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

	)	Subcase No. 01-02064
	)	(Hydropower Storage Claim at American Falls)
In Re SRBA	)	
Case No. 39576	)	RESPONSE OF IDAHO POWER
	)	COMPANY TO THE STATE OF IDAHO'S
	)	AMENDED MOTION FOR PARTIAL
	)	SUMMARY JUDGMENT
	)	
	)	

Idaho Power Company, by and through undersigned counsel, hereby submits this
Response to the State of Idaho's Amended Motion for Partial Summary Judgment ("State Brief")
in the above captioned case.¹

¹ Idaho Power Company refers the Court to Footnote 2 of its Response to the American Falls Spaceholders. To the extent that the State is attempting to incorporate any arguments from its original Motion for Summary Judgment, the Company asks the Court to reject this strategy. The original Motions were based on claims that have been withdrawn and an Objection that has been amended.

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INTRODUCTION

As the Court knows, the Idaho Power Company ("Idaho Power," "the Company," or "IPC") is a spaceholder in the American Falls Reservoir. Over the years of the Reservoir's existence, the Company has entered into contracts with the United States – like every other spaceholder – that require the United States to release water for the Company's use. As explained by the Company in its Brief in Support of its Motion for Summary Judgment ("IPC Brief"), and in the Company's Responses to the United States and American Falls Spaceholders, this case is about contractual rights held by the Company. The rights were the result of negotiations between the Company and the United States in the 1920s, and those contractual rights are the basis for the Company's claim to 300,000 acre-feet of storage capacity in the American Falls Reservoir.

It is the *nature* of the Company's rights to storage capacity in the Reservoir that has caused the apparent confusion evident in the parties' briefs. From the beginning, the Company has understood that it has two separate and unique contractual rights in the Reservoir and that only one of those rights is for "active" storage. This distinction has been ignored and misunderstood by the other parties to this litigation.

It seems self-evident that if a person spends a great deal of time talking about and using his left hand, it does not mean that his right hand no longer exists or that he is estopped from using it. As explained below and in the Idaho Power Company briefs in this case, the same principal can be applied to Idaho Power Company's two distinct contract rights in American Falls Reservoir.

The first right afforded to Idaho Power Company by the 1923 Contract, IPC Brief, Ex. 1, was access to 45,000 acre-feet of primary, or "active," storage capacity. The Company can

request, "demand," or "schedule the release of" this water. It is this right – the "active storage" right – that the company was referencing in the various comments and quotations cited in the State's Brief because this was the only right the company could actually "control" and it was the only right that was, and is, on par with the rights held by other spaceholders in the Reservoir.²

The second right afforded to the Company by the 1923 Contract was access to 255,000 acre-feet of "secondary storage capacity" in the Reservoir. This is a unique right, somewhat akin to reservoir releases to maintain flows for species protection or flood control. In essence, the secondary storage capacity right in the 1923 Contract acts as a volumetric cap on water that can be passed through the reservoir during certain winter months to maintain minimum flow levels below Milner Dam. The right is limited by time, by the availability of storage capacity in the Reservoir, and by the fact that the flows are entirely controlled by the United States. As noted many times in this and other briefs, the Company cannot demand or schedule the release of that water. Instead the releases are fixed by the agreement entered between the Company and the United States in 1923. It is the United States' responsibility to comply with the terms of the Contract. Further, the secondary storage water is intended for power generation downstream from the American Falls facility, it is not intended to be used for power generation at American Falls.

We are before this Court because the United States has failed to comply with the 1923 Contract, and because now the parties to this litigation seek to limit the Company's right to storage in the Reservoir to only 45,000 acre-feet of active-capacity. They base their arguments

² The distinction between active storage capacity and secondary storage capacity is a very important element of this case. As discussed throughout the many briefs submitted by Idaho Power Company, opposing parties mistake representations by the Company that it holds 45,000 acre-feet of storage capacity that it can schedule for release for power generation as some sort of admission that it does not have access to any other space in the Reservoir. This is simply incorrect. Further, as discussed in IPC's Brief at 39-41 and Section II below, it would be incorrect to misread Congressional intent in relation to certain legislative enactments that had nothing whatsoever to do with the Company's secondary storage right.

on statements made by the Company that are misquoted, or at the very least misunderstood, and on court rulings and federal legislation that say nothing about the Company's secondary storage right.

RESPONSE TO ARGUMENTS

Given the overlap and repetition of arguments, Idaho Power Company incorporates by reference its Responses to the arguments included in the United States' and Spaceholders' Briefs. The Company addresses each of the State of Idaho's arguments below, but urges the Court to keep one issue in mind: this is a contract claim case. The rights to storage in the Reservoir claimed by the Company stem from the contract terms it negotiated in 1923 which have never been rescinded.

I. POWER STORAGE CAPACITY IN THE AMERICAN FALLS RESERVOIR SHOULD BE CONSISTENT WITH THE 1923 CONTRACT

The basis for the Company's claim to 300,000 acre-feet of storage capacity in the Reservoir, divided between its active and secondary storage capacity rights, is explained in detail in the IPC Brief.³

In summary, the contract rights afforded to the Company in 1923 were recognized by all parties in official correspondence submitted as exhibits to the IPC Brief, were specifically protected by Congress when it enacted legislation to reconstruct the reservoir, and were not – and could not be – rescinded by contracts entered by the parties after the reconstruction legislation was enacted in 1973 because to do so would directly contradict the expressed will of Congress as recognized and upheld by this Court.

The State of Idaho seems to believe that because the Company's representatives spoke of its active storage right before Congress, or noted that it could only "demand" 45,000 acre-feet of

³ The Company refers the Court to the arguments and facts contained in that Brief.

storage in the Reservoir, this meant that the company was rescinding its secondary storage capacity right. Nothing could be further from the truth. A "secondary" right is not active storage, and the Company could not "demand" the release of this right.⁴

Further, the State's claim that the 1976 Spaceholder contract trumps the 1923 Contract because the United States included a clause in the 1976 Spaceholder contract that the terms of that contract control if it conflicts with the 1923 Contract is misguided for more than one reason.⁵

First, and most obviously, federal agencies cannot simply ignore the will of Congress when drafting contracts.⁶ In 1973 Congress specifically protected existing proportionate spaceholder rights in the Reservoir. It would be unconscionable to allow a federal agency to ignore that fact and attempt to implement a Contract three years later that rescinded the proportional storage capacity rights of the Company.

Second, there is nothing in the 1976 Spaceholder contract that specifically states the Company's secondary storage right is void. Instead, the Contract speaks to the various active storage rights of parties. Further, the 1976 Contract specifically references and incorporates the portion of the 1923 Contract that establishes the Company's Operation and Maintenance charges for its secondary storage capacity. *See* IPC Brief, Ex. 53 at para. 28(b); *see also* the discussion in Section I.E. of IPC's Response to the U.S. Brief. Given that reference, it would seem that the

⁴ *See also* the Introduction to IPC's Response to the United States, as the United States made the same arguments and the Company addresses the facts in detail in that Section.

⁵ State Brief, FN 106.

⁶ Congress specifically protected "existing proportionate storage rights" when it enacted the 1973 reconstruction legislation, so the Bureau of Reclamation cannot simply ignore the Company's secondary storage right or deem it void by Contract. This issue was specifically addressed in the Company's Brief at FN 10 (*citing California v. United States*, 271 F.3d 1377, 1383 (Fed.Cir. 2001) ("Without a doubt, contractual provisions made in contravention of a statute are void and unenforceable, ... [and] cannot bind the federal government.")).

1976 Contract contains no language that either conflicts with, or specifically voids, the Company's secondary storage right.

There are dozens of documents and facts in the Record that clearly support the Company's continuing claim – all of which are discussed in the IPC brief and the various responses and/or attached as exhibits – to 300,000 acre-feet of storage capacity in the Reservoir divided between active and secondary storage.

At issue here, of course, is whether the Company's secondary storage right remains in force and whether it survived the 1976 Contract. While many documents in the Record support the Company's claim that it did, some particularly interesting documents are those in which the United States itself specifically recognizes the Company's secondary storage capacity right. For instance:

- Ex. 53. The 1976 Spaceholder Contract that includes the specific provision stating that the Contract is "supplemental and in addition" to the Existing Spaceholder Contract [the 1923 contract], Section 48,⁷ and in which the parties express the specific intention to meet subsequent to entering the Contract to address issues of inconsistencies between the 1976 Contract and the 1923 Contract.⁸ Section 19(a).
- Ex. 56. The draft memorandum from Martz stating that BOR would have preferred to rescind the 1923 Contract as part of the negotiations leading to the 1976 Spaceholder Contract, but noting that IPC rejected this approach in favor of renegotiation of 1923 Contract rights at a future point.
- Ex. 57. The 1977 memorandum – written after the Company and the United States completed the 1976 Spaceholder Contract -- from Martz discussing the fact that the 1923 Contract included the Company's secondary storage right, that the right had not been rescinded by the 1976 Contract, and reiterating that the parties intended to meet to address inconsistencies between the 1923 Contract and the 1976 Contract at a future point. He further expressed the view of the United States that such a meeting need not occur, and that

⁷ Raising the obvious question of how a "supplemental" contract that does not discuss secondary storage rights could somehow be interpreted to have rescinded those rights.

⁸ The parties imply that the Company's secondary storage capacity right was the "inconsistency" referenced in the 1976 Spaceholder Contract. Even if this were the case, this provision confirms that any such "inconsistency" had not been addressed in the 1976 Contract so they would remain in force until such time as the parties met to renegotiate the terms.

issues between the Contracts be addressed on a case-by-case basis.⁹

- Ex. 68. The 1974 memorandum from BOR's Martz establishing without a doubt that the Company has paid operation and maintenance charges for both its active and secondary storage capacity rights since 1923. If the Company did not hold a secondary right, it would not have paid for it.

The exhibits to IPC's Brief walk the Court through the arguments and facts that support its claim to the secondary storage capacity right afforded to the Company by the 1923 Contract. The historical documentation is unquestionable. That secondary right, combined with the Company's unquestioned active storage right in the Reservoir, represents the Company's basis for claiming access to 300,000 acre-feet of storage capacity in the Reservoir. The Company stands by, and incorporates, the arguments included in the IPC's Brief and its Response Briefs to establish that the Company's active and secondary storage rights remain viable, and notes that there is significant evidence in the Record – some of which is referenced above – that the United States specifically recognized the Company's rights historically and took no action to rescind those rights.

II. CONGRESS DID NOT INTEND TO LIMIT IDAHO POWER COMPANY'S SECONDARY STORAGE RIGHTS WHEN IT ENACTED THE REVENUE ADJUSTMENT ACT OF 1975

Again, the Company refers the Court to the arguments contained in its Brief in Support to address the State's claim that somehow the vague reference in the federal bond legislation requiring that "substantially all" of the stored water in the Reservoir be available for releases for irrigation purposes means that the Company's secondary storage right is void. See IPC Brief, Ex. 65, P.L. 94-164 at Sec. 7(a). This is not an accurate claim.

⁹ Confirming that the United States did not intend to meet to renegotiate "inconsistent" contract terms, but instead simply decided to ignore the Company's secondary storage capacity right in violation of its own contracts and in direct violation of Congressional intent.

As explained in the Company's Brief, the term "substantially all" was defined in Committee Reports explaining the legislation to mean that no more than ten percent of the water stored in the Reservoir could be used for power generation at the facility. There is no discussion in the legislative history, however, explaining the basis for the 10% limit. What is known, however, is at the time the legislation was enacted, the Company held approximately 2.6% of the active storage capacity in the Reservoir, and that Congress had – only three years earlier – specifically protected the proportional storage rights of the Company and all existing spaceholders. Further, the limitation included in public law 94-164 was intended to prevent more than 10% of active storage capacity from being used *at the facility* for power generation. We know this because Congress was interested in preventing public funds from being used for a private power facility.¹⁰ As stated by the State in its Brief,

The text of the Revenue Adjustment Act of 1975 [P.L. 94-164] plainly demonstrates Congress's intention to limit the quantity of storage that could be permanently obtained for hydropower purposes at **American Falls** to no more than "10% of the normal supply of stored water..."

State Brief at 34 (emphasis added).

Thus, the only way to read the legislation so as to recognize Congressional intent is that it was addressing the active capacity rights of spaceholders in the Reservoir that could be used for power generation at a facility being constructed with federal financial support. Thus, Congress was concerned with the Company's storage rights which could be used for power generation at American Falls, not the Company's secondary storage capacity rights used to ensure adequate flows below Milner Dam.

¹⁰ Congress did not want a power plant to be built for a private company at tax-payer expense. Thus, it was limiting the amount of storage capacity in the Reservoir that could be used for power generation at the American Falls power generation facility. It makes no sense to argue that Congress was limiting the use of any and all water stored in American Falls from ever being used to produce power at any location downstream from American Falls.

III. IDAHO POWER IS NOT COLLATERALLY ESTOPPED FROM CLAIMING ACCESS TO ITS SECONDARY STORAGE CAPACITY RIGHT

As also noted in IPC's Brief, the Company agrees with the State that this Court's confirmation proceedings, IPC Brief, Ex. 61 and 62, are binding on Idaho Power Company, the United States, other spaceholders, and on the State. We just do not agree on what that means. In fact, this Court recognized that all existing proportionate storage rights were protected when Congress enacted the rebuild legislation in 1973 and that the Spaceholder Contracts recognized those rights. *See e.g.* IPC Brief, Ex. 62 at 578.

In a slightly different twist on the facts, however, the State argues that since this Court stated that Idaho Power Company's "active" storage capacity in the Reservoir is approximately 2.65%, Idaho Power Company only has access to that storage right and not to its secondary storage capacity right. State Brief at 37. As seems to be the practice in all briefs in this case, the State has read the word "active" entirely out of the Court's ruling and ignores the Court's conclusion of law that all proportionate storage rights – including the Company's secondary storage right – were specifically protected by Congress. *Id.* (citing this Court's *Amended Findings of Facts and Conclusions of Law* enumerating the "Percentage of Active Storage Capacity" held by Idaho Power Company.)^{11 12}

In summary, and as fully explained in IPC's Brief, Idaho Power Company cannot be judicially estopped from claiming access to its secondary storage capacity contract right based on this Court's confirmation proceedings because the Court did not rescind the Company's

¹¹ The company would urge the Court to note the number of times the word "active" is ignored in quotations cited in the State's Brief. It is either an intentional strategy, or it is a fundamental misunderstanding on the part of the State as to the nature of the Company's rights.

¹² Likewise, the State simply ignores the phrase "upon our demand" when it misinterprets various quotations to mean the Company only holds 45,000 acre-feet of storage in the Reservoir. *See e.g.* State's Brief at 43.

secondary storage rights in the confirmation proceedings, and because the Court specifically protected all spaceholders' "existing rights" in those proceedings.

IV. THERE IS NO EVIDENCE IN THE RECORD SUPPORTING THE STATE'S ALLEGATION THAT COMPLIANCE WITH THE 1923 CONTRACT'S TERMS WOULD RESULT IN INJURY TO IRRIGATORS

The Company again incorporates by reference its Response to the United States and the Spaceholders in responding to the State's unfounded allegation that compliance with the terms of the 1923 Contract will result in injury to irrigation spaceholders. There is no proof to support this claim in the Record, and no party has put forth an expert opinion or any of the modeling that would be necessary to substantiate such an allegation.

Like the other parties, the State attempts to tie this argument to the parties' understanding that irrigation rights in the Reservoir, aside from the Company's 45,000 acre-foot active storage right, have priority.¹³ But this fact alone does not lead to the conclusion that the secondary storage right afforded to Idaho Power Company by contract should be revoked because to acknowledge the right would harm irrigators' interests. Such harm, even if it were substantiated by facts in the Record, which it is not, is no basis to rescind a contract right.

The question before this Court is whether IPC's secondary storage right remains valid under contract law. Unsubstantiated claims of injury have nothing to do with this question.

V. THE COMPANY'S RIGHTS ARE HELD IN TRUST BY THE UNITED STATES

The State argues that the power storage rights in American Falls Reservoir should be decreed in the name of the United States. While we disagree with the State as to the quantity which should be decreed, we do agree that the Company's rights in the Reservoir are held in trust by the United States. We fully explain the basis for this statement in our Response to the United

¹³ Idaho Power does not, and has not, claimed otherwise.

States, and incorporate that discussion in this Section by reference. *See* IPC Response to the U.S. Brief, Section V.

Regardless, we urge the Court not to get bogged-down in the analysis of which party holds the rights. The purpose of this litigation is to determine that the Company's rights as conveyed in the 1923 Contract remain in force.

CONCLUSION

Idaho Power Company's contractual rights to 45,000 acre-feet of active storage and 255,000 acre-feet of secondary storage capacity in the American Falls Reservoir remain valid and in force today. The Company's Objection in this case is based on the contract rights held pursuant to the 1923 Contract, as recognized in similar Objections by the United States and the State of Idaho. There is no document in which the Company rescinded those rights, and there is no legal theory that would support the rescission of those rights by this Court.

Dated this 16th day of November, 2010.

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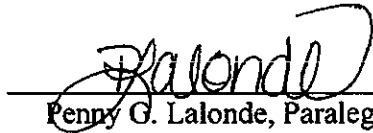
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2010, I caused the foregoing document entitled **RESPONSE OF IDAHO POWER COMPANY TO THE STATE OF IDAHO'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT** to be filed with the Court and served per the method indicated below upon the following:

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