

RECEIVED
MAY 31 2011
DEPARTMENT OF
WATER RESOURCES

James C. Tucker
Senior Attorney
IDAHO POWER COMPANY
1221 West Idaho Street
Boise, ID 83702-5627
(208) 388-2112 – Telephone
(208) 388-6935 – Facsimile
jtucker2@idahopower.com

Adam T. DeVoe, Esq.
David G. Scott, Esq.
BROWNSTEIN HYATT FARBER SCHRECK, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202
(303) 223-1100 – Telephone
(303) 223-1111 – Facsimile
adevoe@bhfs.com; dscott@bhfs.com

Attorneys for Idaho Power Company

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

In Re SRBA	)	
	)	
Case No. 39576	)	Subcase 01-2064
	)	(American Falls Reservoir Hydropower Storage)
	)	
	)	
	)	IDAHO POWER COMPANY'S
	)	RESPONSE TO STATE OF IDAHO'S
	)	MOTION FOR RECONSIDERATION, OR
	)	IN THE ALTERNATIVE MOTION TO
	)	ALTER OR AMEND

COMES NOW Idaho Power Company ("Idaho Power" or the "Company"), by and
through its undersigned attorneys, and hereby submits this *Response to the State of Idaho's*
Motion for Reconsideration, or in the alternative Motion to Alter or Amend ("State's Motion").

STATEMENT OF POSITION

On April 25, 2011, the State of Idaho (the "State") filed a motion for reconsideration, or in the alternative a motion to alter or amend the Special Master's Order of March 31, 2011 in Subcase 01-2064. The State is asking the Special Master to revise certain language in the Order relating to the Company's contractual right to storage in American Falls Reservoir and the amount of storage space in the Reservoir that is available for power generation.

The Company opposes the State's Motion. The sections of the Order the State seeks to revise explain the Court's view on why the trust issue raised by the Company and the United States is not ripe for determination. The sections have nothing to do with the amount of water in the Reservoir held by the Company or the amount of water in the reservoir that should be made available for power generation. There is no reason to revise language in the Order that is essentially qualifying the Court's ripeness determination.

Further, the Company is concerned that including the numerical limits requested by the State could be misinterpreted as limiting the Company's existing right to generate power from irrigation flows or, separately, the Company's right to acquire additional space in the Reservoir for power generation in the future. Neither of these outcomes would be consistent with the Special Master's Order.

RESPONSE

Motions to alter or amend a judgment are addressed to the discretion of the Court. *Lowe v. Lym*, 103 Idaho 259, 263 (1982). The proceeding must 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. Similarly, the decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court. *Campbell v. Reagan*, 144 Idaho 254, 258 (2007). However, unlike

the motion to alter or amend, when considering a motion to reconsider under I.R.C.P. 11(a)(2), the district court may take into account new facts or information presented by the moving party that bear on the correctness of the district court's order. *Coeur d'Alene Mining Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 823 (1990).

The Court's March 31, 2011 Order addresses issues raised in motions for summary judgment filed by the State of Idaho, the United States, Idaho Power Company, and the American Falls Reservoir Spaceholders. The United States 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' Mot. for Partial Summ. J. at 1. Likewise, the State of Idaho requested that

The Court enter an order finding that 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] that the court disallow any explanatory remark requiring water in excess of 45,000 acre-feet ... be released past the American Falls Dam specifically for Idaho Power's power generation purposes rather than stored in the Upper Snake Reservoir system.

State of Idaho's Am. Mot. for Partial Summ. J. at 2.

The Company's motion for summary judgment was focused, instead, on its contractual storage rights in the reservoir and on the trust issue. The Company asked the Court

[to] enter a summary judgment order finding that 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 Company's Mot. for Summ. J. at 2. In particular, the Company asked the Court to determine if the secondary storage capacity right of 255,000 acre-feet granted to the Company in

the 1923 Contract remained valid.

The Special Master's March 31, 2011 Order contains four conclusions of law. The first two conclusions address the Company's claim for both primary and secondary storage in the American Falls Reservoir pursuant to its 1923 Contract with the United States. The Special Master found that the Company's entitlement to secondary storage capacity under the 1923 Contract between the United States and the Company was extinguished by the 1976 Spaceholder Contract, and as a result the Company's right to secondary storage capacity in the Reservoir was rescinded in 1976. The Company is not pursuing that issue further for the reasons explained in its Motion to Alter or Amend.

The Special Master's third conclusion of law concerned the Company's assertion that it holds beneficial and equitable title, consistent with the decision in *United States of America v. Pioneer Irrigation District*, 157 P.3d 590 (Idaho 2007), to the portion of Water Right 1-2064 that is currently designated for power generation. The United States challenged this assertion, and the Special Master deemed the issue unripe for determination.

[Conclusion of Law #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.

Order at 27. In the body of the Order the Special Master made a similar statement when discussing the trust issue:

The record in this subcase is not complete enough to determine the trust issue. Idaho Power Company'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 by 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.

Order at 26. The Company does not dispute the conclusion of law, and it is prepared to further

address the issue further in this litigation or in Federal Court.¹

In its motion, the State has asked the Special Master to revise the conclusion of law and to delete references to "300,000" acre-feet and replace that number with "45,000" acre-feet. It has also asked the Court to strike the italicized sentence in the descriptive paragraph quoted above. The State's rationale is that, since the Company has agreed to no longer pursue its secondary storage right contractual claim, power from storage in the Reservoir should reflect the Company's current contractual right to 45,000 AF.

The Company opposes the State's motion because the requested changes are unnecessary and because the requested changes may limit existing and future power generation opportunities for the Company. Further, depending on the Court's determination as to which Rule this motion appropriately falls under, the State's motion must be denied because its is based on evidence that was not available to the Court at the time the Order was filed; namely, the Company's decision not to further pursue its secondary storage right.

A. Revision of the Order is Unnecessary and May Have Unintended Consequences to the Company's Rights

First, the revision is unnecessary. The passages cited above explain why the Court is not ruling on the trust issue. The storage space references are based on the pleadings, and do not represent a substantive determination by the Court as to the amount of storage space in the Reservoir that is held by the Company or available for power generation. The amount of water referenced in those passages is irrelevant to the trust issue or the Court's determination as to whether the issue is ripe.

Second, and of great concern to the Company, are the potential repercussions of the State's editing request. The Company does not dispute that it holds 45,000 acre-feet of storage in

¹ The fourth conclusion of law concerns the Spaceholder's request for attorneys fees and is irrelevant to the State's Motion.

the American Falls Reservoir pursuant to its Spaceholder Contract with the United States, or that it uses that 45,000 acre-feet for power generation. But, that contractual limitation should not be misconstrued as an absolute limit on the amount of storage water in the Reservoir that can currently be used, or may in the future be used, for power generation.

Pursuant to the Company's Spaceholder Contract and this Court's Order, the Company currently controls 45,000 AF of water stored in the Reservoir, and the Company uses that water for power generation. That contractual right to 45,000 acre-feet of stored water, however, should not be confused with a reservoir-wide limitation on the amount of stored water that can be used for power generation. In fact, currently *all* of the water in the Reservoir is available for power generation pursuant to the Falling Water Contract which allows the Company to generate power from irrigation releases. *See* Idaho Power's Mot. for Summ. J., Ex. 54.

"Falling Water" shall mean the water released from the Replacement Dam for irrigation and other purposes incidental thereto, the utilization of which during the Original Term of this Falling Water Contract ... is granted to the Idaho Power Company for power generation at the [American Falls] Powerplant in return for the Falling Water Payments to the Constructing Agency, which utilization shall be subordinate to the furnishing of water for irrigation purposes.

Falling Water Contract at 6. Pursuant to the Falling Water Contract, the Company was given the right to use all irrigation releases from American Falls Reservoir for power generation in return for certain payments.

[I]n consideration of the utilization by the Idaho Power Company of the Falling Water at the Powerplant for power generation ... the Idaho Power Company shall pay the Falling Water Payments determined in accordance with the provisions of Article IX hereof So long as the Idaho Power Company is not in default under the provisions hereof, the Idaho Power Company shall be entitled to utilize ... the Falling Water ... at the powerplant for power generation in connection with the operation by the United States of the Replacement Dam

Falling Water Contract at 13. The original term of the Falling Water Contract terminates in 2025 and may be renewed, *id.* at 46, and the Company is not in default on its payment obligations under the Contract. Given the Company's existing contractual right to use Falling Water, nothing in the Order should suggest that this right to generate power from irrigation flows has been rescinded or limited.

Further, while the Company's current Spaceholder Contract provides the Company with access to 45,000 acre-feet of storage in the Reservoir, the Company is not prevented by any law or regulation from obtaining additional space in Reservoir in the future to use for power generation. While the Company has no specific plans to acquire additional storage capacity in the Reservoir at this time, it should not be inadvertently limited from pursuing additional rights through long-term leases or outright purchase should the opportunity arise. Nothing in the Order should impose a limitation on the Company's ability to increase its contractual rights to storage space in the Reservoir in the future for the purposes of generating power from storage.

Ultimately, including a specific limitation in the Order that reflects only the Company's existing Spaceholder contractual right to storage could be interpreted as an absolute limitation on the Company's ability to use irrigation flows for power generation and on the Company's future right to obtain additional storage space. There should be no term or condition in the Order, or in the water right for that matter, that can be interpreted in a manner that so limits water available in the Reservoir for power generation to the Company's current contractual right as a Spaceholder.

B. The State's Motion is Inconsistent with Idaho Rules of Civil Procedure

The State of Idaho has cited two rules, in the alternative, on which it has based this motion. If the Court determines that the motion is, indeed, a motion to alter or amend, then the motion should be denied because it seeks to revise the Court's Order based on evidence that was

not available at the time the Order was rendered.

The State bases its motion on both Idaho Rule 11 and, in the alternative, SRBA Administrative Order 1, Section 13. In interpreting SRBA Administrative Order 1, Section 13, the Court has determined that "a motion to alter or amend in AO1 is similar to a motion under Rule 59(e), IRCP." *Order on Motion to Alter or Amend the Special Master's Recommendation*, Subcase No. 65-20333 (Apr. 27, 2000) at p. 2. Pursuant to Rule 59(e), a motion to alter or amend must be "directed to the status of the case as it existed when the court rendered its decision upon which the judgment is based." *Lowe*, 103 Idaho at 263. Rule 59(e) is intended to provide the Court with the opportunity to amend a ruling to correct errors of either fact or law, it is not intended to provide a party with the opportunity to seek revision of a final Order pursuant to new evidence that did not exist at the time the Order was rendered. *See First Security Bank v. Webster*, 119 Idaho 262, 265 (1991) (upholding trial court's decision refusing to consider an affidavit that was submitted to the Court after judgment had been rendered when ruling on a motion to alter or amend); *See also First Security Bank v. Neibaur*, 98 Idaho 598, 603 (1977).

The State has not alleged a mistake of fact or law, but instead has asked the Court to revise its Order based on the Company's post-order statement relative to its secondary storage right. *See State's Mot.* at 3. The State relies entirely on the Company's statement in its motion to alter or amend filed with the Court on April 21, 2011 – 21 days after the Court's Order was filed. In that Motion, the Company notified the Court that it would no longer pursue its contractual secondary storage right. As such, the State is asking the Court to revise certain figures in the Order to reflect the Company's post-Order decision.

If the Court determines that the State's motion is, indeed, brought pursuant to SRBA Administrative Order 1, Section 13, then the motion must be denied because the State is asking

the Court to revise the Order based on evidence that was not available at the time the Court rendered its decision.

CONCLUSION

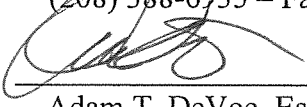
The Company asks the Court to reject the State's request to amend the Order.

In addition to the fact that Idaho Rules may not support the State's motion, it would be inappropriate, and potentially damaging to the Company, if the Court inadvertently included limits in the Order that could be interpreted to limit the Company's access to space in the Reservoir for power generation. Changing the Order in the manner requested by the State could be perceived as an intentional limitation on the amount of water stored in the Reservoir that can be used for power generation. While the Company's current Spaceholder Contract provides it with the control of 45,000 AF of storage space which it uses for power generation, storage space available for power generation is not limited to the Company current contractual right. There should be no language in the Court's Order that can be interpreted to limit the amount of water in the Reservoir available for power generation to 45,000 AF, either now or in the future.

DATED this 26th of May, 2011.

IDAHO POWER COMPANY

James C. Tucker, ISB No. 2038
Senior Attorney
IDAHO POWER COMPANY
1221 West Idaho Street
Boise, ID 83702-5627
(208) 388-2112 – Telephone
(208) 388-6935 – Facsimile

By: 

Adam T. DeVoe, Esq.
David G. Scott, Esq.
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202
(303) 223-1100 – Telephone
(303) 223-1111 - Facsimile

Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 2011, I caused the foregoing document entitled **RESPONSE TO STATE OF IDAHO'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	☒ Facsimile Filed: 208.736.2121
IDWR Document Depository PO Box 83720 Boise, ID 83720-0098	☒ U.S. Mail, postage prepaid
United States Department of Justice Environment and Natural Resources Division 550 West Fort Street, MSC 033 Boise, ID 83724	☒ U.S. Mail, postage prepaid
Clive Strong David Stanish Office of the Attorney General Natural Resources Division 700 West State Street Joe R. Williams Building, Second Floor P.O. Box 83720 Boise, Idaho 83720-0010	☒ E-Mail: clive.strong@ag.idaho.gov david.stanish@ag.idaho.gov
David Gehlert David Jarvis United States Department of Justice Environment & Nat'l Resources Div 1961 Stout Street, 8 th Floor Denver, CO 80294	☒ E-Mail david.gehlert@usdoj.gov david.jarvis2@usdoj.gov
Gloria Baimbridge – Project Manager U.S. Dept. of Justice – ENRD c/o U.S. Attorney's Office, Dist. of Idaho Washington Group Plaza IV 800 Park Blvd. Suite 600 Boise, ID 83712-9415	☒ E-Mail Gloria.Baimbridge@usdoj.gov

Randy Budge Candice M. Hugh Racine Olson Nye Budge & Bailey, Chtd. 201 E. Center, Suite A2 PO Box 1391 Pocatello, ID 83204-1391	☒ E-Mail rcb@racinelaw.net cmm@racinelaw.net
Roger D. Ling 615 H Street, P.O. Box 396 Rupert, ID 83350-0396	☒ E-Mail rdl@idlfirm.com
Travis Thompson John Simpson Barker Rosholt & Simpson LLP 113 Main Avenue W, Suite 303 PO Box 485 Twin Falls, ID 83301	☒ E-Mail tlt@idahowaters.com jks@idahowaters.com
Tom Arkoosh P.O. Box 32 Gooding, ID 83330	☒ E-Mail tarkoosh@capitollawgroup.net
Jerry R. Rigby Rigby, Andrus & Rigby, Chartered 25 North Second East Rexburg, Idaho 83440	☒ E-Mail jerry.rigby@gmail.com
W. Kent Fletcher 1200 Overland Avenue, PO Box 248 Burley, ID	☒ E-Mail wkf@pmt.org



Penny G. Lalonde, Paralegal