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DEPARTMENT OF
WATER RESOURCES

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

Introduction

Despite the Surface Water Coalition and Idaho Power's (collectively "the Coalition") attack on the remarks proposed by the United States – and joined in by the State, Upper Valley irrigators and groundwater districts – they agree that "the federal reservoirs have been legally operated and administered in accordance with the [Palisades] contract provisions" for decades. JOINT OPPOSITION TO STATE AND U.S. MOTIONS FOR SUMMARY JUDGMENT ("JO") at 76. Indeed, they attack the proposed remarks precisely because they want to see those operations continue. *See id.* Below the United States demonstrates that the best way for this Court to

ensure those operations continue is to enter summary judgment in favor of the United States. Indeed, should this Court mandate the operations implicit in the Coalition's arguments, *that* would change the operational *status quo*, to the potential detriment of the Surface Water Coalition's own members.

The Coalition does not dispute that a remark addressing the United States' operation of Minidoka and Palisades Reservoirs and their respective powerplants during the non-irrigation season is appropriate.^{1/} Rather, the Coalition urges this Court to solve the alleged problems with the proposed remarks by substituting a remark which simply refers to the Eagle Decrees, the pertinent parts of which merely repeat the Palisades Contracts.^{2/} Those contracts are still in force and still bind the United States. The Eagle Decree, however, does not. The United States was not a party to the Eagle Decrees and could not have been because the proceedings failed to meet the requirements for an adjudication under the McCarran Amendment. Consequently, this Court cannot accept the Coalition's invitation to bind the United States to the Eagle Decree through a remark. What it can do, however, should it find a need to do so, is reform the proposed remarks to address its concerns.

^{1/} During the irrigation season, senior downstream water rights pull water through the powerplants. Deposition Testimony of Richard M. Rigby ("Rigby Depo.") at 108:10 (Oct. 27, 2009) (pertinent pages attached as Exhibit C to the Second Affidavit of David A. Jarvis ("2nd Jarvis Aff.")).

^{2/} What the Coalition likes to refer to as Paragraph 24(a) of the Eagle Decree is actually part of Exhibit E to that Decree, an "[e]xcerpt from United States, Department of the Interior, Bureau of Reclamation, Contract with Minidoka Irrigation District Concerning Storage . . . ; Contract No. 14-06-100-1833," ("MID Contract"). The Eagle Decree is attached as Exhibit E to the Affidavit of David I. Stanish (Aug. 17, 2009) ("Stanish Aff.").

Argument

I. AFFIRMATION OF THE PROPOSED REMARKS WOULD CONTINUE A STATUS QUO THAT THE COALITION AGREES HAS WORKED FOR DECADES.

What is at issue in this proceeding is how the hydropower water rights for Minidoka and Palisades Reservoir will describe operation of those reservoirs during the non-irrigation season. The Coalition correctly observes that during that time there is a “fundamental tension” in operating the reservoirs between storing water and releasing water for power generation. JO. at 39. Reclamation does its best to optimize both power and storage. Rigby Depo., 2nd Jarvis Aff., Ex. C, at 37:11-38:5. Still, the agency cannot have its cake and eat it too. At Minidoka Reservoir, any water that passes the hydropower plant is storage foregone.^{2/} Through the Palisades contracts Reclamation agreed to resolve that tension in favor of storage. In simple terms, the contracts require the Secretary to make a judgment that the reservoir system will fill before the senior Minidoka and Palisades hydropower rights are fully exercised.

The United States’ opening brief explained that it agreed to voluntarily compromise operation of its water rights through proposed remarks “founded on and consistent with the Palisades contracts.” UNITED STATES MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (“U.S. Opn.”) at 10. The United States described the proposed remarks in that manner because although the remarks largely track the relevant provisions of the Palisades contracts, and are intended to continue the operations established by the contracts, their language is not identical to that of the contracts. The United States did not try to hide the changes. Rather, we identified, and explained the rationale for, all of the deviations from the contract

^{2/} Because Palisades is upstream, water that is released for power generation can be captured in American Falls or Minidoka Reservoirs.

language. *Id.* at 8-11. Broadly speaking, those changes sought to clarify the operations and conform the remarks to present realities by removing obsolete terms.

The Coalition would have this Court believe that those changes make the proposed remarks a “new,” “broad” subordination that would fundamentally reset a set of operations all parties agree has worked well for decades, to the detriment of three irrigation districts that have a contractual interest in hydropower generation at Minidoka dam. *See* JO at 7-13. As is shown below, the proposed remarks will do no such thing. Indeed, an irony of the Coalition’s brief is that the operational paradigm implicit in their argument would be a change to the operational *status quo*, to the potential detriment of the Surface Water Coalition’s own members.

Cutting through the chaff of the Coalition’s argument, there are only three changes from the contract language the Coalition even alleges to have any consequence:^{4/} (1) the proposed remarks speak of the Secretary’s obligation to preserve “storage” rather than “storage for irrigation,” JO at 41; (2) the proposed remarks do not incorporate the power loss provisions of the Palisades Contracts, JO at 30; and (3) the proposed remarks delete the reference in the

^{4/} Significantly, none of the alleged shortfalls address the Palisades hydropower water rights. That is not surprising, given that the junior Palisades hydropower right (01-4054) is not mentioned in either the Palisades contracts or the Eagle Decrees and that proposed remark merely clarifies the applicable contract provisions for the senior hydropower right (01-2068) without changing their substance. *See* JO at 74. The Coalition does not take issue with those changes. Consequently, this Court can and should enter summary judgment in favor of the United States on the two Palisades water rights.

Palisades contracts to two downstream diversion rights one held by canal companies and a former contractual obligation to Idaho Power.⁵⁷ JO at 37.

A. The Proposed Remarks Will Not Change Operation of the Powerplants.

The Coalition's claim that the proposed remarks create a broad new subordination rests on the deletion of a single phrase – “for irrigation” – from the contracts' direction that the Secretary can pass water for hydropower only to the extent he has determined it can be done “without loss of water that could be stored for irrigation.” JO at 41 & nn. 14-15. That deletion is far from the earth shattering change the Coalition portrays it as. Indeed, Mr. Rigby offered uncontroverted testimony that Reclamation has long attempted to maximize storage of water without regard to that water's ultimate use.⁶⁷ Rigby Depo., 2nd Jarvis Aff., Ex. C, at 127:23-

⁵⁷ The Coalition has little to say about the two junior Minidoka hydropower rights (01-4024 and 01-4025), presumably because they are of little practical consequence. As Mr. Rigby explained in his deposition, the junior power rights at Minidoka are only in effect during times of surplus water, *i.e.*, at times there is “ample water to fill the reservoirs and extra water to release downstream.” Rigby Depo., 2nd Jarvis Aff., Ex. C, at 98:17-19. Because the junior Minidoka rights are not included in either the Palisades contract or the Eagle Decrees, the Coalition's arguments do not prevent the Court from entering summary judgment on those rights.

⁶⁷ The fact that the operational *status quo* will continue also disposes of the Coalition's claim that the proposed remarks may harm BID, MID and Falls' asserted “beneficial interest” in the two senior Minidoka hydropower water rights. Nonetheless, it is clear that they have no such right. First, the D.C. Circuit rejected the argument the Coalition now raises in *Burley Irrigation District v. Ickes*, 116 F.2d 529 (D.C. 1940). In doing so, that court chided BID for not understanding the “vast difference” between owning a contractual right to power profits and holding an ownership interest in the plant itself and the appurtenant water rights. 116 F.2d at 530, 538. Second, even if the Coalition was not precluded from re-litigating the issue, its claim has no merit. The Coalition claims that BID, MID and Falls Irrigation District are the “beneficial owners” of Reclamation's hydropower water right because they are the end users of *power*, not water. JO at 26. The end user of power has no claim to the water right. Once the water runs through Reclamation's turbines the water has been put to beneficial use and the appropriation of the water right completed. *E.g. Sarret v. Hunter*, 32 Idaho 536, ___, 185 P. 1072, 1074 (1919).

128:7; 80:12-18. There is a simple reason why: the supply of water is too uncertain to knowingly forego storage of any water available to Reclamation. Indeed, to do so, as the Coalition implies Reclamation must, would only increase the risk of water shortages.

B. Operating As The Coalition Suggests Would Change the Status Quo to the Likely Detriment of Members of the Surface Water Coalition.

What is most striking about the Coalition's arguments is that they suggest the Coalition is more concerned about the power-loss payments that they assert benefit three irrigation districts, than the Project water supply used by more than thirty contractors – including Idaho Power and the other members of the Surface Water Coalition. Implicit in their fretting about the omission of the word “irrigation” is the notion that Reclamation should operate the reservoirs in a three-tiered hierarchy: water would be stored for irrigation purposes; then the senior Minidoka hydropower rights would be run at their full 2,700 cfs capacity for as long as possible; then water would be stored for non-irrigation purposes – if any water is available.

The Court should understand three things about that proposition. First, implementing it would be a change from the *status quo* that the Coalition admits has worked for decades.^{2/} See Rigby Depo., 2nd Jarvis Aff., Ex. C, at 127:23-128:7; 80:12-18. Second, while the

What happens to the power is of no consequence. Indeed, taken to its logical end, the Coalition is arguing that a person who toasts wheat bread creates a beneficial interest in both the hydropower storage right used to create the energy powering the toaster, and the irrigation storage right used to grow the wheat.

^{2/} Despite having described operations as “in accordance with the contract provisions . . . for the past 40 years,” JO at 76, the Coalition suggests that if this Court adopts the proposed remarks it will amount to a breach of contract. JO at 65. First, this Court cannot “breach” the contracts; its order will simply define the water rights available to Reclamation. Second, even if that were not the case, this Court lacks jurisdiction to determine whether a breach has occurred. Such suits can only be brought in the Court of Federal Claims under the Tucker Act, 28 USC § 1491(a)(1). Finally, no breach can be found because contract holders’ decades of acquiescence

Coalition's position is one that may have some theoretical appeal, it is not even certain Reclamation could implement it because the quantity of non-irrigation water is so small relevant to the total system capacity.^{8/} Third, even if Reclamation were able to finely parse out the non-irrigation water and the quantity of non-irrigation water were to increase, the only consequence of the Coalition's proposition would be a greater risk of a storage shortfall.

By seeking to maximize total reservoir storage, Reclamation maximizes storage *for the irrigation contractors*. Indeed, if Reclamation were to do anything other than try to maximize storage, it would put irrigation storage at risk. Variations in weather and our limited ability to forecast the weather create risks of shortage. Putting hydropower generation ahead of non-irrigation storage would only increase the risk that Reclamation's storage right will be out of priority before Reclamation could store the non-irrigation water. That creates risk for junior irrigation users because any shortage would be apportioned to reservoir spaceholders according to the contracts and storage priorities – not by the purpose of use. In sum, operating the system to maximize total storage has not only been the *status quo* for decades but it benefits all the contractors.^{9/}

to Reclamation's operations preclude a finding of breach. See e.g., *Lane v. Pacific and Idaho Northern Railway Co.*, 8 Idaho 230, 67 P. 656, 657-58 (1902).

^{8/} Idaho Power's contract for roughly 45,000 acre-feet of storage is the only non-irrigation contract. The system's total storage capacity, over 4,000,000 acre-feet, is almost one hundred times as much.

^{9/} Maximizing storage does not mean that the system is operated to "fill and spill." Cf. JO at 43. Jackson and Palisades Reservoirs are operated for flood control. A "fill and spill" approach is incompatible with Reclamation's flood control obligations. Indeed, the entire point of flood control is to avoid unnecessary spills by releasing water over the winter to empty space in the reservoir so that the reservoir does not spill when the spring runoff comes.

C. The Remark Does Not Need to Incorporate the Power Loss Provisions of the Palisades Contracts in Order to Preserve the Status Quo.

The second issue identified by the Coalition is the absence of a reference to the contractual power loss provisions in the proposed remarks.^{10/} Those provisions are a matter of contract rights, not water rights. Nonetheless, the United States fully acknowledges its contractual obligation and the proposed remarks include an express provision that makes it clear the water right does not disturb *any* of the United States' contractual obligations. The Coalition alleges that is not adequate protection for two reasons, neither of which has merit.

First, they claim that if the contractual power loss provisions are not included in the decree they will be without recourse should the United States not continue to abide by them. *See* JO at 27. A court decree is simply not required to induce compliance with a contract. Innumerable contracts are fulfilled every day without having been incorporated in a decree. In any event, any party asserting they have been aggrieved by the United States' alleged non-compliance with a contract can seek relief in the Court of Federal Claims pursuant to the Tucker Act, 28 USC § 1491(a)(1).

^{10/} The Court does not need a detailed understanding of the power loss provisions, but a few points of background may be helpful. The provisions, which apply only to the two senior Minidoka hydropower rights, are a product of the desire to store additional water during the non-irrigation season that was one of the drivers behind the Palisades contracts. Limiting the exercise of the early priority hydropower rights at Minidoka dam for power production increased the quantity of water that could be stored, to the benefit of the many parties holding space in the reservoirs, but at a cost to power production and hence power revenues at the dam. The power loss provisions created a mechanism by which "all contractors having reservoir rights benefitting from the water savings" would pay for the lost power. MID Contract, Stanish Aff., Ex. E, at ¶ 24(c). Contrary to the implication in the Coalition brief, e.g., JO at 12-13, the payments do not go to the three districts. Instead, they are treated as a revenue that offsets a portion of the costs associated with operating the powerplant. *Id.* at ¶ 24(g).

Second, the Coalition contends that because the contractual power loss provisions were consideration for an agreement to forego power production under the two senior Minidoka hydropower rights, they are “part and parcel” of the water rights. The Coalition cites no precedent where the consideration underlying an agreement to forebear operation of a water right has been included in a water rights decree, much less any precedent that would require this Court to do so. Apart from that, there is good reason not to refer to the contractual provisions. Contracts can and do change. *See, Minidoka Irrigation District v. Dept. of the Interior*, 406 F.3d 567, 571 (9th Cir. 2005) (noting that BID’s contract was amended after the United States purchased BID’s contractual right to part of the profits generated at the Minidoka powerplant). Indeed, the Palisades contracts acknowledge that the criteria for determining annual net power losses “may be changed from time to time.” MID Contract, Stanish Aff., Ex. E at ¶ 24(d). The power loss provisions span seven pages of the Palisades contracts and could be changed in innumerable ways without *any* change in the way the water right is operated. *See Id.* at ¶ 24(b) - (g). “Part and parcel” of the water right they are not.^{11/}

^{11/} In any event, to the extent this Court considers it essential to reference the power loss provisions, it can do so much more simply than the vague and general reference to the Eagle Decrees suggested by the Coalition. A remark to the effect that the subordination will continue only so long as the power-loss payments are made would accomplish the same purpose without inducing the problems inherent in a general reference to an entire decree. *See* Section II, *infra*.

D. The Coalition's Arguments Demonstrate That There is No Need to Reference Rights Once Held by the Twin Falls Canal Company, the North Side Canal Company and the Idaho Power Company.

As the United States noted in its opening brief, the proposed remarks omit provisions of the Palisades contracts that required the United States to pass sufficient flow through Minidoka dam to meet the diversion water rights then held by the Twin Falls Canal Company and North Side Canal Company (collectively "Canal Companies"), and certain flow obligations contained in a 1923 contract between the United States and the Idaho Power Company. Those provisions were not carried forward into the proposed remarks because they are obsolete; neither the diversion rights nor the contractual flow obligations exist today. U.S. Opn. at 9. Not including them also maintains the *status quo* as the United States has not been operating the reservoir to account for those provisions. Rigby Depo, 2nd Jarvis Aff., Ex. C, at 63:1-5; 79:12-15. The Coalition disputes those rights have been entirely extinguished. JO at 38. Their arguments, however, only demonstrates that there is no need to reference the rights in the proposed remarks.

The Coalition points out that the Canal Companies are pursuing claims derived from their diversionary rights in the SRBA. Those claims are not for the diversionary water rights referenced in the contracts; as the Coalition explains, those rights were "exchanged for preferred space for irrigation storage in American Falls and Palisades Reservoirs." JO at 38. Thus, whatever the ultimate fate of the companies' claim to those storage rights, their point of diversion is now above Minidoka reservoir, rather than below it, and no longer affected by the United States' contractual agreement to forego hydropower generation in favor of storage.

The United States' proposed remark does not refer to Idaho Power's alleged contractual right to particular flows below Minidoka Dam because that right was abrogated by,

among other things, the subsequent spaceholder contract Idaho Power agreed to which omitted any obligation to produce those flows. Contract No. Ilr-733S (March 31, 1976) (2nd Jarvis Aff., Exhibit D). As the Coalition notes, Idaho Power recently sued the United States in the Court of Federal Claims to enforce the rights it claims under the 1923 Contract.^{12/} The presence of that litigation is good reason not to include a reference to the alleged 1923 contract rights in the remarks for two reasons.

First, as the Coalition acknowledges, the Court of Federal Claims ruling will define Idaho Power's rights under the contract. *See* JO at 39. Consequently, a reference to the 1923 contract on the water rights is not necessary. Second, even if Idaho Power wins in the Court of Federal Claims, it still may not get the water it currently believes it is entitled to under the 1923 Contract. If that proves to be the case, a reference to providing water under the Contract would only engender confusion.

II. THE UNITED STATES IS NOT BOUND BY THE EAGLE DECREE.

The Coalition argues that this Court must reject the proposed remarks because the United States is bound by the Eagle Decrees. JO at 52-53. They concede that the United States was not a party to the Eagle Decrees,^{13/} but fail to comprehend that the United States could not

^{12/} Idaho Power's rights under the 1923 Contract are also at issue in a series of subcases relating to American Falls reservoir in which Idaho Power claims water rights by virtue of the 1923 contract. *See* Letter from James C. Tucker to IDWR (Dec. 21, 2005) (Jarvis Aff., Exhibit E).

^{13/} Also notably absent was Idaho Power. Interestingly, if this Court adopts the Coalition's argument that all non-parties to the Eagle Decree must be bound, Idaho Power would be precluded from asserting any water rights above Milner Dam by its failure to claim them in the Eagle Decree proceedings.

have been a party because it did not waive its immunity from suit to allow its participation and therefore its absence was privileged.

It is beyond dispute that the United States is immune from suit unless it consents to be sued and that only Congress can provide consent. *E.g., United States v. Sherwood*, 312 U.S. 584, 586-87 (1941). The waiver of immunity must be expressed in the statutory text in question and cannot come from extraneous sources.^{14/} *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36-37 (1992). Absent that consent, any attempt to exercise judicial power against the United States is void. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 514 (1940).

Through the McCarran Amendment, 43 U.S.C. 666, Congress waived the United States immunity to allow federal water rights to be determined in comprehensive general adjudications such as the SRBA. *See e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). That waiver cannot be applied to the Eagle Decrees. The Coalition goes to great lengths to paint the Eagle Decrees as a “comprehensive adjudication of every water right *above Milner Dam.*” JO at 52 (emphasis added). Whether or not that is true, the Coalition’s argument only illustrates that the Eagle Decree was not a general adjudication within the meaning of the McCarran Amendment. *In re Snake River Basin Water System*, 115 Idaho 1, 8, 764 P.2d 78, 85

^{14/} The Coalition’s suggestion that the Field Solicitor’s review of a few documents during the Eagle proceedings somehow waives the United States’ immunity cannot stand. Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give a court jurisdiction of a suit against the United States. *State of Minnesota v. U.S.*, 305 U.S. 382, 388-89 (1939); *Stanley v. Schwalby*, 162 U.S. 255, 270 (1896). As a result, courts have refused to bind the United States even when the Attorney General has authorized federal agencies to file claims in a state adjudication suit. *See In re Bear River Drainage Area*, 271 P.2d 846, 849 (Utah 1954); *see also United States v. Oregon Water Resources Dept.*, 774 F. Supp. 1568, 1575 (D.Or. 1991) (consent decrees signed by officials of the executive branch in a state adjudication did not waive the United States’ immunity).

(1988) (the McCarran Amendment requires that “the rights of *all claimants on the Snake River and all of its tributaries* within the state of Idaho” be included in an adjudication before its waiver can apply) (emphasis added). An adjudication of all rights above Milner Dam falls far short of the Idaho Supreme Court’s pre-requisite, no matter what the court or the parties’ intention.^{15/}

That the United States did not waive its immunity for the Eagle proceedings has one further consequence here: it precludes the suggestion by the Coalition that this Court adopt a remark that would make delivery of water under the water rights subject to the Eagle Decrees. JO at 81. Doing so would be an attempt to bind the United States to decrees it was privileged to have not participated in and therefore void.^{16/} *United States Fidelity*, 309 U.S. at 514.

^{15/} Even if the United States were not immune, the Coalition’s attempts to bind the United States would have no merit. First, contrary to their suggestion, the United States was not in privity with the irrigation districts that did participate. Under Idaho law, to be in privity with a party to an action, “a person not a party to the former action must derive his interest from one who was a party to it.” *Ticor Title Co. v. Stanion*, 144 Idaho 119, 157 P.3d 613 (2007). The United States’ interest in the Minidoka hydropower rights derives from its own water rights, not any interest of the districts. Second, the Coalition’s suggestion that the United States should be bound by analogy to *Nevada v. United States*, 463 U.S. 110 (1983) attempts to stand that case on its head. Unlike this case, in *Nevada* it was the United States that had participated in the prior litigation. Moreover, the Supreme Court decision turned on “the distinctive obligations of trust incumbent on the government in its dealings with Indian tribes.” 463 U.S. at 127 (internal punctuation omitted). Because of those unique obligations, when the United States litigates on behalf of Indian tribes, it effectively litigates as the tribe. *See id.* at 135 (quoting *Heckman v. United States*, 224 U.S. 413, 446 (1912)).

^{16/} Even if the United States immunity were not an insurmountable barrier to the Coalition’s request, there are practical reasons not to adopt a remark that offers no specificity and simply refers to an entire decree. The Eagle Decrees address numerous water rights that are not before this Court – but did not decree *any* of the water rights now before this Court. Moreover, the Decrees are rife with excerpts of contract provisions that address issues (some of which will be discussed below) that nothing to do with the water rights now before this Court. A remark is

III. THE COURT CAN AND SHOULD ENTER SUMMARY JUDGMENT.

For all the length of the Coalition's brief, the issues before this Court are simple, discrete and ready for resolution by the Court. The Coalition does not dispute that a remark is appropriately part of the decree for these water rights. Rather, they have alleged three particular deficiencies with the remark proposed by the United States and suggest that the Court cure those alleged deficiencies through the Eagle Decree remark rebutted above.

The United States has demonstrated that what the Coalition insists are deficiencies, are no more than the result of an effort to conform the remark to project operations as they exist today and continue an operational *status quo* that all parties agree works. Nonetheless, should this Court disagree, it is more than capable of modifying the proposed remark to correct any deficiencies it identifies.

The Coalition's resort to the so-called "common plan" reveals that their true objective here is delay. The Court can feel comfortable in setting aside any concern over the "common plan" for two reasons. First, the Coalition fails entirely to demonstrate why this Court needs a "full and complete understanding" of the "common plan" to resolve the issues properly before this Court. Despite the talismanic manner in which the Coalition invokes the term "common plan," it is nothing more than the way the Eagle court chose to describe the Palisades contracts.^{18/} See JO at 78 ("the contracts entered into . . . in connection with the Palisades

supposed to clarify aspects of a water right. Referencing two decrees that address countless irrelevant subjects is a path to confusion, not clarity.

^{17/} Interestingly, while the Coalition make much of the so-called "common plan," former Director Tuthill – an IDWR employee for more than thirty years – testified he had never heard the term until the week of his deposition. Tuthill Depo., 2nd Jarvis Depo, Ex. F, at 31:20-24.

project . . . constitute a common plan . . .) (*quoting* Eagle Decree at 19). While those contracts obviously have some relevance here, many of their provisions are irrelevant to the issues before the Court. For instance, the contracts include provisions such as the exchange of water between American Falls Reservoir and Jackson Lake, *E.g.*, Aberdeen Springfield Canal Company Contract No. 14-06-W-24 at ¶ 18 (attached as Exhibit B to the Affidavit of David A. Jarvis); storage holdover provisions for the reservoirs, *Id.* at ¶¶ 10, 16, 20; the so-called “split right” held by American Falls Reservoir District #2, *Id.* at ¶ 34; distinct storage rights in Island Park Reservoir, *Id.* at ¶ 24(b); and the priority of water stored in Palisades Reservoir under the winter water savings provisions. *Id.* at ¶ 17. *All* of those provisions thus are part of the “common plan,” *none* of them anything to do with the issues before this Court.

Second, the Coalition’s “common plan” issue is already before the District Court. JO at 80. In practical effect, the Coalition’s “common plan” argument asks this Court to grant the motion now pending before the District Court and bring these proceedings to a grinding halt. There is no need for this Court to do so because this Court’s resolution of the summary judgment motions cannot impede the District Court’s resolution of the Coalition’s motion. Should the the Coalition somehow prevail before the District Court, that court can order whatever steps are necessary to be able to decree the rights, including ordering additional proceedings in these sub-cases, if necessary. Simply put, the Coalition offers no good reason for this Court to do anything other than address the issues that have been engaged and enter a ruling setting out the remarks for the hydropower water rights now before the Court.

Similarly, Mr. Rigby testified that the term has no significance to Reclamation. Rigby Depo., 2nd Jarvis Aff., Ex. C, at 140:5-142:25.

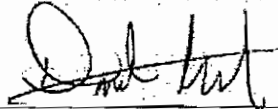
Conclusion

The Coalition's entire argument rests on their assertion the proposed remarks constitute a "broad" "new" subordination of the Minidoka and Palisades hydropower water rights. That makes it imperative that this Court not lose sight of the uncontroverted fact that the remarks proposed by the United States and the State, and joined by a number Upper Valley irrigators and the groundwater districts, will not change the manner in which Reclamation has operated the reservoirs for decades. In other words, the entire premise of the Coalition's argument is false. From that it follows that this Court should enter judgment adopting the proposed remarks. Even if this Court were to disagree, however, it still can and should enter summary judgment because every alleged deficiency raised by the Coalition can be readily addressed by this Court based on the information now before it.

DATED this 10TH day of November, 2009.

Respectfully submitted,

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

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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