . . Idaho Power Company, is precluded from re-

⁹⁵ See *State's Opening Brief* at 36-39. The collateral estoppel discussion on pages 36-39 of the *State's Opening Brief* is incorporated herein by this reference.

⁹⁶ Amended Findings of Fact and Conclusions of Law, *In the Matter of the Petition of the Boards of Directors of the American Falls Reservoir District*, No. 28378 (Idaho 5th Dist. Ct. May 18, 1977) (Exhibit 40 to First Stanish Aff.).

⁹⁷ Memorandum Decision, *In the Matter of the Petition of the Boards of Directors of the American Falls Reservoir District*, No. 28378 (Idaho 5th Dist. Ct. Mar. 7, 1977) (Exhibit 39 to First Stanish Aff.).

litigating the issues addressed in the proceedings.”⁹⁸ The “issues addressed in the proceedings” by this Court included a determination that Idaho Power had rights to only 2.65% (~45,000 acre-feet) of the storage capacity in the American Falls Reservoir:

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

Name of Wateruser	Percentage of Total Active Storage Capacity
Idaho Power Company	2.6471% ⁹⁹

Thus, Idaho Power is precluded as matter of law from asserting a claim to rights to an additional 255,000 acre-feet in the SRBA.

Even if Idaho Power had not admitted that it is part of “the world at large” and thus bound by this Court’s findings and determinations in the confirmation proceeding,¹⁰⁰ under the Idaho Code the company is so bound because Idaho Power plainly was a “person interested in the contracts or proposed contracts” for the reconstruction project. Idaho Code § 43-2204.¹⁰¹

Idaho Power attempts to avoid this conclusion by arguing that this Court’s findings in the confirmation proceeding only defined the extent of Idaho Power’s “active” storage, and that “‘active’ storage capacity is clearly not intended to be the same as

⁹⁸ *IPC Brief* at 45 (citation omitted).

⁹⁹ Amended Findings of Fact and Conclusions of Law at 5, *In the Matter of the Petition of the Boards of Directors of the American Falls Reservoir District*, No. 28378 (Idaho 5th Dist. Ct. May 18, 1977).

¹⁰⁰ This case is not the first time that Idaho Power has conceded that this Court’s determinations in the confirmation proceeding are binding on “the world at large.” The company made the same admission in its briefing in a federal court case involving the reconstruction of American Falls Dam:

Under Idaho law a confirmation decree entered by a court of competent jurisdiction is conclusive not only upon all landowners within the District, whether or not they appear at the confirmation proceedings, but it also binds the world at large.

Reply Brief of the Non-Federal Defendants at 7, *Kerner v. United States*, No. 1-76-204 (D. Idaho Apr. 6, 1979) (Exhibit 43 to First Stanish Aff.).

¹⁰¹ See also *State’s Opening Brief* at 37-38, 40.

‘secondary’ storage capacity.”¹⁰² This argument is an attempt to muddle the issues by erasing the distinction between the tangible, physical “storage capacity” in the reservoir, as opposed to the intangible legal right to the use of such capacity. In other words, there is no such thing as primary or secondary “storage capacity”—rather, the terms “primary” and “secondary” refer to the legal rights to the use of storage capacity as defined in the 1923 Contract.

This is confirmed by the plain language of the contract, which defines Idaho Power’s primary “right to such storage capacity,” which is “to be on an equal basis . . . with other primary storage capacity rights.”¹⁰³ Similarly, the contract defines “a secondary right to use . . . storage capacity.”¹⁰⁴ While it is true that there are some references in the record to primary or secondary “storage capacity” rather than “rights,” this usage must be understood as a term of convenience rather than as a term of art or a term of legal significance, because the operative language of the 1923 Contract defines primary and secondary “rights,” not primary and secondary “storage capacity.” Idaho Power’s argument to the contrary is an attempt to inject ambiguity where none exists by attaching unjustified significance to terms of convenience that were commonly understood to refer to intangible legal “rights” rather than to tangible things.

This is not the first time the company has resorted to this type of argument in the SRBA. Idaho Power argued in the Swan Falls Agreement subcase that the occurrence of the term “trust water” in the record of the Swan Falls settlement proceedings and in a related statute meant that under the settlement what the State held in trust was “water” rather than “water rights,” or at a minimum created ambiguity on the point, despite clear

¹⁰² *IPC Brief* at 27.

¹⁰³ 1923 Contract at 18 (emphasis added).

¹⁰⁴ 1923 Contract at 19 (emphasis added).

statutory and contractual language unambiguously providing that the State holds in trust certain hydropower water rights formerly claimed by the company. Judge Melanson rejected Idaho Power's argument, commenting that it "does not make sense."¹⁰⁵ The company's similar argument in this subcase is similarly nonsensical and should be rejected.

This conclusion finds further support in Idaho Power's illogical application of the term "active" storage capacity. Idaho Power acknowledges that throughout the reconstruction contracts, legislation, and court orders the company was expressly allocated only ~45,000 acre-feet of "active" storage at American Falls. Yet, Idaho Power argues that the use of the term "active" was actually an implied recognition of the company's asserted "secondary" storage right. The company's argument is nonsensical. By definition, "active" storage includes all storage space available for spaceholder use. IDAPA 37.03.06.010.01 & .12.¹⁰⁶ Accordingly, all of Idaho Power's rights to storage space, whether "primary" or "secondary," by definition could only apply to "active"

¹⁰⁵ In addressing Idaho Power's arguments, Judge Melanson held, in part, as follows:

It is also unambiguous that the *res* of the trust consists of 'water rights' as opposed to 'water. . . .

....

The argument that the trust contains a 'block of water' instead of a water right does not make sense. . . .

....

.... new appropriators were [receiving] a portion of the water freed up and encumbered as a result of the trust arrangement. This is where the reference to "trust water" comes from and support for the argument that the *res* of the trust is water, not water rights. Nonetheless, the Court does not find the use of the term "trust water" to create an ambiguity regarding the *res* of the trust.

Order On Cross Motions For Summary Judgment, *In re SRBA Case No. 39576, Consolidated Subcase 00-92023 (92-23)* at 31, 40, 41 (Apr. 18, 2008).

¹⁰⁶ "Active Storage. The water volume in the reservoir stored for irrigation, water supply, power generation, flood control, or other purposes but does not include flood surcharge. Active storage is the total reservoir capacity in acre-feet, less the inactive or dead storage." IDAPA 37.03.06.010.01. "Dead Storage. The water volume in the reservoir stored below the lowest outlet and generally is not withdrawn from storage." IDAPA 37.03.06.010.12.

storage capacity. Further, Idaho Power's argument to the contrary amounts to a claim that its "secondary" storage right applied to "dead" or "inactive" storage space that by definition is not available to Idaho Power or any other spaceholder. The only logical interpretation of the Fifth Judicial District Court's final order in the confirmation proceedings is that the Court, as well as the parties and privies thereto, intended the term "active" storage to include a determination of any and all uses of storage at American Falls.

Moreover, there is nothing in the reconstruction contracts, legislation, or court documents to indicate that the parties, Congress, or the courts intended to change the commonly understood meaning of the term "active" storage. To the contrary, the absence of any reference to Idaho Power's additional "secondary" storage right in the reconstruction contracts, legislation, or court documents is an indictment against the recognition of that right, not an argument for it.¹⁰⁷ In sum, the only storage space to which the "secondary" right could possibly have applied is "active" storage space, because "active" storage capacity is the only reservoir space available for use by Idaho Power or any other spaceholder.

iii. IDAHO POWER IS BARRED BY JUDICIAL ESTOPPEL FROM ASSERTING THAT IT HOLDS STORAGE RIGHTS AT AMERICAN FALLS FOR ANY MORE THAN 2.65% OF RESERVOIR CAPACITY.

Idaho Power also should be judicially estopped from arguing that it has rights to more than ~45,000 acre-feet of storage capacity at American Falls Reservoir because it

¹⁰⁷ The company interpreted the omission of a specific reservation of the "secondary" storage right in the Twin Falls License stipulation as meaning it had "relinquish[ed]" any claim that the "secondary" storage right applied to the Twin Falls plant. Letter from D.F. McGee, Electric Bond and Share Co., to M.L. Hibbard, Vice Pres. & Gen. Mgr., Idaho Power Co. (Sept. 30, 1931) (Exhibit 56 to Orr Aff.).

admitted in the federal lawsuit pertaining to the American Falls reconstruction¹⁰⁸ that it held rights to only 45,000 acre-feet. In its discovery responses, Idaho Power admitted under oath that the findings of fact and conclusions of law entered in the state court confirmation proceedings—specifically including the determination that the company held rights to only 2.647% of storage capacity in American Falls Reservoir—set forth an “accurate and complete statement as to the respective percentage of total active storage capacity” in the reservoir:¹⁰⁹

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

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

ANSWER AND OBJECTIONS TO REQUEST FOR ADMISSION NO. 87: The defendant Idaho Power . . . admits the percentage of space and the active storage capacity of the American Falls Reservoir as set forth in this Request for Admission with the exception that the percentage of total storage capacity for the Burgess Canal & Irrigating Company should read “.5586%” rather than “.5568%”. The defendant Idaho Power further states that a more accurate and complete statement as to the respective percentage of total active storage capacity in the American Falls Reservoir is contained in Section VI of Findings and Facts and Conclusions of Law entered on May 18, 1977, by State Court in the Confirmation Action [i.e., Amended Findings of Fact and Conclusions of Law].¹¹⁰

¹⁰⁸ Following the filing of the petition in the state court confirmation proceedings, a lawsuit was filed in the federal district court for the District of Idaho against the United States, AFRD, Idaho Power, and others, on behalf of certain persons and entities objecting to the American Falls Dam replacement program. The lawsuit was entitled *Kerner v. United States*, No. 1-76-204 (D. Idaho July 25, 1978). *State's Opening Brief* at 39-40.

¹⁰⁹ Answers and Objections of Idaho Power Company to Plaintiff's First Request for Admissions at 56, *Kerner v. United States* (Jul. 25, 1978) (emphasis added) (Exhibit 42 to First Stanish Aff.).

¹¹⁰ *Id.*; see also *id.* at 4 (“Any and all Findings of Fact and Conclusions of Law made by that State Court are

Where Idaho Power has admitted under oath in another lawsuit dealing with the American Falls reconstruction program that it has rights to only 2.65% of storage capacity at American Falls (~45,000 acre-feet), this Court should judicially estop Idaho Power from now claiming a right to more than six times that amount here in the SRBA (~300,000 acre-feet). *See Heinze v. Bauer*, 145 Idaho 232, 235, 178 P.3d 597, 600 (2008) (stating that under the doctrine of judicial estoppel, “a litigant who obtains a judgment, advantage, or consideration from one party through means of sworn statements is judicially estopped from adopting inconsistent and contrary allegations or testimony, to obtain a recovery or a right against another party, arising out of the same transaction or subject matter.”) (citation omitted). To allow otherwise would be contrary to the policy purposes of judicial estoppel. *See id.* (stating that the policies underlying judicial estoppel “are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. Judicial estoppel is intended to prevent a litigant from playing fast and loose with the courts.”) (citations omitted).

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

Idaho Power’s “unconventional”¹¹¹ proposal for rebuilding a federal reclamation dam with tax exempt bonds issued by an irrigation district and underwritten by a private

binding upon the plaintiffs and cannot be waived by the parties to this action.”). Contrary to Idaho Power’s arguments, the company’s admission of the extent of its “active” storage capacity necessarily included the storage capacity that was subject to the company’s “secondary” storage right. As previously discussed, Idaho Power’s contention that “‘active’ storage capacity is clearly not intended to be the same as ‘secondary’ storage capacity,” *IPC Brief* at 27, is incorrect and nonsensical.

¹¹¹ Memorandum from Dan Dreyfus, Staff Member of Committee on Interior and Insular Affairs, to Senator Church (Mar. 11, 1973) at 1 (Exhibit 15 to First Stanish Aff.).

hydropower company naturally attracted scrutiny in Congress—in large part because the proposal allowed Idaho Power to build its private power plant in the federal reclamation dam, thereby benefitting from a significantly increased power head, and also from a greatly increased supply of water for power production. Moreover, while the proposed authorizing legislation provided that replacement of the dam would not “alter or change the present proportionate storage rights of present spaceholders,”¹¹² it did not define the extent of Idaho Power’s rights or interests in the reservoir. Further, the project required that Congress create a new tax exemption that would hinge on the amount of reservoir space in a federal reclamation reservoir that would be allocated to power use by Idaho Power.

Thus, Congress sought to precisely establish what rights, interests and control Idaho Power claimed in and over the existing reservoir. Federal officials, Idaho Power and other interested parties repeatedly assured Congress that the company held rights to only 45,000 acre-feet of storage capacity:

Federal Power Commission: “As a spaceholder in the reservoir, the Company has primary storage in the amount of 45,000 acre-feet.”¹¹³

E.F. Sullivan, Assistant Commissioner, USBOR: “The Idaho Power Co., under a contract executed in 1923, has been utilizing 45,000 acre-feet of space for use in its powerplants located downstream from American Falls Dam.”¹¹⁴

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

¹¹² S. 1529, 93rd Cong. § 2 (1973) (Exhibit 17 to First Stanish Aff.).

¹¹³ S. Rep. No. 93-223, at 16 (1973) (Federal Power Commission Report on S. 1529 (1973)) (Exhibit 19 to First Stanish Aff.).

¹¹⁴ *Hearing before the House Subcommittee on Water and Power Resources on H.R. 6781, H.R. 6782, and S. 1529 to Authorize the Replacement of the American Falls Dam in Idaho*, 93rd Cong. 29 (1973) (Statement of E.F. Sullivan, Ass’t Comm’r, USBOR) (Exhibit 20 to First Stanish Aff.).

Dam.”¹¹⁵

Hearing Testimony of Robert A. Hogg, Idaho Power Company: “The storage, of course, the water going through American Falls Dam, of course, is first used for irrigation service. We have a right to utilize only 45,000 acre-feet upon our demand.”¹¹⁶

Prepared Statement of Idaho Power Company to United States House of Representatives: “The Company’s interest as a spaceholder is very modest in contrast to the irrigator’s interest; however, the Company’s 45,000 acre-feet of storage capacity is important in meeting the Company’s power supply requirements during the irrigation season.”¹¹⁷

Prepared Statement of Idaho Power Company to United States Senate: “The Company’s interest as a spaceholder is very modest in contrast to the irrigator’s interest; however, the Company’s 45,000 acre-feet of storage capacity is important in meeting the Company’s power supply requirements in the irrigation season.”¹¹⁸

Similarly, the sponsor of the additional federal legislation needed for Idaho Power’s proposal to benefit from the tax exemption explained that the company’s interest in the reservoir was limited to 2.65% — or ~45,000 acre-feet of storage capacity:

It is anticipated that normally, substantially all the falling water from the dam would be made available to the Idaho Power Co. only when the water was released from the dam for irrigation purposes. There has been no intention to release water specifically for the power company except to the extent of approximately 2.65 percent of the dam storage capacity. . . . Therefore, the use of water for electric generation purposes would clearly be subordinate to the use for irrigation.¹¹⁹

This explanation was consistent with the committee reports and the other legislative history for the tax exemption legislation, all of which were expressly predicated on the assumption that Idaho Power had rights to only 45,000 acre-feet of space in American

¹¹⁵ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 54 (1973) (Statement of J. Horton, Ass’t Sec’y of Interior; accompanied by E. Sullivan, Regional Director, USBOR) (Exhibit 18 to First Stanish Aff.).

¹¹⁶ *Hearing before the House Subcommittee on Water and Power Resources on H.R. 6781, H.R. 6782, and S. 1529 to Authorize the Replacement of the American Falls Dam in Idaho*, 93rd Cong. 47 (1973) (Testimony of R. A. Hogg, Idaho Power Company) (Exhibit 20 to First Stanish Aff.).

¹¹⁷ *Id.* at 43 (Prepared Statement of Idaho Power Company).

¹¹⁸ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 107 (1973) (Prepared Statement of Idaho Power Company) (Exhibit 18 to First Stanish Aff.).

¹¹⁹ 121 Cong. Rec. 31868 (1975) (Exhibit 32 to First Stanish Aff.).

Falls Reservoir, as previously discussed.

The point, of course, was to definitively nail down what storage rights Idaho Power already had in the reservoir, and whether the company's proposal would somehow give it any additional control or change the reservoir's purposes. Any claim to a further right—"secondary" or otherwise—to an additional 255,000 acre-feet of storage capacity in the reservoir would have been of great interest to Congress, and potentially fatal to the legislation necessary to authorize the reconstruction and the new tax exemption. Even more important, given that Idaho Power had never previously claimed an additional 255,000 acre-feet when explaining its reconstruction proposal to the water users, asserting such a claim in the congressional hearings would have come as a rude shock to the water users, and almost certainly would have turned a group whose support was essential to the company's plans firmly and irrevocably against the private reconstruction program.

There can be no doubt that Idaho Power was keenly aware of all this and deliberately chose not to claim an additional 255,000 acre-feet of storage capacity during the congressional proceedings. This choice is not surprising, because waiving its claim to a "secondary" storage right that had long been the subject of dispute, and that the company had voluntarily limited and deferred for many years, was well worth the far greater benefits Idaho Power stood to gain: significantly increased power head; the use of all falling water at the dam; and a final end to the threat of a federal power plant at American Falls.

The same reasoning applies to the three 1976 contracts for the rebuilding of the reservoir, under which Idaho Power expressly agreed that its spaceholder rights in the

reservoir were limited to 2.65% (~45,000 acre-feet) of the reservoir's storage capacity.¹²⁰

In each of the three main 1976 American Falls contracts, Idaho Power "represented and warranted" that it only owned 2.65% of the storage capacity in the American Falls Reservoir:

[T]he amount of active storage capacity presently owned by the Idaho Power Company under its Spaceholder Contract (2.6471 percent) ¹²¹

The Idaho Power Company represents and warrants as follows: . . . the amount of active storage capacity presently owned by the Idaho Power Company under its Spaceholder Contract (2.6471%) ¹²²

STORAGE CAPACITY TO BE MADE AVAILABLE TO SPACEHOLDER . . . The United States will continue to make available to the Spaceholder stored water accruing to 2.6471% of the active capacity of the Replacement Dam unless the Spaceholder is in default under terms and conditions of the Existing Spaceholder Contract or this Spaceholder Contract.¹²³

By expressly acknowledging in the 1976 contracts that its rights to storage capacity in American Falls Reservoir were limited to 2.65% or 45,000 acre-feet, Idaho Power necessarily and intentionally relinquished any claim it may have had to any additional storage space—including the long disputed "secondary" right to 255,000 acre-feet of space. Idaho Power's contention that it retained its claim to a "secondary" right because the "secondary" right was not meant to apply to "active" storage space is not only factually incorrect but also is nonsensical, for reasons previously discussed.¹²⁴

The federal legislation and contracts authorizing Idaho Power's private

¹²⁰ The 1976 contracts were: the "Government Contract," the "Spaceholder Contract," and the "Falling Water Contract." These contracts are discussed on pages 25-29, 42-45 and 51 and of the *State's Opening Brief*, which are incorporated herein by this reference.

¹²¹ 1976 Government Contract at 13, art. 17(e) (Mar. 31, 1976); *see also* Exhibit A to 1976 Government Contract (listing Idaho Power as holding ~45,000 acre-feet or 2.6471% of active capacity) (Exhibit 35 to First Stanish Aff.).

¹²² 1976 Falling Water Contract at 12-13, art. II § 2.3 (Mar. 31, 1976) (Exhibit 36 to First Stanish Aff.).

¹²³ 1976 Spaceholder Contract at 10, art. 21 (Mar. 31, 1976) (Exhibit 37 to First Stanish Aff.).

¹²⁴ *See supra* pages 31-34.

reconstruction proposal were based on the assumption that Idaho Power's storage right in American Falls Reservoir was strictly limited to 45,000 acre-feet—an assumption supported by multiple representations by Idaho Power and other interested parties, including the irrigation water users, whose support was critical to Idaho Power's plans. Idaho Power's argument that there is no document affirmatively stating that the company waived or relinquished its "secondary" storage right is beside the point. It was incumbent on Idaho Power to assert any such claim when Congress inquired as to the nature and extent of the company's claimed interests in the reservoir. By consciously and deliberately failing to assert any such claim when it mattered most, Idaho Power relinquished it in order to assure passage of the federal legislation authorizing Idaho Power's private reconstruction program.

It would be entirely inconsistent with the congressional intent of the federal legislation and the 1976 contracts to recognize Idaho Power's claim to a "secondary" right to 255,000 acre-feet of storage capacity in American Falls Reservoir. It also would be unconscionable to allow the company to reclaim the "secondary" storage right after more than thirty years during which the State, the USBOR and the other spaceholders in the reservoir have reasonably and detrimentally relied upon Idaho Power's numerous declarations that it held rights to only 45,000 acre-feet. *See, e.g., City of Sandpoint v. Sandpoint Independent Highway Dist.*, 126 Idaho 145, 151, 879 P.2d 1078, 1084 (1994) (discussing detrimental reliance). Accordingly, Idaho Power's summary judgment motion should be dismissed as a matter of law.

C. IDAHO POWER’S ARGUMENTS ARE CONTRARY TO LAW AND THE UNDISPUTED FACTS.

i. IDAHO POWER’S CONTENTION THAT IT WAS ALWAYS ASSUMED THE COMPANY HAD RESERVED ITS “SECONDARY” STORAGE RIGHT IS IMPLAUSIBLE AND CONTRARY TO THE UNDISPUTED RECORD.

Idaho Power argues that it retained its claim to a “secondary” storage right under the 1923 Contract throughout the rebuilding process—a long and arduous undertaking that included meetings with other spaceholders, congressional hearings, state and federal litigation, federal licensing proceedings, and contract negotiations—even though the legislation and the contracts never mentioned or referred to any such claim. Apparently it is the company’s position that everyone simply understood that Idaho Power did not intend to relinquish its claim to an additional 255,000 acre-feet—almost six times the space that the company did expressly claim—even though such a claim was never discussed or mentioned at any point in the contracts, congressional legislation, or court decisions. Such a position is untenable on its face and should not be credited.

The undisputed historic record also demonstrates the improbability of Idaho Power’s assertion that there was no need for the company to specifically reserve its claim to an additional 255,000 acre-feet. Idaho Power was very careful to reserve its claim to the 255,000 acre-feet in the 1935 Contract, which provided that it did not constitute a release, surrender or abandonment of the “secondary” right,¹²⁵ and further required the USBOR to release water under the “secondary” storage right once every five years “[f]or the sole purpose of preserving to the Company the right it might otherwise have”¹²⁶ Further, the 1935 Contract, like the 1976 contracts, allowed Idaho Power to use

¹²⁵ 1935 Contract at 11.

¹²⁶ 1935 Contract at 4-5.

essentially all of the water released from the dam and prevented construction of the planned federal power plant. In other words, when in the 1930s Idaho Power proposed a contract pertaining to its storage rights that resulted in considerable benefits to the company, the company recognized that it was important to specifically reserve its “secondary” storage right in the contract and was careful to do so—but conspicuously did not when the same issues and concerns were present in a far larger and more significant undertaking in the 1970s.¹²⁷

Idaho Power’s argument that there was no need to specifically reserve its “secondary” storage right in connection with the American Falls Dam reconstruction is implausible and contrary to the company’s past practice.¹²⁸

¹²⁷ Idaho Power’s contention that the absence of an express reference to the “secondary” storage right in the 1976 contracts constituted a reservation is also contrary to the company’s view of the Twin Falls subordination stipulation. The company interpreted the omission of a specific reservation of the “secondary” storage right in the Twin Falls stipulation as meaning the company had “relinquish[ed]” any claim that the “secondary” storage right applied to the Twin Falls plant. Letter from D.F. McGee, Electric Bond and Share Co., to M.L. Hibbard, Vice Pres. & Gen. Mgr., Idaho Power Co. (Sept. 30, 1931) (Exhibit 56 to Orr Aff.).

¹²⁸ Idaho Power certainly did not act as if it had a “secondary” storage right following the reconstruction of the dam. In fact, Idaho Power admits that it considered only its ~45,000 acre-foot “primary” right in administering its water rights at American Falls:

Q. You explained a little bit before about how you go about requesting that primary storage [i.e., ~45,000 afa]. In requesting that water, do you have any contact with Water District No. 1 or the Department of Water Resources?

A. We do. . . . [W]e ask IDWR to start accounting for that target flow from our 45,000 acre-feet of primary storage.

Q. Have you ever contacted Water District No. 1 or IDWR concerning your rights under the 255,000 acre-feet of secondary storage?

A. No.

....

Q. And is there an account set up for this 255,000 acre-feet in the water district accounting methods?

A. Not that I know of, because it hasn’t been accounted for since I started tracking it, because it hasn’t specifically been passed through for that purpose.

....

A. I don’t have a record to show that we called for that water.

Rule 30(b)(6) Deposition of Idaho Power Company: Testimony of Jon Bowling at 199–200, 204, 316, *In re SRBA Case No. 39576, Subcase no. 01-02064* (Idaho 5th Dist. Ct., May 3–4, 2010) (“May 2010 Bowling Dep.”) (Exhibit 47 to Second Affidavit of David I. Stanish (Oct. 5, 2010)); *see also* Expert Report of David

ii. IDAHO POWER’S UNDISCLOSED SUBJECTIVE INTENT TO RESERVE ITS CLAIM TO THE “SECONDARY” STORAGE RIGHT MUST BE DISREGARDED.

Even if it was Idaho Power’s intent to retain the “secondary” storage right, that subjective understanding appears nowhere in the 1976 contracts, the legislation or the confirmation proceedings, and therefore must be disregarded. *See J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006) (“A party’s subjective, undisclosed intent is immaterial to the interpretation of a contract.”). Judge Melanson came to the same conclusion when faced with a similar question in the Swan Falls subcase, wherein Idaho Power argued that it had never intended that the State would hold some of the company’s water rights in trust, despite “unambiguous” contractual and legislative language to the contrary:

If Idaho Power’s intent was that its water rights or at least portions of its rights would not be held in trust, then that intent must have been subjective. Alternatively, perhaps Idaho Power lacked an appreciation for the plain meaning of the language which it not only agreed to, but helped to draft.¹²⁹

The same reasoning applies in this subcase. Idaho Power’s undisclosed subjective intent to retain its “secondary” right cannot control over the plain meaning of statutory and contractual language to the contrary, especially when Idaho Power agreed to and helped draft that language.

B. Shaw, P.E., *Idaho Power Co. v. United States*, No. 07-730C (Fed. Cl., Nov. 2009) (showing that Idaho Power has consistently failed to receive—and failed to defend—the 255,000 acre-feet it now claims) (Exhibit 58 to the Orr Aff.).

¹²⁹ Order On Cross-Motions For Summary Judgment, *In re SRBA Case No. 39576, Consolidated Subcase 00-92023 (92-23)*, at 38 (Apr. 18, 2008). Judge Melanson had held that the Swan Falls Agreement and its implementing legislation “unambiguously” provided that the State was to hold in trust certain water rights formerly claimed by Idaho Power. *Id.* at 31.

iii. THE SAVINGS PROVISIONS OF THE 1976 CONTRACTS DID NOT PRESERVE IDAHO POWER'S CLAIM TO THE "SECONDARY" STORAGE RIGHT.

Still, Idaho Power argues that it retained the 1923 Contract's "secondary" right because of general savings provisions in federal legislation and the 1976 contracts that preserved existing spaceholder rights.¹³⁰ This argument is flawed because such general provisions do not control over the specific statutory and contractual provisions, judicial determinations, and admissions by Idaho Power that its storage capacity rights were limited to 45,000 acre-feet (2.65% of reservoir capacity). *See Wheeler v. Idaho Dept. of Health & Welfare*, 147 Idaho 257, 264, 207 P.3d 988, 995 (2009) ("It is a basic tenet of statutory construction that the more specific statute or section addressing the issue controls over the statute that is more general."); *Twin Lakes Village Property Ass'n, Inc. v. Crowley*, 124 Idaho 132, 138, 857 P.2d 611, 617 (1993) ("It is well established that specific provisions in a contract control over general provisions where both relate to the same thing.").

Moreover, Idaho Power fails to mention that Idaho Power's 1976 Spaceholder Contract expressly recognized that it modified the company's storage rights under the 1923 Contract and provided that the 1976 contract would prevail in the event of a conflict:

Nothing herein shall in any way alter or change the present proportionate storage rights of the Spaceholder . . . except as modified by this [1976] Spaceholder Contract as authorized in the Act of December 28, 1973, and in the Government Contract. The provisions of this [1976] Spaceholder Contract with respect to the Replacement Dam, including but not limited to the operation and maintenance thereof and the distribution of water therefrom, shall prevail over the provisions of the [1923] Existing Spaceholder Contract wherever and to whatever extent the provisions Existing Spaceholder Contract are in conflict with the provisions of the

¹³⁰ *IPC Brief* at 26-27.

Spaceholder Contract.¹³¹

Accordingly, the provisions of the 1976 contracts designating the amount of storage available to the company control with respect to the company's storage rights, including its asserted "secondary" storage right:

STORAGE CAPACITY TO BE MADE AVAILABLE TO SPACEHOLDER

(b) The United States will continue to make available to the Spaceholder stored water accruing to 2.6471% of the active storage capacity of the Replacement Dam ¹³²

iv. THE OPERATIONS & MAINTENANCE PROVISIONS OF THE 1976 CONTRACTS DO NOT DEFINE IDAHO POWER'S STORAGE WATER RIGHTS, AND ARE EQUITABLE IN LIGHT OF THE CONSIDERABLE BENEFITS ACCRUING TO IDAHO POWER UNDER THE RECONSTRUCTION PROGRAM.

Idaho Power also argues that it must have retained the "secondary" right to 255,000 acre-feet of space because under the 1976 Contracts the company pays operation and maintenance ("O & M") charges for more than 45,000 acre-feet of capacity.¹³³ Aside from the fact that as a matter of law the O & M provisions do not control over the specific contractual provisions limiting Idaho Power's storage space to 45,000 acre-feet, the O & M provision is not "inequitable" or even questionable, because of the significant benefits that accrued to Idaho Power under the contracts and the reconstruction program.

As previously discussed, the reconstruction program allowed Idaho Power to integrate its power plant into the new dam, and thereby significantly increase the power head (vertical drop) available to the company for power generation purposes. In addition, the company also obtained the right to use essentially all of the water leaving the dam, significantly increasing the water supply for power production. Moreover, the

¹³¹ 1976 Spaceholder Contract at 6-7 (Exhibit 37 to First Stanish Aff.).

¹³² *Id.* at 10, part II, art. 21.

¹³³ *IPC Brief* at 28.

company's proposal finally ended any chance for a competing federal power plant to be built at American Falls, something that had long been contemplated and that Idaho Power had long opposed. In sum, the rebuilding project was a huge victory for Idaho Power and greatly benefitted the company.

These points were not lost on the USBOR or the other water users, who in light of all the benefits accruing to the company from the reconstruction would not have been receptive to a request by Idaho Power that its O & M charges be lowered—which would also have meant an increase in the O & M charges for all other water users. Far from being “inequitable” to Idaho Power,¹³⁴ it would have been inequitable for Idaho Power to ask the irrigators to shoulder a portion of the company's O & M charges when the company was already getting more than it had before the reconstruction. Indeed, given that the support of the water users was critical to Idaho Power's proposal, it certainly would have been ill-advised—and possibly fatal to the company's plans—to ask the water users to take on a portion of the company's O & M charges.

It is therefore not surprising that the 1976 Contracts also made no provision for any change in O & M charges. Finally, Idaho Power's argument regarding the O & M charges ultimately reduces to nothing more than a contractual dispute with the USBOR that has no bearing the elements of water right 01-02064. If the company believes that its O & M charges should be reduced, it is free to approach the USBOR or take appropriate legal action.

¹³⁴ *Id.*

v. THE MARTZ MEMO DOES NOT DEFINE OR RECOGNIZE IDAHO POWER'S STORAGE RIGHTS, AND AFTER THE MARTZ MEMO THE COMPANY CONTINUED TO ASSERT THAT ITS STORAGE RIGHTS WERE LIMITED TO 45,000 ACRE-FEET.

The Court should also reject Idaho Power's argument that the "Martz Memo" demonstrates that the company did not relinquish its "secondary" storage right through the 1976 contracts.¹³⁵ The Martz Memo is best understood not as a statement of Idaho Power's rights but rather as an attempt to determine the best course forward on issues as to which there may have been some lingering questions.

In addition, the Martz Memo suggests that the author may not have been fully informed on all of the questions he identified in relation to the "secondary" storage right. For instance, while the record demonstrates that the nature and extent of the "secondary" storage right had been a source of virtually constant tension and disagreement between the USBOR and Idaho Power for many years, the memo doubtfully asserts that "it is not likely there would be conflicts" regarding the provision of flows under the "secondary" right.¹³⁶ Further, while the memo states that "[g]enerally, these flows have been maintained over the years,"¹³⁷ it fails to recognize that the USBOR rather than Idaho Power had control of the "secondary" storage right for many of these years, pursuant to the 1935 Contract, and further that under the 1935 Contract the Shoshone Falls minimum flows had been reduced and the applicable time period shortened.

Moreover, the record shows that after the 1976 contracts—and after the Martz Memo—Idaho Power continued to represent that the company's storage rights were limited to 45,000 acre-feet. In order for Idaho Power to assume liability as the guarantor

¹³⁵ *IPC Brief* at 31-33.

¹³⁶ *IPC Brief* at 32.

¹³⁷ *Id.*

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

Pursuant to the Idaho Power Company Spaceholder Contract, Idaho Power Company is entitled to the use of stored water accruing to 2.6471% (approximately 45,000 acre-feet) of the active storage capacity of the Replacement Dam (approximately 1,700,000 acre-feet) for power generation.¹³⁸

Idaho Power offered a similar bond counsel opinion in a subsequent application to the IPUC as well:

Pursuant to the Idaho Power Company Spaceholder Contract, Idaho Power Company is entitled to the use of stored water accruing to 2.6471% (approximately 44,275 acre-feet) of the present active water storage capacity of the Replacement Dam (approximately 1,672,590 acre-feet) for power generation.¹³⁹

vi. IDAHO POWER'S CONTENTION THAT THE STATE HAS TAKEN CONTRARY POSITIONS IN THE SRBA ON THE "SECONDARY" RIGHT IGNORES THE LAW AND THE UNDISPUTED FACTS.

Idaho Power further argues that the State has taken contradictory positions on the "secondary" storage right because the Director's recommendation referenced the 1923 Contract and recommended 295,163 acre-feet of the reservoir for "power storage" and "power from storage."¹⁴⁰ This argument fails to recognize one of the most basic aspects

¹³⁸ Bond Counsel Opinion at 15 (Chapman and Cutler Dec. 1, 1980) (Exhibit 44 to First Stanish Aff.).

¹³⁹ Bond Counsel Opinion at 20 (Chapman and Cutler Feb. 21, 1990) (submitted by Idaho Power in IPC-E-89-15) (Exhibit 45 to First Stanish Aff.).

¹⁴⁰ *IPC Brief* at 33-34.

of the SRBA: the Director and IDWR are not parties to the adjudication and do not speak for the State when the State participates as a party to a subcase. *See* Idaho Code § 42-1401B; *id.* § 42-1401C(2). The Director's report does not amount to a position that the State of Idaho has taken the "secondary" storage right for purposes of this subcase. Further, Idaho Power's argument relies on an old objection by the State that has been superseded by an amended objection.¹⁴¹

vii. THIS COURT SHOULD REJECT IDAHO POWER'S ATTEMPT TO OBTAIN RECOGNITION OF A NATURAL FLOW "PASS-THROUGH" RIGHT UNDER STORAGE WATER RIGHT NO. 01-02064.

Idaho Power also incongruously argues that in reality the "secondary" storage right is not a storage right at all: rather, it is a "pass-through" right, that is, "water that could be stored but is passed through" the reservoir.¹⁴² In effect, Idaho Power argues that the "secondary" storage right is actually a natural flow water right.

Idaho Power's admission that the "secondary" right does not involve a right to "storage water" resolves one of the fundamental issues currently before the court—i.e., the quantity of storage allocated for power purposes. In their motions for summary judgment, the State and the USBOR argue that the quantity of storage for "power storage" and "power from storage" purposes under water right for no. 01-02064 should be only ~45,000 acre-feet. According to Idaho Power's deposition testimony, the company agrees with the State and the USBOR that its "secondary" storage claim does not involve the beneficial use of "stored water:"

- Q. [D]oes Idaho Power take the position that it can compel Reclamation to release water that has been stored in order to meet those flow targets?
- A. I don't believe so. . . .

¹⁴¹ *See IPC Brief* at 35 (quoting the old objection).

¹⁴² *IPC Brief* at 6.

- Q. Just to confirm. So your understanding is that the company's position is that Reclamation has an obligation to pass water through to meet those flow targets but not to release previously stored water?
- A. That's my understanding.¹⁴³
- A. It's water that could be stored, but it's a pass-through right. And it's not water released from storage. . . . We've never asked them to draft the reservoir to provide that water. We don't expect them to.¹⁴⁴
- A. It's not actual stored water that can be delivered. . . .
- Q. So would that pass-through concept involve the release of stored water from the American Falls Reservoir?
- A. It would not.¹⁴⁵
- A. It's not storage water. . . . It's not water that is released from storage that was previously stored.¹⁴⁶

Based upon Idaho Power's own admissions, the company's claim to 255,000 acre-feet of "power storage" and "power from storage" should be dismissed as a matter of law and fact.

It is undisputed that this subcase pertains to a water right for storage purposes alone. The only objection Idaho Power has raised is to the amount of storage that the USBOR must allocate to power use. This Court should reject Idaho Power's attempt to now obtain a right to natural flow under storage water right 01-02064.

V. CONCLUSION

For the reasons set forth herein, The State respectfully requests that this Court deny Idaho Power's Motion.

Respectfully submitted this 16th day of November 2010.

///

¹⁴³ May 2010 Bowling Dep. At 20 (Exhibit 47 to Second Affidavit of David I. Stanish (Oct. 5, 2010)).

¹⁴⁴ *Id.* at 278.

¹⁴⁵ *Id.* at 296.

¹⁴⁶ *Id.* at 335.

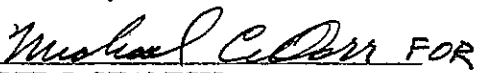
///

///

///

LAWRENCE G. WASDEN
Attorney General

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


DAVID I. STANISH
Deputy Attorney General


MICHAEL C. ORR
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 16th day of November 2010, I caused to be served the original and copies of the **STATE OF IDAHO'S RESPONSE TO IDAHO POWER COMPANY'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE MOTION FOR DECLARATORY JUDGMENT OF CONTRACT RIGHTS** on the following persons by the methods indicated:

1. Original to:

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

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: (208) 736-2121
- ☐ Statehouse Mail

2. Copies to:

IDAHO POWER COMPANY
Represented by:
JAMES C TUCKER
IDAHO POWER CO
PO BOX 70
BOISE, ID 83707

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

IDAHO POWER COMPANY
Represented by:
ADAM T. DEVOE
BROWNSTEIN HYATT ET AL
410 17TH STREET, SUITE 2200
DENVER, CO 80202

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

AMERICAN FALLS RESERVOIR
Represented by:
C THOMAS ARKOOSH
301 MAIN ST
PO BOX 32
GOODING, ID 83330

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

ABERDEEN AMERICAN FALLS GWD
BINGHAM GWD
BONNEVILLE JEFFERSON GWD
CAREY VALLEY GWD
IGWA INC
JEFFERSON CLARK GWD
MADISON GWD
MAGIC VALLEY GWD

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

NORTH SNAKE GWD

Represented by:
CANDICE MCHUGH
RACINE, OLSON, NYE, BUDGE &
BAILEY, CHTD.
101 CAPITOL BLVD., STE. 208
BOISE, ID 83702

A & B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
FALLS IRRIGATION DISTRICT

Represented by:
ROGER D LING
615 H ST
PO BOX 396
RUPERT, ID 83350-0396

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

NORTH SIDE CANAL CO LTD
TWIN FALLS CANAL COMPANY
MILNER IRRIGATION DISTRICT

Represented by:
TRAVIS L THOMPSON
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485

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

MINIDOKA IRRIGATION DISTRICT

Represented by:
W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318

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

USDI BUREAU OF RECLAMATION

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

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

UNITED STATES OF AMERICA
REGIONAL DIRECTOR PN REGION
BUREAU OF RECLAMATION PN-3100
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234

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

IDWR DOCUMENT DEPOSITORY
PO BOX 83720
BOISE, ID 83720-0098

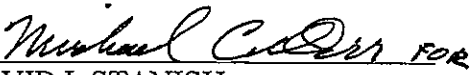
- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☒ Statehouse Mail

DAVID W. GEHLERT
ASSISTANT ATTORNEY GENERAL
ENV'T & NAT'L RESOURCES
UNITED STATES DEPT OF JUSTICE
1961 STOUT STREET, 8TH FLOOR
DENVER, CO 80294

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

AMERICAN FALLS SPACEHOLDERS
Represented by:
JERRY R. RIGBY
25 N 2ND E
PO BOX 250
REXBURG, ID 83440-0250

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


DAVID I. STANISH
Deputy Attorney General