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DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JUL 20 2011	
By _____	Clerk
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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 01-2064
	)	(USDI/BOR)
	)	(American Falls Reservoir Hydropower Storage)
	)	
Case No. 39576	)	ORDER ON MOTION TO ALTER OR AMEND
	)	AND MOTION FOR RECONSIDERATION OR,
	)	IN THE ALTERNATIVE, MOTION TO ALTER
	)	OR AMEND

BACKGROUND

Summary Judgment

On March 31, 2011, the Special Master entered an *Order on Motions for Summary Judgment and Alternative Motion for Declaratory Judgment*. The conclusions of law included the following:

1. 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.
2. The 1976 Spaceholder Contract extinguished Idaho Power's secondary right.
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.

Motions to Alter or Amend

Idaho Power

Idaho Power filed the first *Motion to Alter or Amend* on April 21, 2011, stating the Special Master's *Order* contained errors of fact concerning Idaho Power's operation and

maintenance charges as an American Falls Reservoir spaceholder. It disagrees with the following statements in that **Order**:

[T]here is no firm evidence of a connection between Idaho Power's O & M payments and its storage rights. Neither is there evidence why Idaho Power agreed to continue paying the same percentage [7.1388%] when its secondary storage right ended with the 1976 Spaceholder Contract.

Order, at 24.

Idaho Power suggested "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explains that the Company continued to pay over 7% O&M after 1976 because it believed its secondary rights had not been rescinded by the 1976 Contract." Idaho Power's *Motion*, at 3.

Idaho Power reminded the Court the 1923 Contract established a formula based on both its primary (45,000 af) and secondary (255,000 af) storage rights or approximately 7.5% of the total reservoir space. Later, the 1976 Contract stated the O&M should be determined in accordance with that 1923 Contract, but there was no explanation why the fixed percentage was slightly lower (7.5% versus 7.1388%).

State of Idaho

The State filed its *Motion for Reconsideration or, in the Alternative, Motion to Alter or Amend* on April 25, 2011. It wrote that while the Special Master found that Idaho Power's secondary storage right of 255,000 af no longer exists and its right is now limited to 45,000 af or 2.65% of active storage capacity, the issue of whether the BOR's right to 300,000 af for power use may impressed with some trust obligation was left unresolved and confusing.

To resolve confusing language in the "discussion" and "conclusions of law" sections, the State suggested the following changes to the **Order**:

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 af~~ 45,000 af 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.

State's *Motion*, at 4.

Responses

Upper Valley American Falls Spaceholders¹

The Spaceholders filed their *Response to Motion for Reconsideration or, in the Alternative, Motion to Alter or Amend* on May 4, 2011. They concurred with the State's *Motion* that 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." Spaceholders' *Response*, at 2.

State of Idaho

The State filed its *Response to Idaho Power Company's Motion to Alter or Amend*, on May 24, 2011. It pointed out the fundamental issue on summary judgment – the quantity of power storage at American Falls Reservoir – is no longer in dispute.

It took no position on Idaho Power's *Motion* on its contractual obligation to pay O&M charges to USBOR: "[T]he nature and extent of the O&M charges Idaho Power pays – or should pay – as a spaceholder is a private contractual issue between Idaho Power and the USBOR that need not be decided to support the Court's finding that Idaho Power has a right to only 45,000 acre feet of power storage at American Falls." State's *Response*, at 2. The State said it wants an express finding that Idaho Power "has abandoned its claim to storage contract rights at American Falls in excess of 45,000 acre feet." *Id.*

United States

The United States filed its *Response to Idaho Power Company's Motion to Alter or Amend* on May 26, 2011. It suggested Idaho Power's *Motion* continues to argue whether its 1923 Contract right was actually extinguished even though Idaho Power agreed it is no longer pursuing its claim to 255,000 acre-feet of secondary storage capacity. The United States wrote the 1976 Spaceholder Contract unambiguously extinguished that right and there is no firm evidence why Idaho Power agreed to continue paying the same O&M percentage it paid under the 1923 Contract.

¹ The Upper Valley American Falls Spaceholders include: Blackfoot Canal Company, Burgess Canal Company, Butte & Market Lake Canal Company, Corbett Slough Ditch Company, Dilts Irrigation Company, Enterprise Canal Company, Enterprise Irrigation District, Harrison Canal Company, Idaho Irrigation District, Lenroot Canal Company, New Sweden Irrigation District, Osgood Canal Company, Peoples Canal & Irrigation Company, Poplar, Progressive Irrigation District, Reid Canal Company, Rudy Irrigation Company, Snake River Valley Irrigation District, Trego Ditch Company and Woodville Canal Company.

Whether Idaho Power agreed to continue such payments to appease the irrigators or to gain their support to build a powerplant into the Reservoir, the United States said there is no need to "divine the parties' intentions from extrinsic evidence because once again the plain terms of the 1976 Spaceholder Contract answer the question before the Court . . . the O&M payments did *not* serve to retain the secondary storage right. . . . [T]he plain language of the contract demonstrates that the secondary storage right once held by Idaho Power has been extinguished." United States' *Response*, at 5-6.

Idaho Power

Idaho Power filed its *Response to State of Idaho's Motion for Reconsideration, or in the Alternative Motion to Alter or Amend* on May 26, 2011. It believes the amount of storage space is irrelevant to the trust issue and the Court's determination of the trust issue is not ripe for determination:

[The trust issue has] 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. . . . Further, the Company is concerned that including the numerical limits requested by the State could be interpreted 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.

...

The Company does not dispute that it holds 45,000 acre-feet of storage in 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.

Idaho Power's *Response*, at 2 and 5-6.

Spaceholders

The Spaceholders filed their *Response in Support of the State of Idaho's Motion for Reconsideration, or in the Alternative Motion to Alter or Amend* on May 26, 2011. In their second *Response*, the Spaceholders wrote they concur with the State's legal argument in its *Motion* and do not oppose the *Motion*.

Replies

State of Idaho

The State filed its *Reply in Support of Motion for Reconsideration or, in the Alternative, Motion to Alter or Amend* on June 7, 2011. It wrote that Idaho Power opposes the State's *Motion* because Idaho Power believes the summary judgment **Order** did not determine the quantity of power storage and recognizing any such quantity would limit Idaho Power's ability to produce power from American Falls Reservoir releases.

The State maintains the quantity of power storage and power from storage *was* determined on summary judgment and further, "recognition that Idaho Power has a right to only ~45,000 acre feet 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." State's *Reply* at 2.

Idaho Power – State

Idaho Power filed its *Reply to the State of Idaho* on June 8, 2011. Its stated positions were made clear:

The Special Master's Conclusions of Law address whether or not the Company holds a secondary storage right in the American Falls Reservoir. The Order did not reach a Conclusion of Law as to whether the Company has been, and is being, overcharged for O&M as an American Falls Spaceholder. Since the Company fully intends to pursue damages and injunctive relief in federal court for the overpayments, it asks the Special Master to amend the Order to, at a minimum, clarify that the Court was not asked to, and did not, rule on the propriety of the amount the Company pays for O&M as an American Falls Reservoir Spaceholder. Idaho Power's State *Reply*, at 2.

Idaho Power also asked the Court to reject the State's request for an express finding that Idaho Power "abandoned" its claim to storage contract rights at American Falls in excess of 45,000 acre-feet:

While the Company understands the State's request, there is no reason to tie the Company to a specific acre-foot limit in the Reservoir, or to suggest that only a limited amount of storage space in the Reservoir is available for power generation. Idaho Power's State *Reply*, at 3-4.

Idaho Power – United States

The same date Idaho Power filed its *Reply* to the State, it filed its *Reply to United States*. Idaho Power clarified its efforts in moving to amend the the Special Master's *Order on Motions for Summary Judgment*:

The Company is not asking the Court to alter its Conclusions of Law. Instead, the Company is asking the Court to acknowledge that it was not making a determination of the contractual relationship that the Company has with the United States for Operation and Maintenance charges, and to amend the Order accordingly. The issue that was before this Court was whether or not the Company maintained a secondary storage right in American Falls. This Court was not asked to make a contractual determination as to whether the Company's O&M charges should be decreased or whether the Company has been paying too much for O&M since 1976.

...

The Company asks the Court to, at the very least, amend its Order to clarify that the Court takes no position on the amount the Company should be paying as an American Falls Spaceholder.

Idaho Power's United States *Reply*, at 3.

HEARING

The hearing on *Motions to Alter or Amend* filed by Idaho Power and the State was held at the SRBA Courthouse in Twin Falls, Idaho on June 23, 2011. The following counsel appeared in person or by telephone conference:

Idaho Power Company	Adam T. Devoe and James C. Tucker, along with David G. Scott
United States	David W. Gehlert and David L. Negri, along with Fredric W. Price
State of Idaho	David I. Stanish
Upper Valley American Falls Spaceholders	Jerry R. Rigby
Ground Water Districts	Candice M. McHugh
A & B Irrigation District	Roger D. Ling
Minidoka Irrigation District	W. Kent Fletcher

City of Pocatello

Jane M. Newby

IDWR

Chris M. Bromley, along with Tony Olenichak and Ray Williams

DISCUSSION

Trust Obligation

The first matter raised during the hearing was the Special Master's third conclusion of law in the March 31, 2011 summary judgment *Order*:

3. The issue of whether the 300,000 afy [acre-feet] 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.

Some parties were confused by this statement because on the one hand, the Special Master held the 1976 Spaceholder Contract terminated or extinguished Idaho Power's secondary right of 255,000 acre-feet of storage capacity while suggesting the issue remains unresolved of whether the original 300,000 acre-feet is impressed with some trust obligation. To some, that conclusion suggests Idaho Power retains the original amount of 300,000 acre-feet granted in the 1923 Contract.

As stated at the hearing on motions to alter or amend, the Special Master did not intend to suggest Idaho Power retains the original storage capacity right of 300,000 acre-feet. The central legal conclusion in the summary judgment proceedings remains valid: Idaho Power's secondary storage right of 255,000 acre-feet was terminated or extinguished by the 1976 Spaceholder Contract. The sole reasons for the legal conclusion in the summary judgment *Order* was to suggest the trust issue is not ripe for decision and should be decided based on the 1923 Contract when the total amount awarded was 300,000 acre-feet.

It will be recalled that Idaho Power raised the trust issue when it requested former IDWR Director R. Keith Higginson enter a finding that a trust exists based in part on the following language in the 1923 Contract:

But it is expressly agreed and understood that the water rights and rights to the use of water which it is herein agreed that the Company shall have are reserved out of its existing appropriations and rights as independent rights under its own filings and appropriations and of the dates of priority to which the Company is entitled under such appropriations *and are not to be considered as mere contract rights under contract with the United States* [emphasis added].

Order on Motions for Summary Judgment, at 23, citing David Jarvis' *Affidavit*, Exhibit C, at 11, paragraph 9, (d), and Exhibit DD, at 5, paragraph V.

In order to clear up any confusion, the third conclusion of law in the summary judgment *Order* should now read:

3. The issue of whether the power storage capacity in American Falls Reservoir is subject to a trust obligation in favor of Idaho Power is incomplete and not ripe for decision in this proceeding.

O & M Charges

In the summary judgment proceedings, Idaho Power argued the percentage of total O & M costs of American Falls Reservoir Dam it is required to pay under the 1976 Spaceholder Contract (7.1388 %) supports its claim to more than 2.65 % or 45,000 acre-feet of reservoir capacity. In its *Motion to Alter or Amend*, Idaho Power was concerned with the following statements from that summary judgment *Order*:

[T]here is no firm evidence of a connection between Idaho Power's O & M payments and its storage rights. Neither is there evidence why Idaho Power agreed to continue paying the same percentage when its secondary storage right ended with the 1976 Spaceholder Contract.

Order, at 24.

The parties are generally in agreement that the issue of O & M charges paid by Idaho Power was not before the Court on summary judgment and need not have been determined. The Special Master agrees. The 1923 Contract established a formula based on Idaho Power's primary and secondary storage rights as a percentage of total reservoir space or 7.5%. The 1976 Spaceholder Contract terminated or extinguished the secondary right and set the percentage slightly lower at 7.1388% with no explanation.

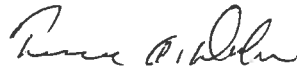
This Court is bound by the principle that "a district court may not decide an issue not raised in the moving party's motion for summary judgment." *Harwood v. Talbert*, 136 Idaho 672, 678, 39 P.3d 612, 618 (2001). For that reason, the issue of O & M charges should not be considered finally determined as a matter of fact or law by the summary judgment *Order*. The issue was addressed solely for purposes of resolving whether Idaho Power's secondary right to 255,000 acre-feet of storage capacity was terminated or extinguished by the 1976 Spaceholder Contract.

ORDER

THEREFORE, IT IS ORDERED that the *Motions to Alter or Amend* filed by Idaho Power and the State are **granted** consistent with the above discussion. The following portion of the March 31, 2011 summary judgment *Order* in subcase 01-2064 is amended to read:

3. The issue of whether the power storage capacity in American Falls Reservoir is subject to a trust obligation in favor of Idaho Power is incomplete and not ripe for decision in this proceeding.

DATED July 20, 2011.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO ALTER OR AMEND AND MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE TO ALTER/AMEND was mailed on July 20, 2011, with sufficient first-class postage to the following:

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ORDER

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