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INTRODUCTION

The Special Master's Order in subcase 01-2064 contains errors of fact relating to Idaho Power Company's ("Idaho Power" or the "Company") operation and maintenance ("O&M") charges as an American Falls Reservoir Spaceholder.

The Special Master's statements that "there is no firm evidence of a connection between Idaho Power's O&M payments and its storage rights," and that there is no evidence explaining "why Idaho Power Company agreed to continue paying the same percentage when its secondary storage right ended with the 1976 Spaceholder Contract," Order at 24, are directly contradicted by record evidence.

The Company respectfully asks the Special Master to reconsider these issues for the reasons explained herein, and to amend the Order accordingly.¹

STANDARD OF REVIEW

Administrative Order #1 provides for motions to alter or amend. AO1 13(A). The standard of review for a motion to alter or amend was set forth in the Order on Motion to Alter or Amend the Special Master's Recommendation, subcase Nos 65-20333 (Apr. 27, 2000) at p. 2.

Motions to alter or amend are provided for in Paragraph 13, AO1. While not identical, a motion to alter or amend in AO1 is similar to a motion under Rule 59(e), IRCP. The case history on Rule 59(e) IRCP sets the appropriate standard and rationale for Paragraph 13, AO1. A Rule 59(e) motion to alter or amend a judgment is addressed to the discretion of the court. *Lowe v. Lym*, 103 Idaho 259, 263 (1982).

Rule 59(e) proceedings afford the trial court the opportunity to correct errors of both fact or law that occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. Such

¹ The Special Master also found that the Company's entitlement to secondary storage capacity under the 1923 Contract was extinguished by the 1976 Spaceholder Contract. The Company is not pursuing that issue further in these proceedings as the parties have effectively resolved the issue by the 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 to provide a reliable supply of water for existing and future beneficial uses.

proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered its decision upon which the judgment is based.

Id. at 263 (citations omitted).

ARGUMENT

I. Record Evidence Ties O&M Payments to Storage Rights and Explains Why the Company Continued to Pay Over 7% O&M After Entering the 1976 Contract, and There is No Record Evidence to the Contrary.

The Order contains inaccurate dicta. Specifically, the Special Master states that "there is no firm evidence of a connection between Idaho Power's O&M payments and its storage rights" and that there is no evidence explaining "why Idaho Power Company agreed to continue paying the same percentage when its secondary storage right ended with the 1976 Spaceholder Contract." Order at 24. As explained below, the statements should be amended or deleted because the applicable contracts specifically tie the Company's O&M payments to its storage rights, and because evidence in the record explains that the Company continued to pay over 7% O&M after 1976 because it believed its secondary rights had not been rescinded by the 1976 Contract. There is no record evidence to the contrary supporting an alternative interpretation.

A. The 1976 Contracts are clear that the Company's O&M charges are calculated based on the Company's storage space in the reservoir.

Each American Falls Reservoir Spaceholder is required to pay its proportionate share of the costs incurred to operate and maintain the Reservoir. The proportionate amount is set by contract, and Spaceholders are billed annually for these costs. Idaho Power has been paying O&M costs in this manner since the 1923 Contract came into force.

The 1923 Contract contains a formula for determining Idaho Power Company's O&M charge, taking into account both the Company's primary and secondary storage rights. Section 17 of the 1923 Contract based the Company's O&M charge on the entirety of its 45,000 AF of

primary storage, plus 7/20ths of its secondary-right of 255,000 AF. Pursuant to this formula, Idaho Power was required to pay O&M charges for the equivalent of 134,250 AF of storage in the Reservoir, representing approximately 7.5% of the Reservoir's total space. 1923 Contract, Section 17, Ex. 1.²

The 1976 Spaceholder Contract includes a fixed percentage for the Company's O&M (7.1388%), and also states that the O&M charge should be determined in accordance with the applicable provisions of the Existing Spaceholder Contract (the 1923 Contract). 1976 Spaceholder Contract, Section 28, Ex. 53. There is no explanation in the 1976 Contract or elsewhere explaining why the fixed percentage referenced in the Contract is slightly lower than the percentage achieved when the 1923 Contract's formula is applied, but it is clear that such minor inconsistencies between space held in the Reservoir and the percentage charged for O&M were common for numerous Spaceholders, not just for the Company.³ Regardless, it is indisputable that the 1976 Contract specifically ties the Company's O&M payment to the 1923 Contract formula – a formula that includes payment for both primary and secondary storage and that specifically ties O&M to storage space.⁴

Further, both the 1976 contract between the United States and the American Falls Reservoir District titled "Construction and Operation and Maintenance of the American Falls Replacement Dam Program," Ex. 55, and the 1976 contract between the American Falls

² Exhibits attached to the Company's Opening Brief, Responses, and Reply are numbered sequentially.

³ Based on the Spaceholder charts attached to multiple 1976 Contracts (referenced below), numerous other Spaceholders pay O&M charges that are slightly different than their respective percent of storage in the Reservoir. For instance, the Blackfoot Irrigation Company's percent of active capacity is .7508%, but it is charged .7161% of total O&M (also a difference of approximately .04%). Likewise, the American Falls Reservoir District (2) holds 27.0688% of space, but is charged 25.8199% of O&M. There is no explanation in the record as to the basis for these disparities.

⁴ This explains why Idaho Power Company has received invoices every year from the Bureau of Reclamation for Operation and Maintenance costs for the American Falls Reservoir stating that the invoices are calculated "in accordance with Contract ILR-733" (the 1923 Contract). Ex. 63.

Reservoir District and the Idaho Power Company titled "Falling Water Contract," Ex. 54, contain exhibits supporting the Company's assertion that its O&M payments are tied to its storage rights.⁵ The exhibits list each American Falls Spaceholder, the amount of space held by each Spaceholder, and the percentage each Spaceholder pays for O&M. Idaho Power's O&M cost percentage is 7.1388%. The exhibits include an identical footnote stating the Company's percentage was "computed on the basis of Article 17 of the contract of 6-15-23." Again, Article 17 makes specific reference to the Company's secondary storage right, and it ties the Company's O&M to its storage rights.

Further, memoranda written by BOR officials support the Company's assertion that its O&M payments are tied to its space in the Reservoir and contradict the Special Master's statements to the contrary. For example, the record contains a March 15, 1974 memorandum from Raymond Filhouse,⁶ Regional Finance Office of the United States BOR to the Regional Supervisor of Water & Land Operations of BOR conveying comments on the draft 1976 Contract. The BOR finance office presumed references to the Company's secondary storage right were purposefully omitted in the 1976 Contract. The memo goes on to state that if the secondary right is omitted, the Company's share of O&M expenses would be reduced from 7.1% to 2.6% because the O&M is tied to the space the Company holds in the Reservoir.

This memo is instructive because it establishes that BOR's Finance Officer understood that the 1923 Contract tied O&M to both primary and secondary storage, and that the company's 7.1% O&M payment was consistent with the 1923 Contract's formula. If, indeed, the 1976 Contract rescinded the company's secondary storage right, then application of the 1923 Contract's formula would yield an O&M payment in the vicinity of 2.6%.

⁵ "Exhibit A" to Ex. 55; "Exhibit 1" to Ex. 54.

⁶ The signature on the memo appears to read "Filhouse", but due to the penmanship it is difficult to determine if that is the correct name. AF008943, attached as Exhibit 72.

Likewise, the March 19, 1974 memorandum from Merrill Martz, BOR Regional Supervisor of Power to the BOR Regional Supervisor of Water and Land Operations explains his understanding that the 1923 Contract O&M charges were established based on both the Company's primary and secondary storage rights. Ex. 68. The memo notes that if the secondary storage capacity is rescinded, it would be logical to reduce the Company's O&M proportionately.

There is significant evidence in the record tying O&M charges to storage space.

B. Record evidence also explains why the Company continued to pay over 7% O&M after it entered the 1976 Contract.

The Company continued to pay over 7% O&M after 1976 because it believed it was paying for both its primary and secondary rights in the Reservoir. Record evidence supports this explanation.

For instance, in his deposition testimony in *Kerner v. United States* in 1978 – two years after the 1976 Contract was signed – Robert Hogg, then President of Idaho Power, stated under oath:

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

Deposition of Robert Hogg, August 29, 1978 at 185-86. Ex. 71. Thus, the primary negotiator of the 1976 Contract for the Company believed the Company was paying for secondary storage after 1976. If the Company had negotiated away the secondary storage right but agreed to continue paying over 7% in O&M, Mr. Hogg would have known this at the deposition in 1978. This fact was not addressed by the United States or the State of Idaho in this litigation, and it stands in direct contrast to the Special Master's assertion that there is no explanation in the record explaining why the Company continued to pay 7% O&M after 1976.

Aside from Mr. Hogg's under-oath testimony, additional record evidence explains why the Company believed its secondary storage right had not been rescinded in 1976. In fact, the parties did not intend to address the secondary storage right in the 1976 Contract, but instead intended to meet subsequent to the enactment of the Contract to address the secondary storage issue.

Article 19(a) of the 1976 Contract states:

Due to events which have occurred since the execution of the Existing Spaceholder Contract, the United States and the Spaceholder recognize that certain provisions of the Existing Spaceholder Contract may no longer be applicable, and it is the intention of the United States and the Spaceholder to subsequently meet and review the Existing Spaceholder Contract for possible revision.

This reality is echoed in a memorandum from Regional Supervisor of Power Martz dated August 2, 1977 -- the year following execution of the 1976 Spaceholder Contract. The memo confirms that despite the intent expressed in Article 19 to "meet and review" the United States unilaterally concluded that resolving issues associated with the Company's rights under the 1923 Contract should be done on a "case-by-case" basis.

As stated in the Martz Memo:

The company has a primary storage right in the amount of 45,000 acre feet of capacity in the American Falls Reservoir and a secondary right to 255,000 acre feet of capacity. Generally speaking, the 255,000 acre feet of capacity is usable in the period from November 1 until the reservoir first fills but there are other limitations too. Article 19 provides that the Company has the right to the first 300,000 acre feet of water flowing into the reservoir after October 1 and actually storable therein, with the exception that precedence is given to the release through American Falls Dam of water to supply an amount of power not exceeding 10,000 kilowatts of peaking power to supply the power needs of the Minidoka Project and other Government uses. There have been differences of opinion between the Bureau and IPC as to whether IPC has the right to claim the full 45,000 acre feet of water in a year when the American Falls Reservoir fails to fill.

IPC would wish to retain the rights it has under the 1923 contract to have certain flows below the Milner Dam maintained by releases of water stored in IPC's 255,000 acre feet of secondary storage capacity. Generally, these flows have been maintained over the years and it is not likely there would be conflicts regarding them.... Although there are provisions of the 1923 contract which are no longer applicable most of them have not prevented operations under the contract since by their nature they no longer have effect. While an attempt could be made to meet the types of problems described above with contract amendments, it would be more practicable to solve on a case by case basis when and if they arise without negotiating an amendment. . . . My conclusion is that it is not necessary to undertake negotiations to amend the 1923 contract.

08/02/1977 Memorandum from BOR, Ex. 57.

Thus, the Regional Supervisor of Power of the United States Bureau of Reclamation specifically recognized the existence of Idaho Power Company's secondary storage right a year after the United States had entered into the 1976 Spaceholder Contract. It remains unclear to the Company how such a timely statement by a senior BOR official can be ignored or discounted as irrelevant. If the parties had negotiated away the Company's secondary storage right in 1976, the Regional Supervisor of Power would have known this in 1977.

Regardless, there is significant record evidence explaining that the Company continued paying O&M as it had prior to 1976 because it believed the secondary right remained in force.

C. There is no record evidence supporting the claim that the O&M percentage was a negotiated term not tied to the Company's reservoir space.

Both the United States and the State of Idaho speculate that the amount the Company pays in O&M was negotiated, and that it is not tied to the 1923 Contract's formula as the 1976 Contract states in black-and-white. Yet, neither party can point to a single document, transcript, or memo that provides support for the position.

CONCLUSION

The Special Master's comments in the Order that there is no firm evidence of a connection between Idaho Power's O&M payments and its storage rights and that there is no evidence in the record explaining why the Company continued to pay over 7% of O&M after 1976 are factually inaccurate, and as such should be amended. In fact, the applicable contracts tie O&M to storage space, and there is record evidence explaining that the Company paid O&M after 1976 on the understanding that its secondary right was still in force.

The Order should be amended accordingly.

DATED this 21st day of April, 2011.

IDAHO POWER COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2011, I caused the foregoing document entitled **IDAHO POWER COMPANY'S MOTION TO ALTER OR AMEND** to be filed with the Court and served per the method indicated below upon the following:

Clerk of the District Court Snake River Basin Adjudication 253 Third Avenue North PO Box 2707 Twin Falls, ID 83303-2707	☒ Filed in Person
IDWR Document Depository PO Box 83720 Boise, ID 83720-0098	☒ U.S. Mail, postage prepaid
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