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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 AMERICAN FALLS
	)	SPACEHOLDERS MOTION FOR
	)	SUMMARY JUDGMENT
	)	
	)	

Idaho Power Company, by and through undersigned counsel, hereby submits this
Response to the American Falls Spaceholders Supplemental Memorandum in Support of their
Motion for Summary Judgment ("Spaceholders' Brief") in the above captioned case.

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INTRODUCTION

Certain spaceholders in the American Falls Reservoir filed a supplemental Brief in support of their existing motion for summary judgment challenging Idaho Power Company's ("Idaho Power", the "Company" or "IPC") contractual right to storage capacity in the American Falls Reservoir as authorized both by the 1923 Contract¹ and by federal legislation. The Spaceholders reference the previous arguments raised in their 2009 motion, and add arguments claiming that Idaho Power Company *never* "demanded or used" its secondary storage capacity in the Reservoir, and that honoring Idaho Power Company's claim to 300,000 acre-feet of storage (presumably referencing Idaho Power Company 45,000 acre-feet of active storage and 255,000 acre-feet of secondary storage capacity) would do "serious harm" to other spaceholders in the Reservoir.²

The Spaceholders' claims do not withstand even a cursory review. As explained below, the facts do not support the Spaceholders' equitable claims (which should not even be considered valid by this Court since they were originally presented to challenge the Company's claims and its Objection that have all been withdrawn and/or amended), the facts show conclusively that Idaho Power Company has used both its primary and secondary storage capacity, and there is no

¹ See Idaho Power Company's Brief in Support of its Motion for Summary Judgment ("IPC Brief"), Ex. 1.

² This Response addresses the arguments presented in the Spaceholders Brief of October 5, 2010, titled "Supplemental Memorandum" supporting the Spaceholders Motion for Summary Judgment. Idaho Power Company notes that the original Motion for Summary Judgment filed by the Spaceholders was in response to claims in subcases 01-10485, 01-10486 and 01-10487, as well as the Company's original Objection in case 01-2064. All of those claims have been withdrawn by Idaho Power Company pursuant to the Company's motion and this Court's Order of February 8, 2010 ("Order"). Further, the Order accepted Idaho Power's Amended Objection in 1-2064. Therefore, any arguments contained in the Spaceholder's 2009 Motion or Supporting Brief pertaining to either the withdrawn claims or Idaho Power's pre-amendment objection in case 01-2064 cannot be considered relevant to this litigation. While Idaho Power Company has responded to the arguments raised in the Spaceholders October 5, 2010 Brief, it is not Idaho Power Company's responsibility to parse through every sentence and paragraph of the pre-Order Motion or Brief to attempt to interpret which claims remain relevant and which do not. It is Idaho Power Company's position that the previous Motions and Briefs concern issues that are moot and not the subject of the current litigation.

support in the Record for the claim that compliance with the terms of the 1923 Contract would harm irrigators.³

Idaho Power notes that many of the arguments made by the United States, the State of Idaho, and the Spaceholders overlap. Rather than repeat identical responses to each brief, the Company will refer the Court to the appropriate sections of its Response to other parties' briefs where appropriate in order to avoid unnecessary duplication.

ARGUMENT

I. IDAHO POWER COMPANY'S SECONDARY STORAGE CAPACITY RIGHTS HAVE BEEN RECOGNIZED BY STATE AND FEDERAL AUTHORITIES SINCE 1923 AND THE COMPANY HAS NEVER REPRESENTED THAT THE RIGHTS DO NOT EXIST

The Spaceholders make reference in their Supplemental Brief to their 2009 claims that Idaho Power Company has represented that its secondary storage rights in the Reservoir are subordinate to irrigation, and their claim that Idaho Power Company's represented that its storage rights are limited to 45,000 acre-feet. They attempt to use these alleged representations to support their theories of estoppel and injury to irrigation interests. Both of these allegations have been directly addressed in Response to the United States' Brief in Support ("U.S. Brief") so the Company refers the Court to that Brief to address this allegation. *See* IPC Response to U.S. Brief, Sections I.C, II, and III.

As noted in the IPC Response to the U.S. Brief, the Company's statements before Congress or elsewhere did not address Idaho Power Company's secondary storage capacity right.

³ In support of their newest claims, the Spaceholders include an affidavit from Lyle Swank. The affidavit of Mr. Swank is neither an expert report, nor should it have any bearing on this case. The affidavit is void of evidentiary basis for the conclusory opinions it contains, and it is irrelevant to this litigation because Idaho Power Company would not contact Mr. Swank in pursuit of its secondary storage right. Further, conclusory lay opinions should not carry undue weight with the Court. *See e.g. City of Pocatello v. IDWR*, Case CV-09-3449-OC, where the District Court for the Sixth Judicial District rejected a similar affidavit from Mr. Swank because it contained conclusory statements that were not supported by evidence in the Record.

The Spaceholders, like the United States, misquote or misunderstand the meaning of Idaho Power Company's statements. The use of the word "active" in the Company's statements and the various referenced documents has a meaning and cannot be blindly discarded. Additionally, the reference to storage water in the Reservoir that the Company can "schedule for release" or "demand" is a specific reference to Idaho Power Company's primary, active storage right of 45,000 acre feet, not to the Company's contractual right to secondary capacity. The Company cannot "demand" the release of its secondary storage capacity right in the traditional sense.⁴

Further, Idaho Power Company has always held the position that the American Falls Dam and Reservoir's purpose is primarily for irrigation use. IPC Response to U.S. Brief at 10; Transcript of John Bowling Deposition at 41:14-29, State of Idaho Brief, Ex. 47. This, on its face, has no relationship to Idaho Power Company's contractual storage rights. The reason the Spaceholders reference this fact is, apparently, the same reason that the United States continually referenced the fact in its Brief. If irrigation rights are paramount in the Reservoir, then BOR cannot honor Idaho Power Company's secondary storage right because doing so might negatively impact irrigators.

However, as discussed below and in the Company's Response to the U.S. Brief, Section I.C., there is absolutely no proof that irrigators will be injured due to compliance with Idaho Power Company's contractual rights, nor is there evidence in the Record that there is insufficient water in the Snake River system to meet all Spaceholder rights. *See* Bowling Depo., 173:9. The parties to this litigation had ample time to provide an expert report to support this claim of injury but they did not. As discussed in Sections III and IV, below, the simple assertion by Lyle Swank of a possible injury with no factual support – based on a false premise that Idaho Power

⁴ These issues are also fully briefed in the Introduction section of IPC's Response to the United States.

Company was in some way obligated to request release of its secondary storage right from a state water master – cannot be considered an expert opinion by this Court.

II. IDAHO POWER COMPANY CANNOT BE ESTOPPED FROM ASSERTING ITS 1923 CONTRACT RIGHTS

In another pre-Order argument (which, again, is based on claims and an Objection that no longer exist), the Spaceholders argue that Idaho Power Company should be estopped from asserting its contractual rights. The argument fails on multiple levels.

First, the Company refers the Court to Section II of its Response to the U.S. Brief. Equitable theories cannot be the basis for rescinding contract rights. The question of whether Idaho Power Company's contract rights remain in force is a question of law, not equity, and contract law principles must apply.⁵

Second, the Spaceholders' quasi-estoppel claim fails for the same reasons cited in the Company's Response to the U.S. Brief, Section III. Even if quasi-estoppel was the proper standard to apply to the validity of contract rights, the Spaceholders cannot establish the requisite elements. Specifically, the Company did not change its position as to the viability of its secondary storage rights, and there is no support for the argument that it would be "unconscionable" to recognize the contract rights.

Further, not even the United States attempted to argue the applicability of equitable estoppel as a basis for rescinding Idaho Power Company's contractual rights. Under Idaho law, equitable estoppel arises:

[w]hen a party makes a false representation or concealment of a material fact with actual or constructive knowledge of the truth; it is made with the intent that it be relied upon; the party asserting estoppel does not know or could not discover the truth; and the party asserting estoppel relies on it to the party's prejudice. *Weitz*

⁵ Idaho Power incorporates the relevant arguments in its Response to the U.S. Brief in this Section.

v. Green, 230 P.3d 743, 753 (Idaho 2009); *Allen v. Reynolds*, 186 P.3d 663, 668 (Idaho 2008) (quoting *Hecla Min. Co. v. Star-Morning Min. Co.*, 839 P.2d 1192, 1196 (Idaho 1992)).

No party to this litigation is claiming that Idaho Power Company made a false representation or concealed a material fact. Instead, the claims surround statements IPC representatives made to various parties which the parties to this litigation have misinterpreted and misunderstood. But, nowhere has anyone alleged the element of bad faith that is inherent in equitable estoppel jurisprudence. Further, the Spaceholders only had to read the 1923 Contract or speak to a representative of Idaho Power Company to "discover the truth" as to the Company's belief that it always maintained its right to 255,000 acre-feet of secondary storage capacity in American Falls Reservoir.

Contract rights are rights in law, not equity. They should be judged based on contract law principles. Even if equitable principles could be the basis for rescinding the 1923 Contract rights held by Idaho Power Company, however, the Spaceholders cannot establish the elements of either quasi-estoppel or equitable estoppel.

III. IDAHO POWER COMPANY HAS USED ITS PRIMARY AND SECONDARY STORAGE IN THE PAST

The Spaceholders claim that "Idaho Power Company has *never* demanded or used its alleged right to 300,000 acre-feet of storage water." Spaceholders' Brief at "3."⁶ This one statement not only crystallizes for the Court the Spaceholders' misunderstanding of Idaho Power Company's storage rights in American Falls Reservoir, it is also false.

First, the "300,000 acre-feet of storage water" to which Idaho Power makes a claim is not 300,000 acre-feet of active storage capacity. As noted throughout the many briefs filed by the

⁶ The Spaceholders failed to include page numbers on their supplemental brief. This statement is on what appears to be Page 3.

Company, Idaho Power holds 45,000 acre-feet of active storage capacity in the Reservoir which is on par with the storage rights of other Spaceholders in the Reservoir. Idaho Power Company can "call" on that storage right at any time. The Company's remaining right in the Reservoir is for 255,000 acre-feet of secondary storage capacity in the Reservoir.

Not only is it undisputed that Idaho Power Company uses its active storage rights for power generation each year, but there is significant evidence in the Record that Idaho Power Company has used its secondary storage capacity as well. *See e.g.* IPC Brief, Ex. 10.

Further, the allegation by Watermaster Lyle Swank that Idaho Power Company's secondary storage rights must not exist because the company has never "demanded, or even requested" the release of its secondary storage rights is irrelevant. The Company's secondary rights are held in trust by the United States, so the releases to maintain flows below Milner in a manner consistent with the terms of the 1923 Contract would be the responsibility of the Bureau of Reclamation ("BOR"), not of Idaho Power Company. Again, the Company holds contract rights which are to be administered and delivered by BOR, not by Mr. Swank or the State. The lay opinion of Mr. Swank, and the computer program of his predecessor, is simply irrelevant in determining whether or not Idaho Power Company's secondary storage rights remain in force.

IV. RECOGNITION OF IDAHO POWER COMPANY'S SECONDARY STORAGE RIGHT WILL NOT CAUSE HARM TO IRRIGATORS

Finally, the Spaceholders attempt to argue that compliance with the 1923 Contract will result in potential injury to irrigator interests in the Reservoir. Idaho Power has addressed this issue in its Response to the U.S. Brief at I.C., and again refers the Court to that Section. In short, there is no evidence supporting a claim of injury, let alone "serious harm," to irrigators or "other users" of American Falls Reservoir.

Further, to the extent the Spaceholders attempt to base their argument on the hypothetical harm referenced in Mr. Swank's affidavit, not only is Mr. Swank not an expert under state or federal rules, but there is no proof to support his lay opinion that compliance with the terms of the 1923 Contract would harm irrigators.⁷

V. AWARD OF COSTS IS UNWARRANTED

The Spaceholders sought attorney's fees and costs in their original motion because Idaho Power's Claim allegedly "utterly lacked evidentiary support" and because the Company had taken an "inconsistent position." Idaho Power Company emphatically denies that the Spaceholders have any right to costs or fees. The Company has provided hundreds of pages of evidence with its brief, and the Record contains thousands of pages of documents relative to this litigation. Further, as explained above, and in the Company's Response to both the United States and the State of Idaho, the Company has not changed its position as to its secondary storage right or its access to 300,000 acre-feet of storage rights in the Reservoir.

Idaho Code § 12-121 and Idaho R. Civ. P. 54(e)(1) provide that a court may award attorney fees to the prevailing party where it finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. This determination rests in the sound discretion of the trial court, *Nelson*, 99 P.3d at 1103-1104. The standard for showing frivolity is high. A claim is not necessarily frivolous simply because it fails. Rather, the question is if the claim is so plainly fallacious that it can be termed frivolous, unreasonable, or without foundation, *Gulf Chem. Employees Fed. Credit Union v. Williams*, 693 P.2d 1092, 1096 (Idaho Ct. App.

⁷ To establish injury, the other Parties would, at the very least, need to commission and submit to the Court expert modeling studies of the entire Snake River system based on the operational criteria used by the BOR. BOR would also need to fully explain to the Court how it manages the Snake River system, how and when flows are released, how water rights are protected, etc. If the parties continue to argue this issue, it cannot be settled on Summary Judgment, so a trial regarding injury to irrigators will be necessary. Regardless, this has nothing to do with whether or not Idaho Power Company's contractual rights remain valid or whether the various parties' Objections in 1-2064 calling for 300,000 acre-feet of storage for power should be approved by this Court.

1984); *Associates N.W. v. Beets*, 733 P.2d 824, 826 (Ct. App. 1987) (attorney's fees should only be awarded under this section if the claim is plainly fallacious and not fairly debatable).

Furthermore, an award of attorney's fees is not appropriate under Idaho Code § 12-121 and I.R.C.P. 54(e) unless all claims brought or all defenses asserted are frivolous and without foundation, *Management Catalysts v. Turbo W. Corpac, Inc.*, 809 P.2d 487, 491 (Idaho 1991) (Where there are multiple claims and multiple defenses, it is not appropriate to segregate those claims and defenses to determine which were or were not frivolously defended or pursued, rather the total defense of plaintiff's proceedings must be unreasonable or frivolous.).

Ultimately, an award of attorney's fees under this section is proper if there is no foundation for a claim, *Del Milam & Sons v. Bailey*, 691 P.2d 1202, 1204 (Idaho 1984) (where third-party defendant offered no defense, called no witnesses, presented no supported legal argument in favor of its position, and made no attempt to cross-examine other party's witnesses, attorney's fees under I.R.C.P. 54(e) was proper); *Sunshine Mining Co. v. Metropolitan Mines Corp.*, 726 P.2d 766, 771 (Idaho 1986) (attorney's fees were properly awarded where the plaintiff initiated a lawsuit without any foundation for its claim).

Idaho Power Company has presented dozens of exhibits establishing the historical recognition by the United States and the State of Idaho of its contract rights in American Falls Reservoir. It has presented documentation supporting its argument that its right to secondary storage capacity in the Reservoir remains in effect today, and it has brought to the Court's attention the fact that the United States and the State of Idaho have filed Objections in this case that provide for 300,000 acre-feet of storage for power in the Reservoir. This case is neither frivolous nor unreasonable.

CONCLUSION

The Spaceholder's claims are not supported by law or fact. They misquote key statements, misinterpret documents in the Record, and make arguments based on those misquotes and misinterpretations. The Company's secondary storage capacity right as authorized by the 1923 Contract remains in force today and there is nothing in the Spaceholders' Brief that could lead this Court to an alternative legal conclusion.

Dated this 16th day of November, 2010.

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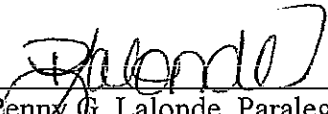
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2010, I caused the foregoing document entitled **RESPONSE TO SPACEHOLDER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be filed with the Court and served per the method indicated below upon the following:

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