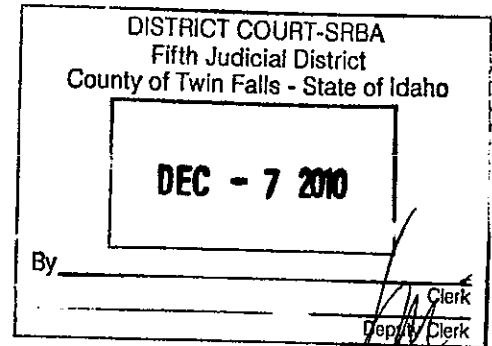


Adam T. Devoe
David G. Scott
BROWNSTEIN HYATT FARBER SCHRECK, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202
(303) 223-1100 – Telephone
(303) 223-1111 – Facsimile

James C. Tucker, ISB No. 2038
Senior Attorney
IDAHO POWER COMPANY
1221 West Idaho Street
Boise, ID 83702-5627
(208) 388-2112 – Telephone
(208) 388-6935 – Facsimile



Attorneys for Idaho Power Company

IN THE DISTRICT COURT FOR 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
) (Hydropower Storage Claim at American Falls)
)
) **REPLY OF IDAHO POWER COMPANY TO**
) **THE UNITED STATES AND STATE OF**
) **IDAHO'S RESPONSE TO IDAHO POWER**
) **COMPANY'S MOTION FOR SUMMARY**
) **JUDGMENT**
)

Idaho Power Company, by and through undersigned counsel, hereby submits this Reply to the United States' and the State of Idaho's Response to Idaho Power Company's Memorandum in Support of Summary Judgment. Idaho Power Company did not receive a Response from the American Falls Spaceholders.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
REPLY	3
I. THE COURT MUST DETERMINE IF IDAHO POWER COMPANY'S 1923 CONTRACT RIGHTS REMAIN VALID IN ORDER TO SETTLE THE WATER RIGHTS AT ISSUE IN THIS CASE	3
A. The Contract Right Determination Is Not "Peripheral" To Determining The Elements Of The Water Right 01-02064.....	4
B. The United States Acquiesced To SRBA Jurisdiction To Settle The Water Right, Which Turns On Idaho Power's 1923 Contract Rights	7
II. IDAHO POWER COMPANY'S 1923 SECONDARY STORAGE CAPACITY RIGHT REMAINS VALID AND MUST BE RECOGNIZED BY THIS COURT AS THE BASIS FOR IDAHO POWER COMPANY'S OBJECTION AND WATER RIGHT	7
A. The Company's Secondary Storage Right Was Recognized By All Parties Up To, And Following, The United States' Protection Of Existing Storage Rights In 1973	8
B. Congress Intended To Protect Existing Placeholder Rights When It Enacted The Rebuild Legislation, And The 1975 Bond Legislation Did Not Rescind Those Rights	9
C. The 1976 Placeholder Contract Did Not, And Could Not, Rescind Idaho Power Company's Secondary Storage Right	12
D. The Company's Secondary Storage Right Was Not Waived Based On Statements By Idaho Power Representatives.....	15
E. The Company's Secondary Storage Capacity Right Was Never Abandoned	16
F. The Company Continues To Pay Operation And Maintenance Fees For Its Secondary Storage Right	18
III. THE COMPANY REITERATES THAT THE PARTIES ARE ESTOPPED FROM CLAIMING THE COMPANY DOES NOT MAINTAIN ITS SECONDARY STORAGE RIGHTS.....	20
CONCLUSION.....	21

INTRODUCTION

Idaho Power Company holds certain contractual rights to storage capacity in the American Falls Reservoir pursuant to a contract it entered in 1923 ("1923 Contract"). The Company filed a damages claim in the United States Court of Federal Claims because those rights are not being recognized by the United States, resulting in financial damage to the Company. The Court of Federal Claims action was designed to settle, once and for all, whether or not the Company's claim to secondary storage capacity in the Reservoir as granted to the Company in 1923 remains a valid contractual right.

The same contractual issues are present in this case. As the parties have previously represented to this Court, Idaho Power Company agreed to stay its claim in the Court of Federal Claims in return for an agreement by the United States and the State of Idaho that the contract issue could be settled by this Court as part of the water right adjudication. Based on that agreement, an unopposed motion to stay the Court of Federal Claims action pending the outcome of this case was filed on March 17, 2010. To be perfectly clear, Idaho Power Company would not have agreed to stay that action had it not been for the agreement between the parties to allow this Court to address the underlying 1923 Contract issue.

Now, much to the surprise of Idaho Power, the United States and the State of Idaho argue that this Court either cannot, or need not, address the underlying contract issue in order to settle the water rights. *U.S. Response* at 15; *State of Idaho Response* at 21. In fact, this Court cannot issue a decree in this matter for any amount of power generation from storage without addressing the contract issues. There is no support for a claim for power from storage in the American Falls Reservoir other than Idaho Power Company's contractual rights. Either the Court must adopt the position of Idaho Power Company, recognizing both the active and secondary storage rights from the 1923 Contract and decree the American Falls reservoir including 300,000 acre feet of power

generation from storage; or accept the arguments of the State of Idaho and the United States, and decree the American Falls reservoir including only 45,000 acre feet of power generation from storage. In either case, the Court must necessarily address and resolve the contract issue.

The jurisdictional argument from the United States is surprisingly disingenuous given that the United States filed a claim and an objection which include 300,000 acre feet for power generation. In making both the claim and the objection, the United States attaches and references the 1923 Contract and subsequent agreements. The United States cannot now support an argument that the Court cannot or need not address the contract in order to issue a decree for American Falls after making the contract central to the adjudication.

To the extent that the Court agrees with the United States and the State of Idaho that the contract law questions underlying the water right cannot be, or need not be, settled by this Court, then Idaho Power Company asks the Court to stay these proceedings to allow the proceedings before the Court of Federal Claims to run their course. Idaho Power Company agreed to stay those proceedings in good faith, but had it known the other parties would argue that this Court does not have jurisdiction to address the Contract issue, or that the contract issue need not be settled in order to adjudicate the water rights, Idaho Power Company would never have agreed to the Stay. If, on the other hand, the Court recognizes the agreement entered between the parties and plans to address the underlying contract issues when it adjudicates the water rights, then Idaho Power Company files this Reply to the arguments included in the United States' and the State of Idaho's Responses.

In short, the 1923 Contract rights remain valid today and have never been permanently rescinded or revoked.

REPLY

I. THE COURT MUST DETERMINE IF IDAHO POWER COMPANY'S 1923 CONTRACT RIGHTS REMAIN VALID IN ORDER TO SETTLE THE WATER RIGHTS AT ISSUE IN THIS CASE

As a result of negotiations with the Bureau of Reclamation, the 1923 Contract between Idaho Power and the United States grants Idaho Power Company access to 300,000 acre-feet of storage capacity in the American Falls Reservoir. *IPC Brief In Support of its Motion for Summary Judgment* ("IPC Opening Brief") Ex. 1 at 19. The Company's access is divided between "active" and "secondary" rights.

The "active" right is identical to the rights held by other spaceholders in the reservoir, in that Idaho Power Company can call for the release of that 45,000 acre-feet at any time for power generation. The "secondary" right is a unique right, in that it is unlike a traditional "active" storage right. As explained throughout these many Idaho Power Company memoranda, the secondary storage right provides the Company with limited access to 255,000 acre-feet of storage capacity in the reservoir when such capacity is not then required and not being used by the owners of the irrigation rights. The secondary right is therefore consistent with Idaho principles of optimum use as it provides flows for power generation when they are not needed for irrigation storage. The right is also unique in that it is extinguished if not used by the date of allocation set forth in the 1923 Contract. The secondary storage capacity right was established to ensure certain flow rates below Milner Dam are met during specified periods of the year to provide for power generation at facilities below Milner Dam.¹

¹ The state's attempt to cast Idaho Power Company's secondary storage capacity right as an "active" right just like every other storage right in the Reservoir is inaccurate. Regardless of the terminology used, the Company's Secondary right is unique, and application of a Dam Safety definition enacted 70 years after the 1923 Contract was entered cannot be used to explain away the unique nature of Idaho Power Company's secondary storage right. This issue is discussed in depth in IPC's Opening Brief, Section I.C. There is a clear distinction between a traditional active storage right held by a Reservoir spaceholder that is subject to the Spaceholder's call or demand for release, and the secondary capacity access right held by Idaho Power Company. Further, there are a variety of rights that are

At issue in this adjudication, in part, is the amount of water available in the American Falls Reservoir for hydropower use. The parties, including Idaho Power Company, have filed Objections in this case calling for "Power from Storage" of 300,000 AFY.² Idaho Power Company asserts that the basis for its 300,000 acre-foot right is the 1923 Contract. As such, the Company is not seeking control of 300,000 acre-feet of active storage capacity in the Reservoir at the potential expense of other existing Spaceholders, but instead is seeking control of the 45,000 acre-foot active storage right afforded to the Company in 1923, and access to its 255,000 acre-foot secondary storage capacity right pursuant to the terms of the 1923 contract to ensure adequate flows below Milner Dam.³

In order to settle this adjudication, and to address the 300,000 acre-foot power storage claim filed by the United States, it is necessary for the Court to settle, once and for all, whether Idaho Power Company's 1923 Contract rights including its claim to 255,000 acre-feet of secondary storage capacity – remains a valid claim.

A. The Contract Right Determination Is Not "Peripheral" To Determining The Elements Of The Water Right 01-02064.

The State claims that the determination of whether the 1923 Contract rights remain valid is "peripheral" to the determination of this water right, and that the "question of what rights Idaho Power Company has under the 1923 Contract need not be addressed or determined for purposes of decreeing water right 01-02064." *State Response* at 21.

not considered part of a Reservoir's active storage capacity, for example, rights for the release of water from a reservoir for flood control and releases to maintain minimum flows for species protection.

² See IPC's Response to the United States at 7 and 8, noting that the parties have all filed Objections with essentially the same amounts.

³ The state's effort to recast the Company's secondary storage right as a "natural flow right" based on the testimony of Jon Bowling is mistaken. *State's Response* at 50. Mr. Bowling was attempting to explain conceptually how the right operates, he did not recast the storage right as a natural flow right. The contract right specifically affords the Company 255,000 acre-feet of secondary storage capacity. It is that storage right which the Company is seeking to protect in this litigation and in the litigation before the Court of Federal Claims.

Aside from the fact that these statements directly contradict the agreement between the parties to ask this court to settle the contract rights at issue in this case, the statement is wrong. Idaho Power Company's Objection in this case is based on the contract rights afforded to it under the 1923 Contract. The Court cannot issue a decree for any amount of "Power from Storage" for the American Falls Reservoir without addressing the contract issue. Whether the amount of "Power from Storage" is 45,000 or 300,000 acre feet is a question wholly reliant on the contract issue presented by this case, raised directly by both the United States and the State of Idaho.

There are obvious inconsistencies between what the State of Idaho and the United States argue on summary judgment, and their previous filings which put the contract at issue and clearly recognize a claim for 300,000 acre feet of power from storage. For instance, the State of Idaho's 2007 Objection included 300,000 acre-feet of power from storage in the Reservoir with the following language included as a proposed remark:

The exercise of this water right for power purposes is subject to the limitations and conditions set forth in the Act of December 28, 1973, Pub. L. 93-206, and the following contracts: Contract between the United States and Idaho Power Company dated June 15, 1923, Symbol Ilr-733....

The state amended its Objection in 2008, based on "further investigation into the record that covers the 80-plus year history of the American Falls project that the State discovered evidence that further informs its Objection to the Director's Report for water right claim no. 01-020164." *State Amended Objection* at 2. Presumably, that "further investigation" resulted in evidence convincing the State that the Company's secondary right was no longer valid, as the State now argues that the Company holds 45,000 acre-feet of storage in the Reservoir. Idaho Power asserts that the State's "evidence" does not support the rescission of the Company's secondary storage right. But, either way, the Court must look at the underlying 1923 Contract right in order to determine if the storage claim of the Company is valid.

The United States also filed an objection in 2007 with references to 300,000 acre feet of power storage and comments requiring interpretation and operation of the reservoir with reference to the 1923 contract, and in 2006 filed an amended notice of claim for storage and attached a copy of the 1923 Contract.

In light of these prior positions, and with no other support for a hydropower claim at American Falls, the United States and State of Idaho cannot now credibly argue that the contract dispute is not relevant to the water rights adjudication.

If the Court issues a decree in this case including any amount for power from storage, but does not base that determination on the contract rights the Company claims, then there are a variety of potential repercussions. For example, following a decree from this Court for 45,000 acre feet for power from storage without an express finding on the contract issues, the Company would be forced to return to the Court of Federal Claims and argue that its 300,000 acre-foot contract right remains valid. If the Court of Federal Claims agreed with the Company's position, the Company and the United States could be in a position where the Court of Federal Claims recognizes a 300,000 acre-foot contract right held by the Company, while the water right decreed by this body is less than 300,000 acre-feet. This incongruity would simply add to the confusion surrounding this issue, and ensure future litigation.

The contract dispute is central to the adjudication of the American Falls Reservoir, particularly with regard to power from storage. In order to avoid additional expense and delay, and in the interest of finality in the water rights adjudication proceeding, the Court must determine the validity of the 1923 Contract rights held by the Company.

B. The United States Acquiesced To SRBA Jurisdiction To Settle The Water Right, Which Turns On Idaho Power's 1923 Contract Rights.

The United States argues that the Court cannot determine the status of the 1923 Contract in relation to the United States because the United States has not waived its Sovereign Immunity to allow such a determination. Aside from the fact that this claim appears to contradict the agreement entered between the parties that served as the basis for the stay of Idaho Power Company's action before the Court of Federal Claims, it is also incorrect.

As stated by the United States,

The McCarran Amendment waives the United States' sovereign immunity for two purposes only: (1) a comprehensive adjudication of the rights to the use of water of a river system; and (2) the administration of those rights.

U.S. Response at 15, citing 43 U.S.C. § 666(a).

As explained above, in order to "comprehensively adjudicate" the water right at issue here the Court must determine if Idaho Power Company maintains its contractual rights to 300,000 acre-feet of storage capacity in the Reservoir. That contractual determination is a key element of this adjudication, so if the United States agreed to waive its immunity for the adjudication, it also agreed to waive its immunity to allow the SRBA to determine if Idaho Power Company's secondary storage right remains valid and binding on the United States.

II. IDAHO POWER COMPANY'S 1923 SECONDARY STORAGE CAPACITY RIGHT REMAINS VALID AND MUST BE RECOGNIZED BY THIS COURT AS THE BASIS FOR IDAHO POWER COMPANY'S OBJECTION AND WATER RIGHT

Assuming the Court agrees that the 1923 Contract rights must be addressed in order to effectively adjudicate the water right at issue in this case, then the Court must determine if Idaho Power Company's 1923 Contract rights remain valid. In particular, at issue in this case is

whether or not Idaho Power Company's secondary storage capacity right remains valid and in force.

The Company's *Opening Brief* addresses this issue in depth, but in summary it establishes the following facts. First, all parties recognized the secondary right prior to the United States' enactment of the American Falls reconstruction legislation in 1973. In that legislation, Congress specifically protected "all existing proportionate storage rights." That blanket statement by Congress must be interpreted to include Idaho Power Company's proportionate storage rights in effect in 1973. Subsequently, the 1976 Spaceholder Contract between the United States and the Company was negotiated. That document was required by Congress to be drafted in a manner that protected Idaho Power Company's proportional storage rights. Further, that Contract says nothing about the Company's secondary right except that the Company's Operation and Maintenance payments incorporate those rights. *See IPC's Opening Brief*, Sections I-IV.

In spite of the many protestations by the other parties that the secondary storage right was waived, abandoned, vacated, or that it otherwise somehow disappeared, there is no document in the Record to which opposing parties can direct the Court that specifically invalidates the right, no relevant equitable theory on which a contract right can be revoked, and no applicable theory of contract law which, when applied, would result in the Contract right's rescission.

A. The Company's Secondary Storage Right Was Recognized By All Parties Up To, And Following, The United States' Protection Of Existing Storage Rights In 1973.

As explained in detail in the Company's *Opening Brief*, there is a great deal of evidence from the period after the 1923 Contract was entered and leading up to the enactment of the rebuild legislation in 1973 proving that the Company's secondary storage rights were recognized

by all parties. The Company attached the various letters and memoranda to its Opening Brief to provide the Court with a clear picture of this fact. *See IPC Opening Brief*, Ex.'s 7-46.

There is no question that when the United States Congress enacted the rebuild legislation in 1973, the Company's "proportionate storage rights" included its 45,000 acre-foot active storage right and its 255,000 secondary storage capacity right.

B. Congress Intended To Protect Existing Spaceholder Rights When It Enacted The Rebuild Legislation, And The 1975 Bond Legislation Did Not Rescind Those Rights.

In 1973, Congress enacted Public Law 93-206, *IPC Opening Brief*, Ex. 2, which provided for the reconstruction of American Falls Dam to address safety issues, and for the execution of new spaceholder contracts in conjunction with dam reconstruction. The legislation expressly provided that it constituted a reaffirmation of existing contract rights between the United States and spaceholders in the American Falls Reservoir, and that the terms of new spaceholder contracts must be consistent with the terms of existing contracts. Congress expressly affirmed existing contract rights in Section 2(A) of PL 93-206:

Replacement of the existing dam . . . shall in no way alter or change the present proportionate storage rights of present spaceholders in the American Falls Reservoir and shall constitute a reaffirmation of existing contract rights between the Secretary and the spaceholders except as otherwise provided in this Act.

In fact, despite the language enacted by Congress specifically protecting existing proportionate storage rights, the United States argues in its Response that "the Court should understand that whether the secondary storage provisions were valid in 1973 makes no difference because ... the 1973 Reconstruction Legislation did not preserve the secondary storage provision" *U.S. Response* at 4. The U.S.'s argument is in direct contradiction to the words enacted by Congress.

The fact that Congress protected existing proportionate rights is relevant to this argument because the subsequently-entered Spaceholder Contract – in this case the 1976 Spaceholder Contract – had to incorporate that Congressionally-mandated principle. If the Contract did not embody that principle, it would be in direct contradiction to Congressional intent. Arguments by opposing parties such as the United States' incongruous claim above that somehow Congress protected existing "proportionate storage rights" in the Reservoir, but did not protect the Company's secondary storage right, have no basis in fact and are unsupported.

1. *The 1975 Bond Legislation Did Not Affect The Company's Secondary Storage Right.*

Both the United States and the State of Idaho spend a great deal of energy arguing that the Bond Legislation enacted in 1975 limits the Company's 1923 Contract right to 45,000 acre-feet. The issue is addressed in depth in each brief filed by the parties, so the background and basis for the legislation need not be reiterated here. The crux of their respective arguments is that since the Committee Reports interpreting the legislation state that Congress intended to limit to 10 percent the amount of storage capacity in a federally-authorized reservoir that can be used for power generation, Idaho Power Company's secondary storage right must be void. They claim that the combination of the Company's active and secondary storage rights total more than 10% of the reservoir's capacity.

The arguments are overly-simplistic and inaccurate.

First, as previously discussed by the Company in its *Response to the State of Idaho* and in its *Opening Brief*, the 1975 Bond legislation addressed power generation at the facility, it had nothing to do with secondary storage flows released from the reservoir to maintain minimum flows down stream. See *IPC Opening Brief* at 39; *IPC Response to State of Idaho* at 6. In enacting the Bond legislation, Congress was addressing the perceived problem of the use of

federal funds to build dams, reservoirs and power generation facilities resulting in the use of storage in a reservoir for private power generation and profit. This legislation was designed to prevent that perceived problem. There was no effort to prevent the release of flows miles downstream.⁴

Second, the State and U.S. seem to be equating the Company's active storage right of 45,000 acre-feet to the Company's secondary storage capacity right of 255,000 acre-feet, so when added together they represent 300,000 acre-feet of storage in the Reservoir. If the Company owned and controlled 300,000 acre-feet of active storage space in the Reservoir, then this would violate the Bond legislation's 10% limit because the Company would have the right to call for that 300,000 acre-feet of storage for power generation at American Falls. But, that is clearly not the case. The Company cannot call for the secondary storage right for power generation at American Falls. The Company's access to its secondary storage capacity, which is contractually bound for use below Milner Dam, is based on availability, is limited to specific periods of the year, and is clearly distinct in nature from other storage rights in the Reservoir.

In trying to claim that the Company's access to 300,000 acre-feet of storage exceeds the 10% limit included in the Bond legislation, the United States and the State are adding apples to oranges to come up with a figure that exceeds that limit. At most, the Company holds the equivalent of 134,000 acre-feet of active storage in the Reservoir, an amount that does not exceed the Bond legislation's 10% limit.⁵ Regardless, the United States' and the State of Idaho's

⁴ The state admits as much in its *Opening Brief*, stating: "[t]he text of the Revenue Adjustment Act of 1975 [P.L. 94-164] plainly demonstrates Congress's intention to limit the quantity of storage that could be permanently obtained for hydropower purposes at American Falls to no more than 10% of the normal supply of stored water..." *State's Opening Brief* at 34.

⁵ In fact, the United States has already established a formula that establishes the relative amount of storage the Company holds in the Reservoir as compared to other Spaceholders. That formula is contained in the 1923 Contract, and it is used – to this day – to determine the Company's proportionate Operation and Maintenance charges in the Reservoir. Based on that formula, the Company holds the equivalent to 134,000 acre-feet in the

reliance on the Bond Legislation as a basis for arguing that the Company's secondary right is void is misguided.

C. The 1976 Spaceholder Contract Did Not, And Could Not, Rescind Idaho Power Company's Secondary Storage Right.

In spite of the clear directive from Congress in 1973 that existing spaceholder rights were to be protected, both the United States and the State of Idaho argue that, for various reasons, the 1976 Spaceholder Contract did not include the Company's Secondary Storage right.⁶ To refute these allegations, the Court need only review the language of the Contract itself.

Incidentally, the Company notes that it has addressed these claims previously in both its *Opening Brief* and its *Responses*. However, a few points bear repeating.⁷

First, Section 48 of the 1976 Spaceholder Contract states it is "supplemental and in addition to the Existing Spaceholder Contract [defined in the 1976 contract as the 1923 contract]." It remains unclear to the Company how a "supplemental" contract could be interpreted to rescind an existing contract right when the existing contract right is neither directly nor indirectly referenced in the supplemental contract.

Second, both the United States and the State of Idaho also reference the "savings provision" of the 1976 Contract in support of their claims. That provision states that in the event of a direct conflict between the 1976 Contract and the 1923 Contract, the 1976 Contract terms control. 1976 Spaceholder Contract at 6-7, *IPC Opening Brief* Ex. 53. This is a misdirected argument because the provision has no bearing on the status of the secondary storage right. The

Reservoir. This is less than 10 % of the Reservoir's capacity, and it is based on the United States' own formula. See 1923 Contract at para. 17, *IPC Opening Brief* Ex. 1.

⁶ The 1976 Spaceholder contract used by the United States serves as the model for the future spaceholder contracts entered between the parties. So, if the right was maintained in 1976, it remains a part of the subsequent spaceholder contracts entered by the Company.

secondary right is not addressed in the 1976 Contract which is a supplemental and not a replacement spaceholder contract. There is no direct conflict so the provision does not apply.

These points aside, the Company's position on the 1976 Contract has not changed from its *Opening Brief*. The 1976 Spaceholder Contract references Idaho Power Company's rights in the American Falls Reservoir as "2.6471% of the active water storage capacity of the Existing Dam as well as other rights relating to the use of water for power generation." See "Whereas Clause 5".⁸ It is this "2.6471%" figure that opposing parties hang much of their argument upon. Since this figure represents approximately 45,000 acre-feet of storage in the reservoir, they argue that the contract must therefore have been intended to rescind any additional storage right previously held by Idaho Power Company and specifically, Idaho Power Company's 255,000 acre-feet secondary storage right. Of course, such an argument is in direct contradiction to Congressional intent, as previously discussed, and is also in direct contradiction to the language in the referenced "Whereas Clause" that states "as well as other rights relating to the use of water for power generation." In light of the statutory reservation, this reference to "other rights" necessarily includes the use of Idaho Power's secondary storage rights for power generation below Milner Dam.

Other relevant provision of the 1976 Spaceholder Contract include:

- Article 19(a). Purpose and Term. "... Nothing herein shall in any way alter or

⁷ Initially, the Company agrees with the United States when it instructs the Court that there is no need for the Court to "parse the contracts at length" because "there is no surer way to find out what parties meant than to see what they have done." US Response at 9 (citations omitted). According to the United States, the Company "asserted its right in 1980", and in the periods between 1981 and 1987, "flows exceeded the 1923 Contract targets." U.S. Opening Brief at 42. So by the U.S.'s own admission, in approximately 8 of the 12 years following the Contract's enactment, the Company either "asserted" it right or the secondary flow rates were met. Based on the United States' argument, this means the parties recognized the existence of the secondary right.

⁸ The United States seems particularly disturbed that the Company cites a "whereas" clause in its argument in relation to the 1976 Spaceholder Contract. The Company cites numerous sections of the Contract when asserting its secondary right, and only sites the "whereas" clause to point out to the Court that the other party's interpretation of that clause is inaccurate.

change the present proportionate storage rights of the Spaceholder, and this Spaceholder Contract and the American Falls Replacement Dam Program constitute a reaffirmation by the United States of the rights of the Spaceholder under the Existing Spaceholder Contract, except as modified by this Spaceholder Contract as authorized in the Act of December 28, 1973, and in the Government Contract.

- Article 28(e). "The Replacement Dam will be operated by the United States pursuant to the operating criteria set for the in Article 16 of the Government Contract in a manner so that (1) the present proportionate storage rights of the Spaceholders shall not be altered or changed except as provided in the Government Contract and in the Spaceholder Contracts"

Neither the federal statute referenced in these sections, nor the Government Contract, alter the Company's secondary storage right. It is difficult to determine how these paragraphs could be any clearer. The 1976 Spaceholder Contract protected then-existing spaceholder rights, just as the 1973 Rebuild Legislation did.

The parties also cling to the following section as the basis for their claims.

- Article 21(b). "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 unless the Spaceholder is in default under the terms and conditions of the Existing Spaceholder Contract or this Spaceholder Contract."

Regardless of how the term 'active' is defined, this paragraph is referencing the company's right to control 45,000 acre-feet of storage for power generation at American Falls. The parties allege that this means the company's secondary right is void. That may be true if the 1976 Contract did not specifically state it was "supplemental." "Supplemental" is defined by *Merriam-Webster* to mean "something that makes an addition." It does not mean something that replaces or something that rescinds. Further, there is no reference in Article 21(b) to the United States making "only" 2.641% of the active capacity available, or to the United States making "no more than" 2.6471% of the active capacity available, which would be a clear statement by the United States that it intended to rescind the secondary storage capacity access right. Nowhere is

that sentiment stated in the 1976 Contract.

The terms of Idaho Power Company's 1976 Spaceholder Contract help to clarify that the contracting parties understood Congress' intention of protecting Spaceholders' rights that existed prior to passage of the 1973 rebuild legislation. Those rights were protected in the contract. Efforts to reinterpret the terms of the contract in order to cancel Idaho Power's secondary storage right must be rejected given the overwhelming evidence to the contrary.

D. The Company's Secondary Storage Right Was Not Waived Based On Statements By Idaho Power Representatives.

The United States and the State of Idaho continue to allege that statements by representatives of Idaho Power Company at various points in history mean that the Company intended to rescind its secondary storage right. That is simply not the case.

While the parties may disagree on whether the secondary right is part of "active" storage in the Reservoir or something entirely different so that a reference to "active" storage by its vary nature cannot and does not refer to the Company's secondary right, what is not at issue is the fact that the Company most certainly cannot "call" for, or schedule the release of, its secondary storage right. That storage is held in trust by the United States and it must be released when available pursuant to the terms of the 1923 Contract.

Thus, statements by Idaho Power Company representatives such as the following excerpt from Robert Hogg's 1973 testimony before Congress had no bearing on the Company's claim to secondary storage capacity.

The storage ... water going through American Falls Dam, of course is first used for irrigation service. We [Idaho Power Company] have a right to utilize only 45,000 acre-feet **upon our demand**. (emphasis added).

The Company cannot "demand" that the secondary storage capacity be released. Mr. Hogg was talking about the Company's traditional right, not its secondary storage capacity right.

Further, Mr. Hogg's testimony in 1978 makes clear, once and for all, that his statement before Congress had nothing to do with the Company's secondary storage right. In his deposition testimony in *Kerner v. United States* in 1978 – five years after the oft-quoted statement Mr. Hogg made to Congress – he said under oath that the Company's Operation and Maintenance charge for American Falls included payment for its secondary storage right.

Because Idaho Power Company participates in the O&M operation of the dam and the reservoir, and particularly we pay – instead of paying O&M costs exactly based upon our 45,000 acre-feet of prime storage, which is 2.6 per cent of the total, we pay in excess of 7 per cent because of our secondary storage right.

Deposition of Robert Hogg, August 29, 1978, Ex. 69 at 185-86. Mr. Hogg did not rescind the Company's secondary contract right when he discussed the Company's primary storage right in 1973.

This line of argument has been addressed extensively by the Company in its *Opening Brief and Responses*. In short, the Company never intended to relinquish its secondary right and never intended to have various parties misinterpret its statements.⁹

E. The Company's Secondary Storage Capacity Right Was Never Abandoned.

The parties continue to allege that various equitable theories, such as equitable and quasi-estoppel, should be applied by the Court to rescind the Company's contract rights. Aside from

⁹ The State's new argument that the Company's "subjective intent" to reserve its secondary storage right must be "disregarded" is a flawed argument. The Company explicitly stated its intent not to have its secondary right rescinded during the negotiations that resulted in the 1976 Spaceholder Contract. See *IPC Opening Brief* Ex. 56. The parties also specifically agreed to meet to address any inconsistencies between the 1923 Contract and the 1976 Contract, going so far as to include the intent to meet in the language of the 1976 Contract. *IPC Opening Brief* Ex. 53, at 7 ("Due to events which have occurred since the execution of the Existing Spaceholder Contract [the 1923 Contract], the United States and the Spaceholder recognize that certain provisions of the Existing Spaceholder Contract may no longer be applicable, and it is the intention of the United States and the Spaceholder to subsequently meet and review the Existing Spaceholder Contract for possible revision.") Such open communication of intent can hardly be deemed "subjective intent."

noting that the facts do not support the equitable claims,¹⁰ the Company reiterates here its arguments that a contract right cannot be rescinded based on equitable theories, and that the Company's actions do not satisfy the legal criteria required to establish abandonment of a contract right.

Courts have long held that, while equitable remedies such as Specific Performance or Injunction may be warranted in certain instances to ensure a party is made whole when there is a breach, there is no support for a Court applying equitable principles such as quasi-estoppel to rescind contract rights. *See e.g. Hedges v. Dixon County*, 150 U.S. 182, 189 (1893) (holding that "equity follows the law ... wherever the rights or the situation of parties are clearly defined and established by [contract], equity has no power to change or unsettle those rights or that situation."); *see also Allen v. Kitchen*, 100 P. 1052, 1057 (Idaho 1909) (noting that absent deception, fraud, or mutual mistake, courts of equity have no power to construct or reconstruct a contract or insert new elements in order to make a contract valid and binding.)

Instead, rights acquired under a contract may only be abandoned or relinquished by agreement or intent and conduct clearly indicating such purpose. *See American Silver Min. Co. v. Coeur D'Alene Mines Corp.*, 480 P.2d 900, 906 (Idaho 1971) ("Abandonment is a matter of intent with corresponding conduct...."); *see also Copenhaver v. Lavin*, 448 P.2d 774 (Idaho 1968). To constitute abandonment of contract rights, an actual intent to abandon must exist, *Palmer v. Fuqua*, 641 F.2d 1146 (5th Cir. 1981), and there must be proof of the intent. *Id.* at 1160.

While the requisite intent may be inferred from the conduct of the parties, an abandonment does not occur unless the right-holder, with full knowledge of all material facts,

¹⁰ See the Company's Responses to the United States and the State of Idaho. Each equitable claim is specifically addressed, even though equitable claims are inappropriate when determining if a contract term remains valid.

does or bears the doing of something inconsistent with the right or with an intention to rely on it. *See Copenhagen*; *see also Russell v. Russell*, 578 P.2d 1082 (Idaho 1978). Further, mere passage of time and inaction under a contract does not necessarily constitute abandonment of contract rights, *Liston v. Home Ins. Co.*, 659 F. Supp. 276 (S.D. Miss. 1986). Finally, whether there has been abandonment is a question of fact to be ascertained from all surrounding facts and circumstances, *American Silver Min. Co.*, 480 P.2d at 906; *see also Gillis v. Gillette*, 184 F.2d 872, 875 (9th Cir. 1950).

There is no legal basis to argue that the Idaho Power Company abandoned its secondary storage capacity access right. Mere passage of time is insufficient to establish abandonment. Further, there was certainly no "overt act" on the part of the Company that would be sufficient proof of intent to abandon. In fact, the parties have provided no evidence at all that would establish the requisite intent to abandon.

Equitable theories could not rescind the Company's secondary storage right. Further, there was no intent by Idaho Power Company to abandon the secondary right, and there was no overt act conveying an intent to abandon the right. The Court must determine that Idaho Power Company's contract rights were never rescinded or abandoned.

F. The Company Continues To Pay Operation And Maintenance Fees For Its Secondary Storage Right.

This one fact alone should convince the Court that the Company's secondary storage capacity right remains valid and in force.

The 1923 Contract included a formula applicable to Idaho Power Company's Reservoir Operation and Maintenance payments. The formula was designed to require the Company to pay for its 45,000 acre-feet of active capacity in the Reservoir at the same rate as all other Spaceholders. It also includes a second provision requiring the Company to pay for the

secondary storage capacity it held at a discounted rate since the secondary right was not at all similar in utility or availability to a traditional storage right. *IPC Opening Brief* Ex. 1 at 18. Each year the Company receives a bill from the United States referencing the 1923 Contract and requiring payment based on that formula. *IPC Opening Brief*, Ex. 63.

The United States BOR recognized that the Company's O&M payments incorporate a charge for secondary storage even after the United States enacted the reconstruction legislation in 1973. In the March 19, 1974 memo from Merrill Martz, he states

As we understand Article 17 of the 1923 contract with IPCo, the charge to the Company for O&M is made up of two components. The basic charge is for 45,000 acre-feet of primary storage capacity. The charge for use of 255,000 acre-feet of storage capacity during the winter .. is made at 7/20ths of the basic rate per acre-foot.

If it is decided that the new proposed falling water contract articles should not include mention of the secondary storage, 255,000 acre-feet, then it would be logical to reduce the Company's share of the O&M costs of the reservoir.

IPC Response to the United States, Ex. 68.¹¹

The 1923 formula, including payments for the Company's secondary capacity right, was carried forward by the 1976 Spaceholder contract.

- Article 28(b). "Commencing with the year the first Spaceholder Bond payments are due, the Spaceholder Replacement Dam Operation and Maintenance Payments shall be paid by the Spaceholder to the United States and shall be (7.1388%) of the total cost of operation and maintenance of the Existing Dam during the Construction of the Replacement Dam and of the Replacement Dam and the Related Facilities not paid by the Idaho Power Company pursuant to Section 10.6 of the Falling Water Contract. **Such costs shall be determined in accordance with the applicable provisions of the Existing Spaceholder Contract** and shall continue to be due and payable to the United States on or before April 1 of each

¹¹ This is one of two memos from Mr. Martz penned around the time the 1976 Spaceholder Contract was being negotiated. The opposing parties suggest that Mr. Martz' opinions carry no weight or are irrelevant despite the fact that he was the BOR's Regional Supervisor of Power headquartered in Boise, Idaho. If anyone in the federal government understood the rights associated with the 1923 Contract, it would seem that Mr. Martz would be that person. His opinions carry significant weight and cannot simply be dismissed by opposing counsel.

calendar year under procedures established therein, except that the operation and maintenance charge notice shall be furnished to the Spaceholder on or before February 20 of the calendar year for which the notice is issued." (emphasis added) [Again, the "Existing Spaceholder Contract" is defined in the 1976 Spaceholder Contract as the 1923 Contract.]

The United States and the State of Idaho conjure creative arguments in an effort to explain-away the relevance of the fact that the Company is paying for its secondary storage right each year. One theory is that the Company agreed to pay O&M charges representing more than three times the proportional space it held in the reservoir because it wanted to curry favor with the other Spaceholders. In reality, the parties agreed that Idaho Power Company was to pay more than the others at least in relation to the active, primary storage capacity it controlled in the reservoir – because Idaho Power also had access to its secondary storage capacity in the reservoir to which other spaceholders did not have access.¹² Any other assertion is unfounded and illogical.

For nearly a century the Company has paid for 300,000 acre-feet of storage space in the Reservoir based on a formula develop and implement by the United States that takes into account both the active and secondary storage rights held by the Company. The United States and the State of Idaho cannot now claim that the Company cannot maintain access to that space in a manner consistent with the 1923 Contract.

III. THE COMPANY REITERATES THAT THE PARTIES ARE ESTOPPED FROM CLAIMING THE COMPANY DOES NOT MAINTAIN ITS SECONDARY STORAGE RIGHTS

While the Parties challenge the applicability of equitable doctrines such as quasi-estoppel to their assertions that the Company's right to secondary storage has been rescinded, the Company reasserts those arguments here.

¹² The Company also believed it was paying O&M fees based on its Secondary Storage, not because it was attempting to curry favor with other Spaceholders. See *Hogg Deposition*, Ex. 71 at 185-86.

Under Idaho law, quasi-estoppel “prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a previous position.” *Grover v. Wadsworth*, 205 P.3d 1196, 1200 (Idaho 2009) (citing *C&G, Inc. v. Canyon Highway Dist. No. 4*, 75 P.3d 194, 198 (Idaho 2003)) ; *Allen v. Reynolds*, 186 P.3d 663, 668 (Idaho 2008); *Arwood v. Smith*, 138 P.3d 310, 314 (Idaho 2006). The doctrine of quasi-estoppel applies when:

(1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in To prove quasi-estoppel, it is not necessary to show detrimental reliance; instead, there must be evidence that it would be unconscionable to permit the offending party to assert allegedly contrary positions.

Arwood, 138 P.3d at 314 (quoting *Thomas v. Arkoosh Produce, Inc.*, 48 P.3d 1241, 1246 (Idaho 2002)); See also *Weitz v. Green*, 230 P.3d 743, 753 (Idaho 2010).

Further, “[t]he doctrine of quasi-estoppel is distinguishable from equitable estoppel in that no concealment or misrepresentation of existing facts on the one side, nor ignorance or reliance on the other, is a necessary ingredient.” *Schiewe v. Farwell*, 867 P.2d 920, 923 (Idaho 1993).

Aside from the points raised in the Company's *Opening and Response Briefs*, it would also be unconscionable to allow the United States to assert that the Company's secondary storage right has been rescinded after it has charged the Company operation and maintenance fees based in part on those secondary storage rights for nearly a century.

CONCLUSION

Idaho Power Company has spent a great deal of time and money in an effort to explain to this Court that its rights in this adjudication stem from the rights afforded to it by the 1923

Contract. The parties agreed that if Idaho Power Company stayed its Court of Federal Claims action, the parties would ask this Court to settle the 1923 Contract issues once and for all. That agreement appears to have been breached.

This Court is required to reach the contract issue to enter any decree for the American Falls Reservoir with a reference to power from storage. If the Court cannot or will not address the underlying contract issue, which is the basis for Idaho Power Company's claim in this case, then Idaho Power Company would ask the Court to stay this action until it can resolve the contract claim in the Court of Federal Claims.

The Company's contract claims are straight forward. The historical record, much of which is attached to Idaho Power's memoranda, is clear that the rights afforded to Idaho Power in 1923 have been recognized over time by all parties, have been protected by federal legislation, have been actively defended by Idaho Power, and remain valid today. As the Court will note upon review of the many documents attached to and cited in these memoranda, there is no document, contract, memorandum, or letter that states that Idaho Power Company's secondary storage right has been rescinded. Further, equitable arguments raised by opposing parties are an insufficient basis for a contract abandonment claim and the facts do not support an abandonment claim based on contract law theory.

The Company's active and secondary rights in American Falls Reservoir total 300,000 acre-feet pursuant to the 1923 Contract. It is the 1923 Contract rights that are the basis for Idaho Power's Objection in these proceedings.

Dated this 7th day of December, 2010.

IDAHO POWER COMPANY

By: 

Adam T. DeVoe, Esq.
David G. Scott, Esq.
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202
(303) 223-1100 Telephone
(303) 223-1111 Facsimile

James C. Tucker, ISB No. 2038
Senior Attorney
IDAHO POWER COMPANY
1221 West Idaho Street
Boise, ID 83702-5627
(208) 388-2112 Telephone
(208) 388-6935 Facsimile

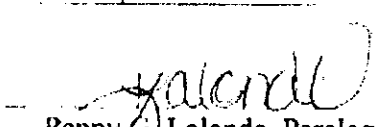
Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2010, I caused the foregoing document entitled **REPLY OF IDAHO POWER COMPANY TO THE UNITED STATES AND STATE OF IDAHO'S RESPONSES TO IDAHO POWER COMPANY'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be filed with the Court and served per the method indicated below upon the following:

Clerk of the District Court Snake River Basin Adjudication 253 Third Avenue North PO Box 2707 Twin Falls, ID 83303-2707	☒ Hand Filed Original and 1 working copy
IDWR Document Depository PO Box 83720 Boise, ID 83720-0098	☒ U.S. Mail, postage prepaid
Clive Strong David Stanish Office of the Attorney General Natural Resources Division 700 West State Street Joe R. Williams Building, Second Floor P.O. Box 83720 Boise, Idaho 83720-0010	☒ E-Mail: clive.strong@ag.idaho.gov david.stanish@ag.idaho.gov
David Gehlert David Jarvis United States Department of Justice Environment & Nat'l Resources Div 1961 Stout Street, 8 th Floor Denver, CO 80294	☒ E-Mail david.gehlert@usdoj.gov david.jarvis2@usdoj.gov
Randy Budge Candice M. Hugh Racine Olson Nye Budge & Bailey, Chtd. 201 E. Center, Suite A2 PO Box 1391 Pocatello, ID 83204-1391	☒ E-Mail rcb@racinelaw.net cmm@racinelaw.net
Roger D. Ling 615 H Street, P.O. Box 396 Rupert, ID 83350-0396	☒ E-Mail rdl@idlawfirm.com

Travis Thompson John Simpson Barker Rosholt & Simpson LLP 113 Main Avenue W, Suite 303 PO Box 485 Twin Falls, ID 83301	☒ E-Mail tlt@idahowaters.com jks@idahowaters.com
Tom Arkoosh P.O. Box 32 Gooding, ID 83330	☒ E-Mail tarkoosh@capitolawgroup.net
Jerry R. Rigby Rigby, Andrus & Rigby, Chartered 25 North Second East Rexburg, Idaho 83440	☒ E-Mail jerry.rigby@gmail.com
W. Kent Fletcher 1200 Overland Avenue, PO Box 248 Burley, ID	☒ E-Mail wkf@pmt.org


Penny G. Lalonde, Paralegal