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JUL 30 2010
DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
JUL 29 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

	)	Subcases:
	)	Minidoka Power Rights
	)	01-217
In Re SRBA	)	01-218
	)	01-4024
	)	01-4025
	)	Palisades Power Rights
	)	01-2068
Case No. 39576	)	01-4054
	)	(USDI/BOR)
	)	
	)	ORDER DENYING JOINT MOTION TO
	)	ALTER OR AMEND

Summary Judgment Order

On March 25, 2010, the Special Master entered an *Order Granting Motions for Summary Judgment and Special Master Report and Partial Recommendation* granting 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. The principal holding was that Judge Theron W. Ward, in his July 10, 1968 *Supplemental Decree (Burley Irr. Dist. v. Eagle, Idaho 5th Dist. Ct.)*, "ratified, confirmed and approved" Palisades Contracts between various federal contractors and the BOR for use of storage water rights from Palisades Reservoir which "constitute a common plan for the administration of the Snake River [emphasis added]." *Supplemental Decree*, at 19.

By ratifying, confirming and approving the Contracts, [Judge Ward, and later Judge Willard C. Burton] did not mandate a "common plan" that would bind all parties, the State and the United States in how [the] Snake River is administered.

The judges were merely describing a comprehensive plan of operation developed as part of the Palisades project, nothing more.

Order Granting, at 12.

The Special Master then held that when the IDWR Director agreed with remarks proposed by the State and the United States in place of the Director's original recommendations, the *Director's Report* lost its *prima facie* weight, but there would be nothing to gain by referring the matter back to the Director to amend his recommendations. The new "historic practice" and "winter power operation" remarks did not amend the Palisades Contracts but clarified historical operations and conformed to present realities by removing obsolete terms.

Next, the Special Master held that the State and the United States are not bound by the *Eagle Decrees* – hence, there was no legal basis to simply incorporate the decrees as urged by the Surface Water Coalition.

Lastly, the *Report and Recommendation* was termed "partial" because the Special Master recommended that the remarks proposed by the State and the United States be included in the "priority date" and "other provisions necessary" elements of the partial decrees after all other remaining elements are resolved.

Surface Water Coalition's Joint Motion to Alter or Amend

On April 28, 2010, the Surface Water Coalition¹ filed its *Joint Motion to Alter or Amend*. They argued that the common plan "ratified, confirmed and approved" in the *Eagle Decrees*

[W]as made to *voluntarily* subordinate the power rights to irrigation storage in order to increase irrigation storage in the reservoir system. Importantly, at the time these rights were developed and decreed, the law did not allow the State to subordinate water rights. Those who benefited from the resulting increase in irrigation storage were then required to help defray the increased cost of electricity to those who relied on the inexpensive winter power generation that would no longer be available. The [Special Master's] *Order*, however, threatens to expand this subordination without any consideration for the power loss payment program agreed to by the spaceholders and Bureau and "ratified, confirmed and approved" by the *Eagle Decree*.

....

¹ 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.

The *Order* fails to properly apply the law and should be reconsidered. Notwithstanding the fact that the State is bound to administer to the *Eagle Decree*, and the Bureau is bound by the Palisades Contracts and *Foster Decree*,² the *Order* approves of the State's and Bureau's attempts to significantly expand the subordination voluntarily agreed to between the Bureau and space holders. Moreover, the Court cannot approve an agreed to "remark" as a matter of law when the remark was not recommended by IDWR and no party to the SRBA was given the due process and opportunity to object as required by AO1 [emphasis in original].

Joint Motion, at 3 and 15.

State's Response

On May 28, 2010, the State filed its *Response to Joint Motion to Alter or Amend* arguing:

[The Surface Water Coalition'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.

State's Response, at 2.

The State repeated its earlier arguments made in summary judgment proceedings that the *Eagle Decrees* are not binding on the State where the State was not a party and the United States, as the sole claimant of the rights, is free to voluntarily limit its hydropower water rights. The State concluded: "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." *State's Response*, at 5.

Idaho Power's Response

On June 7, 2010, Idaho Power Company filed its *Response to Surface Water Coalition's Joint Motion to Alter or Amend*. Its main concern was footnote 11, page 13 in the *Order Granting Motions for Summary Judgment*. In that footnote, the Special Master mentioned an example of an "obsolete term" in the Palisades Contracts cited by the United States. The footnote reads:

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

² *Twin Falls Canal Company v. Charles N. Foster*, Idaho 4th Dist. Ct., June 20, 1913.

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.

Idaho Power requested that the Court remove any reference or finding in regards to the 1923 American Falls Contract between the United States and Idaho Power Company as an "obsolete term" because:

It was unnecessary for the Court to make a finding regarding the 1923 Contract in resolving the Motions for Summary Judgment in these proceedings because the parties did not request such relief, the American Falls rights are not at issue in these proceedings, and the statement can therefore only be interpreted as *dicta*.
Idaho Power's *Response*, at 2.

Surface Water Coalition's Reply

On June 22, 2010, the Surface Water Coalition filed its *Reply in Support of Surface Water Coalition's Joint Motion to Alter or Amend*. It argued the *Joint Motion* "thoroughly explains why the Court's *Order* is contrary to law and should be altered or amended." *Reply*, at 2. It repeated its earlier arguments that the State and the United States are bound by the 1913 *Foster Decree* (incorporated into both the 1968 and 1969 *Supplemental Eagle Decrees*) and the Palisades Contracts.

Hearing on Joint Motion to Alter or Amend

A hearing on the Surface Water Coalition's *Joint Motion to Alter or Amend* was held on June 24, 2010. David W. Gehlert appeared for the United States; David I. Stanish appeared for the State of Idaho; 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; James C. Tucker appeared for Idaho Power; Robert H. Wood appeared for the Upper Valley Irrigators / Upper Valley Water Users; and Chris M. Bromley appeared for IDWR.

Discussion

First of all, Idaho Power's concern about "*dicta*" in footnote 11 of the *Order Granting Motions for Summary Judgment and Special Master Report and Partial Recommendation* is well taken. The Special Master did not intend to address matters outside the Minidoka and

Palisades Power Rights issues raised in the State's and United States' motions for summary judgment. The reference was included merely as an example of a provision in the Palisades Contracts which the United States considered "obsolete." The Special Master did not intend to express an opinion concerning any portion of the 1923 American Falls Contract between the United States and Idaho Power Company. Hopefully, that point was made clear to all counsel during the hearing on the *Joint Motion to Alter or Amend* and no further discussion is necessary.

Next, to the merits of the Surface Water Coalition's *Joint Motion to Alter or Amend*, it is apparent that the issues it raises now were argued before and addressed in the ***Order Granting Motions for Summary Judgment***. By granting the State's and United States' *Motions for Summary Judgment*, the Special Master explicitly or implicitly held:

1. Judge Ward, and later Judge Burton, did not mandate a "common plan" for administration of the Snake River and its tributaries above Milner Dam – they merely "ratified, confirmed and approved" the 1950s Palisades Contracts.
2. Both the current interim Director and his predecessor support the State's and United States' proposed remarks concerning "historic practice" and "winter power operation" instead of the original recommended remarks.
3. The Director's original recommendations were no longer entitled to *prima facie* weight and the issue of whether the proposed remarks are necessary for definition, clarification or administration of the rights then became a question of proof.
4. Nothing would be gained by referring the matter back to the Director to amend the recommendations.
5. The parties had ample notice and opportunity to pursue their objections.
6. The *Foster Decree* and *Eagle Decrees* were not *de jure* and *de facto* general adjudications.
7. The State and the United States are not bound by the *Eagle Decrees*.
8. Water right decrees and contracts are not the same. A water right describes the nature and extent of the owner's right to use water while a contract memorializes an agreed-upon exchange of promises and consideration between two or more parties. The remarks proposed by the State and the United States amend contracts, not elements of water rights.
9. Power generation at the Minidoka and Palisades facilities is incidental to irrigation project purposes.

10. 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.

11. The United States, as sole claimant, is free to voluntarily limit its hydropower water rights.

12. The Palisades Contracts may be amended from time to time as conditions change, all without court intervention.

13. Remarks proposed by the State and United States clarify the historical operations and conform to present realities by removing obsolete terms.

14. 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.

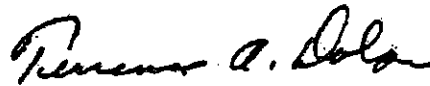
15. The Surface Water Coalition's remedy for breach of the Palisades Contracts is a matter for the Court of Federal Claims, not the SRBA Court.

16. There are no genuine issues as to any material facts and the State and the United States are entitled to summary judgment as a matter of law on the issues termed "Minidoka and Palisades Power Rights."

It is apparent from the above holdings that the Surface Water Coalition's *Joint Motion to Alter or Amend* failed to present newly discovered evidence or any clear error of law. It also failed to identify an intervening change in controlling law.

THEREFORE, IT IS ORDERED that the Surface Water Coalition's *Joint Motion to Alter or Amend* is **denied**.

DATED July 29, 2010.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING JOINT MOTION TO ALTER OR AMEND was mailed on July 29, 2010, with sufficient first-class postage to the following:

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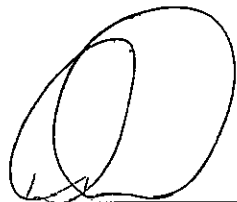
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