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DEPARTMENT OF  
WATER RESOURCES

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| DISTRICT COURT - SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |              |
| JAN 20 2012                                                                               |              |
| By _____                                                                                  | Clerk        |
| _____                                                                                     | Deputy Clerk |

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

|                |   |                                               |
|----------------|---|-----------------------------------------------|
|                | ) | Subcase 01-2064                               |
|                | ) | (USDI/BOR)                                    |
| In Re SRBA     | ) | (American Falls Reservoir Hydropower Storage) |
|                | ) |                                               |
|                | ) | ORDER GRANTING MOTION FOR                     |
| Case No. 39576 | ) | ISSUANCE OF SPECIAL MASTER'S                  |
|                | ) | RECOMMENDATION                                |
|                | ) | and                                           |
|                | ) | PARTIAL SPECIAL MASTER REPORT AND             |
| _____          | ) | RECOMMENDATION                                |

**Findings of Fact**

**Summary Judgment Order**

On March 31, 2011, the Special Master entered an *Order on Motions for Summary Judgment and Alternative Motion for Declaratory Judgment*. The matter was essentially a contract dispute, but the IDWR Director determined certain of his recommended remarks were necessary for definition of the right, for clarification of the priority date and purpose of use, and for administration of the right. Hence, the Special Master concluded the SRBA Court had jurisdiction to interpret contract rights in order to adjudicate elements of the water right. That *Order* essentially found that Idaho Power holds a storage right for 2.65% of primary storage capacity and any additional secondary storage right was extinguished by the 1976 Spaceholder Contract. The three relevant conclusions of law were:

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.

#### **Order on Motion to Alter or Amend**

Soon after entry of the *Order on Motions for Summary Judgment*, Idaho Power filed a *Motion to Alter or Amend* and the State of Idaho filed a *Motion for Reconsideration or, in the Alternative, Motion to Alter or Amend*. Following a hearing, on July 20, 2011, the Special Master entered an *Order on Motion to Alter or Amend and Motion for Reconsideration or in the Alternative, Motion to Alter or Amend*. In that second *Order*, the Special Master held that 1) the issue of operation and maintenance charges paid by Idaho Power were not properly before the SRBA Court and 2) whether the power storage capacity in American Falls Reservoir is subject to a trust obligation is "incomplete and not ripe for decision in this proceeding." *Order on Reconsideration*, at 9. That being said, the Special Master agreed a portion of the March 31, 2011 summary judgment *Order* should be amended. The third conclusion of law was amended as follows:

3. The issue of whether the [power storage capacity in American Falls Reservoir] ~~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 9.

#### **State's Motion for Issuance of Special Master's Recommendation**

On September 29, 2011, the State filed its *Motion for Issuance of Special Master's Recommendation as to Elements Related to Hydropower Storage Rights*. The State wrote:

The State requests that the Court issue a Special Master's Recommendation in this subcase as to elements related to hydropower storage rights. This will provide the parties finality on the matter and narrow the issues remaining in this subcase that may go to trial. Issuance of a Special Master's Recommendation on this discrete issue will not frustrate the ongoing settlement discussions between the parties as to other disputed elements of this water right, but will help clear the field of issues that are no longer in play in this proceeding.

State's *Motion* at 2-3.

## Idaho Power's Response

Idaho Power Company filed its *Response to State of Idaho's Motion for Issuance of Special Master's Recommendation as to Elements Related to Hydropower Storage* on October 14, 2011. It wrote:

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 . . . 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.

...

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.

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

## United States' Response

The United States filed its *Response to the State's Motion for Partial Recommendation* on November 29, 2011. It supports the State's *Motion* and suggested Idaho Power wants to impose unwarranted conditions on the partial recommendation:

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. 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. *C.f.* I.C. § 42-1411 (2). Instead, it is directed at Idaho Power's contracts with the United States [footnote omitted].

United States' *Response*, at 1-2.

The United States then argued the remarks are unnecessary and would create the possibility of conflict and confusion implying Idaho Power has a right to acquire additional water from other contractors. The suggested remarks might also imply the March 31, 2011 *Order on Motions for Summary Judgment* and the July 20, 2011 *Order on Motion to Alter or Amend* intended to address the O&M issue Idaho Power may pursue in the Court of Federal Claims.

### **State's Reply**

The State filed its *Reply* on November 30, 2011, arguing a partial recommendation of Idaho Power's existing rights should not include potential future acquisition of hydropower storage rights. Further, Idaho Power's contractual right to generate power with "falling water" is governed by its contract with the USDI/BOR and should not be addressed in any partial recommendation. Finally, the State argued the Special Master has already held O&M issues are not properly before this Court and are not ripe for discussion in this proceeding.

### **Hearing on the State's Motion for Issuance**

The hearing on the State's *Motion for Issuance of Special Master's Recommendation* was held at the SRBA Courthouse in Twin Falls, Idaho, on December 8, 2011. The following counsel appeared:

|                              |                                                           |
|------------------------------|-----------------------------------------------------------|
| Idaho Power Co.              | Dave G. Scott and James C. Tucker                         |
| USDI/BOR & BLM               | David W. Gehlert, along with Fredric W. Price             |
| State of Idaho               | Shasta Kilminster-Hadley and Michael C. Orr               |
| Upper Valley American Falls  |                                                           |
| Spaceholders                 | Jerry R. Rigby                                            |
| Falls Irrigation District    | Roger D. Ling                                             |
| Minidoka Irrigation District | W. Kent Fletcher                                          |
| Ground Water Districts       | Candice M. McHugh                                         |
| A & B Irrigation District    | Travis L. Thompson, John K. Simpson and Paul L. Arrington |
| IDWR                         | Chris M. Bromley, along with Ray Williams                 |

### **Conclusions of Law**

During oral argument on the various *Motions* leading to the March 31, 2011 *Order on Motion for Summary Judgment*, the issue was raised whether the matter concerned interpretation of contract rights or adjudication of water right 01-2064. The parties recognized the SRBA Court, a court of limited jurisdiction, adjudicates elements of water rights while a claim of non-compliance under a federal contract is a matter for the Court of Federal Claims. In

that **Order**, the Special Master held the SRBA Court had jurisdiction to interpret the contracts because the IDWR Director "determined the remarks he recommended for water right 01-2064 are necessary for definition of the right, for clarification of the priority date and purpose of use elements of the right and for administration of the right." **Order**, at 22. In this case, there has been no showing Idaho Power's suggested language meets the requirements of I.C. § 42-1411 (2).

Idaho Power requested the Special Master's recommendation clearly state that its current storage space (45,000 acre-feet or 2.65 % of storage capacity) is not a cap or limit on future hydropower storage space available in American Falls Reservoir. It also requested clear statements the recommendation does not alter the terms or rights granted Idaho Power in the "Falling Water" contract nor address O&M issues.

Here are the major obstacles to granting Idaho Power's requests. First of all, Idaho Power did not submit particular language it wanted in the recommendation; and second, the Director has not recommended the inclusion of any language suggested by Idaho Power. That leaves the Court to draft its own versions of Idaho Power's ideas without having the benefit of the Court's independent expert and technical assistant (I.C. § 42-1401B) evaluate and recommend specific language. Additionally, the parties are prevented from having their voices heard.

In these circumstances, the Special Master must refrain from pursuing any further issues arising from contracts between the United States and Idaho Power and must leave speculation concerning Idaho Power's future acquisition of hydropower storage space for others to address.

### **Order**

THEREFORE, IT IS ORDERED that the State's *Motion for Issuance of Special Master's Recommendation as to Elements Related to Hydropower Storage Rights* is **granted**. The Special Master's March 31, 2011 **Order on Motions for Summary Judgment**, as amended by the July 20, 2011 **Order on Motion to Alter or Amend**, remains unchanged.

### **Recommendation**

THEREFORE, IT IS RECOMMENDED that when all issues concerning water right 01-2064 are finally determined by the SRBA Court, the partial decree include all remarks

recommended by the IDWR Director in his December 19, 2006 *Director's Report, Reporting Area Basin 01, IDWR Part 2*.

DATED January 26, 2012.

A handwritten signature in dark ink, appearing to read "Terrence A. Dolan". The signature is fluid and cursive, with a horizontal line drawn underneath it.

TERRENCE A. DOLAN  
Special Master  
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION AND PARTIAL SPECIAL MASTER REPORT AND RECOMMENDATION was mailed on January 20, 2012, with sufficient first-class postage to the following:

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