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DEPARTMENT OF
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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	)	Subcase Nos. 1-217, 1-218, 1-4024, and 1-4025
	)	(Minidoka Power Rights)
	)	
Case No. 39576	)	Subcase Nos. 1-2068 and 1-4054
	)	(Palisades Power Rights)
	)	
	)	NOTICE OF CHALLENGE
	)	
	)	
	)	

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(c), and hereby submit this *Notice of Challenge* in the above subcases. The Coalition challenges Special Master Dolan's March 25, 2010 *Order Granting Motions for Summary Judgment and Special Master*

Report & Partial Recommendation and the July 29, 2010 *Order Denying Joint Motion to Alter or Amend* (collectively referred to as the “*Recommendation*”).

INTRODUCTION

The Coalition challenges the *Recommendation* because it is not consistent with Idaho law. Whereas the law requires the Bureau of Reclamation (the “Bureau”) to be bound by the water rights decrees to which it was a party and to be bound by the terms of the contracts it voluntarily entered with Coalition members, the *Recommendation* authorizes the vast expansion of the scope of the subordination provision contrary to prior decrees and contracts. Whereas the law binds and demands that the Water District 01 Watermaster administer the water rights pursuant to the prior decrees, the *Recommendation* now authorizes the Watermaster to enlarge the subordination provisions of those prior decrees. Whereas the law requires that the Director of the Idaho Department of Water Resources (“IDWR”) participate as an unbiased non-party expert in proceedings before the SRBA District Court, the *Recommendation* unlawfully condones the Director’s participation as a witness on behalf of the State to challenge the original recommendation. Finally, whereas the law requires that the Director issue an amended recommendation and provide notice whenever he changes the original recommendation, the *Recommendation* excuses the Director’s refusal to issue an amended recommendation with an opportunity for objections and responses after he decided that his original recommendation was in error.

The Presiding Judge should correct these legal errors and issue partial decrees consistent with the law and history of use of these water rights pursuant to the prior decrees and contracts governing the administration and use of the water rights.

STATEMENT OF FACTS

This case involves water rights for hydropower use associated with the facilities at Minidoka and Palisades Dams. When Palisades was being planned, there was a concern that the exercise of the senior hydropower water rights at Minidoka Dam would impair – or possibly prevent – the ability to fill Palisades and generate power at Palisades Dam. Seeking to resolve these concerns, the Bureau entered into contracts (the “Palisades Contracts”) with various water users in the Upper Snake River Basin in order to increase storage for irrigation. This action necessarily required a shift in some of the historical irrigation and management practices of the canal companies and irrigation districts throughout the Snake River Plain in order to accommodate the new reservoir at Palisades. The *Eagle Decree*, referred to the reservoir operations and plan established by the contracts, *Foster Decree* and *Eagle Decree* as a “common plan of administration” for the Snake River Basin.

The portion of the “common plan of administration” involved in these proceedings is the operation of the hydropower water rights at Minidoka and Palisades Dams, including the power loss payment program set forth in the contracts and *Eagle Decree*. The power loss payment provisions sought to increase water for irrigation storage only by reducing the quantity of water that would be passed through the dams in the winter for power generation at Minidoka Dam pursuant to its senior water rights decreed in the *Foster Decree*. Several irrigation entities in the Minidoka Project, including members of the Coalition, rely upon the winter power generation for their project operations. By storing more water in the reservoir system, there would be less power generated the Minidoka Dam facility in the winter pursuant to its decree rights. As such, those who received the benefit of the increased irrigation storage would pay a power loss payment to those who would no longer receive the benefit of the power generated by

Reclamation in the winter months. The effect of the power loss payment program was to subordinate the senior priority hydropower rights at Minidoka Dam to junior priority irrigation storage rights in the reservoir system, provided the payments continued to be made as specified in the *Eagle Decree* and Palisades Contracts.

The power loss payment program is a vital part of the operations of the Upper Snake reservoir system. Both the Minidoka and Palisades Dams were constructed pursuant to the Reclamation Act of 1902, as approved and authorized by Congress. Storage spaceholders, including members of the Coalition, rely on Reclamation's winter power generation to reduce the cost of the reserved power they were entitled to receive from Reclamation. The use of winter power generation would allow those irrigation projects receiving reserved power to acquire that reserved power at the cost of production – a significant savings to those using the reserved power. The right to this reserved power at the cost of production is affirmed in the prior decrees and Palisades Contracts. The right to receive reserved power at the cost of production was protected and preserved through the power loss payment provisions agreed to by Reclamation in the Palisades Contracts whereby the beneficiaries of stored water for irrigation agreed to pay Reclamation for the loss of power production resulting from the increase in storage for irrigation.

After the above power rights were recommended in the SRBA, the State and Reclamation negotiated and agreed upon a remark for the above water rights that eliminated the power loss payment program from being referenced in the water rights at all. In addition, rather than subordinating the power rights to only “*irrigation* storage rights,” the State and Reclamation agreed upon a remark that would subordinate the power rights to “storage rights.” Importantly, the Coalition, who are parties to these proceedings and who are parties to the Palisades Contracts

and/or rely on the power loss payment program, were not included in, or parties to, the settled remarks.

Following the negotiations, the Director determined that the negotiated remark was more appropriate than the original recommendation and began to defend the negotiated remark during limited discovery. Since the Director no longer agreed with his original recommendation, the Coalition requested that the Director issue an amended recommendation for the water rights to trigger the required objection and response periods specified by AO1. This would allow those who were not participating an opportunity to review and, if desired, object to and discover the factual and legal basis for the negotiated remark. The request was rejected. In addition, the Director participated in the SRBA proceedings as a witness for the State of Idaho in defending the negotiated remark, which was never formally issued by IDWR at any time.

On March 25, 2010, Special Master Dolan issued a decision on summary judgment affirming the State's and Reclamation's actions in these proceedings and recommending that the negotiated remark be placed on the partial decrees. The Coalition filed a motion to alter or amend, which was denied in the Special Master's July 29, 2010 *Order*.

STATEMENT OF ISSUES

Based on the foregoing facts, the Coalition raises the following issues in its Challenge:

1. Whether the Special Master erred in holding that the State is not bound by the prior decrees and the Bureau is not bound by the *Eagle Decree*, *Foster Decree* and Palisades Contracts for purposes of adjudication and administration of the water rights?
2. Whether the Special Master erred legally and factually in authorizing a remark that significantly differs from the terms of the *Eagle Decree* and the Decrees incorporated into

the *Eagle Decree* and significantly expands the subordination provisions of the Palisades Contracts without the consent of the contracting parties?

3. Whether the Special Master's *Recommendation* violates the "common plan of administration" set forth in the *Eagle Decree*?

4. Whether the subordination of the right to receive reserved power at the cost of production violates federal and state law?

5. Whether the subordination of Reclamation's beneficial use claims is contrary to law?

6. Whether the Special Master erred in refusing to order that the Director issue an amended recommendation for the above water rights when the Director determined that the original recommendation was in error?

7. Whether the Director's involvement as a witness for the State of Idaho in defending the negotiated remark that materially differed from the Director's recommendation violates law and procedures in the SRBA?

TRANSCRIPT

The Coalition requests a copy of the transcript of the summary judgment hearing in this matter held on November 12, 2009 at 1:30 p.m.

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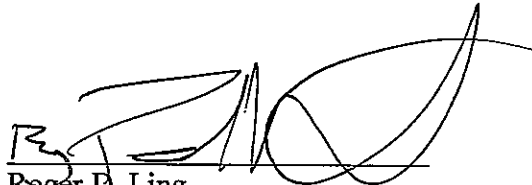
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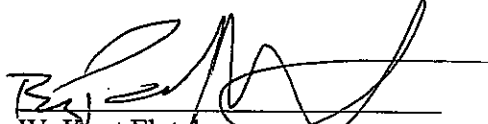
DATED this 12th day of August, 2010.



Roger D. Ling

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Burley Irrigation District and Falls
Irrigation District*

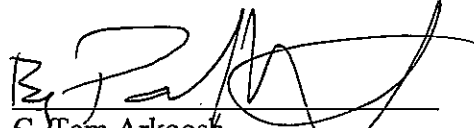
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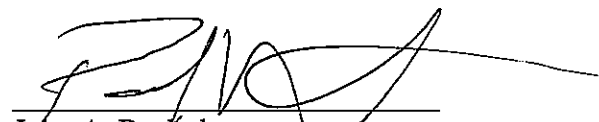
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Burley Irrigation District, Milner Irrigation
District, North Side Canal Company, and
Twin Falls Canal Company*

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2010, I served a true and correct copy of the foregoing **NOTICE OF CHALLENGE** on the following by the method indicated:

Clerk of the SRBA Court
253 Third Ave. North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

Natural Resources Division Chief
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Boise, Idaho 83711-4449

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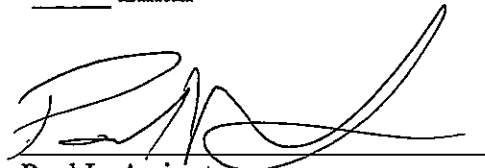
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