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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

Case No. 39576

)
) Subcase No. 01-02064
)

) (American Falls Hydropower Storage
) Subcase)
)

) **REPLY IN SUPPORT OF 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 submits its reply in support of its April 25, 2011 *Motion for Reconsideration or, in the Alternative, Motion to Alter or Amend*.

I. INTRODUCTION

Idaho Power opposes the State's motion, alleging both that the Court did not determine

the quantity of power storage on summary judgment and that recognizing any such quantity would limit the company's ability to produce power from American Falls Reservoir releases. To the contrary, recognition that Idaho Power has a right to only ~45,000 acre feet of power storage does not affect any additional rights, if any, the company may have to produce power from reservoir releases, now or in the future, as provided by law. Accordingly, the State's motion should be granted.

II. DISCUSSION

A. THE QUANTITY OF POWER STORAGE AND POWER FROM STORAGE AT AMERICAN FALLS WAS DETERMINED ON SUMMARY JUDGMENT.

The quantity of power storage at American Falls was the fundamental question determined on summary judgment. Yet amazingly, Idaho Power now alleges that quantity was never at issue: "The storage space references . . . 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." *Idaho Power Company's Response to State of Idaho's Motion to Alter or Amend* at 5 (May 26, 2011). In order for Idaho Power's allegations to be true, however, the Court's *Order*, the parties' pleadings, and the very purpose of the SRBA would all have to be ignored.

First, the Court's summary judgment determination that Idaho Power's storage right at American Falls was limited to only 45,000 acre feet was directed specifically at the Quantity element of the water right:

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 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, 27 (Mar. 31, 2011).

Second, the parties' motions for summary judgment were directed specifically at the Quantity element of the water right:

State of Idaho

1. Whether 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)

United States

(1) the quantity of water assigned to hydropower generation under water right no. 01-02064 is 45,00 acre-feet

State of Idaho's Amended Motion for Partial Summary Judgment at 1, In re SRBA Case No. 39576, Subcase No. 01-02064 (Idaho 5th Dist. Ct. Oct. 5, 2010); *United States' Motion for Partial Summary Judgment* at 1, In re SRBA Case No. 39576, Subcase No. 01-02064 (Idaho 5th Dist. Ct. Oct. 5, 2010).

Third, Idaho Power's allegations that the summary judgment proceedings were entirely unrelated to the elements of the American Falls Reservoir water right ignore the very purpose of the SRBA, which is to determine the nature and extent of water rights. *See* Idaho Code § 42-1606A (uncodified Apr. 12, 1994) ("Effective management in the public interest of the waters of

the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined.”). Idaho Power’s allegations suggest that the Court was acting outside the context of the adjudication of water rights and thus outside the scope of the Court’s subject matter jurisdiction.

B. THE QUANTITY OF POWER STORAGE AND POWER FROM STORAGE AT AMERICAN FALLS IS ~45,000 ACRE FEET.

The quantity of Power Storage and Power from Storage at American Falls is ~45,000 acre feet. Idaho Power agrees that it controls only that quantity: “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.” *Idaho Power Company’s Response to State of Idaho’s Motion to Alter or Amend* at 6 (May 26, 2011). Yet, Idaho Power alleges that recognizing the ~45,000 acre foot quantity in the partial decree will affect the company’s other rights to produce power at American Falls: “[the 45,000 acre foot] 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.” *Id.* Idaho Power’s concerns are unwarranted.

First, recognition that Idaho Power has a right to only ~45,000 acre feet of storage at American Falls does not affect any additional rights, if any, the company may have to produce power from reservoir releases, now or in the future, as provided by law.

Second, Idaho Power’s allegations that the entire ~1,700,000 acre foot capacity should be decreed with Power Storage and Power from Storage purposes of use are precluded by federal law. *See* Revenue Adjustment Act of 1975, Pub. L. 94-164, § 7, 89 Stat. 970, 976 (1975) (“A dam for the furnishing of water for irrigation purposes which has a subordinate use in connection with the generation of electric energy by water shall be treated as meeting the requirements of

[the Internal Revenue Code’s tax-exempt provisions] if—(1) substantially all of the stored water is contractually available for release from such dam for irrigation purposes”); H.R. Rep. No. 94-531, at 4 (1975) (“The committee intends that subordinate use of water for generating electric energy means that less than 10 percent of the normal supply of stored water may contractually be scheduled for release by the power company and used for generating electric energy.”); S. Rep. No. 94-570, at 3 (1975) (“In this case the Idaho Power Company has a limited spaceholder right (under 3 percent)”; 1976 Falling Water Contract at 10, art. II, § 2.1(e) (Mar. 31, 1976) (“Less than ten per cent (10%) of the water accruing to the active storage capacity in the Replacement Dam may be contractually scheduled for release from the Replacement Dam by the Idaho Power Company”).

Third, Idaho Power’s allegations that the entire ~1,700,000 acre foot capacity should be decreed with Power Storage and Power from Storage purposes of use are beyond the scope of the company’s objection and summary judgment pleadings, *see e.g., Idaho Power’s Standard Form 1 Objection – Amended* at 2 (Feb. 8, 2010) (“Power storage should be 300,000 AFY. Power from storage should be 300,000 AFY.”), and therefore, the allegations cannot be raised for the first time in response to the State’s motion for reconsideration/motion to alter or amend.

III. CONCLUSION

The quantity of Power Storage and Power from Storage at American Falls should be decreed for ~45,000 acre feet, and the Court’s *Order* should be reconsidered and/or amended consistent therewith.

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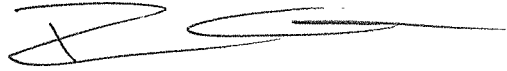
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DATED this 7th day of July 2011.

LAWRENCE G. WASDEN
Attorney General

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

A handwritten signature in black ink, appearing to read 'D. Stanish', written over a horizontal line.

DAVID I. STANISH
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 7th day of July 2011, I caused to be served the original and copies of the State of Idaho's **REPLY IN SUPPORT OF OTION 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
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2. Copies to:

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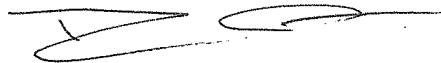
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