

RECEIVED
AUG 20 2009
DEPARTMENT OF
WATER RESOURCES

JOHN C. CRUDEN
Acting Assistant Attorney General
Environmental and Natural Resources Division

DAVID W. GEHLERT
Natural Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
1961 Stout Street, 8th Floor
Denver, Colorado, 80294
Phone: (303) 844-1386
Fax: (303) 844-1350

Counsel for the United States of America

**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 Nos.: See Attachment A
	)	
Case No. 39576	)	UNITED STATES' MEMORANDUM
	)	IN SUPPORT OF MOTION FOR
	)	SUMMARY JUDGMENT
	)	
_____	)	

Introduction

This motion addresses the narrow issue of what limiting remark, if any, should be inserted into the hydropower rights held by the United States for power generation at Minidoka and Palisades dams. The Director's Reports for both the Minidoka and the Palisades hydropower water rights included remarks, referred to as a "historic practice" remark, for the respective facilities. That remark would have prevented the United States from generating hydropower at either facility except as an "incident" to a release of water for another purpose and would have precluded the United States from making a delivery call against any water right other

than a junior hydropower right. The Director also recommended an additional remark for the Minidoka hydropower water rights, referred to as the “winter operations” remark, which would have made the rights subject to the winter operations provisions found in the *Eagle* decrees.¹

The United States objected to the historic practice remark because it would have placed undue restrictions on the United States’ exercise of its hydropower water rights and to the “winter operations” remark because the United States was not a party to the *Eagle* decrees and is not bound by their provisions. Members of the Surface Water Coalition also objected to the historic practice remarks and the State, Idaho Power, and members of the Idaho Ground Water Association (“Ground Water Users”) all became parties through responses.

As this Court is aware, the parties have had two moderated settlement conferences and numerous informal settlement discussions.² Those efforts have produced the proposed remarks³ that are the subject of the motions filed by the United States and the State of Idaho. The proposed remarks are founded on, and consistent with, contracts between the United States and the many parties that have contracted for the use of water from Palisades Reservoir, including some members of the Surface Water Coalition and the City of Pocatello. Those contracts, referred to herein as the Palisades contracts, encapsulate a comprehensive agreement that the Eagle court found “provide[s] the basis of a common plan for the orderly administration of the

¹ *Burley Irrigation Dist. v. Eagle* (Idaho 5th Jud. Dist., July 10, 1968) and *Aberdeen-Springfield Canal Co. v. Eagle* (Idaho 7th Jud. Dist., March 12, 1969).

² Although the City of Pocatello’s objections did not reference hydropower, it participated in the settlement conferences and other discussions.

³ The terms of the proposed remarks are set forth in this memorandum below and are provided in their entirety as Attachment B to the United States’ Motion.

Snake River above Milner Dam”⁴ and which was a prerequisite to the construction of Palisades Reservoir. Moreover, the contracts have shaped the administration of the hydropower rights for more than fifty years. The United States now asks this Court to enter summary judgment substituting the proposed remarks for those offered by the Director.

Factual Background

The Palisades contracts are the product of a process that began with the Secretary’s authorization of Palisades Reservoir in 1941 pursuant to Section 9 of the Reclamation Projects Act, Pub. L. No. 76-260, 53 Stat. 1187 (1939). Palisades was authorized as a multiple-purpose development to provide water for supplemental irrigation supply, flood control and hydroelectric power generation. H.R. Doc. 77-457 (1941) at iii.⁵ One major obstacle, however, had to be overcome in order for Palisades Reservoir to be constructed: the irrigators’ practice of running water through their canals throughout the winter for domestic and stock purposes deprived the reservoir system of more than four hundred thousand acre-feet of potentially storable water, leaving an inadequate water supply for Palisades reservoir. *See* H. R. Doc. 81-720 at vii. Congress refused to provide appropriations for the construction of Palisades reservoir until an adequate supply of water could be assured. *See* Act of September 30, 1950, Pub. L. No. 864, 64 Stat. 1083 (1950) at § 4. Moreover, Congress required that assurance be provided through

⁴ The United States’ motion does not address the hydropower water rights at American Falls Dam. Nor does it address any of the other issues regarding these water rights. All of those issues are distinct and may be addressed in subsequent proceedings. Accordingly, this Court’s Order should note that it is not intended to limit the parties’ arguments in those proceedings.

⁵ The onset of World War II and water supply issues delayed the construction of the reservoir. In 1950 the reservoir was re-authorized for the same purposes in a slightly modified form. *See* Act of September 30, 1950, Pub. L. No. 81-864, 64 Stat. 1083 (1950) at § 1; *see also* H. R. Doc. 81-720 (1950) at iv.

contracts “with various water users’ organizations of the Upper Snake River Valley in Idaho.”

Id.

Extensive negotiations between Reclamation officials and water users resulted in an agreement to make water available for storage in Palisades by conserving water in the winter through three means: (1) the water users would cease winter diversions; (2) operation of the upper Snake River federal reservoirs would be coordinated to maximize storage water yields; and (3) the United States would curtail power generation at Minidoka Dam to conserve additional water for storage in American Falls, Island Park, and Palisades reservoirs.⁶ U.S. Bureau of Reclamation, Status Report-Workings of Palisades Water Savings Agreement (1968) at 2-3 (“Status Report”) (attached as Exhibit A to the Affidavit of David Jarvis (“Jarvis Aff.”)). Reclamation estimated that those conservation efforts would yield as much as 593,000 acre-feet annually during prolonged cycles of drought, such as that experienced from 1930 to 1935. *Id.* at 6. As Congress required, that agreement was embodied in contracts with water users, including many of the parties to these proceedings. Thus, the Palisades contracts were integral to the authorization of the Project.

Each of the Palisades contracts includes standard provisions which limited the Secretary of Interior’s discretion in exercising the United States’ hydropower water rights at Palisades and Minidoka.

⁶ Those negotiations also led to resolution of a number of other issues including holdover privileges, exchanges between Jackson Lake and American Falls reservoirs, allocation of the remaining uncontracted space in American Falls Reservoir, recognition of existing rights to divert during periods of flood flow, and the clarification of the exercise of the American Falls storage right and the natural flow right used by American Falls Reservoir District No. 2. Status Report at 1-3.

The relevant portion of the standard provision for the Minidoka hydropower water right nos. 01-00217 and 01-00218 provides:⁷

The United States, in its operation of American Falls and Minidoka dams during the storage season of each year is required to pass through enough water to satisfy existing diversion rights in the stretch of river down to and including Milner Dam and certain power rights below Milner Dam, and has the privilege under an existing decree to use at Minidoka Dam 2,700 cubic feet per second of water for the development of power. While the United States must operate the American Falls and Minidoka dams so as not to interfere with these third-party rights, it will be the objective of the United States in the operation of both its American Falls and Minidoka powerplants to curtail the release of additional water from American Falls Reservoir for power production at those powerplants during the storage season of any year whenever operation of those powerplants to the full extent of their respective water rights for power production would result in loss of irrigation water otherwise storable in the reservoir system. Accordingly, except as it is determined by the Secretary that additional water may be passed through American Falls and Minidoka dams without the loss of water that could be stored for irrigation in the reservoir system, the United States will, during each storage season beginning October 1, 1952, and continuing so long as the provisions of (c) of this article remain operative, limit the release of water through those dams as follows:

To the amount of water required to provide flows below Minidoka Dam sufficient to meet existing diversion rights in the reach of the river through Milner Dam and the power rights required to be recognized under the provisions of the contract of June 15, 1923, between the United States and the Idaho Power Company (Symbol and No. Ilr-733), as those diversion and power rights may be modified from time to time.

To the extent that it is practicable to do so, the Advisory Committee will be informed in advance of any plans for the release of water in excess of the foregoing limitation; and that the Committee will be furnished written reports as of the close of the storage season of each year showing, among other things, the releases actually made and the minimum releases required to be made.⁸

⁷ This provision deals with the two senior hydropower rights, 01-217 and 01-218, which total 2,700 cfs. The remaining two junior Minidoka power rights, 01-4024 and 01-4025, were not expressly mentioned in the Palisades contracts.

⁸ This standard provision can be found in Article 24(a) of the contract between the United States and Aberdeen-Springfield Canal Company, which is one of the approximately 60 Palisades contracts. A copy of this contract is attached as Exhibit B to the Jarvis Aff.

The standard provision addressing exercise of the Palisades storage power right, water right no. 01-2068 provides:⁹

During any storage season, the United States, after consultation with the Advisory Committee, may release stored water from Jackson Lake and Palisades reservoirs for the maintenance of power production at Palisades dam powerplant and may store such water, as Jackson Lake or Palisades water as the case may be, in American Falls Reservoir. The release of such water will be confined, however, in storage seasons when it appears that American Falls, Palisades, and Jackson Lake reservoirs will fail to fill, to water required for the maintenance of a minimum firm power production (estimated to be about 11,000,000 kilowatt-hours per month at an average production of 15,000 kilowatts) and which can be stored in American Falls Reservoir; and no such release shall be made that will preclude the later delivery of water, by exchange or otherwise, to the upper valley entities entitled thereto.¹⁰

As noted above, these standard provisions were subsequently incorporated into the supplemental decrees entered in the *Eagle* decrees and became what that court referred to as the "common plan for administering the operation of the Snake River."

Argument

I. STANDARD OF REVIEW.

Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *Read v. Harvey*, 141 Idaho 497, 498, 112 P.3d 785, 787 (2005). Because this action is being tried before the Court without a jury, this Court need not draw inferences in favor of the party opposing a motion for summary judgment. Instead, the Court is free to draw whatever inferences it deems appropriate from the evidence before it. *See Read*, 141 Idaho at 498, 112 P.3d at 787.

⁹ The junior natural flow power right for Palisades Dam, 01-4054, is not expressly mentioned in the Palisades contracts.

¹⁰ This standard provision can be found in Article 25(b) of the contract between the United States and Aberdeen-Springfield Canal Company, Exhibit B to the Jarvis Aff.

II. THE PROPOSED REMARKS SHOULD BE SUBSTITUTED FOR THE REMARKS CONTAINED IN THE DIRECTOR'S REPORT.

The United States and the State have filed Motions for Summary Judgment which ask this Court to resolve all the objections and responses related to the Director's "historic practices" and "winter operations" remarks by substituting the proposed remarks for those recommended by the Director.

The proposed remarks would change the Director's proposed remarks in three ways. First, the "historic practices" remarks recommended by the Director in the Priority Date section would be replaced by new remarks founded on Palisades contracts that were a pre-requisite to the construction of Palisades Reservoir. Second, the Director's "winter operations" remark would be eliminated because the Priority Date remarks proposed by the State and the United States render it superfluous. Third, a remark would be added to the Other Provisions Necessary section which will give the parties to the Palisades contracts assurance that this Court's decree will not modify the contracts.

A. The Director's "Historic Practice" Remark Should be Replaced by the Proposed Remarks.

The Proposed Remarks should replace the Director's "Historic Practice" remark for three reasons. First, unlike the Director's "Historic Practice" remark, the proposed remarks are founded on, and consistent with, the limitations on operation of the Minidoka and Palisades hydropower water rights the Secretary agreed to in the Palisades contracts and which were a prerequisite to the construction of Palisades Reservoir. Second, agreements to limit the operation of a water right are fully consistent with Idaho water law. Third, the proposed remarks will aid in the administration of the water rights.

1. The proposed remarks are founded on, and consistent with, the Palisades contracts.

As recounted above, the Palisades contracts represent the Secretary of the Interior's agreement to voluntarily limit his discretion in operating the United States' hydropower water rights at Palisades and Minidoka as part of a broad compromise with the water users that enabled the Secretary to meet requirements Congress set as a prerequisite for construction of Palisades reservoir. Unlike the Director's "historic practice" remark, which, *inter alia*, would have precluded releases for hydropower generation except as "incidental" to a release for other purposes, the proposed remarks are entirely consistent with the limitations agreed to in the Palisades contracts.

a. The proposed priority date remark for Minidoka water rights nos. 01-00217 and 01-00218.

The United States and the State propose that the Priority Date section of water right nos. 01-00217 and 01-00218 include the following remark:

While the United States has the privilege to use 2,700 cfs for the development of power under water right nos. 01-00217 and 01-00218, it will be the objective of the United States in the operation of the Minidoka powerplant to limit the exercise of water right nos. 01-00217 and 01-00218 for power production at the Minidoka powerplant whenever operation of the Minidoka powerplant to the full extent of these water rights for power production would result in loss of water otherwise storable in the reservoir system. Accordingly, except as it is determined by the Secretary that additional water may be passed through Minidoka Dam without the loss of water that could be stored in the reservoir system, the United States will limit the release of water through the Minidoka Dam. To the extent that it is practicable to do so, the Watermaster and the Water District 1 Advisory Committee will be informed in advance of any plans for the release of water in excess of the foregoing limitation. "Reservoir system" shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott.

This remark is effectively the portion of the Palisades contracts that relates to how the

exercise of the senior Minidoka power rights will be limited, with obsolete and unnecessary terms removed. In particular, it does not include the contractual terms addressing “existing diversion rights in the reach of the river through Milner Dam” because those rights were not claimed in the SRBA. It also does not include the reference to the 1923 contract between the United States and Idaho Power because that contract addresses storage rights at American Falls and therefore reference to the contract would not be appropriate for purposes of administration of these senior natural flow rights.

b. The proposed priority date remark for Minidoka water right nos. 01-04024 and 01-04025.

The United States and the State propose that the Priority Date section of Minidoka water right nos. 01-04024 and 01-04025 include the following remark:

This right may be exercised if it is determined by the Secretary that additional water may be passed through Minidoka Dam, in excess of that authorized under right nos. 01-00217 and 01-00218, without the loss of water that could be stored in the reservoir system. “Reservoir system” shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott.

This right carries no entitlement to make a delivery call for hydropower generation except as against junior hydropower rights.

As noted above, the Palisades contracts did not expressly address water right numbers 01-04024 and 01-04025. Nonetheless, the fact that these junior rights had been decreed at the time the contracts were drafted but were not mentioned in the contracts implies that the exercise of these rights should be at least as limited as that of the senior Minidoka hydropower rights (01-00217 and 01-00218). Thus this remark makes exercise of these rights subject to the same “without the loss of water that could be stored in the reservoir system” limitation that the senior Minidoka hydropower rights are, and additionally limits the United States’ ability to issue a call against non-hydropower water rights on behalf of these junior rights.

c. The proposed priority date remark for Palisades water right no. 01-02068.

The United States and the State propose that the Priority Date section of Palisades storage water right nos. 01-02068 include the following remark:

The United States, after consultation with the Watermaster and the Water District 1 Advisory Committee, may release stored water from Jackson Lake and Palisades reservoirs for the maintenance of power production at Palisades Dam powerplant and may store such water in American Falls Reservoir. The release of such water will be confined, however, when it appears to the Secretary that American Falls, Palisades, and Jackson Lake reservoirs will fail to fill, to not more than 1,000 cfs for minimum firm power production and that amount which can be stored in American Falls Reservoir; and no such release shall be made that will preclude the later delivery of water, by exchange or otherwise, to the upper valley entities entitled thereto. "Upper valley entities" shall mean those reservoir spaceholders diverting from the Snake River and its tributaries above American Falls Dam.

This provision is almost a word-for-word reiteration of the relevant contract provision. The only two changes are non-substantive: (1) the implication in the contract that it is the Secretary who will determine when it appears that the reservoirs will fail to fill has been made explicit; and (2) the amount of water needed for firm power production has been converted to cubic feet per second rather than the kilowatt-hours per month used in the contracts.

d. The proposed priority date remark for Palisades water right no. 01-04054.

The United States and the State propose that the Priority Date section of Palisades storage water right nos. 01-04054 include the following remark:

This right may be exercised if it is determined by the Secretary that additional water may be passed through Palisades Dam, in excess of that authorized under water right no. 01-02068, without the loss of water that could be stored in the reservoir system. "Reservoir system" shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott.

Water right 01-04054, a junior natural flow right located at Idaho's border with Wyoming, did not exist at the time the Palisades contracts were executed. Nonetheless, this remark imposes the same "without the loss of water that could be stored in the reservoir system" that is included in the contracts and in the proposed remarks for the Minidoka water rights. Further, that limitation is effectively required by the right's junior priority within the reservoir system.

2. It is well established that the exercise of a water right may be voluntarily limited.

Agreements to limit the exercise of a water right such as those agreed to in the Palisades contract and continued in the proposed remarks are quite common and fully consistent with Idaho water law. *Idaho Power Company v. State of Idaho*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983). Thus they may appropriately be included in a water rights decree.

3. The proposed remarks are consistent with Water District No. 1's administration of the hydropower water rights.

As is explained in the Second Affidavit of Tony Olenichak, the proposed remarks are consistent with how Water District No. 1 has administered the hydropower water rights. Thus, the proposed remarks may appropriately be included in the decree because they will aid in the administration of the water right.

B. The Director's "Winter Operation Remark" Should be Eliminated.

The Director's "winter operation" remark would have made delivery of water under the Minidoka hydropower rights subject to "the provisions for winter power operation at the Minidoka power plant as recognized in the [*Eagle* decrees]." As was explained above, the *Eagle* decrees incorporated the Palisades contracts. Because proposed remarks incorporate the

winter operations contained in the Palisades contracts and incorporated into the *Eagle* decrees, the Director's "winter power operations" remark is superfluous.

Further, eliminating the "winter power operations" remark will avoid two problems inherent in that remark's reference to the *Eagle* decrees. One, it avoids having the water master interpret the decrees -- a role which is only appropriate for a court and, two, it avoids making the United States subject to a decree which it was not a party to, and is not bound by.

C. Each Water Right Should Carry a Remark Clarifying that the Decree Does Not Affect the Contracts.

The United States and the State ask this Court to decree the following remark in the Other Provisions Necessary section in each of the water rights at issue here:

This decree does not alter, amend, or modify the contracts entered into between various federal contractors and the United States Bureau of Reclamation, as amended, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties thereto.

This proposed remark accomplishes two purposes. First, it provides the United States and the other parties to the Palisades contracts with assurance that the decree will not alter the terms of the contracts. Second, by clarifying that the Palisades contracts remain in effect and unchanged, it obviates the need for the Court to incorporate provisions of the contracts having no direct connection to the definition or administration of the water rights.

Conclusion

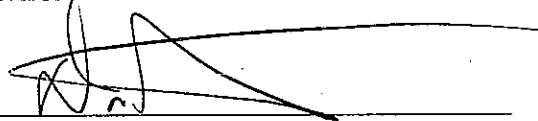
This Court should enter summary judgment substituting the proposed remarks for those offered by the Director because, unlike the Director's "Historic Practice" remark, the proposed remarks are founded on, and consistent with, the limitations on operation of the Minidoka and Palisades hydropower water rights the Secretary agreed to in the Palisades contracts as a

prerequisite to the construction of Palisades Reservoir. Further, the proposed remarks are fully consistent with Idaho water law and will aid in the administration of the water rights.

DATED this 17th day of August, 2009.

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General
Environmental and Natural Resources Division

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

DAVID W. GEHLERT
Natural Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
1961 Stout Street, 8th Floor
Denver, Colorado, 80294

Attorneys for the United States of America

Attachment A

Subcase Nos.

Minidoka Power Rights

01-217

01-218

01-4024

01-4025

Palisades Storage Power Right

01-2068

Palisades Natural Flow Power Right

01-4054