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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAR 31 2011	
By _____	Clerk
Deputy Clerk	

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

	)	Subcase 01-2064
	)	(USDI/BOR)
In Re SRBA	)	(American Falls Reservoir Hydropower Storage)
	)	
	)	
Case No. 39576	)	ORDER ON MOTIONS FOR SUMMARY
	)	JUDGMENT AND ALTERNATIVE MOTION
	)	FOR DECLARATORY JUDGMENT

Background

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Report, Reporting Area Basin 01, IDWR Part 2* on December 19, 2006. The Director recommended claim 01-2064 to the United States of America, Department of Interior, Regional Director PN Region, Bureau of Reclamation PN-3100, 1150 N. Curtis Road, Suite 100, Boise, Idaho, 83706-1234 ("USBOR"), for 1,672,590 afy from the Snake River for year-'round irrigation storage, power storage and power from storage ¹ plus irrigation from storage from March 15 to November 15 with a priority date of March 30, 1921, based on a license.²

Under the priority date and purpose of use elements, the Director added the following remarks:

¹ Of the total quantity, the Director recommended approximately 300,000 acre-feet per year (295,163 afy) for power uses.

² IDWR filed a *Supplemental Director's Report Regarding Subcase Nos. 1-217, 1-218, 1-2064, 1-2068, 1-4024, 1-4025 and 1-4054* on April 11, 2008. The Director's recommendation of 01-2064 remained unchanged. More on that later.

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

...

The diversion and release of storage for power purposes under this water right is subject to those conditions contained in contract nos. I1r-733 and I1r-801 between the United States Bureau of Reclamation and Idaho Power Company.³

Idaho Power Company's Objection

Ten different objections to the Director's recommendation were filed in multiple, including subcase 01-2064. Idaho Power filed its objection on April 20, 2007, objecting to quantity, priority date, purpose of use, period of year, place of use and "other provisions necessary for definition or administration of this water right."

1st Round Summary Judgment Motions

United States

The United States filed its first *Motion for Summary Judgment* on December 4, 2009, arguing Idaho Power's alternative claims 01-10485, 01-10486 and 01-14087 should be disallowed and United States' claim 01-2064 "is not subject to trust obligations and that the quantity of water able to be released for hydropower purposes under the right is 44,275 acre-feet." United States' *Motion*, at 1.

State of Idaho

On December 4, 2009, the State filed its *Motion for Partial Summary Judgment* in subcases 01-2017, 01-2032, 01-2046, 01-10382, 01-10383, 01-10384, 01-10531 and 01-10532 (American Falls Hydropower Natural Flow subcases) and 01-2064, 01-10485, 01-10486 and 01-10487 (American Falls Hydropower Storage subcases). The State argued:

(A) that Idaho Power's natural flow claims at American Falls be disallowed; or in the alternative, (B) if the Court denies the State's motion to disallow Idaho Power's natural flow claims and subsequently determines that some or all of the

³ A copy of I1r-733, *Contract, between the United States and the Idaho Power Company, Relative to Power Rights at American Falls, Idaho, Dated June 15, 1923* ("1923 Contract") can be found at Exhibit C to the *Affidavit of David A. Jarvis* in support of the United States' *Motion for Summary Judgment*. A copy of I1r-801, *Contract between United States and Idaho Power Company for Conservation of Snake River water and furnishing transmission service*, dated October 1, 1934, is marked Exhibit Q to Mr. Jarvis' *Affidavit*.

claims should be disallowed, that any decrees resulting from those claims include the subordination remark set forth in the Director's Report. State's *Motion*, at 2.

American Falls Spaceholders⁴

The American Falls Spaceholders filed their *Motion for Summary Judgment* on December 9, 2009, in the same 12 subcases as the State. They joined in support of the United States' and the State's *Motions* and then argued:

Idaho Power has consistently represented to American Falls Spaceholders that its hydropower water rights are subordinate to water uses for irrigation with the exception of its storage rights in American Falls Reservoir, which are limited to 45,000 acre-feet. The Company should therefore be precluded from claiming otherwise under the doctrines of equitable estoppel and quasi estoppel. American Falls Spaceholders' *Motion*, at 2.

Idaho Power Company's Withdrawal of Claims and Amended Objection

On January 21, 2010, Idaho Power filed its *Motion to Amend Objection and to Withdraw Claims*. It sought to withdraw its claims 01-10484, 01-10486 and 01-10487 because it concluded resolution of issues related to those claims will be addressed by the amendment of its objection to water right no. 01-2064. Idaho Power was granted leave to withdraw those three claims on February 8, 2010.

The same date, Idaho Power was granted leave to amend its *Objection* in subcase 01-2064, this time objecting to name and address, quantity and purposes of use. The reasons supporting its particular objections are lengthy but warrant quoting at length because they provide important history plus Idaho Power's positions in the current summary judgment proceedings:

The Idaho Power Company has been involved in the development and use of water from the American Falls dam and reservoir project since its inception in the early 1920's. Under the contract dated June 15, 1923, symbol Ilr-733, which remains in effect today ("1923 Contract") and the contract dated March 31, 1976, symbol Ilr-733S ("1976 Spaceholder Contract"),⁵ the United States granted to

⁴ The "American Falls Spaceholders" includes Aberdeen Springfield Canal Company and Upper Valley American Falls Spaceholders.

⁵ The "1976 Spaceholder Contract" (Ilr-733S) is actually four separate documents all signed the same date, March 31, 1976: (1) *Spaceholder Contract among the United States, the American Falls Reservoir District, and Idaho Power Company for Storage in the American Falls Replacement Dam and for Construction and Operation and Maintenance of the American Falls Replacement Dam Program*, including Exhibit A to two of the *Contracts (Water Quality Facilities Agreement)*, (2) *Spaceholder Contract among the United States, the American Falls Reservoir District, and the Aberdeen-Springfield Canal Company for Storage in the American Falls Replacement Dam and for*

Idaho Power, and Idaho Power reserved, storage capacity and a water right in the Reservoir of 45,000 acre-feet of active or primary storage of hydropower use. Under the 1923 Contract, the United States granted to Idaho Power, and Idaho Power reserved, secondary storage capacity “when such capacity is not then required and not being used by the owners of irrigation rights to the use of such capacity,” and a water right for the use of up to 255,000 acre-feet of water during the period October 1–June 15, for the purpose of storing and regulating water in, and delivering water through, the Reservoir during such period so as to meet specified flows for hydropower use at Idaho Power’s hydroelectric projects downstream from American Falls Reservoir, subject to specified terms and conditions. This contract obligation remains in effect.

Pursuant to this contractual relationship with the United States, in March of 1921, Idaho Power filed state water right applications which resulted in certain water right permits (Permit Nos. 01-2065 and 01-2041) being issued by the Idaho Department of Reclamation (now the Idaho Department of Water Resources/IDWR). By Memorandum Decision dated April 21, 1971, the Director of IDWR found that “the rights established by Idaho Power Company, by reason of permit Nos. 01-2041 and 01-2065, have been merged with rights granted to the United States of America and that by reason of contracts and agreements entered into between the Company and the United States of America, Bureau of Reclamation, those rights are held in trust for use by the Company under the water rights of the United States at American Falls Reservoir.” The Director further found that “since the Company’s rights to water at American Falls Dam and Reservoir are already covered by reason of Licenses issued to the United States of America, under Permit Nos. R-269 and 4168 and contracts between the Company and the United States of America, that Permit Nos. 01-2041 and 01-2065 are duplicate and should be cancelled.”

Idaho Power’s *Standard Form 1 Objection – Amended*, at 3-4.

2nd Round Summary Judgment Filings

In light of Idaho Power’s withdrawal of claims 01-10484, 01-10486 and 01-10487 and its amended *Objection* in subcase 01-2064, an amended summary judgment schedule was ordered.

Construction and Operation and Maintenance of the American Falls Replacement Dam Program, (3) Falling Water Contract and (4) Contract between the United States of America and the American Falls Reservoir District for Construction and Operation and Maintenance of the American Falls Replacement Dam Program. For complete copies, see Exhibits BBB, CCC, EEE and FFF to Mr. Jarvis’ Affidavit.

Idaho Power Company

Idaho Power filed its *Motion for Summary Judgment or in the Alternative Motion for Declaratory Judgment of Contractual Rights* on October 5, 2010. It sought summary judgment or declaratory relief stating:

[T]hat the rights granted to Idaho Power Company in the 1923 Contract between the Company and the United States, including but not limited to those rights authorized and explained in Paragraphs 18 and 21 of that Contract, remain valid and enforceable contract rights that must be recognized by the United States, the State of Idaho, and the other parties to this subcase, and must be appropriately acknowledged in the water rights adjudication for the American Falls Reservoir. Idaho Power's *Motion*, at 2.⁶

Idaho Power argued the 1923 Contract granted it a total of 300,000 acre-feet of storage capacity at American Falls Reservoir for power generation: 45,000 acre-feet of *active* or *primary*

⁶ Paragraphs 18 and 21 of the 1923 Contract are as follows:

18. Company's Secondary Storage Capacity.

Between October 1st of any year and June 10th of the following year, the company shall have and is hereby granted for the purpose of regulating and controlling the water reserved to the company under Paragraph 19 hereof, and the water which may be acquired under the last sentence of Paragraph 10, a secondary right to use not to exceed 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 irrigation rights to the use of such capacity, but shall have no further right to use any part of said 255,000 acre-feet of capacity or any water stored therein after the reservoir is first filled each season, and the company shall in any event release on April 1st of each year all right and claim to such capacity and water stored therein, except 60,000 acre-feet, and shall release all right and claim to the remainder, if any, on June 10th of each year.

21. Company's Rights below Milner Dam

The company's right to demand the turning out of water from the reservoir for release by and use below Milner Dam shall be limited to the 45,000 acre-feet of primary storage rights, the water referred to in the last sentence of Paragraph 10, and to such portion of the 255,000 acre-feet mentioned in Paragraph 18 as is needed for beneficial use for power development at Shoshone Falls or Twin Falls but not exceeding the amount that may be necessary to make the total flow at the head of Shoshone Falls: [flow targets omitted] exclusive of any part of the company's said 45,000 acre-feet of primary storage and the water referred to in the last sentence of Paragraph 10.

Provided, however, that the amount of water released past Milner for maintaining the flow at Shoshone Falls between October 1st and June 10th inclusive, as listed above, shall be a part of the 255,000 acre-feet of primary storage water which the company may have stored in its secondary storage capacity in the reservoir, and provided that it releases such water from the American Falls Reservoir in such a way that the required flow can be maintained at Shoshone Falls by the utilization of storage capacity in Lake Walcott not to exceed 3,000 acre-feet of storage capacity.

Nothing in this paragraph is to be construed as abridging the company's right to release from the Reservoir and have passed by Milner at any time any part of its 45,000 acre-feet of primary stored water stored in its primary storage capacity, or hold over as provided for in Paragraph 20.

Exhibit C to *Affidavit of David A. Jarvis* in support of the United States' *Motion for Summary Judgment*.

storage capacity plus 255,000 acre-feet of *secondary* storage capacity.⁷ It summarized its rights as follows:

Thus, the 1923 Contract provides Idaho Power Company with a right to use 300,000 acre-feet of water stored in or flowing through the American Falls Reservoir. 45,000 acre-feet of that right is a traditional storage right. The remaining 255,000 acre-feet of that right is considered secondary capacity that is, at its essence, a right to the use of capacity in American Falls when it is otherwise unused by other spaceholders to ensure flow rates below Milner Dam are met during specified periods of the year to provide for power generation at facilities below Milner Dam.

Idaho Power's *Brief in Support*, at 9.

The present issue before the Court is Idaho Power's contractual claim to 255,000 acre-feet of secondary storage capacity for power generation. In its *Brief in Support*, Idaho Power argued there is only one question in this matter:

Can the United States Bureau of Reclamation and the State of Idaho simply ignore a valid contract right and the express intent of Congress as exclaimed in enacted federal legislation? For that is exactly what they are attempting to do by violating Idaho Power Company's contractual right to 255,000 acre-feet of secondary storage capacity in the American Falls Reservoir.

...
The facts . . . establish that in 1973 the United States Congress specifically stated that when American Falls Dam and Reservoir was rebuilt, existing spaceholder rights must be protected and maintained. The facts also establish that as of the date of passage of that legislation, all parties recognized that Idaho Power Company held a 45,000 acre-foot active [or primary] storage capacity right in the American Falls Reservoir and a 255,000 acre-foot secondary storage capacity right in the reservoir for power generation.

...
The right existed at the time of the passage of the 1973 legislation, and the legislation required that right to be maintained in the 1976 spaceholder contract.
Idaho Power's *Brief in Support*, at 3 and 25, fn 11.

Idaho Power cited a portion of the 1973 federal legislation authorizing replacement of the existing American Falls Dam (Public Law 93-206, 87 Stat. 904, "Act of December 28, 1973") as

⁷ Idaho Power defined its *active* or *primary* storage right as "similar 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." It defined its *secondary* storage right as unique because it "provides the Company the right to use up 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 to the use of such capacity." Idaho Power's *Brief in Support*, at 5-6.

confirming and protecting both its primary and secondary storage capacity rights under the 1923 Contract:

Sec. 2. (a) Replacement of the existing dam as authorized in section 1 hereof 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 [of the Interior] and the spaceholders except as otherwise provided in this Act.

Idaho Power's *List of Exhibits to IPC's Brief*, Exhibit 2.

In response to arguments that the 1976 Spaceholder Contract terminated Idaho Power's ability to require the United States to forego storage of up to 255,000 acre-feet of water in American Falls Reservoir, Idaho Power answered, "no." The first of the four 1976 Spaceholder Contracts (*Affidavit of David A. Jarvis*, Exhibit BBB) acknowledges the United States and Idaho Power are parties to the 1923 Contract and then states: "[Idaho Power] conveyed to the United States certain lands and water rights and obtained the right to use the stored water accruing to 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* [emphasis added]." Explanatory Recitals, § 5.

Idaho Power argued that while the figure 2.6471 % (hereafter "2.65 %") represents its 45,000 acre-feet of *active* storage in the reservoir, its 255,000 acre-feet *secondary* storage right was not rescinded. In other words, this particular 1976 Spaceholder Contract first acknowledged Idaho Power's active storage right and then with the words "as well as other rights relating to the use of water for power generation," recognized Idaho Power's secondary storage rights for power generation below Milner Dam.

Besides, Article 28(b) of the same 1976 Spaceholder Contract required Idaho Power to pay 7.1388 % of the total operation and maintenance costs of the dam. To Idaho Power, that suggests it has held valid rights to both 45,000 acre-feet of active storage and 255,000 acre-feet of secondary storage since 1923 through today. See Idaho Power's *Brief in Support*, at 26-28 and 36-38.

Finally, Idaho Power acknowledged a controlling principle in asserting its claim to a secondary storage capacity right in American Falls Reservoir:

It is not the intent of the Company to reference [letters and correspondence from 1926 through 1973] in an effort to establish that Idaho Power Company's secondary storage capacity right is superior to irrigation storage rights. To the contrary, Idaho Power Company recognizes that storage for irrigation remains the primary purpose of the Reservoir and that Idaho Power Company's secondary

storage capacity rights are secondary rights. This is not, however, inconsistent with Idaho Power Company's position that the secondary storage capacity contract right remains a valid contract right and the Right must be honored by the United States in a manner consistent with the terms of the 1923 Contract. Idaho Power's *Brief in Support*, at 19, fn 7.

United States

The United States filed its second *Motion for Partial Summary Judgment* in subcase 01-2064 on October 5, 2010. It sought a ruling that "(1) the quantity of water assigned to hydropower generation under water right 01-02064 is 45,000 acre-feet and (2) no trust obligation has been imposed on the United States." United States' *Motion*, at 1.

The United States' view of Idaho Power's objections is brief. It suggested Idaho Power is asking the Court "to grant Idaho Power two contractual rights: (1) the right to store up to 45,000 acre-feet of water on the same terms as the other spaceholders and (2) the right to demand that the United States release or forego storage of up to 255,000 acre-feet of water in American Falls Reservoir so that the water can flow downstream and be used by Idaho Power to generate electricity." United States' *Memorandum in Support of the United States' Motion for Partial Summary Judgment*, at 3.

The United States argued that Idaho Power now seeks recognition of a 1923 contract right terminated long ago and the United States' water right is not subject to a trust obligation in favor of Idaho Power. In particular, the United States wrote that Idaho Power's claims are premised on provisions of a contract terminated by statutes and contracts leading to reconstruction of American Falls Reservoir in the 1970s. Further, Idaho Power's demand for a right to use up to 300,000 acre-feet of water entering American Falls Reservoir would have a dramatic impact on the irrigation community because of Idaho Power's decades-long acquiescence to non-delivery of water for hydropower generation.

The core of the United States' contract arguments is this:

The United States' position is simple: Idaho Power's right to use water from American Falls Reservoir is exactly what it contracted for in 1976 – the contractual right to use up to 45,000 acre-feet of space, and the right to generate hydropower through the use of "falling water," water that is released from the dam for purposes other than generating hydropower. . . . [B]oth the legislation and the contracts resulting from the re-construction of American Falls Reservoir precludes Idaho Power from being awarded a right to demand 300,000 acre-feet of water.

. . .

In sum, both the plain terms of the contracts and Congress' review of the contracts lead to only one conclusion: the 1976 Contracts terminated Idaho Power's ability to require the United States to forego the storage of up to 255,000 acre-feet of water in American Falls Reservoir.

United States' *Memorandum in Support*, at 31-32 and 41.

Finally, the United States argued this Court cannot grant Idaho Power's request to impose a trust obligation on the United States. Regardless of the IDWR Director's statement that a trust obligation on BOR's water right 01-2064 arose when he cancelled Idaho Power's permit, 1) IDWR lacked jurisdiction to impose such a trust obligation; 2) BOR contracts do not create trust obligations; and 3) fiduciary obligations on the United State cannot be implied – "there must be an express statement of intent to assume a fiduciary obligation." United States' *Memorandum in Support*, at 45.

State of Idaho

The State filed its *Amended Motion for Partial Summary Judgment* in subcase 01-2064 on October 5, 2010. First, the State pointed out that all parties agree Idaho Power's natural flow hydropower water rights at the company's American Falls power plant is junior and subordinate to all other water rights in Idaho. Next, the State said the current filings were made in response to Idaho Power's amended *Objection* "that seeks the inclusion of remarks on the quantity and purpose of use elements that would require the USBOR to bypass flows for use at the company's downstream power plants based upon an alleged contractual right arising from its 1923 spaceholder contract." State's *Brief in Support*, at 2.

The State then summarized the issues presented on summary judgment:

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

State's *Brief in Support*, at 2.⁸

⁸ "The storage provided by this reservoir is the foundation of the existing irrigation development in the upper Snake River basin. The largest storage reservoir in the upper Snake River basin, American Falls Reservoir contributes almost half of the usable storage on the main stem of the upper Snake River. Nearly 900,000 acres of land now receive irrigation water from the reservoir." State's *Brief in Support*, at 5, quoting *American Falls Dam Replacement: Information Report* (USBOR Dec. 1966).

The State wrote that in 1923, as part of development of irrigation potential above Milner Dam, the United States and Idaho Power entered into a contract that led to construction of the American Falls Dam as part of the Minidoka Reclamation Project. The United States acquired from Idaho Power two of the company's three power plants at American Falls, most of the company's water rights and certain real property. Idaho Power could continue to operate its power plant on the east side of the river below the dam, but its right to demand releases from the dam were limited by the 1923 Contract.

As early as 1930, abnormal cracking in the original American Falls dam was observed and by 1966, the USBOR reported the dam could not be permanently rehabilitated. In 1973, federal legislation authorized construction of a replacement dam provided the United States would take title to the dam which would continue to be operated as part of the Minidoka Reclamation Project. By contract, Idaho Power would be allowed to use releases from the dam for hydropower generation to defer the costs of dam reconstruction provided the purposes of the Minidoka Project were not impaired. Generally see State's *Brief in Support*, "factual background," 2-15.

Beginning in 1974, in order to secure tax exempt bonds to privately finance reconstruction of American Falls Dam, the American Falls Reservoir District (AFRD) argued before the IRS that construction of the new dam was an irrigation project with only incidental hydropower features. In 1975, the AFRD wrote to the IRS that while Idaho Power was entitled to use water released past American Falls Dam, it had no right to control or demand the USBOR to make those releases beyond its 45,000 acre-feet of storage:

The Company will have no control over the release of water other than in its capacity as a Placeholder which is exceedingly nominal. . . .

Pursuant to Public Law 93-206, a falling water contract has been drafted which specifically states that the Company has no right to call upon the Bureau of Reclamation or the placeholders for the release of water from the American Falls Reservoir (except for the 45,000 acre feet which the Company owns as a spaceholder of the 1,700,000 acre feet capacity).

State's *Brief in Support*, at 17, quoting *Brief of AFRD to IRS*, at 4 (January 31, 1975).

On December 23, 1975, Congress passed Public Law 94-164, 89 Stat. 970 (1975) ("Revenue Adjustment Act of 1975") providing AFRD the tax exemption necessary to move forward with reconstruction of the dam. State's *Brief in Support*, at 20. That done, and after

issuance of Federal Power Commission licenses, the United States, AFRD and Idaho Power signed the 1976 Placeholder Contract defining operation of the new American Falls Dam and Reservoir:

The contracts memorialized the limitations placed upon the project by the federal legislation, including the following two principles that resonated throughout the Replacement Program proceedings: (i) Idaho Power would have no control over, and no right to demand, any releases beyond its storage right; and (ii) Idaho Power would only have a right to 45,000 acre-feet of storage at American Falls (i.e., 2.65 % of storage capacity).

State's *Brief in Support*, at 26.

Having recalled the above history, the State concluded its arguments with the following:

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

State's *Brief in Support*, at 53.

American Falls Spaceholders

The American Falls Spaceholders lodged their *Supplemental Memorandum in Support of American Falls Spaceholders Motion for Summary Judgment* on October 5, 2010. They support the State's *Amended Motion for Partial Summary Judgment* and reminded everyone they are "irrigation entities whose members rely on storage in American Falls Reservoir to support their farming liv[e]lihoods." *Supplemental Memorandum*, at 3.⁹

The Spaceholders offered to clarify certain points in support of their 2009 *Motion for Summary Judgment* as well as the State's filings:

1) Idaho Power Company has never demanded or used its alleged right to 300,000 acre-feet of storage water, and 2) granting Idaho Power Company's claim to 300,000 acre-feet of storage water would cause serious damage to the American Falls Spaceholders, their individual member irrigators and other irrigators upstream of the American Falls Reservoir.

Supplemental Memorandum, at 4.

⁹ In their *Supplemental Memorandum*, the Spaceholders "reasserted" their claim for attorney fees and costs "based on Idaho Power Company's behavior in this matter", but there is no evidence of such claim in their 2009 *Motion for Summary Judgment*.

Responses

United States

The United States lodged its *Response Memorandum in Support of Motion for Summary Judgment* on November 16, 2010. Its conclusion fairly lays out its position:

In 1976, Idaho Power signed a Spaceholder Contract that allowed it access to no more than 45,000 acre-feet of storage capacity in American Falls Reservoir. Article 19 of that contract confirmed that 45,000 acre-feet is all the water Idaho Power is entitled to as a spaceholder by specifying that the 1976 Contract's terms regarding the distribution of water "shall prevail" over the terms of the 1923 Contract to whatever extent there is a conflict. Idaho Power's claim to the use of an additional 255,000 acre-feet of storage capacity clearly conflicts with the 1976 Spaceholder Contract and by the plain terms of that contract, cannot be sustained. Even if that were not the case, the Company's two decades of ignoring the "rights" it now claims reiterated what the plain language of the 1976 Spaceholder Contracts made clear: the secondary storage provisions of the 1923 Contract are no longer valid.

United States' *Response Memorandum*, at 15-16.

Idaho Power Company

On November 16, 2010, Idaho Power filed three *Responses*: 1) to the United States' *Motion for Partial Summary Judgment*, 2) to the State's *Amended Motion for Partial Summary Judgment*, and 3) to the American Falls Spaceholders' 2009 *Motion for Summary Judgment*.

First, it argued the 1923 Contract it signed with the United States remains valid and Idaho Power has not abandoned its contract rights:

The 1923 Contract provided Idaho Power with 45,000 acre-feet of active storage capacity in the American Falls Reservoir, and 255,000 acre-feet of secondary storage capacity in the American Falls Reservoir. That contract is still in force today and the Company is asking this Court to recognize the rights afforded to Idaho Power in that contract. In particular, this case is about whether or not the secondary storage capacity right of 255,000 acre-feet in American Falls Reservoir is still a valid contract right.

...

The secondary storage capacity is a right held and operated by the United States, pursuant to the terms of the 1923 Contract governing the water's release. . . [T]he secondary storage right is not a traditional storage right, and the Company does not have the right under the 1923 Contract to call for this storage. Instead, the contract requires water to be released by the United States during certain periods of the year in order to provide sufficient flows to allow the Company to generate power below Milner dam. This action was initiated, in part, because the United States has failed to meet the terms of the Contract and provide those flows.

Idaho Power's *Response* to United States' *Motion*, at 1 and 3.

Then, Idaho Power spelled out its core arguments: 1) there is no proof that compliance with the 1923 Contract would have any effect on the irrigators; 2) contract law principles should govern the Court's analysis, not principles of equity; and 3) the United States holds Idaho Power's storage rights in trust.

In its *Response* to the State's *Amended Motion*, Idaho Power re-stated its earlier argument that Congress did not intend to limit Idaho Power's secondary storage rights when it enacted the Revenue Adjustment Act of 1975. It then offered further explanation of the right:

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

Idaho Power's *Response* to State's *Amended Motion*, at 2.

In its *Response* to the Spaceholders' 2009 *Motion*, and more particularly their 2010 *Supplemental Memorandum*, Idaho Power argued: 1) both its primary and secondary storage capacity rights have been recognized by the United States and the State since 1923, and have been used; 2) Idaho Power cannot be estopped from asserting its 1923 Contract rights; 3) recognition of its secondary storage right will not harm the irrigators; and 4) an award of attorney fees and costs is not warranted.

State of Idaho

The State filed its *Response* on November 16, 2010, providing yet more historical background. It characterized Idaho Power's *Motion* as opening another chapter in the Snake River's long-running conflict between hydropower and irrigation:

An important aspect of this conflict, and the issue at the heart of Idaho Power's motion, is the question of the extent to which a private hydropower company may exercise control over the operation of the federal reclamation system in the upper Snake River basin. Idaho Power's motion seeks to resurrect and enlarge a "secondary" storage space right it unambiguously relinquished in the 1970s, and

if granted would put the company in a position today to control far more storage space in American Falls Reservoir than ever before, and far more than was ever contemplated under any set of circumstances.

The undisputed historic backdrop for this case is more than a century of reclamation development in the upper Snake River basin, a fundamental principal of which has always been that generation of hydropower at federal reclamation dams is incidental and secondary to the primary objective of storing water for irrigation. The 1923 American Falls contract between Idaho Power and the United States implemented this principal, granting Idaho Power a minimal “primary” right to 45,000 acre-feet of reservoir storage capacity, and an even more limited “secondary” right to 255,000 acre-feet of storage capacity.

...
Idaho Power asserts that in addition to its 45,000 acre-foot “primary” storage right, it always intended to retain the 255,000 acre-foot “secondary” storage right, despite having repeatedly and consistently described the company’s storage right as limited to 45,000 acre-feet in numerous meetings, hearings, written statements, contracts, and in state and federal litigation. Idaho Power now brazenly seeks not only to resurrect the relinquished “secondary” right but also to combine the “primary” right and obtain far more than a contractual right to storage space in a federal reservoir: Idaho Power asks this Court to declare that the company has absolute control over 300,000 acre-feet of the storage capacity of American Falls reservoir.

State’s *Response*, at 2 and 4-5.

The State recalled that following the 1919 drought, the State, BOR and Twin Falls and North Side Canal Companies developed a plan to conserve the entire flow of the Snake River above Milner Dam for irrigation purposes. Under the 1923 Contract, the United States acquired two of Idaho Power’s three power plants at American Falls, most of the company’s water rights and certain real property. The secondary storage right awarded to Idaho Power was subject to significant qualifications and limitations in favor of irrigation storage:

In effect, the “secondary” storage capacity right as defined by the 1923 Contract was not a storage right in the conventional sense, but rather was simply authorization for Idaho Power to use the water accruing to certain storage space that was subject first and foremost to the “primary” storage rights of irrigators. The company had a right to use the water accruing to this storage space only when and if the irrigators did not need the water.

The 1923 Contract was a compromise in that the United States had originally sought, consistent with the development principles and plans . . . to prevent hydropower from interfering with reclamation by purchasing all of Idaho Power’s American Falls water rights, and thus avoid having a private hydropower facility situated above Milner Dam in the middle of the federal reclamation project [footnote omitted].

State’s *Response*, at 10.

The State suggested Idaho Power's *Motion* "should be denied as a matter of law because it seeks rulings on contractual matters that are peripheral to determining the elements of water right 01-02064" and any claim for declaratory judgment relief (I.C. § 10-1201, *et al.*) is an impermissible enlargement of the SRBA Court's jurisdiction. Further, under Idaho law, Idaho Power cannot decide when hydropower must be subordinated to irrigation, and under federal law, commercial hydropower use of a federal reclamation reservoir is permitted only when it does not impair the efficiency of the irrigation project. State's *Response*, at 21-23.

The State spelled out the four main reasons why as a matter of law Idaho Power's storage right in American Falls Reservoir is limited to 2.65 % of the reservoir capacity or 45,000 acre-feet:

1. Congress limited Idaho Power's storage right under the Revenue Adjustment Act of 1975;
2. In 1977, the Fifth Judicial District confirmed proceedings on the American Falls Dam reconstruction project and determined Idaho Power had a right to no more than 2.6471% of the reservoir's active storage capacity;¹⁰
3. Idaho Power is barred by judicial estoppel from claiming more than 2.65 % of reservoir capacity; and
4. Idaho Power's support of federal legislation and its signature on the 1976 Spaceholder Contract authorizing replacement of American Falls Dam estop the company from claiming more than 45,000 acre-feet of active storage capacity.

The State argued one final point. Idaho Power suggested that its contractual claim to 255,000 acre-feet of secondary storage capacity does not involve a right to storage water. Rather, it is a "pass-through" right – that is, water that can be stored but is "passed through" the reservoir. With that point, the States suggested Idaho Power's claim to 255,000 acre-feet of water for "power storage and power from storage" should be dismissed as a matter of law and fact. Idaho Power objected to the amount of storage the BOR must allocate to power use; it did not seek a right to natural flow under storage water right 01-2064.

¹⁰ See District Judge Alfred C. Hagan's *Memorandum Decision and Amended Findings of Fact and Conclusions of Law, In the Matter of the Petition of the Board of Directors of the American Falls Reservoir District*, Civil No. 28378 (Idaho 5th Dist. Ct., March 4 and May 18, 1977), Exhibit 39 and 40 to December 4, 2009 *Affidavit of David I. Stanish*.

Replies

Idaho Power Company

Idaho Power filed its *Reply to the United States and State of Idaho's Response to Idaho Power Company's Motion for Summary Judgment* on December 7, 2010. It expressed surprise the State would argue the SRBA Court lacks jurisdiction to determine a contract matter:

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. . . . 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.

In order to settle this adjudication, and to address the 300,000 acre-feet 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.

Idaho Power's *Reply*, at 1 and 4.

Idaho Power summarized its six main arguments:

1. Congress intended to protect existing spaceholder rights when it enacted legislation in 1973 to replace American Falls Dam;
2. The 1975 bond legislation and the 1976 Spaceholder Contract did not affect Idaho Power's secondary storage right;
3. Idaho Power did not waive its secondary storage right based on certain statements by its representatives;¹¹
4. Idaho Power's secondary storage capacity contractual right has never been abandoned, hence equitable theories of estoppel do not apply;¹²
5. Idaho Power continues to pay operation and maintenance fees for its secondary storage right; and

¹¹ Idaho Power agreed it cannot demand the secondary storage capacity be released. When its representative testified before Congress that the Company has a right to "utilize only 45,000 acre-feet upon demand," he was talking about the Company's traditional right, not its secondary capacity right. Idaho Power's *Reply*, at 15.

¹² Idaho Power pointed out that "rights acquired under a contract may only be abandoned or relinquished by agreement or intent and conduct clearly indicating such a purpose. . . . To constitute abandonment of contract rights, an actual intent to abandon must exist, and there must be proof of the intent [citations omitted]." Idaho Power's *Reply*, at 17.

6. “[I]t 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.” Idaho Power’s Reply, at 11.

United States

The United States lodged its *Reply Memorandum in Support of Motion for Summary Judgment* on December 7, 2010. In this filing, the United States focused on the two contracts and federal legislation at the center of this dispute:

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 [1973] 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.

United States’ *Reply Memorandum*, at 4.¹³

The United States reasoned this way: while the 1923 Contract provided Idaho Power a secondary right to use 255,000 acre-feet of storage capacity, the 1976 Spaceholder Contract (to identify all of the storage capacity to be made available to spaceholders) granted Idaho Power no more than 2.65 % (45,000 acre-feet of space). Hence, its claim of a secondary storage right to 255,000 acre-feet was voided. Idaho Power’s argument that its secondary storage capacity claim is not part of the reservoir’s active capacity must fail – the 1976 Spaceholder Contract provided the sole means of using the reservoir’s storage capacity. See United States’ *Reply Memorandum*, 3-8.

The United States then addressed the dispute over O&M charges. Idaho Power argued it continues to pay 7.1388 % of the O & M payments carried forward from the 1923 Contract and that suggests its secondary storage capacity right remains valid – it is entitled to more that 2.65

¹³ The United States conceded that Idaho Power can schedule the release of its 45,000 acre-feet of active storage capacity. But it maintains legislative history confirms that is “the *only* water that would be released specifically for use by the Idaho Power Company to provide electricity.” United States’ *Reply Memorandum*, at 4-5, fn 3.

% of the storage capacity (45,000 acre-feet active storage capacity *plus* 255,000 acre-feet secondary storage capacity).

The United States pointed out there is no firm evidence of this connection between O & M payments and Idaho Power's secondary storage claim or Idaho Power's motive for agreeing to continue such payments. For instance, it may have been concerned with complaints from irrigators that Idaho Power was not paying enough. Or maybe Idaho Power was concerned with default provisions in the 1976 Spaceholder Contract. In any event, "Idaho Power cannot seriously dispute that for decades after signing the 1976 Contracts, Idaho Power acted as though the secondary storage provisions were no longer valid." United States' *Reply Memorandum*, at 9.

Next, the United States argued intent to abandon a contract provision may be inferred from the conduct of a party. "More than two decades of ignoring the [secondary storage] right it now claims in the face of repeated non-delivery is clear evidence of acquiescence and, under general [principles] of contract law, a more than sufficient basis to find that the secondary storage provisions are no longer valid." United States' *Reply Memorandum*, at 11.

Finally, before again arguing the 1923 Contract cannot be construed as imposing a trust obligation on the United States, it spelled out the dire consequences for irrigators of recognizing the secondary storage provision:

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. Not 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.

United States' *Reply Memorandum*, at 12.

State of Idaho

The State lodged its *Reply Brief in Support of Amended Motion for Partial Summary Judgment* on December 7, 2010. The State began with this argument: Idaho Power admits its claimed secondary right is for water that *could* be stored, but is actually a pass-through right that does not involve a right to storage water. Therefore, since this dispute pertains to a water right for storage purposes only, Idaho Power's claim can be for no more than 45,000 acre-feet or 2.65 % of reservoir capacity.

The State then argued that the 1976 Spaceholder Contract defined all spaceholder rights to stored water. Since its definition of “active” storage capacity encompasses all storage rights – whether primary or secondary – Idaho Power’s right to stored water is limited to 2.65 % or 45,000 acre-feet of the active capacity of the replacement dam under the Contract.

The State again noted this limit on Idaho Power’s storage right under the 1976 Spaceholder Contract was mandated under the Revenue Adjustment Act of 1975 which restricted the quantity of storage that could be controlled for power generation at American Falls. So, when Idaho Power signed the 1976 Spaceholder Contract, with its comprehensive “savings clause,” it abandoned any contractual claim to more than 2.65 % of the active storage capacity of the Replacement Dam:

Nothing herein shall in any way alter or change the present proportionate storage rights of the Spaceholder [Idaho Power], and this [1976] Spaceholder Contract and the American Falls Replacement Dam Program constitute a reaffirmation by the United States of the rights of the Spaceholder under the [1923] Existing Spaceholder Contract, except as modified by this Spaceholder Contract as authorized in the Act of December 28, 1973, and in the Government Contract. The provisions of the Existing Spaceholder Contract shall in all respects remain in full force and effect except that the provisions of this Spaceholder Contract with respect to the Replacement Dam, including but not limited to the operation and maintenance thereof and the distribution of water therefrom, shall prevail over the provisions of the Existing Spaceholder Contract wherever and to whatever extent the provisions of the Existing Spaceholder Contract are in conflict with the provisions of this Spaceholder Contract.

State’s *Reply Brief*, at 7, quoting in part from 1976 Spaceholder Contract at 6-7, part I, art. 19(a).

The State then quoted from various Congressional hearings, Federal Power Commission orders, provisions in related contracts and findings from a 5th District Court order to establish that parties to the 1976 Spaceholder Contract intended Idaho Power to have a right to no more than 45,000 acre-feet of American Falls Reservoir capacity.

The State closed its *Reply Brief* with one final point. It agreed with Idaho Power “that the question of whether water right no. 01-02064 is held in trust by the United States for the benefit of the power company ‘is not necessary for this Court to address in this litigation. . . .’” State’s *Reply Brief*, at 23, paraphrasing from Idaho Power’s *Response to the United States’ Motion for Summary Judgment*, at 18, fn 19.

Hearing

The hearing on motions for summary judgment and alternative motion for declaratory judgment was held on December 21, 2010, at the SRBA Courthouse in Twin Falls, Idaho. The following counsel or representative appeared in person or by telephone conference:

Idaho Power Company	Adam T. Devoe and David G. Scott
United States	David W. Gehlert and Matt J. Howard
State of Idaho	David I. Stanish and Michael C. Orr
American Falls Spaceholders	Jerry R. Rigby
Ground Water Districts	Candice M. McHugh
IDWR	Ray Williams

After the parties argued their motions and submitted the matter for decision, they requested any ruling be delayed in the hopes of final settlement. The parties also requested they be given 1-2 weeks' notice before entry of an order. On March 16, 2010, the Special Master issued a *Notice of Intent to Enter Order on Motions for Summary Judgment and Alternative Motion for Declaratory Judgment* setting the date for March 31, 2011, "unless the parties settle the matter or submit a reasonable alternative."

Discussion

Contract Right –v- Water Right

During argument by counsel, the issue was raised whether this matter concerns interpretation of a contract right or adjudication of a water right. Idaho Power said it was not their intent to forum shop, but mentioned its claim for money and declaratory interpretation of its 1923 Contract rights before the Court of Federal Claims has been put on hold pending the outcome before the SRBA Court.

When the United States and the State argued the SRBA Court lacks jurisdiction to determine a federal contract matter, Idaho Power wrote it "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.” Idaho Power’s *Reply* at 1. Idaho Power’s view is this:

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.

Idaho Power’s *Reply* at 4.

The State pointed out that just last year in the Minidoka and Palisades power right subcases (*Order Granting Motion for Summary Judgment*, subcases 01-217, *et al.*, March 25, 2010), the Special Master discussed the differences between federal contract rights and elements of water rights. The SRBA Court, a court of limited jurisdiction, adjudicates elements of water rights while a claim of non-compliance under a federal contract with the United States is a matter for the Court of Federal Claims. In those earlier power right subcases, the Surface Water Coalition argued certain remarks supported by the IDWR Director failed to recognize their interests in reduced BOR power rates to deliver water to their districts’ lands.

The Special Master held that because power generation at BOR reclamation facilities is incidental to irrigation project purposes, power generation may be curtailed to benefit storage for irrigation and other purposes, regardless of the power loss payment system relied upon by the districts. Therefore, because those remarks were necessary for definition of the BOR’s rights, for clarification of elements of the rights or for administration of the rights by the Director (I.C. § 42-1411 (2)(j)), the Special Master supported inclusion of the remarks. Any claim of non-compliance under a contract (money damages) is a matter for the Court of Federal Claims.

The present subcase is similar to those Minidoka and Palisades power right subcases in some ways. Here, the Director recommended the entire power storage capacity of American Falls Reservoir (300,000 afy) to the BOR with two remarks concerning power generation – subordination and contracts:

The . . . use of water for power generation is incidental to the rights of others to the use of water for other purposes. The appropriator shall not make a delivery call for hydropower generation except as against junior hydropower rights.

. . .

The diversion and release of storage for power purposes under this water right is subject to those conditions contained in contract nos. I1r-733 and I1r-801 between the United States Bureau of Reclamation and Idaho Power Company.

The Director determined the remarks he recommended for water right 01-2064 are necessary for definition of the right, for clarification of the priority date and purpose of use elements of the right and for administration of the right. That being the case, the Special Master concludes the SRBA Court has jurisdiction to interpret these contract rights to adjudicate elements of the water right.

Supplemental Director's Report

Nearly a year and a half after the Director filed his initial *Director's Report* recommending water right 01-2064 to the United States for irrigation and power uses, he filed a *Supplemental Director's Report Regarding Subcase Nos. 1-217, 1-218, 1-2064, 1-2068, 1-4024, 1-4025 and 1-4054* on April 11, 2008. The reasons behind the *Supplemental Director's Report* were to explain the "historical subordination practice remark" and IDWR's reasons for including the remark concerning subordination of power generation "to the rights of others to the use of water for other purposes."¹⁴

In the *Supplemental Director's Report*, former IDWR Director David R. Tuthill, Jr., first reviewed the history of the Upper Snake River Basin. He noted that Tony Olenichak, Program Manager for Water District #1 for over 17 years, historically administered the power elements of water right 01-2064 as subordinate to irrigation and all other junior water rights except hydropower. Mr. Tuthill then wrote:

Despite numerous opportunities to make a call against junior water users, Mr. Olenichak is not aware of a single instance when the BOR has made a call for water under these power rights against junior water right holders. Changing the operation of the water system to allow these power water rights to be able to make calls on junior irrigators would be a change from how the Basin 01 water system has historically operated. This change would have a significant negative impact on the junior upstream water users [citations omitted].

Supplemental Director's Report, at 5.

The Director added that numerous historical documents and federal legislation confirm IDWR's understanding "that it has long been BOR's practice to treat these power water rights as subordinate to junior non-hydropower water rights." *Supplemental Director's Report*, at 6.

¹⁴ In most cases, the uses of water for "other purposes" includes irrigation and domestic uses. *Supplemental Director's Report*, at 9-10, citing BOR's 1956 "American Falls Powerplant Definite Plan Report."

As a related matter, the Director also addressed Idaho Power's claim to secondary storage capacity of 255,000 acre-feet in American Falls Reservoir based on the 1923 Contract. He recalled that in 1973, when the AFRD and Idaho Power sought federal approval to rebuild the American Falls Dam, it needed a tax exempt status from the IRS for bonds to finance its reconstruction. The IRS denied the request because of questions about commercial power generation at the new dam. So, in 1975, Congress passed legislation effectively approving the tax exemption but only if 90 % or more of water stored behind American Falls Dam is for irrigation. The Director quoted from a House Report on that specific condition:

There has been no intention to release water specifically for use by the Idaho Power Company to generate electricity, except for 45,000 acre-feet (2.65 percent of the storage capacity) whose release the power company can schedule for the purpose of generating electric energy. Thus, the use of water for electric energy would be subordinated to the use of the water for irrigation.

Supplemental Director's Report, at 13.¹⁵

1923 Contract

The 1923 Contract granted Idaho Power a right to 45,000 acre-feet of active or primary storage capacity plus "a secondary right to use not to exceed 255,000 acre-feet of storage capacity in the reservoir," to ensure certain flow rates are met for power generation below Milner Dam. None of the parties dispute those facts.

Under the 1923 Contract, Idaho Power also agreed it could not demand the secondary storage capacity be released and the secondary right was available only when such capacity was not then required and not being used by the owners of irrigation rights. In other words, Idaho Power agreed that its right to secondary storage capacity in American Falls Reservoir for power generation is subordinate to water stored for irrigation.

Federal Legislation and 1976 Spaceholder Contract

The Revenue Adjustment Act of 1975 was artfully crafted to afford AFRD the tax exemption necessary to quickly move forward with reconstruction of the American Falls Dam. Without that legislation, it is likely the project would have been substantially delayed. The

¹⁵ The Director suggested this House Report, like a similar Senate Report, "identifies a maximum limit of 10 percent of normal supply available for unsubordinated hydropower rights at the dam to be able to be entitled to the tax exempt status. This limit was set high enough to make sure that the generation of power by Idaho Power, with its estimated 2.65 percent of supply, would qualify for the test [citation omitted]." *Supplemental Director's Report*, at 13.

record is replete with evidence the law would not have passed but for recognition that 1) Idaho Power would have no control over and no right to demand releases beyond its storage right, and 2) Idaho Power would have a right to no more than 45,000 acre-feet of storage. Given those conditions, Idaho Power had no choice but to sign the 1976 Spaceholder Contract agreeing that its storage right was limited to 45,000 acre-feet or 2.65 % of storage capacity.

It is evident parties to the 1976 Spaceholder Contract intended to define *all* spaceholder storage rights, whether considered secondary storage or pass-through. Of course, that meant Idaho Power's secondary storage right was effectively waived, abandoned, relinquished or simply bargained away. Whichever term is used, that right ceased to exist. The savings clause of the 1976 Spaceholder Contract explicitly said its provisions prevail over provisions of the 1923 Contract in conflict. Therefore, the Contract extinguished Idaho Power's secondary storage right. Idaho Power's claim to a secondary storage right is no longer valid and its active or primary storage right is limited to no more than 45,000 acre-feet or 2.65 % of reservoir capacity.

The fact that the entire power storage capacity of the reservoir was recommended to the BOR – not Idaho Power – necessarily implies the Director has concluded Idaho Power's claim for “natural flow” or “secondary storage capacity” of 255,000 acre-feet no longer exists. The Special Master agrees with the Director.

O & M Charges

Idaho Power argued the percentage of total operation and maintenance costs of American Falls Reservoir Dam it is required to pay under the 1976 Spaceholder Contract (7.1388 %) supports its claim to more than 2.65 % of storage capacity. After all, it has paid the charges since 1923, when its secondary storage capacity right was granted. But the argument is not supported by the record.

As the United States pointed out, there is no firm evidence of a connection between Idaho Power's O & M payments and its storage rights. Neither is there evidence why Idaho Power agreed to continue paying the same percentage when its secondary storage right ended with the 1976 Spaceholder Contract.

Trust Obligation on United States

In its *Amended Objection*, Idaho Power agreed water rights it established through early state permits were merged with later rights granted the United States. But it noted that when IDWR cancelled those permits, former IDWR Director R. Keith Higginson found: “that by reason of contracts and agreements entered into between the Company and the United States, Bureau of Reclamation, those rights are held in trust for use by the Company under water rights of the United States at American Falls Reservoir.” *Memorandum Decision*, April 21, 1971, Exhibit BB to Mr. Jarvis’ *Affidavit*.

From the beginning, the United States argued its water right 01-2064 is not subject to a trust obligation in favor of Idaho Power. The State, while not necessarily agreeing with Idaho Power on that issue, agreed with Idaho Power it is not necessary to address the issue in this litigation.

The Special Master agrees with Idaho Power and the State. The issue was raised but only partially briefed in the context of Idaho Power’s claim to a continuing valid secondary right to storage capacity for power generation. The issue of a trust obligation on the United States’ right was peripheral to Idaho Power’s *Amended Objection* in the subcase:

[T]hat the rights granted to Idaho Power Company in the 1923 Contract . . . remain valid and enforceable contract rights that must be recognized by the United States, the State of Idaho, and the other parties to this subcase, and must be appropriately acknowledged in the water rights adjudication for the American Falls Reservoir.

Idaho Power’s *Motion for Summary Judgment or in the Alternative Motion for Declaratory Judgment of Contractual Rights*, at 2.

Director Higginson found the permit rights established by Idaho Power were merged with rights granted the BOR which were then “held in trust for use by the Company. . . .” He based that finding on Idaho Power’s *Answer to Order to Show Cause* dated December 1, 1970. Exhibit DD to Mr. Jarvis’ *Affidavit*. There, Idaho Power requested the Director enter a finding that the trust exists because of certain language in the 1923 Contract:

But it is expressly agreed and understood that the water rights and rights to the use of water which it is herein agreed that the Company shall have are reserved out of its existing appropriations and rights as independent rights under its own filings and appropriations and of the dates of priority to which the Company is entitled under such appropriations *and are not to be considered as mere contract rights under contract with the United States* [emphasis added].

Mr. Jarvis’ *Affidavit*, Exhibit C, at 11, paragraph 9, (d), and Exhibit DD, at 5, paragraph V.

In the same *Answer to Order to Show Cause*, Idaho Power added that it continuously applied its stored water to beneficial uses under its permits “*and the Company and all other such contract holders are the equitable owners of the right to so use these waters* [emphasis added].” Mr. Jarvis’ *Affidavit*, Exhibit DD, at 7, paragraph IX. This language suggests the water rights established by Idaho Power and later merged with rights granted to the BOR in 1923, are not “mere contract rights” and Idaho Power may have retained some equitable interest.

The record in this subcase is not complete enough to determine the trust issue. Idaho Power’s secondary storage right was terminated by the 1976 Spaceholder Contract, but the BOR’s right to 300,000 acre-feet for power uses may be impressed with some trust obligation yet to be determined. Whether that trust exists, by the Director’s decision or by contract, and its implications warrant further review at some later date.

Attorney Fees and Costs

The American Falls Spaceholders’ claim for attorney fees and costs “based on Idaho Power Company’s behavior in this matter” is not supportable. As the State suggested, this proceeding is yet one more chapter in the Snake River’s long-running conflict between hydropower and irrigation. And there were hints any decision in the SRBA will not be the end.

From an early chapter beginning with the signing of the 1923 Contract, the parties struggled mightily to identify water rights for Idaho Power at a federal reclamation reservoir that are subordinate to the dam’s primary function of storing water for irrigation. That conundrum was front and center again in the parties’ efforts to secure tax-free bonds to rebuild the dam in the 1970s. The parties failed to convince the IRS to grant tax-free status and it took federal legislation in 1975, to define Idaho Power’s commercial hydropower right as no more than a small percentage of the total capacity. That way, it would not impair the efficiency and central purpose of the Minidoka Reclamation Project – the daunting task of irrigating nearly 900,000 acres in a semi desert.

The 1976 Spaceholder Contract reflected the continuing struggle between hydropower and irrigation, but instead of clearly and concisely terminating Idaho Power’s secondary storage right to 255,000 acre-feet granted in 1923, it did so by inference – the comprehensive “savings clause.” The result, while confusing to some, limited Idaho Power’s storage right to no more

than 2.65 % of active storage capacity behind the Replacement Dam thereby complying with the Revenue Adjustment Act of 1975.

Conclusions of Law

1. The 1923 Contract granted Idaho Power a right to 45,000 acre-feet of active or primary storage capacity *plus* a secondary right to use 255,000 acre-feet of storage capacity in American Falls Reservoir.
2. The 1976 Spaceholder Contract extinguished Idaho Power's secondary right.
3. The issue of whether the 300,000 afy power use portion of water right 01-2064 is subject to a trust obligation in favor of Idaho Power is incomplete and not ripe for decision in this proceeding.
4. The American Falls Spaceholders' claim for attorney fees and costs is not warranted.

Order

THEREFORE, IT IS ORDERED that:

1. The American Falls Spaceholders' *Motion for Summary Judgment*, Idaho Power Company's *Motion for Summary Judgment or in the Alternative Motion for Declaratory Judgment of Contractual Rights*, the United States' *Motion for Partial Summary Judgment*, and the State of Idaho's *Amended Motion for Partial Summary Judgment* in subcase 01-2064 are **granted, in part**, consistent with this *Order*.
2. The American Falls Spaceholders' claim for attorney fees and costs in this matter is **denied** – the parties shall bear their own attorney fees and costs.

DATED March 31, 2011.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND ALTERNATIVE MOTION FOR DECLARATORY JUDGMENT was mailed on March 31, 2011, with sufficient first-class postage to the following:

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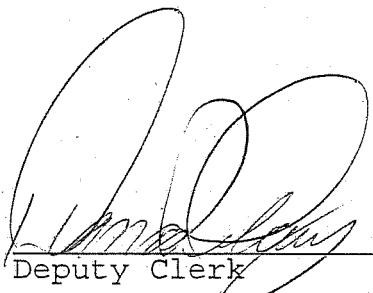
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ORDER

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