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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

)
) Subcase No. 01-02064
)

) (American Falls Hydropower Storage
) Subcase)
)

) **REPLY BRIEF IN SUPPORT OF**
) **AMENDED MOTION FOR PARTIAL**
) **SUMMARY JUDGMENT**
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The State of Idaho, by and through the undersigned deputy attorney general, hereby submits its Reply Brief in Support of Amended Motion for Partial Summary Judgment in the above-entitled subcase.

I. PROCEDURAL BACKGROUND

On February 19, 2010, the parties to the American Falls Hydropower Natural Flow Subcases, including Idaho Power, filed Standard Form 5s in those subcases.¹ The parties agreed that Idaho Power's natural flow hydropower water rights at the company's American Falls power plant would be junior and subordinate to all other water rights in the state of Idaho:

The right for the use of water acquired under this right shall be junior and subordinate to all other rights for the use of water within the State of Idaho with a priority date later in time than the priority of this right and shall not give rise to any claim against any future rights for the use of water within the State of Idaho initiated later in time than the priority of this right.²

In addition, Idaho Power dismissed its independent claims for hydropower storage in the American Falls Reservoir, leaving the United States Bureau of Reclamation's (USBOR) water right, no. 01-02064, as the only remaining claim for hydropower storage in the Reservoir.

The Idaho Department of Water Resources (IDWR) Director recommended water right no. 01-02064 in the name of the USBOR. The recommendation provided for a total storage capacity of ~1,700,000 acre-feet, which included ~1,655,000 acre-feet for irrigation storage and ~300,000 acre-feet for hydropower storage. The Director's recommendation also included an explanatory remark that made the hydropower aspects of water right no. 01-02064 junior and subordinate to all other water rights except other hydropower rights:

The appropriator shall exercise this right in a manner that recognizes the historic practice that the use of water for power generation is incidental to the rights of others to the use of water for other purposes. The appropriator shall not make a

¹ See e.g., Standard Form 5: Stipulated Elements of a Water Right, *In re SRBA Case No. 39576, Subcase nos. 01-02017 et al.* (Idaho 5th Dist. Ct. Feb. 19, 2010).

² See *id.*

delivery call for hydropower generation except as against junior hydropower rights.

The State of Idaho filed an objection to the Director's recommendation, asserting that the amount of power storage under water right no. 01-02064 should be limited to 2.65% of the storage capacity of the American Falls Reservoir. Idaho Power filed an amended objection to water right no. 01-02064 that seeks the inclusion of remarks on the quantity and purpose of use elements that would require the USBOR to spill flows past American Falls Reservoir for use at the company's downstream power plants.

On October 5, 2010, the State filed its motion for summary judgment, seeking a determination:

1. That power storage at American Falls should be decreed in the name of the United States in the amount of ~45,000 acre-feet (2.65% of reservoir capacity); and
2. That any explanatory remark requiring water in excess of ~45,000 acre-feet (2.65% of reservoir capacity) be released past the American Falls Dam specifically for Idaho Power's power generation purposes rather than stored in the Upper Snake River reservoir system should be disallowed.

On November 16, 2010, Idaho Power filed a response in opposition to the State's motion for summary judgment.

II. ARGUMENT

A. PURSUANT TO IDAHO POWER'S ADMISSIONS AND THE TERMS OF THE 1976 CONTRACTS, THE QUANTITY OF POWER STORAGE AT AMERICAN FALLS SHOULD BE DECREED IN THE AMOUNT OF ~45,000 ACRE-FEET (2.65% OF RESERVOIR CAPACITY).

Hydropower storage at American Falls is limited to ~45,000 acre-feet (2.65% of reservoir capacity) pursuant to Idaho Power's own admissions and the terms of the 1976 contracts.

i. IDAHO POWER ADMITS THAT POWER STORAGE AT AMERICAN FALLS IS LIMITED TO ~45,000 ACRE-FEET (2.65% OF RESERVOIR CAPACITY).

Idaho Power admits that the company's claimed "secondary" right does not involve a

right to “storage water,” resolving one of the fundamental issues currently before the court—i.e., the quantity of storage in the American Falls Reservoir allocated for power purposes. Idaho Power’s 30(b)(6) witness testified as follows:

- 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. . . .
- 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.³
- 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.⁴
- 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.**⁵
- A. **It’s not storage water.** . . . It’s not water that is released from storage that was previously stored.⁶

Thus, based upon Idaho Power’s own admission, there is no genuine issue of material fact that the quantity of “power storage” and “power from storage” at American Falls Reservoir under water right no. 01-02064 should be decreed in the amount of ~45,000 acre-feet (2.65% of reservoir capacity). There can be no dispute that this subcase pertains to a water right for **storage** purposes alone,⁷ and therefore, the State is entitled to a summary judgment determination that the amount of storage for power purposes at American Falls Reservoir is

³ Rule 30(b)(6) Deposition of Idaho Power Company: Testimony of Jon Bowling at 20, *In re SRBA Case No. 39576, Subcase no. 01-02064* (Idaho 5th Dist. Ct. May 3–4, 2010) (“May 2010 Bowling Dep.”).

⁴ *Id.* at 278 (emphasis added).

⁵ *Id.* at 296 (emphasis added).

⁶ *Id.* at 335 (emphasis added).

⁷ As discussed in the State’s brief in response to the power company’s motion for summary judgment, the Court should reject Idaho Power’s attempt to now obtain either a natural flow right or a minimum flow right under storage water right no. 01-02064. *See* 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 at 50–51, *In re SRBA Case No. 39576, Subcase no. 01-02064* (Idaho 5th Dist. Ct. Nov. 16, 2010) (“State’s Response Brief”).

limited to ~45,000 acre-feet (2.65% of reservoir capacity).

ii. THE USE OF THE TERM “ACTIVE” STORAGE CAPACITY PRECLUDES ASSERTION OF IDAHO POWER’S SECONDARY STORAGE RIGHT.

Idaho Power’s argument that the term “active” storage capacity is a reference to the company’s “secondary” storage right is absurd. The company accuses the State of implying that the term “active” storage has no meaning;⁸ however, nothing could be farther from the truth. The term “active” storage does in fact have a meaning, it just does not mean what the company wants it to. Instead, “active” storage capacity encompasses **all** storage rights in the reservoir, whether “primary” or “secondary.”

The starting point for interpreting a contract is the plain meaning of the contract itself.⁹ Here the plain language of Idaho Power’s 1976 Spaceholder Contract establishes that the parties intended the storage capacity provisions therein to define all spaceholder rights at American Falls. Article 21, subsection (b) of the 1976 Spaceholder Contract is an all inclusive statement of the quantity of “stored water” to be made available to the spaceholder, providing:

“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”¹⁰

Accordingly, a plain reading of subsection (b) demonstrates that Idaho Power’s right to “stored water” at American Falls is limited to 2.6471% of storage capacity. Under no interpretation of subsection (b) is there an exception for, or reservation of, any “secondary” storage rights. In

⁸ See Response of Idaho Power Company to the United States’ Motion for Summary Judgment at 1, *In re SRBA Case No. 39576, Subcase no. 01-02064* (Idaho 5th Dist. Ct. Nov. 16, 2010) (“Idaho Power’s Brief in Response to United States”).

⁹ See *Harris v. State*, 147 Idaho 401, 405, 210 P.3d 86, 90 (2009) (“When the language in a contract is clear and unambiguous, its interpretation is a question of law and the language will be given its plain meaning.”); *Short Bros., PLC v. United States*, 65 Fed. Cl. 695, 779 (2005) (“[C]ontract interpretation requires the court to begin with the plain language of the contract . . .”).

¹⁰ 1976 Spaceholder Contract at 10, part II, art. 21(b) (Mar. 31, 1976) (also known as “Spaceholder Contract among the United States, the AFRD, and Idaho Power Company for Storage in the American Falls Replacement Dam and for Construction and Operation and Maintenance of the American Falls Replacement Dam Program, Contract No. Ilr-733S”).

fact, no where in any of the 1976 contracts does the term “secondary storage right” appear. If Idaho Power intended to reserve its claimed “secondary” storage right following the reconstruction of the project, it would have certainly been reasonable for the parties to have referenced that right in the series of contracts that were intended to guide the operations of the new dam.¹¹

Moreover, the use of the term “active” storage confirms the parties’ intent that Idaho Power have a right to only 2.6471% of storage capacity. Under any definition, “active” storage means **all** storage for a particular purpose whether that storage is considered “primary” or “secondary” by the spaceholder:

Active capacity: The reservoir capacity normally usable for storage and regulation of reservoir inflows to meet established reservoir operating requirements. It extends from the highest of either the top of exclusive flood control capacity, the top of joint use capacity, or the top of active conservation capacity, to the top of inactive capacity. It is also the **total capacity** less the sum of the inactive and dead capacities. The reservoir capacity that can be used for irrigation, power, municipal and industrial use, fish and wildlife, recreation, water quality, and other purposes.¹²

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.¹³

Idaho Power’s argument to the contrary amounts to a claim that its “secondary” storage right is

¹¹ Even if Idaho Power intended to retain the “secondary” storage right by implication, that understanding appears no where in the 1976 contracts and thus the company’s subjective, undisclosed intent is immaterial to the interpretation of the 1976 contracts. *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.” Order on Cross-Motions for Summary Judgment, *In re SRBA Case No. 39576, Consolidated Subcase 00-92023* at 38 (Idaho 5th Dist. Ct. Apr. 18, 2008).

¹² Glossary, United States Bureau of Reclamation, <http://www.usbr.gov/library/glossary> (last visited Dec. 7, 2010) (emphasis added).

¹³ IDAPA 37.03.06.010.01 (emphasis added).

akin to “dead” or “inactive” storage space that by definition is not available to Idaho Power or any other spaceholder.¹⁴ The only logical interpretation of the 1976 contracts is that the parties and privies thereto intended the term “active” storage to include a determination of any and all uses of storage at American Falls.

There is nothing in the 1976 contracts to indicate that the parties 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 or in the subsequent bond confirmation proceedings is an indictment **against** the recognition of that right, not an argument for it. In fact, in 1931 the company agreed with the State’s interpretation, insisting that the omission of a specific reservation of the “secondary” storage right meant that the company had “relinquishe[d]” any claim thereto for use at its Twin Falls power plant.¹⁵ 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’S 1976 SPACEHOLDER CONTRACT INCORPORATED THE LIMITATIONS OF THE REVENUE ADJUSTMENT ACT OF 1975.

As discussed below,¹⁶ the limitations of the Revenue Adjustment Act of 1975 on the quantity of storage that could be controlled for power generation purposes at American Falls were incorporated into Idaho Power’s 1976 Spaceholder Contract.¹⁷ Pursuant to those

¹⁴ See IDAPA 37.03.06.010.01; see also IDAPA 37.03.06.010.12 (“Dead Storage. The water volume in the bottom of the reservoir stored below the lowest outlet and generally is not withdrawn from storage.”).

¹⁵ See Letter from D.F. McGee, Electric Bond and Share Co., to M.L. Hibbard, Vice Pres. & Gen. Mgr., Idaho Power Co. (Sept. 30, 1931).

¹⁶ See *infra* Section II.B.iv.

¹⁷ See *Rehart v. Clark*, 448 F.2d 170, 173 (9th Cir. 1971) (“It is well settled that existing laws are read into contracts in order to fix the rights and obligations of the parties.”); *Norfolk and Western Ry. Co. v. American Train Dispatchers Ass’n*, 499 U.S. 117, 130 (1991) (“Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which

limitations, Idaho Power's rights to the release of water from the American Falls reservoir were limited to its ~45,000 acre-feet (2.65% of reservoir capacity) storage right. Those limitations were incorporated into the 1976 contracts as a matter of fact and law, and Idaho Power's claim that it contracted around those limitations is ridiculous.

iv. THE SAVINGS PROVISION OF THE 1976 SPACEHOLDER CONTRACT ESTABLISHED IDAHO POWER'S INTENT TO ABANDON ANY STORAGE RIGHTS IT MAY HAVE HAD BEYOND THE 2.65% OF STORAGE CAPACITY SPECIFIED IN THE 1976 CONTRACT.

In the savings provision of the 1976 Spaceholder Contract, Idaho Power unequivocally expressed its intent to abandon¹⁸ any storage rights it may have had under the 1923 Contract that were in conflict with the rights specified in the 1976 Spaceholder Contract:

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 Spaceholder Contract.¹⁹

Pursuant to the savings provision, the provisions of the 1976 contracts designating 2.65% of the storage capacity to the company were intended to prevail over any contractual claim to "secondary" storage under the 1923 Contract:

STORAGE CAPACITY TO BE MADE AVAILABLE TO SPACEHOLDER

(b) The United States will continue to make available to the Spaceholder stored

affect its enforcement or discharge.") (quoting *Farmers and Merchants Bank of Monroe v. Federal Reserve Bank of Richmond*, 262 U.S. 649, 660 (1923)); *Fid. Trust Co. v. State*, 72 Idaho 137, 149, 237 P.2d 1058, 1066 (1951) ("[I]t is axiomatic that extant law is written into and made a part of every written contract."); *Robinson v. Joint Sch. Dist. No. 150*, 100 Idaho 263, 265, 596 P.2d 436, 438 (1979) (recognizing that the Idaho rule "appears to be the law in almost every state, if not all").

¹⁸ "Abandonment is a common law doctrine involving the occurrence of (1) an intent to abandon and (2) an actual relinquishment or surrender of the water right." *Jenkins v. State*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982) (citation omitted).

¹⁹ 1976 Spaceholder Contract at 6-7, part I, art. 19(a) (emphasis added).

water accruing to 2.6471% of the active storage capacity of the Replacement Dam²⁰

Thus, the savings provision was a clear statement of intent by Idaho Power to abandon any storage rights that were inconsistent with those specified in the 1976 Spaceholder Contract.

v. REPRESENTATIONS MADE BY THE PARTIES TO THE 1976 CONTRACTS, INCLUDING IDAHO POWER, ESTABLISH THE PARTIES' CLEAR CONTRACTUAL INTENT THAT IDAHO POWER HAD A RIGHT TO ONLY ~45,000 ACRE-FEET (2.65% OF RESERVOIR CAPACITY) AT AMERICAN FALLS.

Idaho Power represented a clear intent to limit its rights to demand water past American Falls Dam to its ~45,000 acre-feet storage right (2.65% of reservoir capacity) in the course of the various proceedings leading up to, during, and following the 1976 contracts. Those representations included, but were not limited to, the following:

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.²¹

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.²²

Senator McClure: "It is not contemplated to have releases solely for power production?"

Robert A. Hogg, Idaho Power Company: "Not at all. The releases, certainly in the summertime, will be entirely dependent upon the irrigation requirements."²³

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

²⁰ *Id.* at 10, part II, art. 21.

²¹ *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).

²² *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. 43 (1973) (Prepared Statement of Idaho Power).

²³ *Hearing before the Senate Subcommittee on Water and Power Resources on S. 1528 and S. 1529*, 93rd Cong. 102-03 (1973).

irrigation season.²⁴

The Company's proposal includes the necessity of building a new power plant under a 50-year FPC license to develop the full energy potential of the site. This, in no way, would affect the water release nor water rights of the irrigators as they now exist. . . . We have a right to utilize only 45,000 acre-feet upon our demand.²⁵

The use of falling water releases for power generation is so thoroughly under the control of Reclamation in its releases for irrigation and other purposes of the Minidoka Project that the Applicant would have no opportunity to operate the project in a manner to conflict with future depletion or diversion of the water of the Snake River.²⁶

Applicant has no control over the water releases at the Replacement Dam.²⁷

[T]he amount of active storage capacity presently owned by the Idaho Power Company under its Spaceholder Contract (2.6471 percent) ²⁸

[T]he amount of active storage capacity presently owned by the Idaho Power Company under its Spaceholder Contract [is] (2.6471%) ²⁹

STORAGE CAPACITY TO BE MADE AVAILABLE TO SPACEHOLDER . . . (b) The United States will continue to make available to the Spaceholder stored water accruing to 2.641% of the active storage capacity of the Replacement Dam unless the Spaceholder is in default under the terms and conditions of the Existing Spaceholder Contract or this Spaceholder Contract.³⁰

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:

²⁴ *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).

²⁵ *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. 42, 47 (1973) (Testimony of Robert A. Hogg, Idaho Power); *see also* Final Env't'l Statement: American Falls Dam Replacement and Powerplant at 8 (Department of Interior Nov. 13, 1974) ("All the space in American Falls Reservoir is active. Irrigators use a total of 1,655,000 acre-feet, and the remaining 45,000 acre-feet is used by the Idaho Power Company.") (listing Idaho Power as one of the entities from which comments were requested).

²⁶ Order Issuing Major License (Unconstructed), Project No. 2736 at 11-12 (FPC Mar. 31, 1975).

²⁷ *Id.* at 3.

²⁸ 1976 Government Contract at 13, art. 17(e) (Mar. 31, 1976) (also known as Contract between the United States and the AFRD for Construction and Operation and Maintenance of the American Falls Replacement Dam Program, Contract No. 14-06-100-9041); *see also id.*, Ex. A (listing Idaho Power as holding ~45,000 acre-feet or 2.6471% of active capacity).

²⁹ 1976 Falling Water Contract at 12-13, art. II § 2.3 (Mar. 31, 1976) (also known as Falling Water Contract by and between AFRD and Idaho Power Company) ("The Idaho Power Company agrees to the provisions of the Government Contract governing operation and maintenance of the Replacement Dam.").

³⁰ 1976 Spaceholder Contract at 10, part II, art. 21.

Name of Wateruser	Percentage of Total Active Storage Capacity
Idaho Power Company	2.6471% ³¹

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].³²

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.³³

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.³⁴

The other parties to the reconstruction project and the 1976 contracts also intended to limit Idaho Power's rights to demand water past American Falls Dam to the company's ~45,000 acre-feet storage right, as demonstrated by the following representations:

³¹ 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).

³² Answers and Objections of Idaho Power Company to Plaintiff's First Request for Admissions at 56-56, *Kerner v. United States*, No. 1-76-204 (D. Idaho July 25, 1978); see also *id.* at 4 ("Any and all Findings of Fact and Conclusions of Law made by that State Court are binding upon the plaintiffs and cannot be waived by the parties to this action.").

³³ Bond Counsel Opinion at 15 (Chapman and Cutler Dec. 1, 1980) (submitted by Idaho Power in U-1006-171).

³⁴ Bond Counsel Opinion at 20 (Chapman and Cutler Feb. 21, 1990) (submitted by Idaho Power in IPC-E-89-15).

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.³⁵

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 Dam.³⁶

All the space in American Falls Reservoir is active. Irrigators use a total of 1,655,000 acre-feet, and the remaining 45,000 acre-feet is used by the Idaho Power Company.³⁷

The Company will have no control over the release of water other than in its capacity as a Spaceholder 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).³⁸

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.³⁹

In this case the Idaho Power Company has a limited spaceholder right (under 3 percent) ⁴⁰

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.⁴¹

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

³⁵ *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).

³⁶ *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).

³⁷ Final Env't'l Statement: American Falls Dam Replacement and Powerplant at 8 (Department of Interior Nov. 13, 1974).

³⁸ *Id.* at 4, 6.

³⁹ H.R. Rep. No. 94-531, at 3 (1975).

⁴⁰ H.R. Rep. No. 94-531, at 3 (1975).

⁴¹ 121 Cong. Rec. 31868 (1975).

electric energy.⁴²

In this case the Idaho Power Company has a limited spaceholder right (under 3 percent) ⁴³

The project shall be operated in such a manner as will not conflict with the future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the backwater created by the project for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed.⁴⁴

The use of falling water releases for power generation is so thoroughly under the control of Reclamation in its releases for irrigation and other purposes of the Minidoka Project that the Applicant would have no opportunity to operate the project in a manner to conflict with future depletion or diversion of the water of the Snake River.⁴⁵

Applicant has no control over the water releases at the Replacement Dam.⁴⁶

[T]he amount of active storage capacity presently owned by the Idaho Power Company under its Spaceholder Contract (2.6471 percent) ⁴⁷

[T]he amount of active storage capacity presently owned by the Idaho Power Company under its Spaceholder Contract [is] (2.6471%) ⁴⁸

STORAGE CAPACITY TO BE MADE AVAILABLE TO SPACEHOLDER . . . (b) The United States will continue to make available to the Spaceholder stored water accruing to 2.641% of the active storage capacity of the Replacement Dam unless the Spaceholder is in default under the terms and conditions of the Existing Spaceholder Contract or this Spaceholder Contract.⁴⁹

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:

⁴² S. Rep. No. 94-570, at 3 (1975).

⁴³ *Id.*

⁴⁴ Order Issuing Major License (Constructed), Project No. 2258 at 21, § 32 (FPC Mar. 31, 1975).

⁴⁵ Order Issuing Major License (Unconstructed), Project No. 2736 at 11-12 (FPC Mar. 31, 1975); *see also* Idaho Power Company Proposal Presented to Executive Committee of Spaceholders at 8 (Feb. 27, 1973) ("American Falls Reservoir District would agree with Idaho Power Company: . . . (b) To assist the Company in obtaining a 50-year FPC license for the Company to build, own, operate and maintain a power plant to utilize the water released from the dam.").

⁴⁶ Order Issuing Major License (Unconstructed), Project No. 2736 at 3 (FPC Mar. 31, 1975).

⁴⁷ 1976 Government Contract at 13, art. 17(e); *see also id.*, Ex. A (listing Idaho Power as holding ~45,000 acre-feet or 2.6471% of active capacity).

⁴⁸ 1976 Falling Water Contract at 12-13, art. II § 2.3.

⁴⁹ 1976 Spaceholder Contract at 10, part II, art. 21.

Name of Wateruser	Percentage of Total Active Storage Capacity
Idaho Power Company	2.6471% ⁵⁰

Idaho Power's argument that the parties intended something entirely different in the 1976 contracts—i.e., inclusion of an implied reservation of 255,000 acre-feet of power storage not mentioned in the text of the contract itself—from what was represented throughout the reconstruction project process defies the record and defies logic.

B. CONGRESS EXPRESSLY PRECLUDED IDAHO POWER FROM DEMANDING RELEASES OF WATER FROM THE RESERVOIR OTHER THAN THE ~45,000 ACRE-FEET OF STORAGE SPACE.

The plain language of the Revenue Adjustment Act of 1975, the legislative history, and the very purpose of the Act itself establish Congress's intent to limit **the total quantity of water** that could be controlled for power generation purposes to no more than 10% of the storage capacity at American Falls. Idaho Power's arguments (a) that the limitations of the Revenue Adjustment Act of 1975 apply only to releases made for power generation at its American Falls power plant, but not to releases made for power generation at the company's other downstream power plants, and (b) that the limitations of the Act apply only to the company's "active" storage rights, are both contrary to Congress's clear intent that the tax exemption apply only if **all** power generation is subordinate to "the furnishing of water for irrigation purposes."⁵¹ Instead, the statute unambiguously limits **all rights and releases** controlled solely for power generation purposes to no more than 10% of the storage capacity at American Falls.

i. THE PLAIN LANGUAGE OF THE REVENUE ADJUSTMENT ACT OF 1975 ESTABLISHED THAT THE 10% LIMITATION APPLIES TO THE TOTAL QUANTITY OF WATER ALLOWED TO BE CONTROLLED SOLELY FOR POWER GENERATION PURPOSES.

Idaho Power admits that pursuant to the Revenue Adjustment Act of 1975 no more than

⁵⁰ 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).

⁵¹ Revenue Adjustment Act of 1975, Pub. L. 94-164, § 7, 89 Stat. 970, 976 (1975).

10% of the water stored in the American Falls Reservoir can be released solely for power generation purposes.⁵² Yet, Idaho Power argues that there is no limitation under the Act on amount of control the company can have over the releases from the reservoir so long as: (a) the water released is for use somewhere other than American Falls;⁵³ and/or (b) the water released is simply stamped with the word “secondary” before it.⁵⁴ The plain language of the Act, however, provides no such distinctions.

“[T]he starting point for interpreting a statute is the language of the statute itself.”⁵⁵ Here, the plain language of the Revenue Adjustment Act of 1975 establishes that Congress intended the limitations therein to apply to **all rights and releases** from the American Falls Reservoir. The Revenue Adjustment Act of 1975 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.⁵⁶

Read plainly, limitation (1) requires substantially all of the stored water at a qualifying project be available for release for irrigation purposes.⁵⁷ This limitation applies unambiguously to “**all**” of the stored water at such a project, **without qualification**. Idaho Power’s interpretation would

⁵² See Response of Idaho Power Company to the State of Idaho’s Amended Motion for Partial Summary Judgment at 7, *In re SRBA Case No. 39576, Subcase no. 01-02064* (Idaho 5th Dist. Ct. Nov. 16, 2010) (“Idaho Power’s Brief in Response to State of Idaho”) (“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.”).

⁵³ See *id.* (“Thus, Congress was concerned with the Company’s storage rights which could be used for power generation purposes at American Falls, not the Company’s secondary storage capacity rights used to ensure adequate flows below Milner Dam.”).

⁵⁴ See *id.* (“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.”).

⁵⁵ *Consumer Product Safety Comm’n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

⁵⁶ Revenue Adjustment Act of 1975, Pub. L. 94-164, § 7, 89 Stat. 970, 976 (1975).

⁵⁷ *Id.*

read the term “all” completely out of the text of the Act, and therefore, such an interpretation would be contrary to the plain language of the statute.

ii. THE LEGISLATIVE HISTORY OF THE REVENUE ADJUSTMENT ACT OF 1975 ESTABLISHES CONGRESS’S INTENT THAT LESS THAN 10% OF THE STORAGE CAPACITY IN TAX-EXEMPT IRRIGATION RESERVOIRS COULD BE OBTAINED FOR HYDROPOWER PURPOSES.

In the event that the Court finds the term “all” stored water ambiguous,⁵⁸ the legislative history of the Revenue Adjustment Act of 1975 clearly shows Congress’s intent to limit **all releases** that could be controlled for power generation purposes to no more than 10% of the storage capacity at American Falls:

The Company will have no control over the release of water other than in its capacity as a Spaceholder 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).⁵⁹

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.⁶⁰

In this case the Idaho Power Company has a limited spaceholder right (under 3 percent) ⁶¹

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.⁶²

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

⁵⁸ Where the statutory language is clear, as is the case here, the Court’s analysis is complete. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992) (“When the words of the statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”) (citations omitted).

⁵⁹ Brief of AFRD to IRS at 4, 6 (Jan. 31, 1975).

⁶⁰ H.R. Rep. No. 94-531, at 3 (1975).

⁶¹ H.R. Rep. No. 94-531, at 3 (1975).

⁶² S. Rep. No. 94-570, at 3 (1975).

percent) ⁶³

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.⁶⁴

There is no exception in the legislative history for water released for use downstream of American Falls and/or for water released under the guise of “secondary” storage. Instead, the legislative history could not be clearer—the tax exemption was to apply in Idaho Power’s situation because there was no intention on the part of Congress that water could be released specifically for use by the company to generate electricity, except for 45,000 acre-feet.

iii. PROVIDING IDAHO POWER CONTROL OVER AN ADDITIONAL 255,000 ACRE FEET OF STORAGE WOULD DEFEAT THE PURPOSE OF THE REVENUE ADJUSTMENT ACT OF 1975.

Idaho Power’s interpretation of the Revenue Adjustment Act of 1975 defies the very purpose of the Act, which was to provide tax-exempt status to “irrigation dams” that “ha[ve] a subordinate use in connection with the generation of electric energy by water”⁶⁵ Under Idaho Power’s interpretation of the Act, there is no limit on the quantity of water Idaho Power can control at American Falls so long as those releases either are used for power generation below the dam or are termed “secondary” by the company. Providing the company control over an additional 255,000 acre-feet of storage at American Falls would turn what Congress intended to be an “irrigation” dam into something entirely different. Accordingly, the State is entitled to summary judgment as a matter of federal law that no more than 2.65% of the storage capacity of the American Falls reservoir is controlled for power generation purposes.

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⁶³ S. Rep. No. 94-570, at 3 (1975).

⁶⁴ 121 Cong. Rec. 31868 (1975).

⁶⁵ Revenue Adjustment Act of 1975, Pub. L. 94-164, § 7, 89 Stat. 970, 976 (1975).

iv. THE LIMITATIONS OF THE REVENUE ADJUSTMENT ACT OF 1975 WERE INCORPORATED INTO IDAHO POWER'S 1976 SPACEHOLDER CONTRACT AS A MATTER OF FACT AND LAW.

"It is well settled that existing laws are read into contracts in order to fix the rights and obligations of the parties."⁶⁶ The parties to a contract are presumed "to know and to have had in mind"⁶⁷ those laws that were in existence at the time of contracting. Accordingly, the limitations on the quantity of water that could be controlled for power generation purposes under the Revenue Adjustment Act of 1975 could not be contracted around in 1976.

Limitation (1) of the Revenue Adjustment Act of 1975 requires substantially "all" of the stored water at a qualifying project be available for release for irrigation purposes.⁶⁸ This limitation applies unambiguously to "all" of the stored water at such a project, **without qualification**. There are no exceptions or distinctions drawn in the statute or in the legislative history for "active" or "secondary" storage. Accordingly, Idaho Power's "active" storage versus "secondary" storage argument can not be reconciled with the limitations of the Revenue Adjustment Act of 1975, which were incorporated into the contract as a matter of contract interpretation principles.⁶⁹

The parties specifically amended the 1976 contracts in order to make it clear that the contracts would comply with the Revenue Adjustment Act of 1975. In a March 12, 1976 letter to the various American Falls spaceholder organizations, American Falls Reservoir District

⁶⁶ *Rehart v. Clark*, 448 F.2d 170, 173 (9th Cir. 1971); *see also Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991) ("Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge.") (quoting *Farmers and Merchants Bank of Monroe v. Federal Reserve Bank of Richmond*, 262 U.S. 649, 660 (1923)); *Fid. Trust Co. v. State*, 72 Idaho 137, 149, 237 P.2d 1058, 1066 (1951) ("[I]t is axiomatic that extant law is written into and made a part of every written contract."); *Robinson v. Joint Sch. Dist. No. 150*, 100 Idaho 263, 265, 596 P.2d 436, 438 (1979) (recognizing that the Idaho rule "appears to be the law in almost every state, if not all").

⁶⁷ *Progressive W. Ins. Co. v. Yolo County Super. Ct.*, 37 Cal. Rptr. 3d 434, 449 (2005).

⁶⁸ *Id.*

⁶⁹ *See supra* note 67.

counsel, John Rosholt, explained the changes that were made to the spaceholder contracts in order to recognize the applicability of the Revenue Adjustment Act of 1975:

3. In paragraph 2, in line 2, after the words "Federal Reclamation Laws" the words "primarily for the furnishing of water for irrigation purposes" have been inserted to more clearly emphasize the irrigation nature of the project and more closely conform to the language of the amendment to the Internal Revenue Code.⁷⁰

5. The words "primarily for the furnishing of water for irrigation purposes as a feature" were added to the last line of paragraph 6, page 1. The reason is the same as in paragraph 3 of this letter.

8. Paragraph 10 at page 2 was amended and the words which appear in parentheses in lines 2 and 3 was [sic] added to reinforce the language for the same reasons as in paragraph 3 of this letter.⁷¹

The 1976 Government Contract and the 1976 Falling Water Contract were similarly amended to recognize the applicability of the Revenue Adjustment Act of 1975 and the limitations therein:

WHEREAS, the United States has constructed the Existing Dam of the Minidoka Project pursuant to the Reclamation Laws primarily for the furnishing of water for irrigation purposes⁷²

Replacement Dam to the United States to be operated and maintained primarily for the furnishing of water for irrigation purposes as a feature of the Minidoka Project⁷³

(which utilization shall be subordinate to the furnishing of water for irrigation purposes)⁷⁴

which utilization is and shall continue to be subordinate to the furnishing of water for from the Replacement Dam for irrigation purposes, in that less than 10 percent of the water accruing to the active storage capacity in the Replacement Dam may be contractually scheduled for release by the Idaho Power Company⁷⁵

The utilization by the Idaho Power Company of the Falling Water at the

⁷⁰ Letter from John Rosholt, Attorney, American Falls Reservoir District, to American Falls Spaceholder Organizations at 2 (Mar. 12, 1976).

⁷¹ *Id.* at 3.

⁷² 1976 Government Contract at 1, art. 2.

⁷³ *Id.* at 1, art. 4.

⁷⁴ *Id.* at 1, art. 5.

⁷⁵ *Id.* at 14, art. 18(a).

Powerplant for power generation is and shall continue to be subordinate to the furnishing of water from the Replacement Dam for irrigation purposes⁷⁶

Less than ten per cent (10%) of the water accruing to the active storage capacity in the Replacement Dam may be contractually scheduled for release from the Replacement Dam by the Idaho Power Company⁷⁷

The limitations of the Revenue Adjustment Act of 1975 on the total quantity of storage available for power generation purposes applied to, and were incorporated into, the 1976 contracts. Idaho Power's argument that the company contracted around the requirements of the Act is contrary to the law, the text of the contracts, and the parties expressed intentions. Accordingly, Idaho Power's rights to the release of water from the American Falls reservoir are limited to the 2.65% of storage capacity prescribed by the Revenue Adjustment Act of 1975.

C. IDAHO POWER IS COLLATERALLY ESTOPPED FROM CLAIMING AMERICAN FALLS STORAGE GREATER THAN THE 2.65% APPORTIONED TO IT IN THE CONFIRMATION PROCEEDINGS ACCOMPANYING THE AMERICAN FALLS REBUILD.

Idaho Power admits that the findings of fact and conclusions of law in the American Falls reconstruction confirmation proceedings are binding on the company,⁷⁸ including the following findings by the district court concerning the storage rights at American Falls:

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% ⁷⁹

Where the district court in the confirmation proceeding already determined Idaho Power is

⁷⁶ 1976 Falling Water Contract at 10, art. II, § 2.1(d).

⁷⁷ *Id.* at 10, art. II, § 2.1(e).

⁷⁸ See Idaho Power's Brief in Response to State of Idaho at 8 ("[T]he Company agrees with the State that this Court's confirmation proceedings . . . are binding on Idaho Power Company, the United States, other spaceholders, and on the State.").

⁷⁹ 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).

entitled to only 2.65% of storage capacity at American Falls (~45,000 acre-feet), Idaho Power is therefore barred by collateral estoppel from now asserting a claim to more than six times that amount in the SRBA (~300,000 acre-feet).

Idaho Power disagrees with the State's interpretation of the district court's findings in the confirmation proceedings. As was the case with Congress and the Revenue Adjustment Act of 1975, Idaho Power argues that the district court similarly intended to preserve the company's "secondary" storage right through implication alone. There is no mention of the "secondary" storage rights in the district court's findings of fact and conclusions of law; yet, Idaho Power insists the district court intended it to be there.

As discussed above, "active" storage encompasses **all** storage for power generation purposes, regardless of whether Idaho Power refers to its storage as "primary" storage or "secondary" storage. The district court's use of the term "active" storage capacity confirms that the court intended its findings to address **all** storage rights in the reservoir, and therefore, Idaho Power is barred by collateral estoppel from now asserting a claim here in the SRBA to more than six times the amount of storage delineated to the company in the confirmation proceedings.

D. IDAHO POWER'S ASSERTED RIGHT WILL IMPAIR THE OPERATION OF THE PROJECT FOR IRRIGATION PURPOSES.

Idaho Power's attempt to dictate the operations of the American Falls Dam through an explanatory remark on this water right is antithetical to federal law and to Idaho Power's own admissions. Pursuant to federal law and FPC licenses, Idaho Power's use of the flows leaving the American Falls Dam is entirely dependent upon, and incidental to, the operation of the project by the USBOR.⁸⁰ In fact, Idaho Power admits that it has no such control over the USBOR's decision to make releases from the reservoirs:

⁸⁰ See Brief in Support of Amended Motion for Partial Summary Judgment at 45–53.

Well, you know, it's really the company's position that irrigation comes before hydropower. And if an irrigator is using that water or needs that capacity, then it's never been the company's position to try to circumvent that or usurp that.⁸¹

Well, we've talked about that previously. But I think the projects were designated as irrigation first and hydropower second.⁸²

Idaho Power has no control over the operation of the Upper Snake system.⁸³

[A]nything released past American Falls is at the control of the Bureau.⁸⁴

[T]he 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.⁸⁵

A "secondary" rights is not active storage, and the Company could not "demand" the release of this right.⁸⁶

[T]he Court should note that Idaho Power Company cannot "schedule for release" or "demand the release of" its secondary storage capacity. The only water Idaho Power Company can specifically call for the release of is its 45,000 acre-feet of active storage capacity in the Reservoir.⁸⁷

[T]he Company does not have the right under the 1923 Contract to call for this storage.⁸⁸

Where Idaho Power admits that the company has no right to demand that the USBOR release the "secondary" storage and where Idaho Power admits that the company cannot seek administration from IDWR for the release of the "secondary" storage, the company cannot now ask this Court to do so through the inclusion of an explanatory remark to that effect. Such a result would provide Idaho Power an element of control and entitlement at odds with federal Reclamation Laws, the replacement program legislation, the FPC licenses, and Idaho Power's

⁸¹ May 2010 Bowling Dep. at 40.

⁸² *Id.* at 72.

⁸³ *Id.* at 52.

⁸⁴ *Id.* at 80–81.

⁸⁵ Idaho Power's Brief in Response to State of Idaho at 2.

⁸⁶ *Id.* at 4.

⁸⁷ Idaho Power's Brief in Response to United States at 3.

⁸⁸ *Id.*

own admissions.⁸⁹

At stake is the reliability of filling the reservoir system. Idaho Power agrees with the State that hydropower generation at American Falls is incidental to the operation of the project for irrigation purposes:

Well, you know, it's really the company's position that irrigation comes before hydropower. And if an irrigator is using that water or needs that capacity, then it's never been the company's position to try to circumvent that or usurp that.⁹⁰

Well, we've talked about that previously. But I think the projects were designated as irrigation first and hydropower second.⁹¹

Idaho Power Company has always held the position that the American Falls Dam and Reservoir's purpose is primarily for irrigation use.⁹²

Nonetheless, the company insists that the USBOR must spill water past the dam under the guise of its claimed 255,000 "secondary" storage right even though doing so will increase the risk of failing to fill the reservoir system:

Q. [D]oes more water released from American Falls for hydropower purposes mean less water for irrigation storage? . . .

A. It means that there's less water being stored.⁹³

A. [I]f water's not being stored in the reservoir, then it increases probability that the reservoir may not fill ⁹⁴

The harm here is simple to define: Water spilled past American Falls during the winter season is water not being stored in the upper Snake River reservoir system, resulting in an increased risk that the system will not full in the springtime when it is needed for irrigation. In other words, more water for hydropower generation means more risk for irrigation space holders.

⁸⁹ See also Brief in Support of Amended Motion for Partial Summary Judgment at 45--53.

⁹⁰ May 2010 Bowling Dep. at 40.

⁹¹ *Id.* at 72.

⁹² Response of Idaho Power Company to American Falls Spaceholders Supplemental Brief in Support of Its Motion for Summary Judgment at 3, *In re SRBA Case No. 39576, Subcase no. 01-02064* (Idaho 5th Dist. Ct. Nov. 16, 2010)

⁹³ May 2010 Bowling Dep. at 243--44.

⁹⁴ *Id.* at 144.

E. THE STORAGE RIGHT IS HELD BY THE UNITED STATES.

The State agrees with Idaho Power that the question of whether water right no. 01-02064 is held in trust by the United States for the benefit of the power company “is not necessary for this Court to address in this litigation”⁹⁵

III. CONCLUSION

Power storage at American Falls should be decreed in the name of the United States in the amount of ~45,000 acre-feet (2.65% of reservoir storage capacity). Furthermore, Idaho Power’s objections seeking the inclusion of remarks on the quantity and purpose of use elements that would require the USBOR to bypass flows for use at the company’s downstream power plants to the detriment of upstream storage should be disallowed.

RESPECTFULLY SUBMITTED this 7th day of December 2010.

LAWRENCE G. WASDEN
Attorney General

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



DAVID I. STANISH
Deputy Attorney General

⁹⁵ Idaho Power’s Brief in Response to United States at 18; *see also id.* (“Whether those rights are held by Idaho Power Company or whether they are held in trust by the United States for Idaho Power Company is not a question that needs to be addressed by the Court in response to this Motion unless the Court so-chooses.”).

CERTIFICATE OF SERVICE

I certify that on this 7th day of December 2010, I caused to be served the original and copies of the State of Idaho's **REPLY BRIEF IN SUPPORT OF AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT** 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:
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A & B IRRIGATION DISTRICT
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FALLS IRRIGATION DISTRICT
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US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
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DAVID W. GEHLERT
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UNITED STATES DEPT OF JUSTICE
1961 STOUT STREET, 8TH FLOOR
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JERRY R. RIGBY
25 N 2ND E
PO BOX 250
REXBURG, ID 83440-0250

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DAVID I. STANISH
Deputy Attorney General