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DEPARTMENT OF
WATER RESOURCES

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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 No. 01-02064
	)	
Case No. 39576	)	(American Falls Hydropower Storage
	)	Subcase)
	)	
	)	MOTION FOR RECONSIDERATION
	)	OR, IN THE ALTERNATIVE,
	)	MOTION TO ALTER OR AMEND
	)	

The State of Idaho, by and through the undersigned deputy attorney general, hereby moves the Court for an order reconsidering and/or amending certain language set forth in the *Order on Motions for Summary Judgment and Alternative Motion for Declaratory Judgment* (Mar. 31, 2011).

The grounds for this motion are as follows:

1. Idaho Rule of Civil Procedure 11(a)(2)(B) provides for the reconsideration of an

interlocutory order at any time before the entry of final judgment.

2. SRBA Administrative Order 1, Section 13, provides that a party may move to alter or amend a Special Master's Recommendation within 21 days of the date the recommendation appears on the Docket Sheet.

3. In its *Order on Motions for Summary Judgment and Alternative Motion for Declaratory Judgment* (Mar. 31, 2011), the Court found that Idaho Power's secondary storage right of 255,000 acre feet no longer exists, leaving Idaho Power with a right to only 45,000 acre feet in the American Falls Reservoir:

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 [sic] 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 Idaho Power's claim to a secondary storage right is no longer valid and its active or primary storage right is limited to no more than 45,000 acre-feet or 2.65 % of reservoir capacity.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.

...

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.

...

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.

The 1976 Spaceholder Contract extinguished Idaho Power's secondary right.

Order on Motions for Summary Judgment and Alternative Motion for Declaratory Judgment at 24, 26–27, 27 (Mar. 31, 2011).

4. In its April 21, 2011 *Motion to Alter or Amend*, Idaho Power confirmed it is no longer pursuing its claim to 255,000 acre feet of secondary storage:

The Special Master also found that the Companys 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.

Idaho Power Company's Motion to Alter or Amend at 2 n.1 (Apr. 21, 2011)

5. Despite the Court's findings and Idaho Power's confirmation that the power company's right at American Falls is limited to 45,000 acre feet or 2.65% of active storage capacity, the Court makes reference to a right to 300,000 acre feet for power storage purposes at American Falls:

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.

...

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.

Order on Motions for Summary Judgment and Alternative Motion for Declaratory Judgment at 26, 27 (Mar. 31, 2011) (emphasis added).

6. The Court's *Order* should be reconsidered and/or amended to clarify that Idaho Power's right at American Falls is limited to 45,000 acre feet or 2.65% of active storage capacity.

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PRAYER FOR RELIEF

The State of Idaho respectfully requests the following relief:

1. That the Court grant the State of Idaho's *Motion for Reconsideration or, in the Alternative, Motion to Alter or Amend*;

2. That the Court enter an order finding specifically that the quantity of storage at the American Falls Reservoir for "Power Storage" and "Power from Storage" is ~45,000 acre feet or 2.65% of active storage capacity¹;

3. That the Court enter an order amending its *Order on Motions for Summary Judgment and Alternative Motion for Declaratory Judgment* as follows:

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.~~

...

The issue of whether the ~~300,000~~ 45,000 ~~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. That the Court grant such other or further relief as it deems proper.

RESPECTFULLY SUBMITTED this 25th day of April 2011.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division



DAVID I. STANISH
Deputy Attorney General

¹ There are outstanding objections in this subcase concerning how the quantity of storage under this right should be described where the licensed quantity is 1,700,000 acre feet but the current active storage capacity is 1,628,316 acre feet. Those objections were not at issue on summary judgment. Accordingly, the exact quantity of power storage may ultimately be adjusted pending resolution of those objections.

CERTIFICATE OF SERVICE

I certify that on this 25th day of April 2011, I caused to be served the original and copies of the State of Idaho's **MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, MOTION TO ALTER OR AMEND** on the following persons by the methods indicated:

1. Original to:

CLERK OF THE DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
253 THIRD AVENUE NORTH
PO BOX 2707
TWIN FALLS, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 736-2121
- ☐ Statehouse Mail

2. Copies to:

IDAHO POWER COMPANY
Represented by:
JAMES C TUCKER
IDAHO POWER CO
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BINGHAM GWD
BONNEVILLE JEFFERSON GWD
CAREY VALLEY GWD
IGWA INC
JEFFERSON CLARK GWD
MADISON GWD
MAGIC VALLEY GWD
NORTH SNAKE GWD

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TWIN FALLS CANAL COMPANY
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USDI BUREAU OF RECLAMATION

Represented by:
US DEPARTMENT OF JUSTICE
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550 WEST FORT STREET, MSC O33
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UNITED STATES OF AMERICA
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