

RECEIVED

5-26

MAY 31 2011

DEPARTMENT OF
WATER RESOURCES

IGNACIA S. MORENO
Assistant Attorney General
Environmental and Natural Resources Division
DAVID W. GEHLERT
Natural Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
999 18th Street
South Terrace – Suite 370
Denver, Colorado 80294
Phone: (303) 844-1386
Fax: (303) 844-1350

Counsel for the United States of America

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

In Re SRBA	)	Subcase: 01-02064
	)	
Case No. 39576	)	THE UNITED STATES' RESPONSE
	)	TO IDAHO POWER COMPANY'S
	)	MOTION TO ALTER OR AMEND

Introduction

Idaho Power Company's MOTION TO ALTER OR AMEND ("Motion") purportedly asks only that this Court to reconsider its findings regarding the operation and maintenance ("O&M") charges the Company pays as an American Falls Reservoir Spaceholder. The Company explains that it is no longer "pursuing" its claim to 255,000 acre-feet of "secondary storage capacity under the 1923 Contract."¹ Motion at 2, n.1. Nonetheless, the Company argues

¹ Idaho Power explains that "the parties have effectively resolved the issue by agreement to engage in a collaborative process to explore opportunities to optimize the management of the water resources and operation of the reservoir system above Milner Dam." Motion at 2, n.1. While the United States is aware that there have been discussions regarding the opportunity for a collaborative process, the United States is not aware that any agreement has been signed, much less one that ties the establishment of a collaborative process to the resolution of Idaho Power's claims. In any event, this Court's ORDER ON MOTION FOR SUMMARY JUDGMENT disposed of

at length that the Court was incorrect to find that contractual right extinguished.

Idaho Power's Motion provides no basis for the Court to reconsider its decision. As the Court found, the plain language of the contract – and indeed, the entirety of the circumstances under which the 1976 Spaceholder Contract was developed – leaves no doubt the secondary storage right was extinguished. Even if that were not the case, Idaho Power's Motion must fail because the plain language of the 1976 Spaceholder Contract demonstrates that the Company's O & M payments could not have been intended to retain the secondary storage right. In short, rather than undermining this Court's decision, Idaho Power's O & M payments are yet another piece of evidence supporting this Court's conclusion that the secondary storage right was extinguished.

Argument

I. THE PLAIN LANGUAGE OF THE 1976 CONTRACT, INCLUDING PROVISIONS ADDRESSING OPERATION AND MAINTENANCE PAYMENTS DEMONSTRATES THAT THE SECONDARY STORAGE RIGHT HAS BEEN EXTINGUISHED.

Interpretation of a contract must start with its plain language. Equally important, if the plain language of the contract resolves a matter it is conclusive. *See Warm Springs Development Associates Ltd. Partnership v. Burrows*, 120 Idaho 280, 284, 815 P.2d 478, 482 (Idaho App. 1991); *Parma Seed, Inc. v. General Ins. Co. of America*, 94 Idaho 658, 662, 496 P.2d 281, 285 (1972) (“it is well settled that this Court must look first to the contract itself, construing the document as a whole. If the language of the entire contract reveals the parties’ intent, it is unnecessary to examine extrinsic evidence. . .”) (internal citations omitted). Further, this Court’s review of the 1976 Spaceholder Contract’s plain language must not myopically focus on one provision. Instead, the Court must construe terms of the contract in light of the parties’ intentions as evidenced by the contract as a whole. *Parma Seed, Inc.*, 94 Idaho at 662, 496 P.2d at 285; *Henderson v. Henderson Inv. Properties, L.L.C.*, 148 Idaho 638, 640, 227 P.3d 568, 570 (2010).

Idaho Power's secondary storage claim on the merits and Idaho Power now challenges that decision.

A. The Plain Terms of the 1976 Contract Specify that Idaho Power Has One, and Only One, Right to the Use of Storage Capacity in American Falls Reservoir.

The 1976 Spaceholder Contract clearly identifies the “storage capacity to be made available” to Idaho Power as 2.6471% of the active capacity, roughly 45,000 acre-feet. 1976 Spaceholder Contract at 10, Article 21(b). Nowhere does it provide for the use of “secondary storage capacity.” To the contrary, as this Court noted, the 1976 Spaceholder Contract’s terms explicitly provide that its provisions regarding the distribution of water from the reservoir take precedent over any potentially conflicting provisions of the 1923 Contract. *Id.* at 6-7, Article 19(a). Thus, Article 21(b) provides Idaho Power only one storage right and Article 19(a) reiterates that is the only storage right the Company is entitled to. This Court concluded that through those provisions, “the contract extinguished Idaho Power’s secondary storage right.” Order at 24.

Idaho Power asks this Court to reconsider that conclusion in light of a contrary inference the Company draws from Article 28(b) of the contract. That article states unambiguously that Idaho Power shall pay 7.1388% of the total cost of operation and maintenance of the dam. 1976 Spaceholder Contract at 14, Article 28(b). It then adds that “[s]uch costs shall be determined in accordance with the applicable provisions of the Existing Spaceholder Contract.” According to Idaho Power, because the Company’s O & M payments under the 1923 Contract were premised on the existence of the secondary storage right, the Court should infer from that statement that the parties intended to retain that storage right. The Court need not be concerned with what inferences may be drawn from Article 28 because an inference cannot be used to rewrite the plain terms of the contract. *See J.R. Simplot Co. v. Nestle USA, Inc.*, 2009 WL 564194 at * 9 (D. Idaho 2009) (express terms of a contract preclude contrary

implications); *see also Losee v. Idaho Co.*, 148 Idaho 219, 223, 220 P.3d 575, 579 (2009) (courts do not have the power to rewrite contracts, even if the terms seem harsh). As this Court found, the plain terms of the 1976 Spaceholder Contract leave no doubt that Idaho Power's contract right to use water from American Falls Reservoir as a Spaceholder is limited to 45,000 acre-feet. Order at 24.

B. The Plain Terms of the 1976 Contract Specify that Idaho Power's O & M Payment Serve Only to Retain the Company's Ability to Use Up to 45,000 Acre-Feet of Water Stored in American Falls Reservoir.

As this Court found, there is no firm evidence why Idaho Power agreed to continue paying the same O & M percentage it had paid under the 1923 Contract, despite its secondary storage right having ended with the 1976 Contract. Idaho Power attempts to rebut that conclusion through extrinsic evidence it claims leads to the conclusion that the parties intended Idaho Power's O & M payments to retain its use of the secondary storage water. An initial problem with Idaho Power's argument is that other pieces of extrinsic evidence support a different conclusion. As the United States argued in its briefing, the available evidence makes it as likely that Idaho Power agreed to pay the same O & M in order to appease the irrigators. The irrigators would have had to pay any O & M not paid by Idaho Power and the Company desperately needed their support to get a powerplant built into the reservoir – and the quantum leap in revenues that would go with it.² Indeed, that is a more likely explanation, given that the

² The evidence establishes that during the negotiations the quantity of Idaho Power's payments for water became the subject of a dispute between the Company and the irrigators. *See* Memorandum from Commissioner of Reclamation to the Secretary of the Interior (Feb. 25, 1976) (Affidavit of David A. Jarvis, Ex. QQ at 4-5 (Aug. 17, 2009)). Idaho Power resolved that dispute by agreeing to pay more for its use of falling water. *Id.* Surely then the Company would not have been anxious to further stoke the irrigators ire by suggesting the Company should pay less O & M when the consequence would have been the irrigators having to pay more.

legislation that gave birth to the 1976 Contract was premised on Idaho Power having a right to use only 45,000 acre-feet of storage. *See* Order at 23-24.

But this court need not – and indeed, must not – get bogged down in trying to divine the parties’ intentions from extrinsic evidence because once again the plain terms of the 1976 Spaceholder Contract answer the question before the Court. *Cf. Tanadgusix Corp. v. Huber*, 404 F.3d 1201, 1205 (9th Cir. 2005) (“The terms of the contract control, regardless of the parties’ subjective intentions shown by extrinsic evidence”). Those terms demonstrate that Idaho Power’s O & M payments are in fact linked to Idaho Power’s storage rights – just not in the manner the Company claims. To the contrary, the contract terms demonstrate conclusively that the O & M payments did *not* serve to retain the secondary storage right.

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

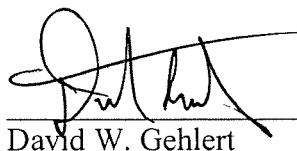
Article 29(e) spells out the consequences if the contract is terminated for non-payment of the O & M charges in unambiguous terms: “the United States will no longer make

available to the Defaulted Spaceholder the stored water described in Article 21(b) hereof [*i.e.*, only 45,000 acre-feet of water].” If Idaho Power were correct that the O & M payments served to retain the secondary storage provisions, Article 29(e) would create the anomalous result that Idaho Power could default on its O & M payments, yet still retain use of the secondary storage water. Such a result cannot be sustained. *See Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 566 (9th Cir.1988) (if possible courts must interpret contracts so as to avoid internal conflict); *see also Ace Realty, Inc. v. Anderson*, 106 Idaho 742, 749-50, 682 P.2d 1289, 1296-97 (Idaho App. 1984) (refusing to adopt a construction of a contract that would effectively nullify one of the contract’s provisions).

Conclusion

At bottom Idaho Power’s attempt to have this Court reconsider its decision rests on inferences the Company draws from its payment of O & M charges. Such inferences are simply of no consequence when, as this Court found, the plain language of the contract demonstrates that the secondary storage right once held by Idaho Power has been extinguished. In any event, rather than supporting Idaho Power’s claim, the Company’s O & M payments provide another basis to support the conclusion that the secondary storage right was extinguished. Under the plain terms of the contract, interpreting Idaho Power’s O & M payments as retaining the secondary storage right would lead to an absurd result where the Company could default on those payments yet retain use of the secondary storage. Consequently, to the extent this Court revisits its decision, the Court should do so only to clarify that the O & M provisions of the 1976 Spaceholder Contract confirm what is apparent from the plain language of Article 21: Idaho Power has a contractual right as a Spaceholder to use up to 45,000 acre-feet of water in American Falls Reservoir and no more.

DATED this 25th day of May, 2011.

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

David W. Gehlert

CERTIFICATE OF SERVICE

I certify that on May 25, 2011, I served true and correct copies of the foregoing THE UNITED STATES' RESPONSE TO IDAHO POWER COMPANY'S MOTION TO ALTER OR AMEND as follows:

via FedEx mail:

Clerk of the District Court (original)
Snake River Basin Adjudication
253 Third Avenue North
Twin Falls, ID 83303-2707
Phone: 208-736-3011

via First Class U.S. Mail, pre-paid:

C.Thomas Arkoosh
Capitol Law Group, PLLC
P.O. Box 2598
Boise, ID 83701-2598

Travis Thompson
Barker, Rosholt & Simpson, LLP
P.O. Box 485
Twin Falls, ID 83303-0485

James C. Tucker
Idaho Power Company
P.O. Box 70
Boise, ID 83707

Adam T. Devoe
Brownstein Hyatt Farber Schreck, PC
410 17th Street, Suite 2200
Denver, CO 80202

W. Kent Fletcher
Fletcher Law Office
P. O. Box 248
Burley, ID 83318

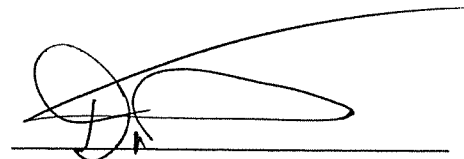
Roger D. Ling
Ling Law Office
P.O. Box 623
Rupert, ID 83350-0623

Randall C. Budge
Candace M. McHugh
Racine, Olson, Nye, Budge & Bailey, Chtd.
P.O. Box 1391
Pocatello, ID 83204-1391

Chief, Natural Resources Division
State of Idaho
Office of the Attorney General
P.O. Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment and Natural Resources Div.
550 West Fort Street, MSC 033
Boise, ID 83724

Director of IDWR
Idaho Water Center
P.O. Box 83720
Boise, ID 83720-0098



David W. Gehlert