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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

Case No. 39576

)
) Subcase Nos. 01-00217, 01-00218,
) 01-04024, and 01-04025
) (Minidoka Power Rights)

)
) Subcase Nos. 01-02068 and 01-04054
) (Palisades Power Rights)

)
) **RESPONSE TO JOINT MOTION TO**
) **ALTER OR AMEND**
)

The State of Idaho, by and through the undersigned deputy attorney general, hereby submits its response to the Surface Water Coalition's Joint Motion to Alter or Amend filed in the above-entitled subcases.

I. DISCUSSION

The State opposes the Surface Water Coalition's (SWC) motion to alter or amend upon

the following grounds, incorporating and reserving those arguments briefed and argued before on summary judgment.

A. THE SURFACE WATER COALITION'S MOTION FAILS TO ESTABLISH GROUNDS FOR RELIEF UNDER I.R.C.P. 59(e).

The SWC's motion to alter or amend the Special Master's recommendation should be denied because the SWC fails to establish grounds for relief under I.R.C.P. 59(e). While the rule permits a court to reconsider and amend a previous order, I.R.C.P. 59(e) should be considered an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *In re Fehrs*, No. 05-21306-TLM, 2008 WL 4443062, at *2 (Bankr. D. Idaho 2008) (interpreting F.R.C.P. 59(e)) (quoting 12 James Wm. Moore et al., *Moore's Federal Practice* ¶ 59.30[4] (3d ed. 2000)). Indeed, a motion brought pursuant to I.R.C.P. 59(e) should not be granted "unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Id.* (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). An I.R.C.P. 59(e) motion cannot be used "to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Id.* (citation omitted).

The SWC's motion to alter or amend is nothing more than a rehash of the arguments that it made before this Court on summary judgment. The SWC has failed to present any newly discovered evidence, has failed to point to any clear error of law, and has failed to identify any intervening change in the controlling law. The Court correctly distinguished the Minidoka Credit Remark decision (Feb. 2, 2010) and the Flood Flow Rights decision (Dec. 11, 2009)¹ from the issues addressed here, and moreover, those decisions pre-date this decision and hence have not changed the controlling law as it existed when this decision was issued. *See In re Fehrs*, No.

¹ In their motion to alter or amend, the SWC incorrectly identified the date of the Court's Order on Motions for Summary Judgment as November 9, 2009.

05-21306-TLM, 2008 WL 4443062, at *2 (Bankr. D. Idaho 2008). Because the SWC fails to establish grounds for relief under I.R.C.P. 59(e), the SWC's motion to alter or amend the Special Master's recommendation should therefore be denied.

B. THE EAGLE DECREES ARE NOT BINDING ON THE STATE WHERE THE STATE WAS NOT A PARTY THERETO.

Adding nothing to its argument presented on summary judgment, the SWC continues to incorrectly equate the watermaster's authority to administer water rights to the watermaster's authority to bind the State of Idaho, in its sovereign capacity, to a privately adjudicated water right decree. The Director of the Idaho Department of Water Resources (IDWR) could only, and did only, delegate to the watermaster the authority to administer water rights in accordance with the provisions of title 43, chapter 6, Idaho Code. *See Stanish Aff.* (Nov. 10, 2009), Ex. M, Certificate of Appointment (Mar. 28, 1969). Nothing in chapter 6 authorizes the watermaster to appear on behalf of the State in its sovereign capacity or to otherwise bind the State in its sovereign capacity. Accordingly, the State never appeared in, and never was made a party to, the Eagle Decrees proceedings, and thus, the State cannot be bound thereby.

The Idaho Supreme Court has already stated that Idaho statutory law does not obligate the Director—or the State of Idaho for that matter—to accept a prior decree as conclusive proof of the nature and extent of a water right. “Although a decree evidences a legal right to the use of water, *see* I.C. § 42-230(e), it does not obligate the Director to make a recommendation contrary to his findings.” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 741, 947 P.2d 409, 414 (1997). In *Hagerman*, the Court further stated:

Nowhere in Title 42 is the Director “obligated to accept a prior decree” issued in a private adjudication “as being conclusive proof of the nature of a water right.” This is especially true in light of longstanding decisions in Idaho that decreed water rights, although protected like any other water right, are not insulated from re-examination by the court and may be lost or reduced based on evidence that the water right has been forfeited, Graham v. Leek, 65 Idaho

279, 287-88, 144 P.2d 475, 479 (1943), abandoned, *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 59-60, 231 P. 418, 421-22 (1924), *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 393, 43 P.2d 943, 947 (1935), or lost through adverse possession.

Id. (emphasis added). The SWC's argument that the State of Idaho and the IDWR Director by implication are bound to accept all aspects of the Eagle Decrees as a matter of law is contrary to the clear statements of the Idaho Supreme Court in *Hagerman* indicating otherwise.

C. AS THE SOLE CLAIMANT TO THESE WATER RIGHTS, THE UNITED STATES IS FREE TO VOLUNTARILY LIMIT ITS RIGHTS THERETO.

The SWC's assertion that the State lacks the authority to subordinate these water rights² disregards both the facts and the law in these subcases. The State has taken no action to subordinate these rights; rather, the sole claimant of the water rights at issue in these proceedings—the United States—has voluntarily agreed to the conditions accepted by the Special Master in the Court's March 25, 2010 order. As the owner and claimant of the rights, the United States is entitled to define how the rights will be exercised in relation to other water rights. The Court in *Idaho Power Company v. State*, 104 Idaho 575, 661 P.2d 741 (1983) made this clear: "We hold only that a voluntary subordination agreement is not in violation of Idaho's water law." *Id.* at 587, 661 P.2d at 753. That is exactly what we have here. The United States has voluntarily moved for summary judgment to accept a limitation upon its hydropower water rights.

As discussed in the State's November 10, 2009 Reply Brief, the SWC's assertions of a controlling interest over these water rights is clearly refuted by their failure to file alternative claims to these rights and their failure to object to the name element of the Director's

² Surface Water Coalition's Joint Motion to Alter or Amend at 10 (Apr. 28, 2010) ("[T]he State has no authority to retroactively apply the law and diminish these water rights."); *id.* at 11 ("Furthermore, in light of the State's lack of authority to subordinate the Bureau's *Foster Decree* right when they were decreed, any attempt to expand the voluntary subordination in the Palisades Contract would constitute a takings.").

Recommendations in these subcases. Moreover, the SWC fails to explain how their contentions can be reconciled with the holding in *Burley Irrigation District v. Ickes* that the United States owns these hydropower water rights and that the authority over power production at Minidoka is vested in the Secretary. See *Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 531, 539 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 687 (1941).

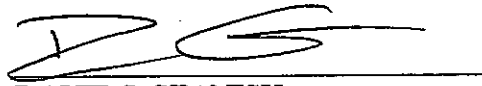
II. CONCLUSION

The Court correctly determined on summary judgment that the explanatory remarks presented by the State of Idaho and the United States accurately represent the historic exercise and administration of the Minidoka and Palisades water rights for generation of hydroelectric power. Because the SWC's motion to alter or amend fails to present any newly discovered evidence, fails to point to any clear error of law, and fails to identify any intervening change in the controlling law in contradiction to the Court's March 25, 2009 Order, the SWC's motion should be denied.

RESPECTFULLY SUBMITTED this 28th day of May 2010.

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CERTIFICATE OF SERVICE

I certify that on this 28th day of May 2010, I caused to be served the original and copies of the **RESPONSE TO JOINT MOTION TO ALTER OR AMEND** on the following persons by the methods indicated:

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