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

In Re SRBA

Case No. 39576

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Subcase No.: 01-02064

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

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Introduction

The bulk of Idaho Power's BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT is devoted to establishing the validity of the secondary storage provisions of the 1923 Contract – in 1973. The Court need not be distracted by whether the provisions were valid at the time of the 1973 Dam Reconstruction Legislation because even if they were, the Legislation did not preserve them. Rather, that legislation sought to insure that hydropower generation will not impair the efficiency of the Minidoka Project. Idaho Power's claim to a right to compel Reclamation to forego storage of 255,000 acre-feet of water is incompatible with that intent. Similarly, Congressional instruction provided with the 1975 Bond Legislation contradicts Idaho Power's claim by instructing that hydropower is to be subordinate to irrigation and that no more than 10% of the available water may be used for hydropower generation.

More to the point, the Court need not bother with Congress' intentions at all, because those intentions merely confirm what the plain language of Idaho Power's 1976 Spaceholder Contract provides: the Company has a proportionate storage right to no more than 45,000 acre-feet and any provision of a prior contract that would create a right to the use of additional storage capacity cannot be valid.

Apart from the plain language of the 1976 Spaceholder Contract, Idaho Power's own actions – or more accurately, inactions – demonstrate that the Company understood the secondary storage provisions to have been terminated by the 1976 Contracts. Idaho Power offers page after page of correspondence allegedly affirming the validity of the secondary storage provisions. That correspondence comes to a complete halt with the signing of the 1976 Contracts. The absence of any correspondence affirming the secondary storage provisions after

1976 is not surprising. Evidence and testimony provided by Idaho Power demonstrate that for decades after signing the 1976 Contracts the company acted as though the secondary storage provisions were no longer valid – despite years of not receiving the water it now claims.

In sum, the plain language of the 1976 Placeholder Contracts and Idaho Power's inaction after those contracts were adopted demonstrate that the "secondary storage" provisions of the 1923 Contract are no longer valid and that the United States is entitled to summary judgment – no matter what the status of the secondary storage provisions may have been in 1973.¹⁷

Argument

I. THE APPLICABLE FACTS AND THE PLAIN LANGUAGE OF THE 1976 CONTRACTS DEMONSTRATE THAT THE "SECONDARY STORAGE" PROVISIONS OF THE 1923 CONTRACT ARE NO LONGER VALID.

Idaho Power suggests that "the facts" demonstrate that the company still "holds a contract right to 255,000 acre-feet of secondary storage capacity in American Falls Reservoir." IPC Brf. at 42. The pertinent "facts" listed by Idaho Power are (1) correspondence between the parties recognizing the right; (2) the 1973 Dam Replacement Legislation's alleged protection of the right; (3) the lack of any document formally terminating the right; (4) Idaho Power's payment

¹⁷ Although Idaho Power asserts the secondary storage provisions created "independent water rights and not mere contract rights," BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT... at 7, n.4 (IPC Brf.), its arguments ascribe no importance to that claim and the Company's actions belie it. Idaho Power renounced any claim to an independent water right both in proceedings before IDWR – twice – and again when it withdrew its claims to an independent water right before this Court. Letter from Idaho Commissioner of Reclamation to Idaho Power Co. at 1 (Dec. 31, 1932) (Jarvis Aff., Ex. N); ANSWER TO ORDER TO SHOW CAUSE at 6 (Dec. 1, 1970) ("ANSWER TO SHOW CAUSE," Jarvis Aff., Ex. DD); IDAHO POWER COMPANY'S MOTION TO AMEND OBJECTION AND TO WITHDRAW CLAIMS (Jan. 21, 2010).

of O & M charges; and (5) the United States' objections in this Court.^{2/} *Id.*

Idaho Power's suggestion that the facts support its claim is wrong for two reasons. First, none of the "facts" asserted by Idaho Power demonstrate that the secondary storage provisions remain valid. Second, Idaho Power ignores the most important fact – its own decades of inaction – which conclusively demonstrates the provisions are no longer valid.

A. The Parties' Correspondence Does Not Demonstrate That the Secondary Storage Provisions Remain Valid.

Idaho Power offers page after page of laborious quotations from correspondence between the parties, presumably to show that there was no doubt all parties understood the secondary storage provisions to still be effective at the time Congress enacted the 1973 Dam Replacement Legislation. While the most informative aspect of that correspondence is that it ends with the signing of the 1976 Contracts, this Court should understand that whether the secondary storage provisions were valid in 1973 makes no difference^{3/} because (1) the 1973

^{2/} Idaho Power also asserts that this court previously "recognized Idaho Power's protected rights." IPC Brf. at 42. As will be explained in Section III below, the Court did no such thing.

Another judicial decision with no bearing on the issues before this Court is the Eagle Decree. *Cf.* IPC Brf. at 38-39. First, as this Court has recognized, the United States is not bound by the Eagle Decree. ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT, Subcases 01-217 *et al.* (Mar. 25, 2010) (MINIDOKA DECISION). Second, because the Eagle Decree was entered in 1968, it sheds no light on the question of whether the secondary storage right was terminated by either the 1976 contracts or Idaho Power's subsequent actions.

^{3/} Nonetheless, the point is open for debate. Although there is no question that the parties all recognized the secondary storage provisions through the 1920s, 30s and 40s, by the 1950s the provisions were the subject of controversy. MEMORANDUM IN SUPPORT OF THE UNITED STATES MOTION FOR PARTIAL SUMMARY JUDGMENT at 14 & n.15 (U.S. Opn.). By the time Idaho Power appeared before Congress to testify regarding the 1973 Dam Replacement Legislation, the Company was publically trumpeting that "[t]he Company's interest as a spaceholder is very modest in contrast to the irrigators interest," while relegating the secondary storage provisions to a single mention in its written submission. IPC Brf. at 22 (quoting Statement of R. Hogg on

Reconstruction Legislation did not preserve the secondary storage provisions; (2) the provisions are inconsistent with the 1975 Bond Legislation; (3) the plain language of the 1976 Spaceholder Contract demonstrates that Idaho Power retained no more than its proportionate storage right of 45,000 acre-feet of water; and (4) Idaho Power's own actions confirm the secondary storage provisions no longer were valid after 1976.

B. The 1973 Dam Replacement Legislation Does Not Demonstrate That Congress Intended to Preserve the Secondary Storage Provisions.

The 1973 Dam Replacement Legislation does not demonstrate that Congress intended to preserve the secondary storage provisions. The Legislation did expressly preserve the "present proportionate storage rights" of the spaceholders, in Idaho Power's case roughly 45,000 acre-feet of water. Pub. L. 93-206, at § 2(a). The Legislation also reaffirmed "existing contract rights between the Secretary and the spaceholders." *Id.* However, it did so with an important caveat. Such rights were reaffirmed only to the extent not "otherwise provided" in the Act. *Id.* As the United States explained in its Opening Memorandum, Section 4 of the Act "otherwise provided" that (1) apart from the 45,000 acre-feet of water Idaho Power was entitled to as a Spaceholder, power generation would be done pursuant to the 1976 Falling Water Contract and (2) power generation is not to "impair the efficiency of the project to serve the other purposes of the Minidoka project." U.S. Opn. at 38. Not only does Idaho Power's claim ask this Court to endorse a source of water for hydropower generation not recognized by Congress, but granting

behalf of Idaho Power, Oct. 6, 1973 (IPC Ex. 49)). Idaho Power's submission neatly ducked the question of whether the secondary storage provisions were still valid by merely noting that the Company had "acquired 45,000 acre-feet of primary storage and 255,000 acre-feet of secondary storage in the reservoir." *Id.*

Idaho Power the right to siphon off up to 255,000 acre-feet of storable water would have obvious potential to impair the efficiency of the project. Further, even if that were not the case, the 1975 Bond Legislation demonstrates that Congress did not intend to preserve the secondary storage provisions.

C. The Secondary Storage Provisions are Inconsistent With Congressional Instruction Regarding the 1975 Bond Legislation.

The 1975 Bond Legislation instructed that “substantially all of the stored water [must be] contractually available for release from such dam for irrigation purposes.” Pub. L. No. 94-164. As Idaho Power observes, the Congressional Committees considering the legislation provided instruction “in an effort to clarify Congressional intent as to how the legislation applies to American Falls.” IPC Brf. at 40. First and foremost, the instruction the Committees provided stressed that the use of water from American Falls Reservoir for generating electric energy would be subordinate to its use for irrigation purposes. *Id.* (citing S. Rep. No. 94-570 (1975), IPC Ex. 66). A loss of up to 255,000 acre-feet of water would have an unquestioned impact on irrigation use.

Further, the Committees explained that a “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.” *Id.* Idaho Power attempts to dismiss that instruction by arguing the Committees were “not concerned about the secondary storage capacity.” IPC Brf. at 41. Whether or not Congress was concerned with the secondary storage provisions, Idaho Power’s claim of a right to use a total of 300,000 acre-feet of water – roughly eighteen percent (18%) of the reservoir’s capacity –

is simply inconsistent with Congress' instruction that no more than 10% of the available water should be used for generating electric energy.

Moreover, there is a good reason why the Committees were likely not concerned about the secondary storage capacity: they had read the 1976 Contracts in substantially complete draft form and concluded that Idaho Power was limited to 45,000 acre-feet of water. As the Committees explained, "[s]ubsequent to the adoption of the [1973 Dam Replacement] Act, the District [American Falls Reservoir District], as the constructing agency, entered into negotiations with the Secretary of the Interior, the Idaho Power Company and the other water users for the preparation of various contracts including a contract for the use of falling water. S. Rep. 94-570 at 3. Discussing contracts, the Committees explained that

[i]t was intended that in normal circumstances, substantially all of the falling water would be made available to the Power Company only when water was released from the dam for irrigation purposes. *There has been no intention to release water specifically for use by IPC 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.

Id (emphasis added). Thus not only do the Committees' instructions contradict Idaho Power's claim, but the Committees' reading of the 1976 contracts confirms that Congress understood the contracts to terminate the secondary storage provisions.

D. The Plain Language of Contracts Demonstrates the Secondary Storage Provisions Are No Longer Valid.

Although the parties' arguments regarding the 1976 Contracts are voluminous, this Court need do no more than read two provisions of the 1976 Placeholder Contract to be convinced that the contract terminated the secondary storage provisions. The first is Article 21 of

the contract, which identifies the “Storage Capacity to be Made Available to Spaceholder.”

Article 21 does not grant Idaho Power the use of any secondary storage capacity. Rather, the sum total of the storage capacity provided is 2.6471% of the active capacity, roughly 45,000 acre feet.

The second provision, Article 19, makes it clear that 45,000 acre-feet of water is all that Idaho Power is entitled to. It directs that the 1976 Spaceholder Contract’s terms regarding the distribution of water “shall prevail” over the terms of prior spaceholder contracts “wherever and to whatever extent” the provisions of the two contracts are in conflict.⁴ *Id.* at 6, ¶ 19(a). Notwithstanding Idaho Power’s belated effort to recast the secondary storage provisions as a “pass through,” there is a clear conflict between Article 21 of the 1976 Spaceholder Contract and the secondary storage provisions of the 1923 Contract because they both address Idaho Power’s use of the reservoir’s storage capacity. The plain language of the 1923 Contract allows no other conclusion. *See* 1923 Contract, Article 18 at 19, lines 451-52 (providing “a secondary right to use not to exceed 255,000 acre-feet of *storage capacity in the reservoir*”) (emphasis added). Indeed, Article 21 of the 1923 Contract explains that the water to be provided to Idaho Power’s powerplants below Milner Dam “shall be a part of the 255,000 acre-feet of primary [sic] storage water *which the Company may have stored in its secondary storage capacity* in the reservoir.” 1923 Contract, Article 21 at 22, lines 538-39 (emphasis added).

⁴ Idaho Power asserts that to the extent the 1976 Contracts were interpreted to terminate the secondary storage provisions the Contracts would have to be void. IPC Brf. at 25 & n.10. That statement has no foundation in either the law or logic. First, there is no basis for Idaho Power’s suggestion that to construe the 1976 Contracts as terminating the secondary storage capacity would render them *ultra vires*. As was explained above, the 1973 Dam Replacement Legislation neither expressly, nor implicitly, preserved the secondary storage provisions. Second, even if the secondary storage provisions were preserved as of 1973, nothing prevented Idaho Power from subsequently entering into contracts relinquishing the right.

Idaho Power struggles mightily to avoid the conclusion that the plain language of the 1976 Spaceholder Contract forecloses its claim. Its principal tactic is resort to a “whereas clause” in the 1976 Spaceholder Contract. IPC Brf at 26. Whereas clauses are not enforceable. *Rose v. M/V GulfStream Falcon*, 186 F.3d 1345,1350-51 (11th Cir. 1999). In any event, the language of the whereas clause merely states that through the 1923 Contract Idaho Power obtained a proportionate storage right to 2.6471% of the active capacity and unidentified “rights relating to the use of water for power generation.” 1976 Spaceholder Contract at Whereas Clause 5 (Jarvis Aff., Ex. BBB). Thus the whereas clause neither specifically addresses the secondary storage provisions, nor says anything about what rights, if any, the Company retained in the 1976 Contracts.

None of the other provisions of the 1976 Spaceholder Contract that Idaho Power cites expressly address the secondary storage provisions either. Instead, the contract terms offer vague references to unidentified “other” rights. For instance, while Article 19(a) expressly preserves the “present proportionate storage rights” of the spaceholders, *i.e.*, Idaho Power’s 2.6471% of reservoir space, other “rights of the Spaceholder” are “reaffirmed” *only* to the extent they are not “modified by this [the 1976] Spaceholder Contract.” IPC Brf. at 26-27. As was just discussed, the plain language of the 1976 Contract modified the government’s obligation to provide the use of storage capacity to Idaho Power. Nor does Article 28(e) help Idaho Power’s cause. It merely requires that the reservoir be operated so that the Spaceholder’s “present proportionate storage rights” are not altered.

In sum, because the secondary storage provisions did not create “present proportionate storage rights” and yet nonetheless expressly provide for the use of storage

capacity, none of the contract provisions cited by Idaho Power provide a basis for this Court to conclude the secondary storage provisions were retained in the 1976 Placeholder Contract.

E. Idaho Power's Actions in the Decades After the Signing of the 1976 Contracts Only Reiterate that the Company Understood the Secondary Storage Provisions to Have Been Terminated.

Although all the parties have parsed the contracts at length, there is no need for this Court to do so because “[t]here is no surer way to find out what parties meant, than to see what they have done.” *Brooklyn Life Ins. Co. of N.Y. v. Dutcher*, 95 U.S. 269, 273 (1877). Thus, “the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence.” *Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 118 (1913). Here there is no dispute regarding what Idaho Power did to recognize the secondary storage provisions in the decades immediately following the 1976 contracts: absolutely nothing.^{5/}

^{5/} The United States does not dispute that Idaho Power paid its Operation and Maintenance (O & M) costs following the adoption of the 1976 Contracts. Those payments, however, say nothing about Idaho Power’s understanding of the secondary storage provisions. Setting aside the likelihood that the O & M bills are paid by accountants with no knowledge of the contracts, there is a simple reason why the Company would have agreed to continue to pay the same O & M percentage, irrespective of the fate of the secondary storage provisions: Idaho Power wanted to curry favor with the irrigators, whose support was vital to Idaho Power getting a new powerplant connected to the dam and the substantial increase in revenues that would bring. U.S. Opn. at 16. Moreover, while Idaho Power suggests that “in reality” the parties must have agreed that Idaho Power would pay the same O & M charge because they understood that the secondary storage provisions continued, the company has not offered a single document supporting its view of “reality.” Cf. IPC Brf. at 28. In contrast, the record is rife with documentation of the Company’s efforts to avoid conflict with the irrigators. *E.g.* Memo from B. E. Stoutemyer, District Counsel, to Commissioner of Reclamation at 2, ¶ 5 (Nov. 12, 1926) (Jarvis Aff., Ex. G) (noting that Idaho Power expressed a willingness to waive its right to the secondary storage water if the weather continued such that the water would likely later be needed for irrigation purposes.); Letter from K. M. Robinson, Vice President, Idaho Power to B. E. Stoutemyer, District Counsel at 1-2 (Nov. 9, 1933) (Jarvis Aff., Ex. P) (documenting the company’s efforts to ensure water would be

Idaho Power's own calculations establish that the United States has not delivered the water the company claims. E-mail from Jon Bowling to James Tucker (October 10, 2001) (Jarvis Aff., Ex. HHH). Nor can there be any dispute that Idaho Power assented to that non-delivery for decades. The Company's deponent testified the Company was not tracking deliveries under the contract rights it now claims until he discovered (or more perhaps accurately, re-discovered) the secondary storage provisions in the mid-1990s. *See* Bowling Depo. at 131, ll. 7-19; 134, ll. 17-21 (Jarvis Aff., Ex. D). Two decades of Idaho Power acting as though the secondary storage provisions are invalid is all the evidence this Court needs to appreciate that the Company understood them to have been terminated by the 1976 Contracts.⁹

II. THERE IS NO BASIS TO APPLY QUASI-ESTOPPEL AGAINST THE UNITED STATES.

Perhaps because its own actions demonstrate that its claim has no merit, Idaho Power attempts to focus this Court's attention on the United States' actions. Idaho Power claims that the United States should be estopped from challenging Idaho Power's claims because the government has acknowledged the existence of the secondary storage provisions "dozens of times" over the years since the 1923 Contract and filed objections "recognizing" the secondary

available for irrigation use); Idaho Power Memorandum to U.S. Rep. Hamer Budge at 2 (June 14, 1954) (Exhibit LLL to the Second Affidavit of David A. Jarvis) (explaining that under the 1923 Contract the "use of water for power purposes has always been incidental and secondary" to its use for irrigation purposes).

⁹ Apart from the lessons Idaho Power's inaction teaches about its understanding of the intent of the 1976 Placeholder Contract, its decades of acquiescence to the United States' non-delivery modified the terms of the 1923 Contract as a matter of law. *See* U.S. Opn. at 42 (citing *e.g.*, *Scott v. Castle*, 104 Idaho 719, 724, 662 P.2d 1163, 1168 (Id. App. 1983) (agreement to modification of a contract may be implied from a course of contract in accordance with the modification)).

storage provisions. IPC Brf. at 42-43.

An irony of Idaho Power's argument is that the "clear and extensive pattern of correspondence between the parties," the Company cites only reiterates that the parties understood the secondary storage provisions to have been terminated. *Cf.* IPC Brf. at 42 n. 20. Indeed, as was noted above, what's most informative about the correspondence Idaho Power provides is that it simply stops once the new contracts were signed in 1976. Thus rather than affirming that the secondary storage provisions continued to be valid after the 1976 contracts, the correspondence only confirms that the parties understood that the secondary storage provisions were no longer valid.⁷

Nor do the United States' Objections demonstrate that the United States once believed that the secondary storage provisions remained valid. As the United States explained in its Opening Memorandum, because decades had passed with no indication from Idaho Power that it believed the secondary storage provisions remained valid, the Company's assertion of the

⁷ Although not referenced in its argument, Idaho Power's discussion of the facts places great emphasis on a memorandum written in 1977 by Merrill J. Martz, then Reclamation's Regional Supervisor of Power. IPC Brf. at 31-33. Contrary to Idaho Power's representation, Mr. Martz did *not* recognize the existence of the secondary storage provisions. Rather, he merely noted that "Idaho Power would wish to retain the rights. . ." IPC Brf. at 32 (quoting Martz Memorandum (Aug. 2, 1977) IPC Ex. 57). The passage of time would prove Mr. Martz wrong in that assumption. Further, Mr. Martz's observation that "generally, these flows [the secondary storage water] have been maintained over the years and it is not likely there would be conflicts regarding them" is of much less importance than Idaho Power suggests. As the United States explained in its opening memorandum, factors other than the secondary storage provisions have long served to pull water through the reservoir. That continues to be the case today. Idaho Power's own expert's calculations demonstrate that even in the recent years of extreme drought, the flows at Twin Falls exceeded the 1923 Contract quantities on more than two-thirds of the available days. *See* EXPERT REPORT OF DAVID B. SHAW, Idaho Power Company v. United States, Court of Federal Claims, Case No. 07-730C (Nov. 2009) (2nd Jarvis Aff., Ex. MMM).

provisions in 2001 caught Reclamation off guard. Reclamation responded by indicating it would look into the matter. U.S. Opn at 32 (citing Letter from Regional Director, Jarvis Aff., Ex. KKK). Reclamation's consideration of the issue continued through its 2007 Objection, which essentially preserved the agency's options. Only as the Basin 01 subcases began to move forward did the agency engage in the careful consideration of the statutes, contracts and the historic record necessary to confirm what the agency's actions in delivering water had demonstrated for decades: the statutes and contracts associated with the replacement of American Falls Reservoir terminated the secondary storage provisions of the 1923 Contract.

III. RES JUDICATA AND COLLATERAL ESTOPPEL HAVE NO APPLICATION HERE.

Idaho Power suggests that because the decree confirming the 1976 Contracts is "binding on the world at large," and included a finding addressing the effect of Public Law 93-206, the United States is precluded by the doctrines of *res judicata* and/or *collateral estoppel* from challenging whether Public Law 93-206 "protected and preserved the contract rights existing prior to the legislation's enactment."⁸ IPC Brf. at 45. As was shown above, the Legislation did not preserve the secondary storage provisions. In any event, neither *res judicata* nor *collateral estoppel* have any application here.

First, the case relied on by Idaho Power for the proposition that a confirmation proceeding binds the world, *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir.

⁸ Idaho Power asserts the decree was issued by this Court. IPC Brf. at 44. As this Court well knows, that is not the case because there is a distinction between the SRBA Court and the District Court for the Fifth Judicial District. *Walker v. Big Lost River Irrigation Dist.*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993) (noting that the "SRBA district court is ... a separate division of the district courts and exercises the unique jurisdiction given it by the legislature.")

1977), was reversed by the United States Supreme Court on the merits of the acreage limitation issue addressed by the Ninth Circuit and “otherwise vacated.” *Bryant v. Yellen*, 447 U.S. 352, 355-56 (1980). As a result, the decision no longer has any precedential effect. *County of Los Angeles v. Davis*, 440 U.S. 625, 634 n. 6 (1979) (a decision “vacating the judgment of the Court of Appeals deprives that court’s opinion of precedential effect”).

Second, even if the decision had any precedential effect, it would only confirm that Idaho Power’s attempt to apply *res judicata* or *collateral estoppel* to the confirmation proceedings has no merit. Idaho Power wholly ignores the court’s instruction that the *only* issue involved in a confirmation proceeding is validity of the contract and therefore “[t]he judgment (in a confirmation proceeding) is limited to a determination of the validity of the contract.” *Imperial Irrigation District*, 559 F.2d at 525. Accordingly, to the extent *res judicata* or *collateral estoppel* could be applied, the Ninth Circuit’s decision directs that it would only bar claims that the 1976 Spaceholder Contract is invalid.

More importantly here, Idaho law restricts the preclusive effect of confirmation proceedings in the same manner. Contract confirmation proceedings are special statutory proceedings. *Nampa & Meridian Irr. Dist. v. Petrie*, 28 Idaho 227, ___, 153 P. 425, 427 (1915); *see also* I.C. § 43-2204. Thus, it has long been recognized that while confirmation judgments preclude challenges to the validity of a contract, they are not *res judicata* on any other questions. *Nampa & Meridian*, 153 P. at 427-29 (confirmation proceeding is not *res judicata* as to assessment of benefits under the contract); *Florer v. Wood River Valley Irr. Dist.*, 56 Idaho 176, ___, 51 P.2d 700, 702 (1935) (confirmation proceeding not *res judicata* where subsequent litigation was not a collateral attack on the validity of the organization of an irrigation district).

A contract confirmation proceeding may preclude challenge to the validity of the contract but it does no more. Indeed, the Idaho Supreme Court held exactly that in *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978). *Kerner* addressed the confirmation proceedings for the 1976 contracts at issue in this subcase. On appeal to the Idaho Supreme Court, landowners within some of the Districts that had agreed to the contracts argued that the confirmation proceedings were invalid because the trial court had failed to consider the effect of Public Law 93-206 [the 1973 Dam Replacement Legislation] and the new contracts on the existing contracts. *Kerner*, 583 P.2d at 372. In other words, the landowners argued the District Court had erred in concluding that it had no jurisdiction over the existing contracts. The Idaho Supreme Court rejected that argument. As the court explained, the effect of the confirmation judgment was limited to whether the participating districts have complied with the prerequisites for a valid bond issue. It “does not affect matters outside the scope of the proceedings, such as any claims which the non-participating water users may have against the United States *under their existing contracts....*” *Id.* at 373 (emphasis added).

In sum, controlling decisions of the Idaho Supreme Court demonstrate that the confirmation proceedings Idaho Power relies on cannot provide the basis for the application of either *res judicata* or *collateral estoppel*.²⁹ Idaho Power’s claim that the secondary storage

²⁹ Moreover, even if the United States could be bound by the confirmation proceedings, at their essence, the court’s findings do no more than paraphrase the 1973 Dam Replacement Legislation in recognizing that the 1976 Spaceholder Contracts constitute a reaffirmation of existing contract rights, except to the extent modification was authorized by Public Law 93-206. See IPC Brf. at 46 (quoting AM. FINDINGS OF FACT AND CONCLUSIONS OF LAW, Civil No. 28738 (May 18, 1977), IPC Ex. 62). As was explained above, the 1973 Dam Replacement Legislation, Public Law 93-206, did not require preservation of the secondary storage provisions.

provisions remain valid must stand or, as is the case here, fall, on its merits.

IV. THIS COURT LACKS JURISDICTION TO ENTER A DECLARATION OF IDAHO POWER'S RIGHTS UNDER THE 1923 CONTRACT.

The United States is participating in the SRBA pursuant to the waiver of sovereign immunity provided by the McCarran Amendment, 43 U.S.C. § 666. *See United States v. Idaho*, 508 U.S. 1, 4 (1993) (citing I.C. § 42-1406A(1)). As the United States Supreme Court explained when called on to interpret the extent of the McCarran Amendment's waiver, "[t]here is no doubt that waivers of federal sovereign immunity must be 'unequivocally expressed' in the statutory text." *Idaho*, 508 U.S. at 6 (citing e.g., *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990)). "Any such waiver must be strictly construed in favor of the United States, and not enlarged beyond what the language of the statute requires." *Id.* at 7 (internal citations omitted).

The McCarran Amendment waives the United States' sovereign immunity for two purposes and two purposes only: (1) a comprehensive adjudication of the rights to the use of water of a river system; and (2) the administration of such rights. 43 U.S.C. § 666(a). Determining remarks to guide the administration of the United States' water rights falls within the scope of that waiver; declaring Idaho Power's contract rights does not.¹⁰

Conclusion

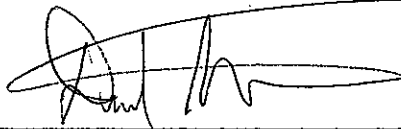
In 1976, Idaho Power signed a Spaceholder Contract that allowed it access to no more than 45,000 acre-feet of storage capacity in American Falls Reservoir. Article 19 of that

¹⁰ As this Court has recognized, and Idaho Power's complaint in the Court of Federal Claims reiterates, declaration of federal contract rights is a matter for the Court of Federal Claims. MINIDOKA DECISION at 12.

contract confirmed that 45,000 acre-feet is all the water Idaho Power is entitled to as a placeholder by specifying that the 1976 Contract's terms regarding the distribution of water "shall prevail" over the terms of the 1923 Contract to whatever extent there is a conflict. Idaho Power's claim to the use of an additional 255,000 acre-feet of storage capacity clearly conflicts with the 1976 Placeholder Contract and by the plain terms of that contract, cannot be sustained. Even if that were not the case, the Company's two decades of ignoring the "rights" it now claims reiterated what the plain language of the 1976 Placeholder Contracts made clear: the secondary storage provisions of the 1923 Contract are no longer valid. As a result, this Court must grant the United States' motion for summary judgment.

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