

11-29

RECEIVED

DEC 01 2011

DEPARTMENT OF
WATER RESOURCES

IGNACIA S. MORENO

Assistant Attorney General
Environment and Natural Resources Division

DAVID W. GEHLERT

Natural Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
999 18th Street
South Terrace – Suite 370
Denver, Colorado 80294
Phone: (303) 844-1386
Fax: (303) 844-1350

Counsel for the United States

**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	)	THE UNITED STATES' RESPONSE TO
	)	THE STATE'S MOTION FOR PARTIAL
_____	)	RECOMMENDATION

This memorandum responds to the State of Idaho's Motion for Partial Recommendation and Idaho Power Company's Response to the State's Motion. The United States supports the State's Motion and comments further only because Idaho Power's Response seeks to impose unwarranted conditions on this Court's issuance of a Partial Recommendation on the United States' water right 01-2064.

Like the State and the United States, Idaho Power recognizes that a Partial Recommendation is appropriate at this time. The Company also recognizes that a partial Recommendation will facilitate proceeding with the companion litigation Idaho Power is pursuing in the Court of Federal Claims. Despite the benefits a Partial Recommendation would

provide to the company, Idaho Power seeks to hold issuance of the Recommendation hostage to the inclusion of language that would effectively serve as remarks on the water right.¹ Unlike proper remarks, however, the language sought by Idaho Power would neither define the United States' water right, clarify its elements nor aid in its administration. *Cf.* I.C. § 42-1411 (2). Instead, it is directed at Idaho Power's contracts with the United States.

The first condition Idaho Power seeks is a remark acknowledging that the 44,324 acre-feet this Court recognized as the proper quantity for hydropower use is merely the current quantity of water contractually available to Idaho Power rather than an "absolute, permanent limit on the amount of storage water in [American Falls] Reservoir that can be used, or may in the future be used, for power generation." Idaho Power Response at 4. The suggested remark is entirely unnecessary because nothing in this Court's decisions suggests that the 44,324 acre-feet recognized by the Court is intended to place a cap on hydropower use. To the contrary, the very premise of the Court's decisions is that contractual quantities can and do change. *See* ORDER ON SUMMARY JUDGMENT at 24 (holding that Idaho Power's 1976 Spaceholder contract extinguished the secondary storage-right provided in the Company's 1923 contract).

Not only is the remark unnecessary, but it also creates the possibility of conflict and confusion. Numerous water rights for Reclamation reservoirs have been partially decreed *with* quantities based on contracts and *without* express acknowledgment that contract quantities can change. *E.g.*, PARTIAL DECREE, Water Right 63-03614. Including a savings clause in this Recommendation could create confusion and conflict by implying that Idaho Power has a right

¹ Idaho Power does not characterize the conditions it seeks to impose on the Recommendation as remarks. Nonetheless, Idaho Power's request that the Recommendation "clearly state" several propositions that are not an element of the water right is effectively a *de facto* request for remarks.

to acquire additional water that is somehow different than those of other contractors. That is not the case. Those contractors have the same ability to acquire additional water as Idaho Power.²

The second remark Idaho Power seeks is an express statement that the terms of Idaho Power's Falling Water Contract have not been at issue in this proceeding. Again, the remark is unnecessary because there is nothing in the Court's Orders suggests an intent to address the Falling Water Contract. Indeed, the Falling Water Contract is not even mentioned in either the Court's ORDER ON SUMMARY JUDGMENT or its ORDER ON MOTION TO ALTER OR AMEND. In short, there is no basis to construe the Court's decisions as affecting the Falling Water Contract and accordingly no basis for a remark addressing it.

Idaho Power finally asks this Court to clarify that the Court's decision did not, and did not intend to, address the so-called O & M issue Idaho Power intends to pursue in the Court of Federal Claims. This proposed remark is unnecessary because this Court has already provided Idaho Power with the assurance it seeks. The Court's Order on Motion to Alter or Amend expressly confirmed that the Court's decisions did not – and indeed, could not – address the O & M issue. ORDER ON MOTION TO ALTER OR AMEND at 8.

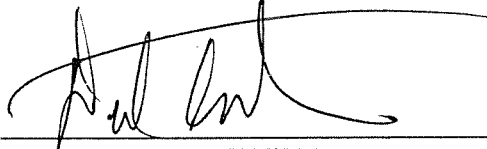
In short, the partial Recommendation will address a single element of the United States' water right 01-2064 - the quantity of water that may be requested for hydropower use. It does not – and indeed, cannot – impose a limit on Idaho Power's ability to acquire additional water by contract, modify the terms of the Falling Water Contract or foreclose the Company's O & M related claims. Accordingly, the remarks Idaho Power seeks to impose on the Partial Recommendation are unnecessary and must be rejected.

^{2/} In fact, to the extent Idaho Power's ability to acquire water in the future is unique, it is only because the company has voluntarily limited its ability to do so. *See* Falling Water Contract (Jarvis Aff., Ex. EEE) at 10, Sect. 2.1(e) and 13, Section 2.3(1).

Dated this 26th day of November 2011.

IGNACIA S. MORENO

Assistant Attorney General
Environment and Natural Resources Division

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

DAVID W. GEHLERT

Natural Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
999 18th Street
South Terrace – Suite 370
Denver, CO 80202
Phone: (303) 844-1386
Fax: (303) 844-1350

Counsel for the United States

CERTIFICATE OF SERVICE

I certify that on November 28, 2011, I served true and correct copies of the foregoing **THE UNITED STATES' RESPONSE TO THE STATE'S MOTION FOR PARTIAL RECOMMENDATION** as follows:

via FedEx mail:

Clerk of the District Court (original)
Snake River Basin Adjudication
253 Third Avenue North
Twin Falls, ID 83303-2707
Phone: 208-736-3011

via First Class U.S. Mail, pre-paid:

C.Thomas Arkoosh
Capitol Law Group, PLLC
P.O. Box 2598
Boise, ID 83701-2598

Travis Thompson
Barker, Rosholt & Simpson, LLP
P.O. Box 485
Twin Falls, ID 83303-0485

James C. Tucker
Idaho Power Company
P.O. Box 70
Boise, ID 83707

Adam T. Devoe
Brownstein Hyatt Farber Schreck, PC
410 17th Street, Suite 2200
Denver, CO 80202

W. Kent Fletcher
Fletcher Law Office
P. O. Box 248
Burley, ID 83318

Roger D. Ling
Ling Law Office
P.O. Box 623
Rupert, ID 83350-0623

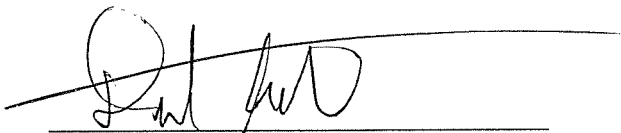
Candice M. McHugh
Racine, Olson, Nye, Budge & Bailey, Chtd.
101 Capitol Blvd., Suite 208
Boise, ID 83702

Jerry Rigby
Rigby Andrus and Rigby, Chtd.
P.O. Box 250
Rexburg, ID 83440-0250

Chief, Natural Resources Division
State of Idaho
Office of the Attorney General
P.O. Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment and Natural Resources Div.
550 West Fort Street, MSC 033
Boise, ID 83724

Director of IDWR
Idaho Water Center
P.O. Box 83720
Boise, ID 83720-0098


David W. Gehlert