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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

)

Subcase No.: 01-02064

)

Case No. 39576

)

THE UNITED STATES' REPLY

)

MEMORANDUM IN SUPPORT OF

)

MOTION FOR SUMMARY JUDGMENT

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Introduction

If there is one constant to Idaho Power's claims before this Court, it is change. Idaho Power initially claimed to hold independent storage water rights in American Falls Reservoir. When the United States' Motion for Summary Judgment demonstrated that approach was doomed to fail, Idaho Power withdrew its claims rather than file a response. The Company then proceeded to file its BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ("IPC Opn.") which repeatedly asserted that the Company holds contractual rights, including 255,000 acre-feet of secondary storage derived from the 1923 Contract.^{1/}

Now, in its RESPONSE TO THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT ("IPC Res."), the Company claims that what it retains of the 1923 Contract's secondary storage provisions is – *nothing*. For this brief, at least, Idaho Power claims that the "secondary storage capacity is a right held and operated by the United States." IPC Res. at 3.

As surprised as the United States is by Idaho Power's change in position, it must admit that the Company is correct in asserting that it no longer holds any interest derived from the secondary storage provisions of the 1923 Contract – but for the wrong reason. The rights that once existed under those provisions were not somehow transferred to the United States. Rather, they were extinguished, as the plain language of the 1976 Placeholder Contract and Idaho Power's conduct in the following decades demonstrate.

To understand that the secondary storage provisions did not survive the 1976

^{1/} See IPC Opn. at 2 (explaining that Idaho Power Company has "expressed publicly that *it holds both primary and secondary storage rights* in the American Falls Reservoir since 1923"); *id.* at 2-3 (explaining that "300,000 acre-feet of storage capacity in the American Falls Reservoir [is] the amount of storage capacity *held by Idaho Power Company* pursuant to the 1923 Contract") (emphases added); *id.* at 4, 22, 25, 28, 33, 35, 38, 42 and 46 (all referring to Idaho Power as holding secondary storage rights).

Contract, this Court need only consider the Operation and Maintenance (“O & M”) payment provisions of the contract that Idaho Power relies on so heavily. Idaho Power argues vehemently that its agreement to pay the same rate of O & M charges in the 1976 Spaceholder Contract as it had paid in the 1923 Contract must mean that the parties intended it to retain the rights created by the secondary storage provisions of the 1923 Contract. Setting aside the complete lack of documentary evidence supporting that assertion, if Idaho Power is correct, it would render Article 29 of the 1976 Spaceholder Contract a non-sequiter. Article 29 explains the consequences of an uncured default resulting from non-payment of O & M in no uncertain terms: the Company would lose *only* the right to the use of “the stored water described in Article 21(b)” of the Contract, *i.e.*, the 45,000 acre-feet of active capacity expressly provided by the 1976 Contract. 1976 Spaceholder Contract, Jarvis Aff., Ex. BBB at 15, ¶ 29(e). If Idaho Power were right that its O & M payments were intended to retain use of the secondary storage provisions, it would create the anomalous result that Idaho Power could default on the O & M payments that allegedly secured use of the secondary storage capacity, yet continue to have use of the secondary storage capacity. This Court can readily appreciate that such a result would violate established principals of contract law.

Finally, while Idaho Power is correct in asserting that it no longer retains any contract rights created by the secondary storage provisions of the 1923 Contract, it errs in asserting that the United States has a trust obligation to Idaho Power. IDWR Director Higginson’s 1971 MEMORANDUM DECISION cannot have imposed any obligation on the United States because he lacked jurisdiction over the United States. Moreover, there is no basis to find that the 1923 Contract created a trust. First, the absence of the term “trust” in the contract is fatal to Idaho Power’s claim. Outside of the Indian context, trust obligations cannot be imposed on

the United States by implication. Second, even if that were not the case, the language of the 1923 Contract offers no evidence that the United States intended to enter into a fiduciary relationship with Idaho Power. Indeed, the contract provision Idaho Power relies on does not even speak to the United States' obligations at all. In short, the 1923 Contract is no different than any other Reclamation water supply contract in that it provides no basis to impose a trust on the United States.

Argument

Idaho Power asserts that this Court must decide whether the secondary storage provisions of the 1923 Contract remain valid through application of “principals of contract law” rather than equitable principals. IPC Res. at 14. In the end, however, it does not matter which route to a decision the Court takes. As is shown below, whether the Court applies principals of contract law or equitable principals, the result is the same: Idaho Power cannot succeed in its attempt to revive the secondary storage provisions.

I. PRINCIPALS OF CONTRACT LAW DEMONSTRATE THAT THE SECONDARY STORAGE PROVISIONS OF THE 1923 CONTRACT ARE NO LONGER VALID.

When the United States is a party to a contract, interpretation of the contract is governed by federal law.² *E.g., Kennewick Irr. Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989). Perhaps the most fundamental principal of contract law is that wherever possible, the plain terms of a contract should be used to resolve questions regarding its meaning. *See e.g., Doe I v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009); *Klamath Water Users Protective Assoc.*

² Because “general principles for interpreting contracts” serve to inform the federal common law of contracts, there is often little difference between state and federal contract law. *See Kennewick*, 880 F.2d at 1032; *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006) (noting the court could discern no difference between federal contract law and Idaho contract law).

v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 2000) (when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself); *accord Lindberg v. Roseth*, 137 Idaho 222, 228, 46 P.3d 518, 524 (2002).

Here the plain language of the contracts demonstrates three things. First, the secondary storage provisions of the 1923 Contract were not preserved by either the 1923 Dam Reconstruction Legislation or the 1976 Spaceholder Contract because they did not create proportionate storage rights. Second, the 1976 Spaceholder Contract both created a single right to use the storage capacity of American Falls Reservoir and mandated that the right be exclusive. Third, the default provisions of the 1976 Spaceholder Contract demonstrate that Idaho Power's O & M payments cannot have been intended to continue the secondary storage provisions. In short, the plain language of the contracts can lead to only one conclusion: the secondary storage provisions are no longer valid.

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

1. The secondary storage provisions did not create a proportionate storage right, and therefore were not preserved.

A central pillar of Idaho Power's case is its assertion that the secondary storage provisions of the 1923 Contract were preserved by the 1973 Dam Reconstruction Legislation and the 1976 Spaceholder Contract. Nonetheless, Idaho Power's emphatic – and correct – assertion that the secondary storage capacity provided under the 1923 Contract is not part of the reservoir's “active capacity” defeats that proposition.^{3/}

^{3/} Thus it is ironic that Idaho Power accuses the United States of attempting to read “active” out of the contract. *Cf.* IP Res. at 3. Idaho Power's claim that the United States selectively quoted from the legislative history of the 1975 Bond Legislation has a similar effect. The pertinent provision of the legislative history provides:

There has been no intention to release water specifically for use by the Idaho

By their plain terms, the 1973 Dam Reconstruction Legislation and the 1976 Spaceholder Contract expressly preserved *only* “proportionate storage rights.” Other contract rights were “reaffirmed,” but only to the extent not otherwise provided. *See* Pub.L. 93-206, Sec. 2 (a), 87 Stat. 904 (1973); 1976 Spaceholder Contract at Article 19(a). Thus, only if the secondary storage provisions constituted “proportionate storage rights” were they preserved; otherwise they were subject to modification, and even termination, by other provisions of the legislation or the contract.

There is no question that the secondary storage provisions did not create a proportionate storage right. While Idaho Power huffs that it is “simply false” that at the time of the 1973 Dam Reconstruction legislation all parties understood Idaho Power’s proportionate storage rights to be limited to 45,000 acre-feet, the Company has failed to provide a single document characterizing the secondary storage capacity as a proportionate storage right.^{4/} Indeed, the Company’s new-found belief that the secondary storage provisions created a proportionate storage right is simply perplexing because the Company has previously claimed the

Power Company to provide electricity, except for the 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.**

IPC Res. at 4 (quoting H.R. Rep. No. 94-531, emphasis in original). Although Idaho Power chastises the United States for omitting the material in bold when quoting the House Report, the material is of no consequence. No party disputes that Idaho Power can schedule the release of its 45,000 acre-feet of active storage capacity. The important part of the quotation is the first sentence, which clearly identifies that 45,000 acre-feet as the *only* water that would be “release[d] specifically for use by the Idaho Power Company to provide electricity.”

^{4/} Idaho Power claims that various documents “specifically recogniz[ed] the Company’s secondary storage right” both “before and after the enactment of the 1973 Reconstruction legislation.” IPC Res. at 6. While the United States disagrees that those rights were recognized after the 1973 legislation, that is not the issue. The issue here is whether the secondary storage provisions created a proportionate storage right. Thus, what is most telling for present purposes is that Idaho Power cannot produce a single document from either before or after the 1973 legislation that states the secondary storage provisions created a proportionate storage right.

provisions created a “pass through” that is not even a storage right at all. *See* IPC Opn. at 6 and n.3. In any event, the plain language of the contracts demonstrates that Idaho Power’s claim has no merit.

The significance of “active capacity” capacity here is that it is allocated on a percentage basis. *See* 1976 Spaceholder Contract, Article 21(b). Thus it is a proportionate storage right because the actual amount of water allocated to spaceholder in any given year varies in proportion to how much water is stored in that year. In contrast, the secondary storage was not allocated on a percentage basis. There is nothing “proportionate” about the secondary storage capacity – it allowed Idaho Power to compel Reclamation to forego up to 255,000 acre-feet of water in any year, whether a wet year or a drought year. *See* 1923 Contract, Articles 18 & 21.

In sum, Idaho Power’s correct assertion that the secondary storage provisions did not create active capacity only demonstrates that the provisions were not expressly preserved and were subject to modification. In turn, as will be shown below, the plain language of the 1976 Spaceholder Contract demonstrates they were modified. Indeed, Article 19(a) of that contract compels the conclusion the secondary storage provisions can no longer be given effect.

2. 1976 Spaceholder Contract provided a single, exclusive form of storage capacity.

As the United States explained in its Response Memorandum, Article 21 of the 1976 Spaceholder Contract identifies all of the “Storage Capacity to be Made Available to Spaceholder.” It grants Idaho Power one means of using the Reservoir’s storage capacity: a right to use 2.6471% of the Reservoir’s active capacity (roughly 45,000 acre feet of space). Despite that, Idaho Power insists that the Company must have intended the contract to retain a second means of using the reservoir’s storage capacity, that provided through the secondary storage provisions of the 1923 Contract. The plain terms of the 1923 Contract and Article 19 of the 1976

Spaceholder Contract demonstrate that Idaho Power is wrong.

Despite Idaho Power's various belated efforts to recast the nature of the 1923 Contract's secondary storage provisions, the plain language of the 1923 Contract demonstrates that they address the use of the reservoir's storage capacity. *See* 1923 Contract, Article 18 at 19, lines 451-52 (providing "a secondary right to use not to exceed 255,000 acre-feet of *storage capacity in the reservoir*") (emphasis added); *Id.* at Article 21 at 22, lines 538-39 (explaining that the water to be provided to Idaho Power's powerplants below Milner Dam "shall be a part of the 255,000 acre-feet of primary [sic] storage water *which the Company may have stored in its secondary storage capacity in the reservoir*") (emphasis added). Further, as Idaho Power correctly asserts, the secondary storage provisions are not part of the reservoir's active capacity. Thus, if the secondary storage provisions remain valid, there would be a conflict between Article 21 of the 1976 Contract, which provides only one means of using the reservoir's storage capacity, and the secondary storage capacity provisions, which would provide another.

Article 19(a) of the 1976 Contract precludes that result. It directs that the terms of the 1976 Spaceholder Contract regarding the distribution of water "shall prevail" over the terms of prior spaceholder contracts "wherever and to whatever extent" the provisions of the two contracts are in conflict. *Id.* at 6, ¶ 19(a). Consequently, the only interpretation of the secondary storage provisions which comports with the plain terms of the contracts and gives meaning to Article 19(a) of the 1976 Spaceholder Contract is that the secondary storage provisions are no longer valid. *E.g., United States v. N.A. Degerstrom, Inc.*, 408 F.2d 1130, 1333 (9th Cir. 1969) (courts strive to give meaning to every provision of a contract); *Tanadgusix Corp v. Huber*, 404 F.2d 1201, 1025 (9th Cir. 2005) (the terms of the contract are controlling); *see also Daugharty v. Post Falls Highway Dist.*, 134 Idaho 731, 735, 9 P.3d 534, 538 (2000) (a contract must be construed

to give force and effect to every part thereof).

3. The O & M provisions of the 1976 Spaceholder Contract confirm that the secondary storage provisions are no longer valid.

Apart from its argument that the Secondary Storage Provisions were preserved by the 1973 Dam Reconstruction Legislation, Idaho Power's only other affirmative argument is that its O & M payments must be construed as evidence the Secondary Storage Provisions are still valid. The plain language of the 1976 Spaceholder Contract defeats that proposition as well.

Article 28(b) of the 1976 Contract instructs that Idaho Power's O & M payments "shall be (7.1388%) of the total cost of operation and maintenance," and further provides that "[s]uch costs shall be determined in accordance with the applicable provisions of the Existing Spaceholder Contract [*i.e.*, the 1923 Contract]." *Id.* According to Idaho Power, this language demonstrates that the O & M formula of the 1923 Contract was "carried forward by the terms of the 1976 Spaceholder Contract." From that proposition, Idaho Power jumps to the conclusion that the parties must have intended the secondary storage capacity to remain valid. IPC Res. at 13.

The language of the contract cannot sustain Idaho Power's conclusion. Indeed, Idaho Power's argument only begs the question of why the O & M formula was "carried forward." Despite the absence of any evidence directly addressing that question – and the presence of circumstantial evidence demonstrating that it behooved Idaho Power to agree to pay the same percentage of the O & M – Idaho Power insists that it must have intended to link the O & M payments to retention of the secondary storage provisions.

Idaho Power's own actions – or more accurately, inactions – cast considerable doubt on that claim. First, a prudent company would have at least documented its intentions in

an internal memorandum. Yet Idaho Power offers only supposition.^{5/} Second, Idaho Power cannot seriously dispute that for decades after the signing of the 1976 Contracts, Idaho Power acted as though the secondary storage provisions were no longer valid. See Section I.B of this Memorandum, *infra*. In any event, once again this is a question that can be resolved on the plain language of the contracts, in this case Article 29 of the 1976 Spaceholder Contract.

Article 29 addresses the consequences if Idaho Power were to fail to pay its O & M charges. Sub-paragraph (a) of the Article defines a failure to make O & M payments as a default under the Contract. If, as Idaho Power claims, the O & M payments were intended to secure the secondary storage water, as well as the 45,000 acre-feet of water expressly provided by the 1976 Contract, it should follow that a default on the O & M payments would relieve the United States of any obligation to provide both the 45,000 acre-feet of active capacity and the secondary storage capacity water. That is not what the 1976 Spaceholder Contract provides.

Article 29(e) spells out the consequences if the contract is terminated for non-payment of the O & M charges in no uncertain terms: "the United States will no longer make available to the Defaulted Spaceholder the stored water described in Article 21(b) hereof [*i.e.*, the

^{5/} Apparently unable to provide evidence of the Company's actual intent in 1976, Idaho Power attempts to rely on a Memorandum written by Regional Supervisor of Power Merrill J. Martz in March of 1974, two full years before the 1976 Contracts were signed. See IPC Res. at 13, n.14. In that memorandum, Mr. Martz merely suggested that if the secondary storage provisions were not included as part of the Falling Water Contract, "it would be logical to reduce the Company's share of the O & M costs of the reservoir." IPC Exhibit 68 at 1. Later correspondence reveals that the quantity of Idaho Power's payments for water became the subject of a dispute between the Company and the irrigators. See Memorandum from Commissioner of Reclamation to the Secretary of the Interior (Feb. 25, 1976) (Jarvis Aff., Ex. QQ) at 4-5 (noting that Idaho Power agreed to pay more for the use of falling water in order to appease complaints by the irrigators that Idaho Power was not paying enough). Thus it is not surprising that despite Mr. Martz's "logic," in the end the Company's O & M rate remained as it had been under the 1923 Contract. In any event, because the memorandum was written in 1974, it is hardly "strong evidence" that the secondary storage provisions continued to be valid after the 1976 Contracts. Cf. IPC Res. at 11.

45,000 acre-feet].” If Idaho Power were correct that the O & M payments served to retain the secondary storage provisions, Article 29(e) would create the anomalous result that Idaho Power could default on its O & M payments, yet still retain use of the secondary storage water. Such a result cannot be sustained. *See Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 566 (9th Cir.1988) (if possible courts must interpret contracts so as to avoid internal conflict); *see also Ace Realty, Inc. v. Anderson*, 106 Idaho 742, 749-50, 682 P.2d 1289, 1297-97 (Idaho App. 1984) (refusing to adopt a construction of a contract that would effectively nullify one of the contract’s provisions).

B. Even if the Plain Language of the 1976 Placeholder Contract Did Not Demonstrate the Secondary Storage Provisions Are No Longer Valid, Idaho Power’s Conduct Would.

Idaho Power does not dispute that an intent to abandon a contract provision “may be inferred from the conduct of the parties.” IPC Res. at 15; *see also Scott v. Castle*, 104 Idaho 719, 724, 662 P.2d 1163, 1168 (Idaho App. 1983) (*quoting Ore-Ida Potato Products, Inc. v. Larsen*, 83 Idaho 290, 296, 362 P.2d 384, 387 (1961)). Here that conduct is supplied by Idaho Power’s years of acquiescing to the United States non-delivery of the water Idaho Power now claims.

Of course, Idaho Power disputes that it has acquiesced in non-delivery of the secondary storage water. Tellingly, however, Idaho Power fails to provide any factual basis for that assertion. The best the company can do is point out that the United States has acknowledged that in certain wet years flows exceeded those called for in the 1923 Contract.⁹ IPC Res. at 6

⁹ Idaho Power also claims that (1) following the 1973 Dam Reconstruction Legislation the United States, through its objections in this subcase, and this Court, through the contract confirmation proceedings, acknowledged “that Idaho Power Company held a secondary storage capacity right in American Falls,” and (2) a 1974 Memorandum written by a Bureau of Reclamation employee acknowledged that Idaho Power was then paying O & M charges for the

(citing U.S. Opn. at 30). That Idaho Power happened to receive the water it now claims a right to in years when water was plentiful is irrelevant. What is relevant is that over a period spanning decades, in dry years Idaho Power did not receive the water and did not protest.

As the United States has explained previously, Idaho Power's own calculations show that from 1977 through 1981 and again from 1987 through 1997, Idaho Power did not receive the water it now claims to be entitled to. U.S. Opn. at 30. Even more strikingly, the Company's deponent explained that until a company engineer re-discovered the secondary storage provisions around 1998, the Company did not even bother to track whether it was receiving the water it now claims or not. *Id.* More than two decades of ignoring the right it now claims in the face of repeated non-delivery is clear evidence of acquiescence and, under general principals of contract law, a more than sufficient basis to find that the secondary storage provisions are no longer valid. *E.g., Jensen v. Chandler*, 77 Idaho 303, 307, 291 P.2d 1116, 1118 (1955) (citing 12 Am.Jur. Contracts, 1011, Sec. 431).

II. EQUITABLE PRINCIPALS CAN BE APPLIED TO BAR IDAHO POWER FROM CLAIMING THAT THE SECONDARY STORAGE PROVISIONS REMAIN VALID.

The basis for the United States' argument that Idaho Power should be estopped from claiming that the Secondary Storage Provisions remain valid was explained in detail in the

secondary storage capacity. IPC Res. at 6. The United States' Response Memorandum explained that the objections were a placeholder and that the contract confirmation proceedings lacked jurisdiction to determine whether Idaho Power retained any rights provided in the 1923 Contract. U.S. Res. at 11-12; 13-14. The preceding section of this Memorandum addressed the significance of Idaho Power's O & M payments. Regardless, the pertinent question is whether Idaho Power acquiesced to non-delivery, *not* what the United States or this Court may or may not have done.

United States' Opening Memorandum. *See* U.S. Opn. at 32-37. For this brief, it is sufficient to make two points.

First, Idaho Power is wrong in asserting that equitable principals such as *quasi-estoppel* have no application here.²⁷ *Cf.* IPC Res. at 14. Indeed, the entire premise of Idaho Power's argument – that the United States is attempting to apply quasi-estoppel to “rescind contract rights” – is wrong. The United States is not seeking to apply equitable principals to reform a contract. Rather, the United States seeks to apply equitable principals to bar Idaho Power's claim in this proceeding. Idaho courts have repeatedly confirmed that quasi-estoppel may be applied to bar a claim based on contract. *E.g.*, *Mundell v. Brigham*, 97 Idaho 216, 541 P.2d 1184 (1975); *Keese v. Fetzek*, 111 Idaho 360, 723 P.2d 904 (Idaho App. 1986).

Second, it is self-evident that if Idaho Power does retain use of the secondary storage provisions, there is a potential for conflict with the irrigators. It does not take a professional engineer to realize that if Idaho Power were to have the right to compel the United States to forego the storage of 255,000 acre-feet of storage in any year, no matter how dry, as the plain language of the 1923 Contract provides, exercise of the right could lead to less water being stored than otherwise would have – as much as 255,000 acre-feet less. Nor does it take a professional engineer to appreciate that in a dry year every drop of water can be precious and that storage foregone could well prove to be storage later needed.

III. THE 1923 CONTRACT CANNOT BE CONSTRUED TO IMPOSE A TRUST OBLIGATION ON THE UNITED STATES.

²⁷ Idaho Power's argument is most interesting as yet another example of the Company's change in position. In its opening brief, the Company argued that *quasi-estoppel* should be applied against the United States. IPC Opn. at 43-44. Now the Company apparently believes the doctrine is entirely inapplicable. There is one consistent aspect of Idaho Power's two *quasi-estoppel* arguments: they are both wrong.

Broadly speaking there are two reasons the 1923 Contract cannot be construed to impose trust obligations on the United States. First, because the United States does not hold or “operate” the secondary storage provisions there is no factual basis to impose trust obligations on the United States. Second, there is no legal basis. While IDWR Director Higginson purported to recognize a trust obligation, he lacked jurisdiction over the United States. Further, the 1923 Contract lacks all of the elements required to impose a fiduciary duty on the United States.

A. The Secondary Storage Provisions Are Not Held and Operated by the United States.

In what appears to be either an effort to bolster its trust arguments or to escape the consequences of its decades of neglecting the secondary storage provisions, Idaho Power now makes the surprising assertion that the secondary storage rights it asks this Court to recognize are “held and operated by the United States.” IP Res. at 3. The most important point for this Court to understand about Idaho Power’s argument is that it is a red herring – regardless of who once held any rights created by the secondary storage provisions of the 1923 Contract, those rights no longer exist. Nonetheless, the United States will show that Idaho Power’s sudden change in position is wholly without merit because if Idaho Power’s rights were never conveyed to the United States there can be no basis for a trust.⁸⁹ See *Dennett v. Kuenzli*, 130 Idaho 21, 30, 936 P.2d 219, 228 (Idaho App. 1997) (a trust arises when the holder of title to property manifests an intent to assume fiduciary obligations with respect to that property for the benefit of another).

⁸⁹ Although prudence requires the United States to rebut Idaho Power’s claim, the Company’s conviction does not appear to be firmly held. Only a few pages after claiming any secondary storage rights are held by the United States, the Company reverts back to arguing such rights are held by the Company. See IPC Res. at 6 (claiming that following the passage of the 1973 Dam Reconstruction Legislation, “Idaho Power held a secondary storage capacity right in American Falls”; see also IPC Res. at 11 (claiming “that Idaho Power Company held and was using its secondary storage capacity at the time the reconstruction legislation was enacted in 1973”).

Nothing in the 1923 Contract suggests that the United States would hold and operate the secondary storage right. To the contrary, the contract plainly envisioned that Idaho Power would hold any right created by the secondary storage provisions and “operate” it by calling for water. *See* 1923 Contract, Article 21 (providing the Company with a “right to demand the turning out of water from the reservoir for release by and use below Milner Dam”).^{9/} Consequently, when the drought of the 1930s led operation of the right to interfere with irrigation rights, Idaho Power had to enter into a new contract so that the United States could assume operation of the secondary storage provisions. *See* 1935 Contract, Jarvis Aff., Ex Q at 4. That contract expired in 1950. Operation of the right then reverted to Idaho Power, as evidenced by Idaho Power’s November 10, 1953 letter requesting that Reclamation “release . . . *from Idaho Power’s secondary storage space* in American Falls Reservoir an average of 2,000 c.f.s. of water for use at our American Falls plant.” Letter from H.R. Moore, Idaho Power Supt. of Power to Glen Simmons, U.S. Bureau of Reclamation (Nov. 10, 1953) (emphasis added) (Jarvis Aff., Ex. W).

Idaho Power apparently believes that IDWR Director Higginson’s 1971 decision canceling the Company’s water right permits somehow transferred any right created by the secondary storage provisions to the United States. The Director’s decision did not, and could not, convey anything to the United States. Indeed, it could not have affected the United States’

^{9/} This language also answers Idaho Power’s rhetorical question of why the United States is pursuing this litigation. *Cf.* IPC Res. at 8, n.7. The answer is simple. Despite Idaho Power’s protests to the contrary, if the Secondary Storage provisions of the 1923 Contract remain valid, the Company has a right to demand up to 255,000 acre-feet of water. The prospect of Idaho Power using the right to compel Reclamation to forego the storage of 255,000 acre-feet of otherwise storable water is the very reason the United States, the State and other Spaceholders are opposed to Idaho Power’s claim.

interests in any way.

Idaho Power correctly notes that Director Higginson characterized any rights established by Idaho Power's permits as having "merged with [the] rights granted the United States." IPC Res. at 23. It seems most likely Director Higginson used "merged" simply to indicate that because the United States had appropriated all of the storage water, any right to use that water would have to come from the United States, *i.e.*, through a contract with the United States.¹⁰ In any event, there is no documentary evidence of a "merger" or any other form of conveyance to the United States. To the contrary, the 1923 Contract expressly reserved to Idaho Power the rights created by Idaho Power's permit application. 1923 Contract at ¶¶ 9(d) & 19.

The Director also suggested that "by reason of contracts and agreements" the rights created by Idaho Power's permit applications were "held in trust for use by the Company." IPC Res. at 23. As the United States has previously noted, Director Higginson failed to explain how a state administrative official could impose a trust upon the United States, particularly in a proceeding to which the United States was not even a party. U.S. Opn. at 15 n. 16. Idaho Power likewise fails to address those points. Both are fatal to Idaho Power's attempt to leverage Director Higginson's decision into a trust relationship.

First, the United States was not a party to the proceedings before the Director and therefore cannot be bound by the Director's decision. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921); *Collard v. Universal Automobile Ins. Co.*, 55 Idaho 560, ___, 45 P.2d 288, 292 (1935). Second, the United States' absence was privileged because there was no waiver of sovereign immunity that could possibly encompass Idaho Power's application

¹⁰ Even had the Director intended to use "merged" in a legal sense, the general effect of a merger is to terminate the merged rights. *See e.g., Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 382, 414 P.2d 879, 884 (1966).

before the Director.¹¹⁷ *E.g.*, *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 514 (1940). Consequently, the Director's Decision cannot have imposed a trust obligation on the United States, conveyed anything to the United States or affected the United States in any way. Moreover, apart from Idaho Power's inability to rely on Director Higginson's decision, the terms of the 1923 Contract itself provide no basis to impose a trust on the United States.

B. The 1923 Contract Provides No Basis to Impose a Trust on the United States.

As the United States has noted previously, not a single court has ever held that Reclamation has a trust obligation to one of its spaceholders and numerous courts have rejected that argument. U.S. Opn. at 44-45. Idaho Power attempts to distinguish those cases by asserting that through the 1923 Contract "Idaho Power retained its pre-existing storage rights" and that as a result the contract recognized that Idaho Power held more than "mere contract rights." IPC Res. at 24 (quoting 1923 Contract, ¶ 9(d)). A threshold problem with that argument is that Idaho Power's "pre-existing storage rights" were a legal fiction ginned up to facilitate the contract. As the United States explained in its Opening Memorandum – and Idaho Power has not disputed – at the time of the 1923 Contract it was well established that the mere filing of a permit application did not create a property right. US Opn. at 8, n. 9 (citing *e.g.*, *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, ___, 263 P. 45,52 (1927) (a water right permit application does not create real property)).

In any event, even if Idaho Power had actual rights capable of being reserved, the United States still cannot have a trust obligation to Idaho Power. First, as Idaho Power concedes,

¹¹⁷ The Supreme Court's decision in *U.S. Fidelity* also disposes of Idaho Power's suggestion that the United States should be bound merely because the Director's Memorandum Decision "cc'd" to the United States. *See U.S. Fidelity*, 309 U.S. at 514 ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power").

the 1923 Contract does not characterize the United States obligations under the contract as trust obligations. IPC Res. at 19-20. That alone defeats Idaho Power's claim because outside of the Indian context, trust obligations cannot be implied against the United States. *E.g., Hohri v. United States*, 782 F.2d 227, 244 n.39 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987).

Second, even if Idaho Power's trust claim did not fail as a matter of federal law, it would still fail. Under general trust law, "the essential characteristics of a trust relationship are separation of the legal title from the beneficial interest and the existence of fiduciary duties." *DBSI/TRI V v. Bender*, 130 Idaho 796, 808-09, 948 P.2d 151, 163-64 (1997) (citing *e.g., In re Eggan's Estate*, 86 Idaho 328, 337, 386 P.2d 563, 568 (1963)). Neither characteristic is present here.

First, because Idaho Power's rights were not conveyed to the United States there is no separation of title. Second, nothing in the plain language of the 1923 Contract suggests that Reclamation intended to take on fiduciary responsibilities to Idaho Power. Indeed, Article 30 of the 1923 Contract, the provision of the 1923 Contract that Idaho Power claims created a trust obligation, instead drives home both of the United States' points. Article 30 speaks *only* to Idaho Power's ability to retain rights it may have had in 1923 – such as the permit rights expressly reserved by the contract – despite its conveyance of other rights to the United States. The provision does not address the United States' obligations at all.¹²⁷ See 1923 Contract at 30, ¶

¹²⁷ Idaho Power also notes that language in Paragraph 9(d) of the 1923 Contract has some similarity to language that the Idaho Supreme Court used in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) to describe an irrigator's beneficial interest the United States' irrigation storage rights. IPC Res. at 18-19. Nothing in the Idaho Supreme Court's opinion suggests that the United States has fiduciary obligations to the irrigators. Moreover, in the SRBA proceedings, then-Presiding Judge Melanson expressly recognized that it does not. See ORDER CLARIFYING MEMORANDUM DECISION..., Consolidated Subcase 91-63 (Oct. 4, 2004)

30. In short, no court has ever held that Reclamation has a trust obligation to any contractor and neither Director Higginson's decision nor the 1923 Contract itself provide any reason for this Court to do so.

Conclusion

Idaho Power's constant changes in its legal argument reveal a company grasping to salvage something out of a nearly century old contract that was effectively rewritten more than forty years ago and ignored by the Company for decades. The plain language of the 1923 Contract demonstrates that it once gave Idaho Power the right to demand use of American Falls Reservoir's storage capacity under certain conditions. Those conditions led to conflicts with the irrigators – so much so that Idaho Power contracted away operation of those rights until 1950. When Idaho Power re-assumed operation of the secondary storage provisions, Idaho Power's attempt to exercise it proved controversial, as evidenced by the 1953 meeting with Water Master Crandall. By the time new contracts were negotiated in the mid-1970s, Idaho Power had apparently had enough.

In 1973 the Company's representative informed Congress that Idaho Power had only a right to demand the use of 45,000 acre-feet of water. With the irrigation community supporting the Company, Congress subsequently gave Idaho Power what it most wanted - a new powerplant built into the replacement dam and a Falling Water Contract that gave the Company access to far more water than it ever had under the 1923 Contract by allowing it to generate

at 2.

Idaho Power further suggests that *Pioneer* requires this Court to recognize a beneficial interest in Idaho Power. IPC Res. at 25-26. As this Court well knows, the question of the applicability of *Pioneer* to non-irrigation entities arises in several subcases within Basin 01 and has been set aside for later resolution. The other contractors interested in the question are not part of this subcase, and this Court should not deny them the opportunity to participate by deciding the question now.

electricity with water released from the reservoir for any purpose. Revenues rolling in, the Company proceeded to ignore the rights it now claims, until they were “re-discovered” by a diligent employee in the late 1990s. Taken together, the Company’s representations during the contracting process, its subsequent inaction, and the possibility of renewed adverse impact on the irrigators if Idaho Power is allowed to revive the secondary storage provisions all lead to the conclusion that Idaho Power should be estopped from asserting its claim.

Nonetheless, this court need not rely on equitable principals to grant summary judgment in the United States’ favor. The plain language of the 1976 Spaceholder Contract demonstrates that the secondary storage provisions of the 1923 Contract are no longer valid. First, the Contract expressly created only one means by which Idaho Power could use the storage capacity of American Falls Reservoir - a right to the use of roughly 45,000 acre-feet of active capacity. To ensure that would be the only means, the contract expressly provides that its terms regarding the use of water would control over those of the 1923 Contract “wherever and to whatever extent” there is a conflict.

Second, while Idaho Power relies heavily on its history of O & M payments, the O & M provisions of the 1976 Spaceholder Contract only serve to demonstrate that the secondary storage provisions are no longer valid. As was explained above, if Idaho Power is correct that its O & M payments were intended to preserve its use of the secondary storage provisions, under the terms of the contract it would be able to default on the those payments, yet not be deprived of the use of the secondary storage. Such an anomalous result cannot be sustained.

Finally, there is no basis for this Court to find the United States has fiduciary obligations to Idaho Power as none of the elements of a trust are present in the 1923 Contract. First, outside of the Indian context, there must be an express assumption of fiduciary obligations

for a trust to be imposed on the United States. Idaho Power concedes that is lacking here.

Second, there is no language in the 1923 Contract that even suggests the United States intended to assume fiduciary obligations to Idaho Power. Indeed, the contract provision Idaho Power relies on does not address the United States' obligations at all.

For all these reasons, and those articulated elsewhere in the United States' briefing, the United States is entitled to summary judgment that the quantity of its storage right available for direct hydropower use is 45,000 acre-feet and that it has no fiduciary obligation to Idaho Power.

Dated this 6th day of December 2010.

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A handwritten signature in black ink, appearing to read 'D. Gehlert', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that on December 6, 2010, I served true and correct copies of **THE UNITED STATES REPLY MEMORANDUM** as follows:

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