

RECEIVED

MAR 29 2010

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAR 25 2010	
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

In Re SRBA

Case No. 39576

) Subcases:
) Minidoka Power Rights
) 01-217
) 01-218
) 01-4024
) 01-4025
) Palisades Power Rights
) 01-2068
) 01-4054
) (USDI/BOR)
)
)
) ORDER GRANTING MOTIONS FOR
) SUMMARY JUDGMENT and SPECIAL
) MASTER REPORT AND PARTIAL
) RECOMMENDATION

FINDINGS OF FACT

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Report, Reporting Area Basin 01, IDWR Part 2* on December 19, 2006. The Director recommended the following six claims for diversions from the Snake River to the United States of America acting through Regional Director PN Region, Bureau of Reclamation PN-3100, 1150 N. Curtis Road, Suite 100, Boise, Idaho, 83706-1234:

01-217 – 2,500 cfs, year-'round power, June 15, 1909, decree

01-218 – 200 cfs, year-'round power, July 1, 1912, decree

01-2068 – 1,200 afy (Palisades Reservoir), July 28, 1939, license:

- year-'round power from storage, power storage and irrigation storage
- March 15 – November 15, irrigation from storage

01-4024 – 825 cfs, year-'round power, June 16, 1927, beneficial use

01-4025 – 1,510 cfs, year-'round power, May 7, 1942, beneficial use

01-4054 – 8,560 cfs, year-'round power, May 6, 1958, beneficial use

Recommended Remarks

Under the “priority date” element in all six Minidoka and Palisades power claims, the Director recommended the following “historic practice” remark:

The appropriator shall exercise this right in manner that recognizes the historic practice that the use of water for power generation is incidental to the rights of others to the use of water for other purposes. The appropriator shall not make a delivery call for hydropower generation except as against junior hydropower rights.

Under the “other provisions necessary” element in the four Minidoka power claims (01-217, 01-218, 01-4024 and 01-4025), the Director recommended the following “winter power operation” remark:

The delivery of water to this right may be subject to the provisions for winter power operation at the Minidoka power plant as recognized in the *Burley Irrigation Dist. v. Eagle*, Supplemental Decree (Idaho 5th Jud. Dist., July 10, 1968) and *Aberdeen-Springfield Canal Co. v. Eagle*, Supplemental Decree (Idaho 7th Jud. Dist., March 12, 1969).

Objections & Responses

Between April 18 and 20, 2007, Minidoka Irrigation District, Burley Irrigation District, Twin Falls Canal Company, City of Pocatello, Falls Irrigation District, Burley Irrigation District and A&B Irrigation District filed *Objections* objecting to source, quantity, priority date and other provisions necessary. On April 19, 2007, the BOR filed an *Objection* objecting to the historic practice remark and references to the 1968 and 1969 *Eagle Supplemental Decrees*. *Responses* were filed by the State of Idaho, Idaho Ground Water Appropriators, Inc. (Ground Water Districts) and Idaho Power Company between June 11 and 20, 2007.

Motions for Summary Judgment

1. The State of Idaho filed its *Motion for Partial Summary Judgment* on August 18, 2009, in all six of the BOR subcases arguing for substitution of its own remarks in place of the

Director's recommendations relating to "historic practice" and "winter power operation." It argued that its remarks would "resolve all objections and/or responses." The remarks were grouped first under Minidoka Power Rights (01-217, 01-218, 01-4024 and 01-4025) and Palisades Power Rights (01-2068 and 01-4054), then by water right numbers and finally by the "priority date" and "other provisions necessary" elements:

Minidoka Power Rights

01-217 and 01-218

Priority Date

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.

Other Provisions Necessary

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.

01-4024 and 01-4025

Priority Date

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.

Other Provisions Necessary

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.

Palisades Power Rights

01-2068

Priority Date

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 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.

Other Provisions Necessary

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.

01-4054

Priority Date

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.

Other Provisions Necessary

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.

The State filed its *Motion for Partial Summary Judgment* primarily because of its concern with one distinct component of the comprehensive plan of operation developed as part of the Palisades project – “namely that the exercise of the Minidoka and Palisades water rights at issue in these subcases for purposes of hydropower generation is limited to avoid impairment of the primary storage purpose of the federal reclamation reservoirs on the Snake River above Milner Dam.” State’s *Memorandum*, at 8. It went on to suggest that “issuance of these water rights without the limiting remarks would fail to recognize historical administration within Water District No. 1 and could change the operation of the Upper Snake River Basin.” State’s *Memorandum in Support*, at 9.

2. The **United States** filed its *Motion for Summary Judgment* on August 19, 2009, in all six subcases with slightly different headings: “Minidoka Power Rights” (01-217, 01-218, 01-4024 and 01-4025), “Palisades Storage Power Right” (01-2068) and “Palisades Natural Flow Power Right” (01-4054). The United States was concerned about the Director’s “historic practice” remark recommended for its hydropower rights at the Minidoka and Palisades dams and the “winter power operation” remark for the Minidoka dam:

That [historic practice] 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.

United States’ Memorandum in Support, at 1-2.

The United States urged the Court to substitute the same remarks proposed by the State¹ in place of the Director's recommended remarks for several reasons:

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 Snake River above Milner Dam" 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 [footnote omitted].

United States' Memorandum in Support, at 2-3.²

Opposition Memorandum

The Surface Water Coalition³ and Idaho Power Company lodged their *Joint Memorandum in Opposition to State of Idaho's and United States' Motions for Summary Judgment* in all six subcases on November 3, 2009. The Coalition suggested the State and the United States agreed on their proposed "historic practice" and "winter power operation" remarks at the expense of the beneficial owners and users of the senior water rights, including districts that rely on power produced by the BOR. In their conclusion, they opposed the remarks for multiple reasons:

[T]he remarks fail to identify and recognize the legal interests held by the irrigation districts in those Reclamation projects that rely upon power to deliver water to their lands. In that respect the State and Reclamation have failed to present the Court with a complete history of the water rights and how those rights relate to the operations of the federal reservoirs pursuant to contract and the *Eagle*

¹ At first, the United States offered no remarks for the "other provisions necessary" elements. On November 2, 2009, the United States filed its *Erratum to United States' Motion for Summary Judgment* to add the same "other provisions necessary" remark proposed by the State.

² The United States noted that the Palisades Contracts – between various federal contractors and the BOR for use of storage water from Palisades Reservoir – created winter water savings mechanisms making water available for storage: "(1) the water users would cease winter diversions [mainly stock and domestic uses]; (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." *United States' Memorandum in Support*, at 4. A copy of one of approximately 60 Palisades Contracts is marked Exhibit B to the *Affidavit of David A. Jarvis* attached to the *United States' Memorandum in Support*. The 62 page Contract is dated December 15, 1952.

³ The Surface Water Coalition includes: A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Falls Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company.

Decrees. There is no basis to rewrite those contracts or prior decrees that have governed the use of the water rights for over 40 years. Finally, given the varying interpretations offered by the witnesses of IDWR, the State, and Reclamation as to the proposed remarks, it is obvious that the present language does not clarify the rights for administration.

Joint Memorandum in Opposition, at 82-83.

The Coalition argued any new subordination of BOR's power rights (i.e., subordination to all present and future junior water rights other than irrigation storage) would negatively impact its members by requiring the landowners to pay higher annual operation and maintenance expenses and higher power rates. The Coalition wrote that under the proposed remarks, "water administration in the Upper Snake basin will continue in an Alice in Wonderland world, where 'irrigation storage' can mean anything the State and Reclamation want it to, where the Secretary in his discretion can store water for any purpose whatsoever despite contractual and decreed requirements to balance irrigation storage and power generation, and where the contract holders who depend on irrigation and power benefits are left wondering whether and how their rights might be satisfied, without recourse to the beneficent discretion of the Secretary of the Interior or the administrative responsibilities of the State [underline in original]." *Joint Memorandum in Opposition*, at 48-49.

The Coalition made two additional arguments worth noting. Both the current and past IDWR Directors support remarks proposed by the State and the United States, but they made no attempt to amend the *Director's Report* thus denying the parties' right to object and respond to the Director's recommendation under I.C. § 42-1411. In addition, the State and BOR are bound by the *Eagle Decree*:

[T]his Court must decline to include the proposed remarks as a matter of law because they are inconsistent with the *Eagle Decree*. Although the parties to the *Eagle Decree* initiated the *Eagle Decree* proceedings through Idaho's summary supplemental adjudication statute, the *Eagle Decree* proceedings were intended to be, and are, a comprehensive adjudication of every water right above Milner Dam, in essence, a *de jure* and *de facto* general adjudication, that joined as parties all persons diverting water from the Snake River above the Milner Dam. As such, the *Eagle Decree* is fully binding to the same extent as any other decree that has been entered pursuant to a general adjudication.

Joint Memorandum in Opposition, at 52.

Idaho Power wrote that under a June 15, 1923 contract between it and the United States in connection with the original construction of American Falls Dam and Reservoir, the United States is obligated to bypass at American Falls Dam sufficient water, up to 255,000 acre-feet, to meet specified flow targets for the generation of power at certain Idaho Power facilities below Milner Dam. That provision was referenced in the later Palisades Contracts. Idaho Power argued that the proposed remarks “fails to reflect the common plan established by the *Eagle Decree* and may prejudice Idaho Power’s right under the 1923 Contract.”⁴ *Joint Memorandum in Opposition*, at 14.

Supporting Responses

1. The Ground Water Districts⁵ filed their *Response to the State of Idaho’s Motion for Partial Summary Judgment* on November 3, 2009. They wrote that they “do not object to the entry of summary judgment as requested by the State of Idaho and hereby join in and support the State’s Motion.”

2. The Upper Valley Water Users⁶ filed their *Response to the State of Idaho’s Motion for Partial Summary Judgment* on November 4, 2009. They, too, wrote that they “do not object to the entry of summary judgment as requested by the State of Idaho and hereby join in and support the State’s Motion.”

State’s Reply Brief

The State lodged its *Reply Brief* on November 10, 2009. It concluded:

The proposed remarks at issue on summary judgment accurately represent the historic exercise and administration of the Minidoka and Palisades water rights for generation of hydroelectric power. Because the proposed remarks are necessary to continue the historic administration within Water District No. 1, summary judgment resolving all objections and responses to the “historic practices hydropower remark” and the “winter power operation remark” should be granted.

⁴ See fn. 11, *infra*.

⁵ The Ground Water Districts include: Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Magic Valley Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District and North Snake Ground Water District.

⁶ The Upper Valley Water Users include: Fremont-Madison Irrigation District, Egin Bench Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District, Blackfoot Irrigation Company and United Canal Company.

Reply Brief, at 21.

The State wrote it merely seeks to memorialize the relationship between power generation at the Minidoka and Palisades facilities and BOR storage. Simply put, under federal law,⁷ power generation at Minidoka Dam is incidental to all irrigation project purposes. Stated another way, power generation at the Minidoka power plant may be curtailed to benefit storage of water for irrigation and other project purposes, regardless of the power loss payment system:

[T]he exercise of the Minidoka and Palisades water rights at issue in these subcases for purposes of hydropower generation is limited to avoid impairment of the primary storage purpose of the federal reclamation reservoirs on the Snake River above Milner Dam. . . . Under Reclamation law, this relationship is clear – “The primary object of the statute, and of the project, is the reclamation of arid lands through irrigation. . . . [P]ower is authorized only as an incidental phase of reclamation, not as a primary or independent end in itself. The statute and its amendments are *reclamation* acts, not commercial power development acts.”

Reply Brief, at 2, citing *Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 530-31 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 687 (1941).

United States’ 2nd Memorandum in Support

The United States lodged its 2nd *Memorandum in Support of Motion for Summary Judgment* (also termed *Reply Brief* in its footer) on November 10, 2009. It recalled that the Palisades Contracts are still in force and binding on the United States, but not the *Eagle Decree* because the United States was not a party and those proceedings failed to meet the requirements for a comprehensive general stream adjudication under the McCarran Amendment (43 U.S.C. § 666). The United States said it agreed to compromise operation of its water rights through the proposed remarks only because they are founded on and consistent with those Palisades Contracts:

[A]lthough 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 Broadly speaking, those changes sought to clarify the operations and conform to present realities by removing obsolete terms.

United States’ 2nd *Memorandum in Support*, at 3-4.

The United States acknowledged the proposed remarks change key language in the Palisades Contract (for instance, “storage for irrigation” becomes “storage”) but argued it merely recognizes BOR’s attempts to maximize storage of water without regard to the water’s ultimate

⁷ “Town Sites and Power Development Act of 1906”, Pub. L. No. 59-103, 34 Stat. 117, 43 U.S.C. § 522 (1906).

use. The simple reason is that “the supply of water is too uncertain to knowingly forego storage of any water available to Reclamation.” United States’ 2nd *Memorandum in Support*, at 6.

The proposed remarks also omit any reference to “contractual power loss provisions”, but the United States noted that such provisions are a matter of contract rights, not water rights. Besides, “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).” United States’ 2nd *Memorandum in Support*, at 8.

Summary Judgment Hearing

A hearing on the *Motions for Summary Judgment* filed by the State and the United States was held on November 12, 2009. David W. Gehlert and Matt J. Howard appeared for the United States; Clive J. Strong and David I. Stanish appeared for the State of Idaho; C. Tom Arkoosh, W. Kent Fletcher, Travis L. Thompson and Roger D. Ling appeared for the Surface Water Coalition; Josephine P. Beeman appeared for the City of Pocatello; Candice M. McHugh appeared for the Ground Water Districts, along with Becky Harvey; James S. Lochhead and Michael A. Gheleta appeared for Idaho Power; Jerry R. Rigby appeared for the Upper Valley Irrigators/ Upper Valley Water Users; and Garrick L. Baxter appeared for IDWR.

CONCLUSIONS OF LAW

The central issues here – the Director’s recommended remarks concerning “historic practice” and “winter power operation” versus remarks proposed by the State and United States – have generated a remarkable historical record of some of the most important water claims in the Upper Snake River Basin. The parties assembled exhaustive records which will substantially aid the Director and the parties in future administration of those rights. The record will also go a long ways to help the public better understand the complex relationship between irrigation storage and hydropower generation at the Minidoka and Palisades facilities.

The key documents to consider are Judge Theron W. Ward’s July 10, 1968 *Supplemental Decree (Burley Irr. Dist. v. Eagle, Idaho 5th Dist. Ct.)* and the 1950s “Palisades Contracts” between various federal contractors and the BOR for use of storage water from Palisades Reservoir.

Judge Ward began his *Supplemental Decree* by noting the water rights spelled out in his order were supplemental to prior decrees dating as far back as 1910, and all the parties were bound by them. Then Judge Ward “ratified, confirmed and approved” the Palisades Contracts “as the same have been amended and modified, in connection with the Palisades project and other projects, were intended to be, and are, binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries, above Milner Dam, and constitute a common plan for the administration of the Snake River [emphasis added].” *Supplemental Decree*, at 19.⁸

When the IDWR Director effectively withdrew his recommended remarks in favor of remarks proposed by the State and the United States, the question became whether those proposed remarks are “necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director” [I.C. § 42-1411(2)(j)]. Instead, the Surface Water Coalition urged the Court to simply incorporate the *Eagle Decrees* because the proposed remarks fail to reflect the common plan established in the *Eagle Decrees*.

Early on, the matter of the *prima facie* weight normally given the Director’s recommendation was raised. I.C. § 42-1411(4). Here, since the Director no longer stands by his original recommended remarks, the Coalition argued they were denied the normal procedures of objecting and responding. It should be evident the Director’s original recommended remarks for these BOR claims are not entitled to *prima facie* weight and the issue now is simply a question of proof. But it is equally clear that nothing would be gained by referring the matter back to the Director to amend his recommendations – the current interim Director and his predecessor both support remarks proposed by the State and the United States. The parties have had ample notice and opportunity to pursue their objections.

The Coalition’s suggestion that the BOR’s water rights should incorporate the *Eagle Decrees* is attractive in its simplicity, but misleading in its premise and scope. To begin with, both Judge Ward’s and Judge Burton’s *Supplemental Decrees* “ratified, confirmed and approved” the existence of the Palisades Contracts signed over a decade before. Both judges agreed with the parties that the Contracts were 1) binding on all parties and 2) constitute a common plan for administration of the Snake River above Milner Dam. But there is no evidence that either judge intended to “freeze” the Contracts in place as decreed elements of the water

⁸ Virtually the same provisions were repeated in Judge Willard C. Burton’s March 12, 1969 *Supplemental Decree* (*Aberdeen-Springfield Canal Co. v. Eagle*, Idaho 7th Jud. Dist. Ct.), at 46-47.

rights or their administration, in no small part because the Contracts contain multiple provisions that go well beyond the elements of Idaho water rights and would insinuate the IDWR Director into contract matters well outside his purview. By ratifying, confirming and approving the Contracts, the judges did not mandate a “common plan” that would bind all parties, the State and the United States in how Snake River is administered.⁹ The judges were merely describing a comprehensive plan of operation developed as part of the Palisades project, nothing more.¹⁰

The State identified a distinction both judges must have recognized: “Water right decrees and contracts serve different purposes: A water right decree describes the nature and extent of the owner’s right to the use of water from a particular water system, whereas a contract memorializes an agreed-upon exchange of promises and consideration between two or more parties.” State’s *Memorandum in Support*, at 11. By their very nature, the Palisades Contracts may be amended from time to time as conditions change, all without court intervention.

The Coalition’s argument that the proposed remarks fail to recognize their legal interests in reduced BOR power rates to deliver water to the districts’ lands is untenable. Reclamation law, the Palisades Contracts, case law and historical administration of the BOR’s hydropower water rights all dictate that power generation at the Minidoka and Palisades facilities is incidental to irrigation project purposes.

As noted earlier, that means power generation at the Minidoka power plant may be curtailed to benefit storage of water for irrigation and other purposes, regardless of the power loss payment system relied upon by the districts. While the State’s and the United States’ proposed remarks deleted reference to “contractual power loss provisions”, the change recognized such a provision is a contract right, not an element of a water right. Any claim of non-compliance under the Contracts is a matter for the Court of Federal Claims.

The parties all seem to agree that no one wants to change the decades-long administration of the Snake River and no one wants the Palisades Contracts to be re-written. The proposed

⁹ The United States pointed out a discrepancy in the Coalition’s argument that the 1968 and 1969 *Eagle Decrees* prescribed a “common plan” for administration of the Snake River. It noted that former Director David R. Tuthill, Jr., an IDWR employee for more than 30 years, said he had never heard the term “common plan” before the week of his deposition, October 19, 2009. United States’ 2nd *Memorandum in Support*, at 14, fn. 17.

¹⁰ On March 1, 2010, SRBA Presiding Judge Eric J. Wildman entered an *Order Denying Motion to Designate Basin-Wide Issue*, Basin-Wide Issue 00-91015, denying a joint motion to designate the following issue: “What is the ‘common plan for administering the operation of the Snake River’ that should be ratified, confirmed and approved, and incorporated into the water rights decrees in Basin 01?” This *Order and Special Master Report* should not be considered as a recommendation to determine that issue because the matter has not referred to any Special Master.

remarks accomplish both goals. The Special Master agrees with the United States' argument that the proposed remarks do not amend the Palisades Contracts which everyone agrees remain in force. Rather, the changes clarify the historical operations and conform to present realities by removing obsolete terms.¹¹ Hence, the proposed remarks are necessary for definition of the BOR's rights, for clarification of the "priority date" and "other provisions necessary" elements and for administration of the rights by the Director.

The argument was made that the State and United States are bound by the *Eagle Decrees*. The answers are simple. The State is not bound because it was not a party and Water District 01 Watermaster Henry Eagle, a USGS employee at the time, lacked authority to bind the State in its sovereign capacity. Neither is the United States bound because it, too, was not a party and proceedings before Judge Ward and Judge Burton were private water adjudications binding only the parties – not a McCarran Amendment adjudication. Suggestions that the *Eagle Decrees* were "*de jure* and *de facto*" general adjudications have no merit because Congress waived the United States' immunity to allow federal water rights to be determined only in comprehensive general stream adjudications such as the SRBA. "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." United States' 2nd *Memorandum in Support*, at 12, fn. 14, citing *State of Minnesota v. U.S.*, 305 U.S. 382, 388-89 (1939); *Stanley v. Schwalby*, 162 U.S. 255, 270 (1896).

Finally, the Surface Water Coalition argued that varying interpretations of the proposed remarks do not clarify BOR's rights and therefore are not a necessary element. Besides, they argue the remarks create questions of fact rendering summary judgment inappropriate. It should surprise no one that opinions may differ on what any given provision may mean, but that does not create questions of fact. Here, there are no genuine issues as to any material facts and the State and United States are entitled to summary judgment as a matter of law on the issues termed "Minidoka and Palisades Power Rights."

¹¹ Examples of obsolete terms in the Palisades Contracts required the United States to pass sufficient flow through Minidoka Dam to meet diversion rights then held by the Twin Falls and North Side Canal Companies and flow obligations contained in a 1923 contract between the United States and Idaho Power. If the United States is correct, those provisions were deleted because neither the diversion right nor the contractual flow obligation exists today. See United States' 2nd *Memorandum in Support*, at 10.

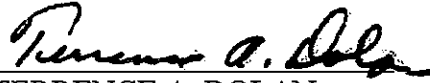
ORDER

THEREFORE, IT IS ORDERED that the State's *Motion for Partial Summary Judgment* and the United States' *Motion for Summary Judgment* in the above six Minidoka and Palisades Power Rights subcases are **granted**.¹²

PARTIAL RECOMMENDATION

THEREFORE, IT IS RECOMMENDED that when the SRBA Presiding Judge partially decrees the Minidoka and Palisades Power Rights claimed by the BOR, the "priority date" and "other provisions necessary" remarks proposed by the State and United States be included.

DATED March 25, 2010.



TERRENCE A. DOLAN

Special Master

Snake River Basin Adjudication

¹² At the State's suggestion, this *Order and Special Master Report* is issued without prejudice to any matters relating to the water rights asserted for hydropower generation at the American Falls Dam. Likewise, it does not prejudice any party's rights to seek the inclusion of other components of the comprehensive plan for the operation of the Upper Snake River federal reclamation projects. See State's *Memorandum in Support*, at 9, fn. 2.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT AND SPECIAL MASTER REPORT AND PARTIAL RECOMMENDATION was mailed on March 25, 2010, with sufficient first-class postage to the following:

CITY OF POCATELLO

Represented by:
A. DEAN TRANMER
CITY OF POCATELLO
PO BOX 4169
POCATELLO, ID 83201
Phone: 208-234-6148

IDAHO POWER COMPANY

Represented by:
ADAM T DEVOE
BROWNSTEIN HYATT & FARBER PC
410 17TH STREET, 22ND FL
DENVER, CO 80202
Phone: 303-223-1100

MILNER IRRIGATION DISTRICT

Represented by:
BARKER, ROSHOLT & SIMPSON LLP
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485
Phone: 208-733-0700

AMERICAN FALLS RESERVOIR

Represented by:
C THOMAS ARKOOSH
CAPITOL LAW GROUP, PLLC
301 MAIN ST
PO BOX 32
GOODING, ID 83330
Phone: 208-934-8872

JERRY R RIGBY

Represented by:
JERRY R. RIGBY
25 N 2ND E
PO BOX 250
REXBURG, ID 83440-0250
Phone: 208-356-3633

IDAHO POWER COMPANY

Represented by:
JOHN K SIMPSON
1010 W JEFFERSON, STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

CITY OF POCATELLO

Represented by:
JOSEPHINE P BEEMAN
409 W JEFFERSON ST
BOISE, ID 83702
Phone: 208-331-0950

STATE OF IDAHO

Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

CITY OF POCATELLO

Represented by:
PEMBERTON, MITRA M
WHITE & JANKOWSKI LLP
511 16TH ST STE 500
DENVER, CO 80202
Phone: 303-595-9441

ABERDEEN AMERICAN FALLS
BINGHAM GROUND WATER DISTRICT
BONNEVILLE JEFFERSON GROUND
BONNEVILLE JEFFERSON GROUND
CAREY VALLEY GROUND WATER DIST
JEFFERSON CLARK GROUND WATER
MADISON GROUND WATER DISTRICT
MAGIC VALLEY GROUND WATER DIST
NORTH SNAKE GROUND WATER DIST

Represented by:
RANDALL C BUDGE
201 E CENTER, STE A2
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

(Certificate of mailing continued)

A & B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
FALLS IRRIGATION DISTRICT

Represented by:
ROGER D LING
615 H ST
PO BOX 396
RUPERT, ID 83350-0396
Phone: 208-436-4717

CITY OF POCA TELLO

Represented by:
SARAH A KLAHN
WHITE & JANKOWSKI LLP
KIT TREDGE BUILDING
511 16TH ST STE 500
DENVER, CO 80202
Phone: 303-595-9441

NORTH SIDE CANAL CO LTD
TWIN FALLS CANAL COMPANY

Represented by:
TRAVIS L THOMPSON
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485
Phone: 208-733-0700

UNITED STATES OF AMERICA
USDI BUREAU OF RECLAMATION

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

MINIDOKA IRRIGATION DISTRICT

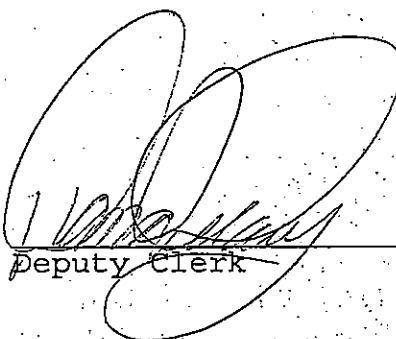
Represented by:
W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318
Phone: 208-678-3250

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

UNITED STATES OF AMERICA
REGIONAL DIRECTOR PN REGION
BUREAU OF RECLAMATION PN-3100
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234
Phone: 208-378-5306

ORDER AND RECOMMENDATION

Page 2 3/25/10 FILE COPY FOR 00410


Deputy Clerk