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**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. 1-217, 1-218, 1-4024, and 1-4025
) (Minidoka Power Rights)
)
) Subcase Nos. 1-2068 and 1-4054
) (Palisades Power Rights)
)
) **REPLY IN SUPPORT OF SURFACE**
) **WATER COALITION'S JOINT MOTION**
) **TO ALTER OR AMEND**
)

COMES NOW, 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 (the "Coalition"), by and
through counsel of record and pursuant to Administrative Order #1 ("AO1") 13(A), and hereby
submit this reply in support of their *Joint Motion to Alter or Amend* the Court's March 25, 2010

Order Granting Motions for Summary Judgment and Special Master Report & Partial Recommendation (the “Order”).

INTRODUCTION

Asserting that the Coalition is simply “rehashing” old arguments, the State wrongly argues that the pending *Motion to Alter or Amend* should be denied.¹ It asserts that the Coalition 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.” To the contrary, the Coalition’s *Joint Motion* thoroughly explains why the Court’s *Order* is contrary to law and should be altered or amended.

For example, the State is bound to administer to the decrees. The law is clear on this point. The fact that the watermaster may not have been an actual employee of the state at the time of the *Foster Decree* or *Eagle Decree* does not sever the State’s obligations in relation to the decrees. Nothing in the State’s brief justifies a contrary conclusion.

The Bureau is bound to follow the Palisades Contracts and the *Foster Decree* to which it was a voluntary party. Just because the water right is held by the Bureau does not give it the authority to change that water right without consideration of the impacts to other water users and contracting parties who rely on the Bureau’s commitments in the contracts and *Foster Decree*.

Finally, the State does not even respond to the discussion about the Director’s failure to issue an Amended Director’s Report and give all parties to the SRBA an opportunity to participate – should they so desire. The law requires as much and the Director’s failure to provide such an opportunity is contrary to that law. Accordingly, the Court’s *Order* should be amended to comply with the law.

¹ Noticably, the Bureau did not response to the Coalition’s *Joint Motion*.

ARGUMENT

I. The State is Bound by the *Eagle Decree*.

Attempting to distance itself from the dictates of the *Eagle Decree*, the State argues that the State's legal obligation to administer to the decree does not mean that it is actually bound by that decree. *State Resp.* at 3. The State attempts to concoct this distinction by relying on the Supreme Court's decision in *State v. Hagerman Water Right Owners, Inc.*, 30 Idaho 736 (1997). According to the State, the *Hagerman* Court held that the Director is not "obligated to accept a prior decree." *State Resp.* at 3. Reliance on this single statement selected from the opinion, however, is misplaced. In *Hagerman*, at 741, the Court held that the Director was not required to recommend a previously decreed water right where the evidence shows that it had been "lost or reduced based on evidence that the water rights has been forfeited, abandoned, or lost through adverse possession." (Internal citations omitted); *see also AFRD#2, et al. v. IDWR, et al.*, 143 Idaho 862 (2007) (although bound by the prior decree, the Director's administration of water rights may be altered due to "post adjudication factors"). Notably, there are no "post adjudication factors" – such as forfeiture or abandonment – alleged in this case. In fact, the Bureau confirmed that it has treated these rights the same since they were decreed. As such, the ruling in *Hagerman* is not applicable.

In truth, the law demands that the State be bound by the decrees. *Special Master Report & Recommendation*, Subcase Nos. 01-209 *et al* (Feb. 2, 2010) (Minidoka Credit Remark) ("the State Engineer was bound to enforce the terms of the *Foster Decree*"); *see also Order on Motions for Summary Judgment & Order Setting Status Conference*, Subcase No. 01-14 *et. al.* (Junior Natural Flow Subcases) (Nov. 9, 2009) (parties developing water rights after the *Eagle Decree* are bound by its terms). The law governs the Director's and Watermaster's obligations

in “clear and unambiguous terms,” *R.T. Nahas Co. Hulet*, 114 Idaho 23, 27 (Ct. App. 1988), thus creating a “clear legal duty,” *Musser v. Higginson*, 125 Idaho 392, 395 (1994), that cannot be ignored. The State is bound by the decrees and cannot avoid its statutory obligations.

II. The Bureau is Bound by the *Foster Decree* and Palisades Contracts

Likewise, the Bureau is bound by the *Foster Decree* – to which it was a voluntary party – and the Palisades Contracts. In those contracts, the Bureau specifically created a common plan for administration of water rights along the Snake River – including the power loss payment program. The Bureau, as a party to the Palisades Contract and *Foster Decree*, cannot take any actions that would impair the rights and obligations created in the contracts. As such, it is not “free to voluntarily limit its rights” as asserted by the State. *State Resp.* at 4.

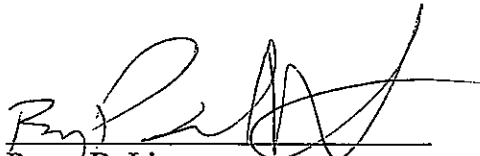
Contrary to the State’s argument, the Court’s decision in *Burley v. Ickes*, 116 F.3d 529 (D.C. Cir. 1940), does not justify an action by the Bureau that is contrary to the Palisades Contracts and *Foster Decree*. There, the Court stated that “the authority to dispose of surplus power is vested exclusively in the Secretary.” *Id.* at 531. Importantly, the Secretary exercised this authority when he entered into the Palisades Contract and voluntarily participated in the *Foster Decree* proceedings. The *Burley* decision cannot be read so as to grant the Bureau the “authority” to ignore its obligations under the Palisades Contract.

CONCLUSION

The Palisades Contracts, as “ratified, confirmed and approved” by the *Eagle Decree*, established a “common plan” for the administration of water rights along the Snake River. The Special Master recognized this, *Order* at 11 (finding that the *Eagle Decree* “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*”) (emphasis added), and the Bureau’s

attorney confirmed it when he stated that the Palisades Reservoir would not have been a reality without a "system that would provide enough water." The *Order*, however, threatens to expand the power loss payment structure of the common plan far beyond the original intent of the parties. The law does not allow this expansion. As such, the *Order* should be amended to comply with the law.

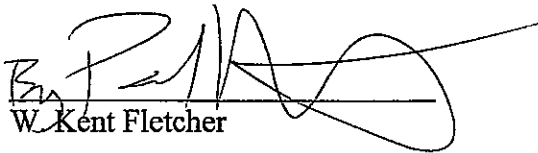
DATED this 22nd day of June, 2010.



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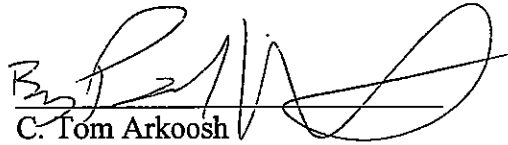
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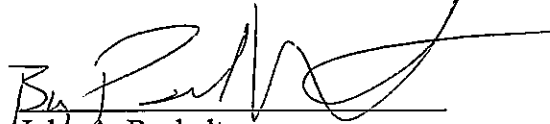
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2010, I served a true and correct copy of the foregoing **REPLY IN SUPPORT OF SURFACE WATER COALITION'S JOINT MOTION TO ALTER OR AMEND** on the following by the method indicated:

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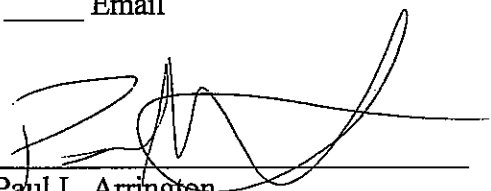
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