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DEPARTMENT OF  
WATER RESOURCES

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

|                |   |                                               |
|----------------|---|-----------------------------------------------|
|                | ) | Subcase Nos. 1-217, 1-218, 1-4024, and 1-4025 |
|                | ) | (Minidoka Power Rights)                       |
|                | ) |                                               |
|                | ) | Subcase Nos. 1-2068 and 1-4054                |
|                | ) | (Palisades Power Rights)                      |
| In Re SRBA     | ) |                                               |
| Case No. 39576 | ) |                                               |
|                | ) |                                               |
|                | ) | <b>IDAHO POWER COMPANY'S RESPONSE</b>         |
|                | ) | <b>TO SURFACE WATER COALITION'S</b>           |
|                | ) | <b>JOINT MOTION TO ALTER OR AMEND</b>         |

COMES NOW Idaho Power Company ("Idaho Power"), by and through its undersigned attorneys, and hereby submits this *Response to Surface Water Coalition's Joint Motion to Alter or Amend* the Court's March 25, 2010, *Order Granting Motions for Summary Judgment and Special Master Report & Partial Recommendation* (the "Order").

## INTRODUCTION

The State of Idaho and the United States filed summary judgment motions in this case to resolve whether the Minidoka and Palisades rights should include "historic practice" and "winter power operation" remarks. Both parties included express statements that they did not seek to resolve issues related water rights at American Falls. The Upper Valley Water Users' and Ground Water Districts' Responses to the Motions for Summary Judgment did not object to entry of summary judgment as requested by the State of Idaho and the United States. No other party sought a finding regarding American Falls. Nevertheless, the *Order* refers to the 1923 American Falls contract between the United States and Idaho Power Company ("1923 Contract") as an "obsolete term." *Order*, Page 13 and Footnote 11. It was unnecessary for the Court to make a finding regarding the 1923 Contract in resolving the Motions for Summary Judgment in these proceedings because the parties did not request such relief, the American Falls rights are not at issue in these proceedings, and the statement can therefore only be interpreted as *dicta*. Nevertheless, Idaho Power Company respectfully requests that the Court remove any reference or finding in regards to the 1923 Contract.

## ARGUMENT

### **I. The State of Idaho and the United States specifically stated that they did not seek a ruling on the American Falls issues in this proceeding.**

The State of Idaho and the United States expressly set aside any issues relating to American Falls and the 1923 Contract. In both cases, the parties specifically included a footnote in their respective Motions for Summary Judgment setting aside any issues relating to American Falls or the 1923 Contract. Two parties filed statements that they did not oppose the relief requested, and no other party asked the Court to resolve any issues related to American Falls in

this proceeding. The United States' Motion for Summary Judgment states the following in footnote 4:

The United States' motion does not address the hydropower water rights at American Falls Dam. Nor does it address any of the other issues regarding these water rights. All of those issues are distinct and may be addressed in subsequent proceedings. Accordingly, this Court's Order should note that it is not intended to limit the parties' arguments in those proceedings.

*United States' Memorandum in Support of Motion for Summary Judgment, Page 3.*

Likewise, the State of Idaho's Motion for Partial Summary Judgment in footnote 2 states:

The State of Idaho by this motion does not seek to resolve issues related to the storage or natural flow water rights asserted for hydropower generation at the American Falls Dam. An order in response to this motion for summary judgment should expressly state that it is issued without prejudice to any matters relating to the water rights asserted for hydropower generation at the American Falls Dam. Likewise, the order should also expressly state that it does not prejudice any party's rights to seek the inclusion of other components of the comprehensive plan for the operation of the Upper Snake River federal reclamation projects.

*Memorandum in Support of the State of Idaho's Motion for Partial Summary Judgment, Page 9.*

The Upper Valley Water Users and Ground Water Districts also did not seek any resolution of American Falls issues, making identical statements that they "do not object to the entry of summary judgment as requested by the State of Idaho and hereby join in and support the State's Motion." *Upper Valley Water Users' Response to the State of Idaho's Motion for Partial Summary Judgment, Page 2; Ground Water Districts' Response to the State of Idaho's Motion for Partial Summary Judgment, Page 2.*

Accordingly, no party sought a ruling on any issues relating to American Falls, and the parties seeking summary judgment expressly stated that the issues should be reserved for future proceedings. As this Court is aware, the parties are on an Amended Summary Judgment Scheduling Order in Case No. 01-02064, the express purpose of which is to resolve issues relating to American Falls water rights and the 1923 Contract.

Idaho Power argued that the Palisades contract specifically referenced aspects of the 1923 Contract, and that those provisions were incorporated, ratified and confirmed by the *Eagle Decree*. *Joint Opposition to State and U.S. Motions for Summary Judgment*, Pages 13 and 14. Based on those references, ratifications and confirmations, Idaho Power argued that the Palisades and Minidoka decrees should include a specific reference to the Palisades contract, the *Eagle Decree*, and the "common plan of operation."

The United States in its reply brief stated, without factual support, reference to undisputed facts, or for that matter any explanation of the statement, that the 1923 Contract obligations are obsolete. *Reply Brief in Support of the United States' Motion for Summary Judgment*, Page 10. Nevertheless, the United States added a footnote recognizing that Idaho Power's rights under the 1923 Contract are at issues in a series of subcases. *Id.* Page 11, Footnote 12. The thrust of the United States' argument in its reply brief was that reference to contract provisions should not be included in the water rights in these proceedings "because it would only engender confusion." The United States never argued that the Court should make a finding that the 1923 Contract is obsolete, and in any case provided no factual or legal support on which the Court could base a conclusion of law.

**II. It is not necessary for the Court to rule on any American Falls issues to resolve the summary judgment motions in these proceedings.**

The parties briefed issues relating to the Palisades contract, the *Eagle Decree* and the "common plan of administration." Though there is a pending *Surface Water Coalition Motion to Alter or Amend*, that motion and the original summary judgment motions and responsive briefing are, at root, about whether or not these decrees should include comments recognizing the Palisades contract, the *Eagle Decree*, the "common plan of administration" and the power loss payment program. None of those issues factually or legally rely on resolution of American Falls

water rights or contract issues. Idaho Power only raised the American Falls issues to illustrate that the Upper Basin water rights are administered as a system, and that finalizing decrees without recognizing and referencing historical and contractual administrative obligations would lead to incomplete and confusing decrees which are difficult to administer.

Furthermore, the Court's *Order* includes a specific finding that contracts and water rights are separate matters, and that any claims related to a contract is a matter for the Court of Federal Claims. *Order*, Page 12. As the Court is aware, Idaho Power has a pending claim in the Court of Federal Claims, which seeks to resolve issues with the American Falls 1923 Contract. The parties have also agreed to litigate on summary judgment the meaning of the 1923 Contract in the SRBA court, as referenced above (Case No. 01-02064). Therefore, the existence, meaning, conformance, and whether or not the 1923 Contract is obsolete, are matters that have been expressly reserved for resolution in Case No. 01-02064 and in the Court of Federal Claims.

### **CONCLUSION**

The *Order* should not have made any findings regarding the 1923 Contract or any issue involving American Falls water rights. The State of Idaho and the United States did not request any findings on the American Fall rights or 1923 Contract, it is not necessary to resolve American Falls issues in this context, and the matter is pending in two other proceedings. Accordingly, Idaho Power respectfully requests that the Court amend the ruling to remove any findings, even in *dicta*, regarding the American Falls rights and 1923 Contract.

DATED this 7<sup>th</sup> day of June, 2010.

IDAHO POWER COMPANY

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7<sup>th</sup> day of June, 2010, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S RESPONSE TO SURFACE WATER COALITION'S JOINT MOTION TO ALTER OR AMEND** to and delivered per the method indicated below:

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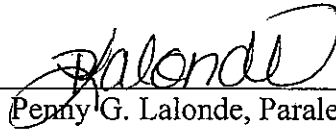
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