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DEPARTMENT OF
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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	)	Subcase 01-2064
	)	(American Falls Reservoir Hydropower Storage)
Case No. 39576	)	
	)	
	)	IDAHO POWER COMPANY'S
	)	RESPONSE TO STATE OF IDAHO'S
	)	MOTION FOR ISSUANCE OF SPECIAL
	)	MASTER'S RECOMMENDATION AS TO
	)	ELEMENTS RELATED TO
	)	HYDROPOWER STORAGE
	)	

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 Issuance of Special Master's Recommendation as to the Elements Related to Hydropower Storage* ("State's Motion").

STATEMENT OF POSITION

The State of Idaho has asked the Special Master to issue a partial Recommendation in this subcase as to elements related to hydropower storage in the American Falls Reservoir pursuant to the authority granted to him by AO1 9(d). The Company does not oppose this motion so long as the partial Recommendation clearly states that 1) the Company's current storage space (approx. 45,000 AF) is not intended to be a permanent 'cap' on the space available in the Reservoir for hydropower storage, but instead represents the Company's current contractual right, 2) it is not intended to alter the terms of, or rights granted to the Company by, the existing "Falling Water" contract, *see* Idaho Power Company's Mot. for Summ. J., Ex. 54, and 3) it is not intended to address the Operation and Maintenance (O&M) issues that are subject to litigation in the United States Court of Federal Claims between the Company and the United States.

The Company asks the Special Master to move forward with the partial Recommendation in an expedited manner. The Company currently intends to pursue the O&M overpayment issue discussed in previous briefs in the United States Court of Federal Claims, and it is necessary for the Special Master's ruling as to hydropower storage to be final in order for the federal litigation to move forward.

BACKGROUND

The Special Master'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 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 between the parties, and as a result the Company currently holds a contractual right to approximately 2.65% of the storage space in the American Falls Reservoir, or approximately 45,000 AF.

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. Order at 26, 27.¹ The Company does not dispute these conclusions of law.

As explained in the State's Motion, following the issuance of the Order, both the Company and the State of Idaho filed motions to alter or amend or motions for reconsideration. The issues raised in those motions included whether the amount of O&M paid by the Company was properly before the Court, and whether the power storage capacity is subject to a trust obligation. In its ruling on these motions, the Special Master determined that the O&M issue was not properly before the Court and that the trust issue was not ripe for decision in this proceeding. Order on Reconsideration at 9.

Therefore, pursuant to the Special Master's rulings in this subcase, the Company currently maintains a contractual right to approximately 45,000 AF of storage in the American Falls Reservoir. However, the rulings did not address or reach whether the Company has been overpaying O&M since 1976 or whether there is a trust relationship between the United States

¹ The fourth conclusion of law concerns the Spaceholder's request for attorney's fees, which the Special Master denied.

and Idaho Power Company. The rulings also did not affect the Company's right to use "falling water" for power generation.

RESPONSE

The Company does not dispute that it holds approximately 45,000 acre-feet of storage in the American Falls Reservoir pursuant to its Spaceholder Contract with the United States, or that the stored water is used for power generation. As such, the Company does not oppose the State's motion seeking a partial Recommendation settling the hydropower storage element of subcase 01-2064. However, the partial Recommendation should clearly address certain issues of concern to the Company.

First, the partial Recommendation should state clearly that the current contractual agreement is not an absolute, permanent 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. While the Company's current Spaceholder Contract provides the Company with access to approximately 45,000 acre-feet of storage in the Reservoir, the Company is not prevented by any law or regulation from obtaining additional space in the Reservoir in the future to use for power generation. The Company has no specific plans to acquire additional storage capacity in the Reservoir at this time, but it should not be inadvertently limited from pursuing additional rights through long-term leases or outright purchase should the opportunity arise. Nothing in the partial Recommendation should impose, or even suggest, 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.

Second, nothing in the partial Recommendation should suggest that the Company's right to generate power from irrigation flows has been rescinded or limited. The Special Master

should state clearly that the Company's current contractual right to approximately 45,000 acre-feet of stored water is not to 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.

Finally, the partial Recommendation should clearly state that this Court did not, and did not intend to, address whether the Company has been overpaying American Falls Dam and Reservoir O&M fees to the United States since 1976. This is a contractual issue between the United States and Idaho Power that will be addressed in the Court of Federal Claims.

CONCLUSION

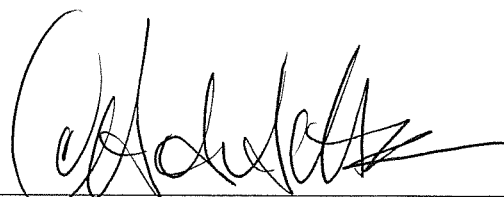
The Company does not oppose the State of Idaho's motion, and it encourages the Special Master to act promptly to finalize this element of his Recommendation so that the Company and the United States can proceed with their litigation before the Court of Federal Claims in a timely manner. The Company urges the Special Master to word the partial Recommendation carefully and precisely so as to avoid any confusion as to how the partial Recommendation affects the issues raised by the Company in this Response and in previous briefs in this litigation.

DATED this 14th day of October, 2011.

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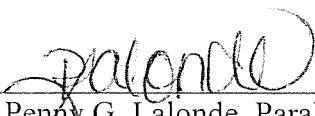
Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2011, I caused the foregoing document entitled **RESPONSE TO STATE OF IDAHO'S MOTION FOR PARTIAL RECOMMENDATION** to be filed with the Court and served per the method indicated below upon the following:

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IDWR Document Depository PO Box 83720 Boise, ID 83720-0098	☒ U.S. Mail, postage prepaid
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